

Maximising your trans and non-binary inclusion in light of the For Women Scotland v Scottish Government Supreme Court Judgment

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Introduction

This information is for organisations and professionals who wish to know what the impact of the recent Supreme Court Judgment (and any subsequent changes to statutory guidance and regulatory changes) could mean for their trans inclusive practices and their trans employees and service users.

It represents Gendered Intelligence's (GI's) understanding of the situation and options, which is informed by a range of sources including those which have sought formal legal opinion. However, please note that GI are not legal professionals; the information in this document does not constitute legal advice and is not a substitute for it.

Whilst the judgment changes the meaning of the term 'single-sex' in the context of the EA2010 **only**, and does not directly affect the common, everyday (trans inclusive) use of the term outside that specific context, for clarity we have adopted the following convention in this guide:

Single sex: Spaces / services designated for a group of people (women or men) using the EA2010 definition of sex

Single gender: Spaces / services designated for a group of people (women or men) that are trans inclusive

Taking an Inclusive Position

At Gendered Intelligence, we strongly encourage organisations to hold an explicitly trans-inclusive line and not to agree with any speculative negative interpretations of the judgment at this stage.

Trans and non-binary people deserve to be treated with dignity and respect. It is fair to say that trans people are increasingly concerned about what the judgment might mean for them, for their ability to live their lives, and for their safety. Organisations need to understand this and step up and be visible around their trans inclusive principles and practices. Inclusion is not only the right thing to do but is a positive and effective practical approach.

What did the For Women Scotland v Scottish Government Supreme Court judgment say?

On 16th April 2025, the UK Supreme Court handed down the following judgment:

"The unanimous decision of this court is that the terms woman and sex in the Equality Act 2010 refer to a biological woman and biological sex. But we counsel against reading this judgment as a triumph of one or more groups in our society at the expense of another, it is not."

The Court ruled that their interpretation of the protected characteristic of 'sex' and the term 'woman', specifically in the context of the Equality Act 2010 (EA 2010), does not include trans women.

The Court defined biological sex as 'sex at birth' (Judgment page 3 item 7) and do not describe it in terms of any biological features. We assume the implication is that it therefore means the sex marker on someone's original birth certificate.

The Court states: "It is not the role of the Court to.... define the meaning of the word 'woman' other than when used in the provisions of the EA 2010." (Judgment p1 Item 2)

The judgment also says the role of the Court is "a ... limited role which does not involve making policy" (Judgment p1 Item 2). We believe this implies that altered policy is not established unless other organisations or bodies choose to put it in place.

What did the Equalities and Human Rights Commission (EHRC) interim update say?

In response, on 25th April 2025, the EHRC issued an interim update, which notably is non-statutory, is not a fully consulted position and has no formal legal status. The interim update is also the subject of legal action by Good Law Project on the basis that it may be unlawful.

In addition, a public consultation has been launched in May to update the EHRC Code of Practice. It is important to note that statutory guidance does not override the law. The current statutory guidance remains unchanged for now, and has not, at time of writing, been withdrawn, although the webpage does note it is under review.

The interim update still states as follows (as at 18-06-25). However, the Good Law Project have released a statement¹ that the EHRC now concede that it is incorrect to say it is 'compulsory' for workplaces to provide single sex toilets:

*"In **workplaces**, it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed.*

*It is not compulsory for **services** that are open to the public to be provided on a single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act. However, it could be indirect sex discrimination against women if the only provision is mixed-sex.*

In workplaces and services that are open to the public:

- trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex*
- in some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological woman) not to be permitted to use the women's facilities*
- however where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use*

¹ <https://goodlawproject.org/ehrc-backs-down-on-single-sex-toilets/>

- *where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided*
- *where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men”*

This has generated considerable public comment, with many considering it unreasonable and unworkable to bar trans people from both men’s and women’s facilities.

Creating compliant and inclusive policy for your organisation

It’s for organisations to decide on their policy position around trans inclusion in light of the Supreme Court Judgment, and any subsequent changes to statutory guidance, regulatory changes and similar.

Our understanding is that organisations are not obliged to exclude trans women or any trans people, and that through policy, organisations have an opportunity to be front footed and to maximise a trans inclusive approach.

It is important to note that a policy must be implementable and the very act of writing a policy and considering its implementation will most likely establish that taking a trans exclusionary approach around single sex services and spaces will prove to be impossible in practice. Conversely, taking a trans inclusive approach is more practical and workable in reality.

How can my organisation provide a trans inclusive single gender service or space?

