For Women Scotland Ltd v The Scottish Ministers – what are the legal and practical implications for schools?

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The judgment in ***For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16** was given on 16 April 2025, making headlines in the national press and internationally. The Equality and Human Rights Commission (EHRC) has now (5 September 2025) shared its updated **Code of Practice** for services, public functions and associations with the Minister for Women and Equalities for approval. The proposed Code of Practice explains that there will be services and functions carried out by educational bodies which do not fall within Part 6 of the Equality Act 2010 (education), and to which Part 3 (services and public functions) will therefore apply. For example, where a school hires out their sports hall to local sports clubs for club activities, this is likely to be subject to Part 3 of the Act.

What are the implications of the *For Women Scotland* judgment for the education functions of schools?

The Supreme Court (at para. 2 of the judgment) made clear that it was not adjudicating on the wider arguments in the public domain on the meaning of gender or sex, nor on the meaning of the word "woman" (or "man") other than when it is used in the provisions of the Equality Act 2010. The task of the Supreme Court was to interpret the 2010 Act in the light of section 9 of the Gender Recognition Act 2004.

As the Supreme Court explained in its judgment (at para. 26), the appeal addressed the position of the small minority of trans people who possess a full Gender Recognition Certificate ('GRC'). It did not affect the status of the large majority who do not possess a full GRC - their sex in law is and has always been their biological sex. A person must be aged at least 18 to make an application for a gender recognition certificate, which means that, although in theory some trans pupils could obtain a GRC before leaving school, in practice this is unlikely, meaning that the Supreme Court's judgment has not affected the position of pupils in schools.

However, the judgment underscored (at paragraph 26) that unless a person possesses a full GRC, their sex in law is their biological sex.

What did the Supreme Court decide?

The 2010 Act defines "man" as "a male of any age" and "woman" as "a female of any age" and provides that in relation to the protected characteristic of "sex", reference to a person who has a particular protected characteristic is a reference to a "man" or to a "woman" (this means that references in the 2010 Act to men and women can be references to boys and girls in the appropriate context). The 2010 Act does not define "male" or "female". However, it was common ground for the Supreme Court that unless a person possesses a full GRC, their sex in law is their biological sex. Section 9(1) of the GRA 2004 provides that where a full GRC is issued to a person, the person's sex becomes "for all purposes" the acquired sex, so that, if the acquired sex is the male sex, the person's sex becomes that of a man and, if it is the female sex/gender, the person's sex becomes that of a woman. However, section 9(3) provides that 9(1) is subject to provision made by the GRA 2004 or any other enactment or any subordinate legislation. The Supreme Court held that section 9(3) applies to the 2010 Act because the provisions of the 2010 Act would be rendered incoherent or unworkable by the application of the rule in section 9(1). So, the Supreme Court determined, references to "men" in the 2010 Act are references to biological males of any age and do not include trans men (on the basis that trans men are biological females), whether they have a GRC or not, and references to "women" in the 2010 Act are references to biological females of any age and do not include trans women (on the basis that trans women are biological males), whether they have a GRC or not.

The Supreme Court decision does not affect the legal position that gender reassignment is a protected characteristic under the 2010 Act as defined in section 7. A person does not need to have a GRC to have the protected characteristic of gender reassignment. By section 7, a person has the protected characteristic of gender reassignment if the person "is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex".

The proposed Code of Practice for services, public functions and associations explains, at paragraph 2.21, that this broad, non-medical definition is particularly important for gender variant children: although some children do reassign their gender while at school, there are others who are too young to make such a decision. Nevertheless, they may have begun a personal process of changing their gender identity and be moving away from their birth sex.

Manifestations of that personal process, such as mode of dress, indicate that a process is in place and they will be protected by the Act.

Part 6 of the Equality Act 2010 makes it unlawful for education bodies (including higher and further education) to discriminate against, harass or victimise a school pupil (or student) or applicant for a place.

Schedule 11 part 1 sets out exceptions to the provisions on sex discrimination that apply to schools. These exceptions relate to admission to single-sex schools, single-sex boarding schools, and single-sex schools turning co-educational. The latter exception enables a school which is going through the process of changing from a single-sex to a co-educational institution to apply for a transitional exemption order to enable it to continue to restrict admittance to a single sex until the transition from single-sex is complete. A single-sex school is defined in para 1 as a school which admits pupils of one sex only. The decision of the Supreme Court confirms that this means one biological sex only. By schedule 11 part 1, para 1(3), a single-sex school can admit pupils of the opposite (biological) sex and still be a single-sex school if the admission of those pupils is "exceptional" or if their numbers are comparatively small and their admission is confined to particular courses or classes. The Act does not define "exceptional" in this context. The Explanatory Notes to the 2010 Act provides some illustrative examples: if the daughters of certain members of staff at a boys' school are allowed to attend, it is still regarded as a single-sex school, and a boys' school which admits some girls to the Sixth Form, or which lets girls attend for a particular GCSE course not offered at their own school, is still regarded as a single-sex school. The Supreme Court decision confirms (see para. 134) that where there is an allegation of direct discrimination because of gender reassignment, the comparator must be a person of the same *biological* sex. Thus, the proper comparator for a pupil who is a trans girl will be a biological boy and the proper comparator for a pupil who is a trans boy will be a biological girl. Thus:

