SOME GUIDELINES

On the INCLUSION of transgender persons in SERVICES and WORKPLACES

Following

The Supreme Court judgment in

For Women Scotland v Scottish Ministers [2025] SC 16

By

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Introduction

Just as when the judgment in For Women Scotland (FWS) was handed down, I have not rushed into print with my thoughts. But it seems that the UK Government is also not rushing to provide the new guidance, probably because it has realised how problematic FWS is to half a century of DE&I progress. At the time of writing, the Equality and Human Rights Commission's (EHRC) new draft Code of Practice on Goods and Services is with the Equality Minister Bridget Phillipson; but she, and the political great and the good have been at the party conferences. It seems unlikely that the EHRC Guidance will come before Parliament until the late autumn and will then face a rather more difficult passage than secondary legislation usually enjoys. The guidance deals with service provision locations, but does not deal with workplaces and so major areas of uncertainty will remain.

A vacuum can become an unfortunate breeding ground for rumour and misinformation. The EHRC's own commentary on FWS, rushed out in haste, stated that the judgment required sex-segregated toilets when I suggest it did no such thing. The most recent piece of misinformation is the suggestion being promoted by the FWS group itself, that making an award for women to a trans woman is a breach of the Equality Act as interpreted in the case. Such awards are not covered by the Equality Act.

I have therefore, felt it incumbent to publish something sooner rather than later, dealing with trans inclusion in service provision and workplaces.

That inclusion usually comes down to toilets and (where provided) changing rooms.

I must make plain that this paper represents my personal views; moreover, in a fluid, legal landscape where there is likely to be significant litigation in coming months and years until (I hope) the FWS Supreme Court Judgment is effectively reversed by legislation. Discrimination cases are notoriously fact-specific and so this paper cannot be taken as legal advice on any particular case. My clerks, of course, would be pleased to receive instructions to give such advice, as they have increasingly been so receiving.

Preliminary Thoughts

It seems clear to me that exclusion of trans people (persons with the protected characteristic of gender reassignment) from facilities in service provision locations and workplaces which match their gender-identity will constitute harassment, unlawful under section 26 of the Equality Act 2010.

By contrast, allowing trans people to use such facilities will not constitute unlawful harassment of other persons by reason of their sex, religion or protected beliefs (with certain caveats that I deal with below).

It is important to note that the Equality Act provisions are permissive, not prescriptive. Put another way, it is intended to a shield not a sword. For example, a religion *can* choose not to have a trans priest but does not *have to*. Similarly, service providers *can* choose to provide sex-segregated services but do not *have* to.

Possibly the only exception in principle to this is where such choices would be indirectly discriminatory or harassing of a particular group, as I will consider.

Harassment Generally

This is defined by s 26(1) of the Equality Act 2010 in the following terms:

> 'A person (A) harasses another (B) if A engages in unwanted conduct which has the purpose or effect of violating B's dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment for B.'

Section 26(4)(c) makes plain that the test for harassment is one of *objective reasonableness* and the case of *Land Registry v Grant* makes plain that the concept of harassment must not be 'cheapened' and is not there to deal with 'trivial matters causing minor upsets'.

Harassment - for trans people?

Contemplate for a moment a trans person who transitioned years ago, after the societal, medical and personal struggle that is gender transition. They have been accepted in their affirmed gender for years. But now a service provider or an employer is to say to them that they cannot use the facilities appropriate to their gender, which they have also used for years without difficulty and must now either use wrong gender facilities or gender-neutral facilities (if those exist), which deny the effectiveness of their gender change. How are they to explain that to friends or work colleagues?

Or contemplate a new workplace transitioner being supported by their employer. Are they really to be told they cannot use gender-appropriate facilities?

Article 8 of the European Convention on Human Rights requires a respect for private life.

I consider it is not difficult to see how the provisions of s26 are made out in such situations.

Harassment - for non-trans people?

A trans person uses a lavatory. Anything they do unclothed they either do in a stall with a closed door, or at a urinal with modesty partitions between the positions. They adjust their clothing and wash their hands in the communal area. They use the mirror to check and adjust their appearance.

How can that, reasonably, be harassment of anyone?

Policy formulation

It can, therefore, be seen that a policy which forces trans people into facilities inappropriate for their gender could be either unlawful harassment or unlawful indirect discrimination.

Service providers / employers would be very well advised to be clear why they are following the policy that they do.

Harassment – special cases

Policy must deal with the commonplace, but also obvious special cases. An argument can be made that a woman who has suffered sexual assault or is from a particular religious minority where sex-segregation is important, might have particular needs in using public facilities. How can their needs be met? It could be argued that not effectively meeting their needs would either be unlawful harassment or indirect discrimination because these are difficulties more likely to be faced by women.

These thoughts assume that any modern service provision location or workplace will have at least one single-cubicle, self-contained sanitary facility principally intended to meet the needs of people with disabilities, usually referred to as an 'accessible' toilet. That is, therefore, the solution for the small number of persons who require, or desire as a matter of choice, or find themselves in circumstances which make desirable, facilities with additional privacy.

It may be that a relevant location also has one or more gender-neutral toilets which can similarly be so used.

Workplaces

In workplaces the position is substantially the same. Toilets in workplaces are governed by the Workplace, Health, Safety and Welfare Regulations 1992 ('the 1992 Regulations'). These Regulations were not considered in FWS, but they speak of providing separate facilities for men and women except where a single lockable room facility is provided.