At Gendered Intelligence we believe that there will be many organisations, services and institutions that want to include trans people in their provision and workplace.

For many, this will just mean continuing previous trans inclusive practice that has caused no practical problems.

It is important to state that there is no automatic individual or collective right to ‘single sex’ provision or spaces established by the EA 2010. However, spaces may be lawfully restricted to people who share one or more protected characteristics. This is called ‘positive action’. This means you can take proportionate steps to support people with a protected characteristic to take part or access the space or service. This applies where the group of people would

otherwise not have their needs met, would be disadvantaged, or where participation is disproportionately low amongst that group. This means we can offer certain single-sex activities (based on the protected characteristic of sex). The same provision allows trans-only sessions such as trans only swimming (based on the protected characteristic of gender reassignment).²

The EA 2010 also allows for “separate services for the sexes” and “single-sex services” to be provided via Part 7, items 26 and 27 respectively³, again provided that it is a “proportionate means of achieving a legitimate aim” and that certain conditions are met.

The effect of the judgment has been to move from a broader, more expansive and inclusive understanding of sex to a narrow, birth-certificated view of sex regarding those provisions. However, a service for all women does not have to say that it is a single sex provision. We believe it could reasonably describe itself as a single gender provision instead, or ‘for women’ / ‘for men’, and make it clear that this is trans-inclusive.

The Good Law Project⁴ state:

“... generally, the judgment does not prevent a service provider from offering an inclusive service or space to people who live as women (or men) or on another similar inclusive basis. Doing so is unlikely to require that the service is opened up to all people whose sex was recorded male (or female) at birth as some have suggested.

² EQUALITY ACT P102 CHAPTER 2 POSITIVE ACTION 158 Positive action: general

(1) This section applies if a person (P) reasonably thinks that—

- (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
- (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
- (c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—

- (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
- (b) meeting those needs, or
- (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

³ See p202+ of the EA2010

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⁴ <https://goodlawproject.org/about/>

Nor does it prevent a trans-inclusive service provider from describing their service as being for women (or men) as the case may be (although it should be made clear to service users what they mean by this).

More specifically, we believe a service provider is entitled to offer a service that is inclusive of trans women (or men), rather than one segregated according to sex recorded at birth. This can be done on a number of legal bases. One is as an act of positive action under s.158 of the Equality Act. Positive action is permitted where this is a proportionate means of overcoming or minimising a disadvantage suffered by (in this case) trans people or meeting the specific needs of trans people or addressing low participation by trans people in a particular activity. It may, for example, be regarded as a disadvantage suffered by, or a specific need of, trans people that they are likely to feel uncomfortable in using the facilities provided for those of their sex recorded at birth and be discouraged from using them.

A trans inclusive policy may be argued to disadvantage, and face challenges from, people whose sex was recorded male or female at birth but those challenges may be defended on grounds which include that the policy is justified as a proportionate means of achieving a legitimate aim. When adopting or reviewing their access policies, whether trans-inclusive or not, all service providers should consider the interests of all service users and document their thinking as to what objectives they are seeking to pursue and why they think that their policy is justified, balancing the interests of different groups of service users.’⁵

Additional scrutiny for public sector organisations

If a service is delivered by a public authority, it will need to pay regard to the Public Sector Equality Duty (PSED), which was created by The Equality Act 2010 and came into force from 2011. This is broadly a duty on public authorities (any organisation which carries out public functions or services - for example, a school, the NHS or the police) to consider how their

⁵ <https://goodlawproject.org/resource/trans-inclusion-after-the-supreme-court-decision-faqs/>

policies or decisions affect people who are protected under the EA 2010. Equality Impact Assessments are one way public authorities demonstrate they are fulfilling their PSED.⁶

How are toilet facilities regulated?

The rules around single sex toilets are not directly established by the EA 2010, but by other regulation. For example, new build and substantively refurbished toilets and changing facilities are regulated by the Building Regulations 2010 with the Toilet Accommodation Guide which came into force on 1st Oct 2024.⁷ For staff, toilets are regulated by the Workplace (Health, Safety and Welfare) Regulations 1992⁸ and for schools it is the Education (School Premises) Regulations 1999.⁹

In the Workplace regulations it states that buildings require separate toilets for men and women **unless** in a room lockable from the inside, which would enable fully gender-neutral provision.

As a reminder the Supreme Court judgment explicitly only affects the EA 2010. Currently, we believe these other regulations are unaffected in any direct sense, and therefore the (lack of) definition of 'single sex' or 'male' or 'female' in the context of these regulations is unchanged. However, there is potentially some complexity as the Good Law Project reference below indicates. An organisation could argue that it operates on a model of 'lived sex' / gender and therefore trans people can continue to use the facilities aligned with their 'lived sex' / gender.