- A single-sex school does not discriminate unlawfully against pupils of the opposite biological sex by not admitting them. A girls' school is not obliged to admit trans girls, as trans girls are biological boys, and a boys' school is not obliged to admit trans boys, as trans boys are biological girls.
- Girls' schools cannot refuse to admit biological girls, or require them to leave the school, because they are trans boys or proposing to transition, and likewise boys' schools cannot discriminate against trans girls in that way.
- It may be argued that under the provisions of schedule 11 para 1 para 1(3), a girls' school may admit *some* trans girls and a boys' school may admit *some* trans boys.

> However, it may be doubted that a single-sex school can lawfully make exception for some pupils of the opposite biological sex *because* they are trans. If a single-sex school admits or would admit pupils of the opposite biological sex who are trans but refuses or would refuse to admit pupils of the opposite biological sex whose circumstances are not materially different, because they are *not* trans, it may be argued that this would constitute direct discrimination because of the protected characteristic of gender reassignment.

The provisions of para. 2 of Part 1 of Schedule 11 mean that a mixed-sex school, some of whose pupils are boarders, may lawfully admit pupils of only one sex to be boarders. The exception allows a school to refuse to admit a pupil to a boarding place at the time he or she initially joins the school, or to provide him or her with boarding facilities at a later stage. The exception applies even if some members of the other sex are admitted as boarders, so long as their numbers are comparatively small. By way of example, provided in the Explanatory Notes, a mixed-sex school may have facilities for female boarders and can lawfully state in its prospectus that males cannot be accepted as boarders. Again, the Supreme Court decision confirms that sex for these purposes means biological sex.

What about toilets, washrooms, changing accommodation and showers in schools?

The School Premises (England) Regulations 2012 (SI 2012/1943) state that suitable toilet and washing facilities must be provided for the sole use of pupils (regulation 4). By regulation 4(2), separate toilet facilities for boys and girls aged 8 years or over must be provided, except where the toilet facility is provided in a room that can be secured from the inside and that is intended for use by one pupil at a time. By regulation 4(3), where separate facilities are provided for pupils who are disabled, they may also be used by other pupils, teachers and others employed at the school, and visitors, whether or not they are disabled.

The Education (School Premises) Regulations 1999 apply in Wales. Regulation 3(1) requires that in every school there shall be facilities including “washrooms” which are “adequate having regard to the ages, sex and numbers of the pupils and any relevant special requirements they may have”. Regulation 3(5) read with regulation 4(3) provide that washrooms for male and female pupils who have attained the age of 8 years shall be separate, except that the school may provide washrooms for use by any pupil, member of staff or visitor to the school if the washroom makes provision for the needs of persons using the premises who are disabled, contains only one water closet and one washbasin with or without one shower or one deep

sink, and any door of the washroom is capable of being secured from the inside and opens directly onto a circulation space other than stairs.

Following the Supreme Court's decision in *For Women Scotland*, the Equality and Human Rights Commission, on 25 April 2025, published an "interim update on the practical implications of the UK Supreme Court judgment" which stated that, *"Pupils who identify as trans girls (biological boys) should not be permitted to use the girls' toilet… and pupils who identify as trans boys (biological girls) should not be permitted to use the boys' toilet… Suitable alternative provisions may be required."*.

That advice is consistent with the statement of the Supreme Court at paragraph 26 of its judgment, that, in law, the sex of trans people who do not possess a full GRC is their biological sex (therefore 'girls' are biological girls and 'boys' are biological boys).

As for changing accommodation and showers, The School Premises (England) Regulations 2012, regulation 4(4), states that suitable changing accommodation and showers must be provided for pupils aged 11 years or over at the start of the school year who receive physical education. The Education (School Premises) Regulations 1999 which apply in Wales provide at regulation 3(7) that, "Changing accommodation including showers shall be provided for pupils who have attained the age of 11 years and who are in receipt of physical education and that accommodation shall be readily accessible from the school grounds and from any accommodation provided for physical education within the school buildings." Perhaps surprisingly, neither the 2012 nor the 1999 regulations expressly state that separate changing accommodation must be provided for boys and girls, although regulation 3(1) of the 1999 regulations requires that in every school there shall be facilities including "changing accommodation and showers" which are "adequate having regard to the ages, sex and numbers of the pupils and any relevant special requirements they may have". However, the EHRC's interim update states that it is compulsory for schools in England and Wales to provide single sex changing facilities for boys and girls over the age of 11, and that pupils who identify as trans girls (who are biological boys) should not be permitted to use the girls' changing facilities and pupils who identify as trans boys (who are biological girls) should not be permitted to use the boys' changing facilities.