The 1992 Regulations enact European Council Directive 89/654/EEC. Neither the Regulations or the Directive define 'man' or 'woman' so it is European case law, particularly the jurisprudence of the Court of Justice of the European Union ('CJEU') to which we must look for guidance, interpreting the Charter of Fundamental Rights of the European Union. This case law, from *P v S and Cornwall County Council* (Case C-13/94) and a number of subsequent cases, establishes that 'woman' includes trans woman and 'man' trans man.

(One of the problems with FWS was the Supreme Court's failure to recognise the European underpinning of the Equality Act 2010, as recognised in the final sentences of the Explanatory Notes to that Act.)

Toilet Use – Before the Trans Panic

It is always worth remembering that before the current 'trans panic' in which the toxic debate about facility use is being conducted, there always was some blurring to the lines on toilet use. Parents have been able to take their children (of whatever sex) with them into toilets. Anti-trans organisation 'Sex Matters' says that is OK until age 8. And bastion of media outrage, GB News, has gender-neutral loos (with communal hand washing) in its Paddington studio. If a 'male cleaner at work' notice is enough, then all the above show that the presence of trans people isn't really the problem that some assert.

Draft Trans Toilet Use Policy

(Applicable to Workplaces and Service-Provision Locations)

It is our policy that female facilities are available for trans women and male toilets are available for trans men.

Anyone requiring or desiring additional privacy may use the accessible toilet (*located…) or the gender-neutral toilet (*located…).

Anyone not clear on this policy or who perceives it causes them a difficulty, please refer to (*who).

(*Complete as relevant to the location)

Changing Rooms

Many workplaces or service provision locations will not have changing rooms.

Those that do will need to consider the remarks about toilets above.

I regularly stay away from home for work purposes and have often booked an hotel with a swimming pool, a recreational activity I enjoy. I would not wish to change or shower 'communally,' as I believe would be the position for many individuals today. Still less would I be prepared to strip to my naked female body in the presence of similarly naked men.

If suitably individual changing (and where necessary showering) facilities can be provided, then all legal difficulties, from whatever direction, should be overcome.

Appendix – the FWS Judgment

I make no bones about it. I consider the judgment in FWS to have mis-stated the law. It purports to divine the will of Parliament as to the meaning of 'sex' in the Equality Act 2010, particularly for a person holding a Gender Recognition Certificate granted by the process established under the Gender Recognition Act 2004. A simple task, one might think, given the clear statements made in Parliament by the Ministers who steered both Acts through parliament. But those statements were offered no respect by the Supreme Court, who arrived at their own definition of 'sex' found nowhere in either Act, being the sex recorded by the midwife on the birth of a child. Fixed and immutable. I list the problems with this judgment in this Appendix and, as a good legal friend recently remarked, it should 'vanish in a puff of logic' when reconsidered in the future. Unfortunately, until that happens, it remains UK law, however illogical and however harmful to the inclusion of trans people in UK society, and has contributed to the declaration of a red flag for genocide by the internationally respected Lemkin institute.

One might have looked to the current Labour government to defend the work of the Blair government in passing the 2010 Equality Act; but the political reality of 2025 is that the present Labour government is trying to outmanoeuvre Reform and the prospect of social justice for minority groups, especially trans people, seems to the writer to be very far off. It seems that we must wait for the Court of Human Rights in Strasbourg or a bold UK court to declare the SC judgment

non-compliant with Human Rights law, or perhaps a different case coming before a different division of the Supreme Court before matters will improve.

The Supreme Court failed to:

* follow applicable European Law principles and directives (such as the Gender Directive (Directive 2004/113) and the Recast Equal Treatment Directive (Directive 2006/54), *

* having identified the importance of the ECHR, provide any ECHR analysis as required by the UK Human Rights Act22

* having identified the 'Goodwin' case, conduct any analysis of the compatibility of their judgment with that case,

* explain the logic of their judgment with regard to s7 of the EA 2010 and the definition of gender reassignment, which specifically says that sex has physiological and 'other' aspects,

* explain the logic of their position with regard to s195 of the EA 2010, in that they justify the trans exclusion clause by refence to someone taking a performance enhancing drug,

* in their analysis of maternity and paternity rights, take account of the GRA provision stating that maternity and paternity are not affected by possession of a GRC,

* take account of the clear statements in Parliament, recorded in Hansard, by the Ministers with conduct of both the GRA and EA, that the effect of a GRC would be that an individual would be dealt with under the EA as a sex corresponding to their certified gender,

* take account of the Notes to the GRA 2004 that say, in terms, that a GRC holder would be treated in their acquired sex for Sex Discrimination Act purposes,

* recognise that 'sex', 'man' and 'woman' might have different meanings in different sections of the EA (as the authority they quote contemplates) and improperly limited themselves to a requirement that these words only have one meaning across the whole EA, despite that Act bringing together rights requiring different interpretations of those words,

* permit an intervention by two highly experienced trans individuals who might have been able to bring greater balance to the submissions before the Court,,

* recognise that it was only receiving submissions from trans-exclusionary lesbian groups and not from ‘mainstream’ lesbian groups, who are much more trans-supportive and understand trans advocacy to form part of their role, taking their support beyond that within the general population.

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