⁶ When public authorities carry out their functions, the Equality Act says they must have due regard or think about the need to:

- eliminate unlawful discrimination
- advance equality of opportunity between people who share a protected characteristic and those who don't
- foster or encourage good relations between people who share a protected characteristic and those who don't

"Having due regard" means public authorities must consciously consider or think about the need to do the three things set out in the public sector equality duty.

The Act further explains that having due regard for advancing equality involves:

- Removing / minimising disadvantages suffered by people due to their protected characteristics.
- Taking steps to meet the needs of people from protected groups where these are different from the needs of other people.
- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

⁷ https://assets.publishing.service.gov.uk/media/67167c02d100972c0f4c9b38/ADT_2024.pdf

⁸ <https://www.legislation.gov.uk/uksi/1992/3004/contents>

⁹ <https://www.legislation.gov.uk/uksi/1999/2/contents/made>

In addition, The Good Law Project state:

'... whether a business or organisation can legally exclude a trans person might depend on whether they have a [Gender Recognition Certificate (GRC)].... lots of the specific law governing the provision of single-sex spaces is not in the Equality Act and some will still be governed by the Gender Recognition Act and not adopt a sex recorded at birth approach.

For example, access to single-sex cubicle toilets (i.e. toilets that are in cubicles, rather than a separate lockable room) may depend upon whether you have a GRC because the meaning of "sex" in the Workplace (Health and Safety) Regulations 1992 may be governed by the GRA. These Regulations require that, if workplaces are providing cubicle toilets, they must offer "sufficient" single-sex cubicles (although employers could provide unisex cubicles as well). These Regulations probably mean "single-sex" according to certificated sex, applying the default position in section 9(1) of the GRA.'

Fundamentally, the practical reality is that any attempts to try to exclude trans people in single sex spaces (such as toilets and changing rooms) would prove fruitless. It is important to point out there is no evidence or documentation that anyone can provide that proves definitively that they are cisgender. It would not only be pointless to try, but potentially highly intrusive and inappropriate.

What choices might trans people make?

An individual who violates a policy in an organisation is not committing a criminal offence. If a trans person continues to access a single sex space that aligns with their lived sex / gender, they are not committing a crime. No private citizen has the right to detain another if they have not committed a crime. If a trans person is questioned about their sex or gender by another individual, they are under no obligations to answer. If someone challenges the presence of another person in a single-sex space, that person is legally within their rights to not engage and to continue about their business. However, there are some risks attached:

The Good Law Project says as follows (for trans people):

"It might be lawful for employers and service providers to segregate toilets according to sex recorded at birth (see further below) and there are some legal risks if you ignore such a policy if lawful. For example, depending on the facts, you could be accused of harassing other users of the toilet, or disobeying a reasonable instruction by your employer. However, it is also true that it might be unlawful to segregate toilets according to sex recorded at birth and it is certainly humiliating to use the wrong toilets. How you balance those factors will depend on your own risk appetite, your personal circumstances and the attitudes of your employer and colleagues. If the business or public space has not indicated that it intends to apply a definition of sex recorded at birth to their toilet provision we think that you should be able to use the toilet that aligns to your gender identity.

We consider that simply showing a gender symbol is not sufficient to show that a sex recorded at birth definition is being applied. That said, there is a risk that an employer or service provider will consider merely showing a gender symbol is clear enough, and you may risk a dispute with them if you take this approach.

If there are no appropriate toilets for you, and you feel confident to do so, you can ask for an appropriate toilet to be made available to you, and explain that it is discrimination on the basis of your rights as a person with the protected characteristic of gender reassignment not to provide you with any appropriate toilets. We understand that it will not be practical or fair for trans people to have this debate in person, let alone at the moment that you need the toilet."

Universal facilities that are fit for all

In general, binary-gendered communal facilities are the least accommodating for trans people and hardest to work with. Binary-gendered spaces are, by nature, not accommodating of non-binary people and any space with limited privacy tends to be challenging for trans people.

The ideal is to provide a predominance of universal, all-gender changing facilities and toilets with fully private individual enclosed cubicles, including at least some with integral washing facilities. It also supports parents bringing older children who are of a different gender, and disabled people who may have a PA/carer of a different gender, as well as better meeting the needs of those who may need more privacy because, e.g. they have a colostomy, or are using Mooncups or similar for menstruation; and improving access for those with faith-based washing requirements.