What of the interplay between the 2012 and 1999 regulations and the Equality Act 2010? There is no exception in Schedule 11 relating to toilets or washrooms, changing accommodation or showers. However, by operation of section 191 and Schedule 22 ("statutory exceptions") paragraph 1, the responsible body of a school does not contravene Part 6 of the

2010 Act, so far as relating to the protected characteristic of sex, if it does anything it must do pursuant to a requirement of an enactment. By section 212(1) - the general interpretation section - “enactment” means an enactment contained in (a) an Act of Parliament, (b) an Act of the Scottish Parliament, (c) an Act or Measure of the National Assembly for Wales, or (d) subordinate legislation.

What about school sports?

Section 195 of the Equality Act 1010 defines a “gender-affected activity” as “a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.” Section 195(4) states, “In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.” Section 195(1) provides that a person does not contravene the 2010 Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity. The Explanatory Notes say, by way of example, that would be lawful to have young men and young women, though not necessarily younger boys and girls, compete in separate 100 metre races. The Supreme Court held, at paragraph 234, that this provision was clearly predicated on biological sex. It follows that schools may have separate competitive sports for biological boys and biological girls if they consider the sport is gender-affected, as defined by section 195. If they do decide to do so, they should not allow trans boys (who are biological girls) to compete alongside biological boys and trans girls (who are biological boys) to compete alongside biological girls.

What about the public sector equality duty and ‘positive action’?

Section 147 sets out the public sector equality duty (“PSED”); section 158 is the section on ‘positive action’. The Supreme Court’s consideration of these provisions at paragraphs 237-244 provided another reason for its conclusion that ‘sex’ in the 2010 Act must mean biological sex. If the interests of trans women (biological males) are to be considered and advanced as part of the group that share the protected characteristic of being “women”, that would require data collection and consideration of a heterogenous group containing some biological women, some biological males (trans women) and excluding some biological females (trans men). Any data collection exercise will be distorted by the heterogenous nature of such a group. Moreover, the distinct discrimination and disadvantage faced by women as a group (or trans people as a group) would not be capable of being addressed because the group being

considered would not be a group that, because of the shared protected characteristic of biological sex, has experienced discrimination or disadvantage flowing from shared biology, societal norms or prejudice. Whereas the interests of biological women (or biological men) can be rationally considered and addressed, and likewise, the interests of trans people (who are vulnerable and often disadvantaged for different reasons), the Supreme Court did not understand how the interests of this heterogenous group could begin to be considered and addressed.

The DfE issued non-statutory guidance on gender separation in mixed schools in June 2018. This non-statutory guidance is provided to support schools in identifying what is expected of mixed schools (maintained, academies and other independent) when it comes to separation by sex following the Court of Appeal's judgment in *HM Chief Inspector of Education, Children's Services and Skills v the Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426 (*Ofsted v Al-Hijrah*). This explains that in a mixed school, any separation of pupils of either sex that denies them the choice or opportunity to interact with pupils of the other sex is likely to be unlawful and the only relevant exceptions are section 158 (positive action) and section 195 (competitive sport). It explains that if pupils are separated by sex (or by reference to any other protected characteristic) in specific classes, assemblies and/or for any extra-curricular activities, school leaders and governors will be expected to justify to Ofsted and other inspectors, parents and the wider community the reasons for the separation. Where a statutory exception is relied upon, they will be expected to demonstrate that they have considered and documented why the exception applies. It explains that outside the specific statutory exceptions, they should be in a position to demonstrate that separation does not give rise to any detriment because its effect is negligible. It states, by way of example, that it would be lawful to teach sex education and elements of Personal, Social, Health and Economic (PSHE) education to single-sex classes because boys and girls may have different needs in this context, but it would be necessary to ensure that appropriate classes were provided to both boys and girls. Another example is if schools might want to do more to encourage the participation of girls in STEM subjects (where there is clear evidence to suggest that girls' participation in STEM subjects is lower than it should be). Any measure to encourage girls would have to be a proportionate way of dealing with the participation issue.

Again, following the decision of the Supreme Court, sex in this context means biological sex.

In December 2023, the Department for Education published draft non-statutory guidance for schools and colleges in England on children questioning their gender and ran a consultation which was open until 12 March 2024. The document points out that it covers areas that remain

untested in the courts. Subject to that important caveat, it offers suggestions on how schools should handle requests from children questioning their gender (or from those children's parents), such as allowing the child to change their informal ('known as') name or pronouns, making provision if the child does not want to use the toilet, changing room or showers designated for their biological sex, or making accommodations where the child does not want to comply with any uniform requirements specified for their biological sex. Unfortunately, we are starting a new academic year with the final published guidance still awaited.

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