

Review of data, statistics and research on sex and gender: Addendum following Judgment given on 16th April 2025 in For Women Scotland Ltd v The Scottish Ministers

At the time of publication of the *Review of data, statistics and research on sex and gender* the meaning of the protected characteristic of sex in the 2010 Equality Act was contested. As stated in the review, *“Some stakeholders have told us that they wish to collect data on the protected characteristic of sex in the 2010 Equality Act (EA2010) in order to comply with the Public Sector Equality Duty (PSED). However, the question of whether the protected characteristic refers to sex or sex as modified by a GRC is the subject of ongoing litigation at the time of writing”*.

The case of “For Women Scotland Ltd v The Scottish Ministers” concerned whether the protected characteristic referred to biological sex or certificated sex subject to a GRC. The supreme court justices gave their judgment on 16th April 2025, and unanimously found that the terms “man”, “woman” and “sex” in the EA 2010 refer to biological sex

The *Review of data, statistics and research on sex and gender* recommended that data collection on sex, including for the purpose of fulfilling the PSED, should refer to biological rather than certificated sex. The recommendations are therefore not changed by the recent Supreme Court judgment. Rather, the judgment removes any possible uncertainty regarding the appropriate target of data collection for the purposes of equalities monitoring on the protected characteristic of sex.

The judgment explicitly sets out the implications for data collection and the reasoning regarding the irrationality which would be entailed by the exercise of collecting data on certificated sex.

“238. As we have explained, all organisations subject to the PSED must have due regard, in considering their rules, policies or practices, to the matters set out in section 149, undertaking where appropriate an equality impact assessment in order to understand how and to what extent the policy in question will affect specific groups with different protected characteristics. Organisations and bodies that are subject to the PSED are required to collect data in order to fulfil this duty.

239. If, in the context of equality between the sexes, the interests of trans women (biological males) who have GRCs (so are legally female) must be considered and advanced as part of the group that share the protected characteristic of being “women”, the PSED will require data collection and consideration of a heterogenous group containing biological women, some biological males with a GRC (trans women who are legally female) and excluding some biological females with a GRC (trans men who are legally male). This is a confusing group to envisage because it cuts across and fragments both biological sex and gender reassignment into heterogenous groupings which may have little in common. 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) would simply not be capable of being addressed by the PSED because the group being considered would not be a group that, because of the shared protected characteristic of sex, has experienced discrimination or disadvantage flowing from shared biology, societal norms or prejudice. Whereas the interests of biological women (or men) can be rationally considered and addressed, and likewise, the interests of trans people (who are vulnerable and often disadvantaged for different reasons), we do not understand how the interests of this heterogenous group can begin to be considered and addressed.”

The judgment referred to the Equality and Human Rights Commission (EHRC) advice to the UK government in 2023 regarding the clarity that would be provided by a biological interpretation of sex in EA2010. This advice referred specifically to data collection.

“247. (8) Data collection: When data are broken down by legal not biological sex, the result may seriously distort or impoverish our understanding of social and medical phenomena. A biological definition of sex would require public bodies like universities to apply this category, without the complexity added by a legal definition of sex, to the analysis of data collected in fulfilling the Public Sector Equality Duty”.

The supreme court judgment refers to the fact that categories which cut across each other are unhelpful. The judgment is precisely in line with the statement in the review that “Questions which combine sex with gender identity, including gender identity as recognised by a Gender Recognition Certificate (GRC) have a mixed target” and that questions with a mixed target should not be asked as they unhelpfully combine distinct characteristics.

This brings complete clarity for organisations collecting data on sex to fulfil their Public Sector Equality Duty (PSED).

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