Note that when redesignating 'accessible' facilities as 'gender neutral' or 'all genders', providers should recognise the impact this can have on those who use those particular toilets for disability-related access reasons.

How does this intersect with the Gender Recognition Act 2004?

The Gender Recognition Act 2004 (GRA 2004) of the UK provides the legal framework by which a trans person can have their gender legally recognised.

The legislation states:

Section 9(1) GRA 2004:

"Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man, and, if it is the female gender, the person's sex becomes that of a woman)."

Following the Supreme Court judgment, a Gender Recognition Certificate (GRC), obtained through the GRA 2004, is still a legally recognised document that affirms a trans person's gender for legal purposes like marriage and tax and, whilst it is not required for death certificates, it does make respect more certain. For some trans people, gaining a GRC is about affirmation and having legal recognition of one's own gender.

As part of this process, a birth certificate is issued to reflect the acquired gender.

What the Supreme Court has decided is to use provision 9(3) in the GRA which states "Subsection (1) is subject to provision made by this Act or any other enactment or any

subordinate legislation” to enable the change of sex afforded by a GRC not to apply with respect to the Equality Act.

There are already exceptions in the EA 2010, with regards to a person being recognised in their acquired gender for ‘all purposes’. However, the exceptions can broadly only be enacted if it is a proportionate means of achieving a legitimate aim.

It is important to note that these exceptions in the EA 2010 already existed prior to the Supreme Court judgment, but that following the Supreme Court judgment, it does mean that these exceptions can more readily be applied.

For employers, key aspects of the GRA 2004 continue to apply. Section 22 of the GRA 2004 makes it a criminal offence for someone who has acquired the information that a person has a GRC in an official capacity (e.g. HR) to disclose that information, unless with consent or if a specific exception applies¹⁰.

Confidentiality and Privacy

In addition, the situation brings complexity for organisations where a trans exclusionary policy might force a disclosure of a person’s trans status and breach the confidentiality protections under the GRA 2004. Organisations should consider how they will maintain the dignity, privacy and confidentiality of all trans people (whether they have a GRC or not) if they are outed or required to out themselves by new policies. For example, a trans man who has always used the men’s toilets or men’s changing room suddenly starting to use a women’s or gender-neutral facility and facing questions or assumptions as a result.

¹⁰ GRA Section 22 Prohibition on disclosure of information, paragraph 4

<https://www.legislation.gov.uk/ukpga/2004/7/section/22>

(4) But it is not an offence under this section to disclose protected information relating to a person if—

(a) the information does not enable that person to be identified,

(b) that person has agreed to the disclosure of the information,

(c) the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued,

(d) the disclosure is in accordance with an order of a court or tribunal,

(e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,

(f) the disclosure is for the purpose of preventing or investigating crime,

(g) the disclosure is made to the Registrar General for England and Wales, the Registrar General for Scotland or the Registrar General for Northern Ireland,

(h) the disclosure is made for the purposes of the social security system or a pension scheme,

(i) the disclosure is in accordance with provision made by an order under subsection (5), or

(j) the disclosure is in accordance with any provision of, or made by virtue of, an enactment other than this section.

(5) The Secretary of State may by order make provision prescribing circumstances in which the disclosure of protected information is not to constitute an offence under this section.

Further reading

There are many opinion pieces and guidance offered by a range of practitioners and organisations in circulation. These are a few that GI has found useful:

[Trans inclusion after the Supreme Court decision: FAQs – Good Law Project](#)

[Know Your Rights Following the Supreme Court Judgement – Trans Actual](#)

[What is Wednesday's Supreme Court decision all about? – Scottish Trans](#)

[For Women Scotland: a legal critique - Crash Wigley](#)

[Supreme Court says Equality Act definition on based on biological sex – Lewis Silkin](#)

[Limits to the UK Supreme Court's Reach: Northern Ireland, the Windsor Framework and Trans Rights by Administrative Court blog](#)

[Melanie Field on the UK Supreme Court judgment For Women Scotland podcast](#)

Our opinions and support work are based on our wide professional experience of working directly with trans people and those who have contact with them. New situations and circumstances involving trans people are developing all the time and GI is at the forefront of helping to evolve forward-looking, positive, inclusive approaches in response. However, whilst GI has significant expertise in the field of trans inclusion, we are not qualified solicitors or medical professionals, and we therefore cannot offer legal or medical advice. Our comments and suggestions do not constitute such advice and should not be regarded as a substitute for it. It is therefore important that you seek appropriately qualified advice where necessary, that is also well-informed about trans lives and the associated critical thinking, especially if you intend to rely on a particular point of law or medicine.



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