

# Who Is a Man and Who Is a Woman? Implications of the UK Supreme Court Decision

## Abstract

On 16 April 2025, the Supreme Court of the United Kingdom ruled that when interpreting the UK's Equality Act (2010)—the Act of the UK Parliament that details protections against unlawful discrimination—the terms ‘man’, ‘woman’, and ‘sex’ refer to ‘biological sex’ (defined in the Court’s ruling as ‘the sex of a person at birth’), and not also ‘certificated sex’ (defined in the Court’s ruling as ‘the sex attained by the acquisition of a Gender Recognition Certificate’). Some have argued that the Court’s decision represents a significant setback for trans people, while others have welcomed the perceived clarity the decision has provided. The decision has had, and will continue to have, wide impact, such as on the lawful operation of single-sex spaces and services in the UK. Scrutiny of the Court’s judgement is therefore warranted. The judgement was based on an interpretation of what Parliament intended in the Equality Act, but there are unresolved questions:

1. Is the Court’s interpretation of what Parliament intended the terms ‘man’, ‘woman’, and ‘sex’ to refer to correct?
2. Was the Court’s ruling made in a sufficiently just way?

With these questions in mind, this article has two main aims. First, to summarise the Court’s recent decision and its social impacts. Second, to stress the importance of procedural justice in evaluating this verdict. This article thereby presents a preliminary case for the adequate consultation of all relevant stakeholders in potentially contentious legal decisions—especially where significant practical consequences for different social groups are likely.

## Keywords

discrimination; sex; gender; procedural justice; public consultation

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# Who Is a Man and Who Is a Woman? Implications of the UK Supreme Court Decision

## Introduction

On 16 April 2025, the Supreme Court of the United Kingdom (UK) ruled that when interpreting UK anti-discrimination legislation, the terms ‘man’, ‘woman’, and ‘sex’ refer to persons by virtue of their ‘biological sex’, which is defined legally as the ‘sex of a person at birth’.<sup>[1]</sup> This is in contrast to prior practice, whereby those terms had been interpreted by policymakers to refer to both ‘biological sex’ and ‘certificated sex’. The latter is defined legally as ‘the sex attained by the acquisition of a Gender Recognition Certificate’ (GRC).

The Court argued that the reading of these terms as referring solely to ‘biological sex’ was what Parliament intended in passing the UK’s Equality Act. In effect, the Court held that for legal purposes, key terms should mean what Parliament intended them to mean.<sup>[1]</sup> Opponents, however, hold that ‘sex’ should instead be understood more expansively, including as the category reflected on a formal document, such as a GRC.<sup>[2]</sup>

In more practical terms, opponents argue that the Court’s judgement represents a “significant setback” for trans people—it would worsen existing social and material inequalities that unjustly disadvantage this group of people.<sup>[3]</sup> A legal challenge to the Court’s judgement has been launched on the basis that trans people were not consulted in arriving at this decision, and no clear justification for exclusion was offered.<sup>[2, 4]</sup> We pick up on this important point in our discussion. In stark contrast, others have welcomed the judgement’s “clarity” and the “victory” it seems to deliver to a “common sense” understanding of sex and gender.<sup>[5]</sup> This “common sense” understanding is alleged by some supporters of the judgement to be necessary, in practice, to secure the rights and interests of non-transgender women,<sup>[6]</sup> itself a contested claim.<sup>[7]</sup>

Whether for legal purposes or otherwise, one likely has a view of what the terms ‘man’, ‘woman’, and ‘sex’ do, or should, mean.<sup>[8]</sup> But whatever one’s substantive commitments, it

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<sup>i</sup> Where we employ the phrase ‘biological sex’, we do so to remain in keeping with the Court’s language. However, we note that on some accounts the term may be misleading insofar as it can be taken to imply that, *in contrast* to ‘gender identity,’ (only) ‘sex’ is biologically determined. Gender identity or incongruence may *also* be determined, at least in part, by biological causes, such as genes and hormones, epigenetic factors, and so on.

(<https://pmc.ncbi.nlm.nih.gov/articles/PMC7415463/>;

<https://www.intechopen.com/chapters/80813>) Very roughly, gender incongruence is the knowledge or sense that one’s self-identity, in relation to sex or gender, is incompatible with, or differs from, the sex implied by one’s congenital sex characteristics and/or the culturally associated gender roles or norms assumed to apply to a person on the basis of such characteristics.

should be clear that scrutiny of so consequential a legal judgement is warranted. The Court’s judgement has had, and will continue to have, wide impact on social groups and institutions in the UK, particularly in relation to the operation of single-sex spaces and services.

In this Current Controversy article, we pursue two aims. First, to elucidate the Court’s decision and describe its impact on social groups and institutions. Second, to consider how the meanings of socially significant terms, in a legal context, *should* be determined. We argue that in the context of the design and implementation of public policy, it is important to ensure a just process when defining relevant terms. With these aims in mind, we now proceed as follows: first, we summarise the judgement and its aftermath; second, we present a case for a stakes-sensitive, appropriate consultation of the public—especially of relevant stakeholders and their representatives—in politically contentious and socially significant legal decisions.

## The Supreme Court’s Judgement

The UK Supreme Court’s ruling concerned a legal challenge to an Act of the Scottish Parliament, *Gender Representation of Public Boards (Scotland) Act 2018*, aimed at increasing the proportion of women on public boards in Scotland.<sup>[9]</sup> An advocacy group, For Women Scotland, requested a review of the Scottish Parliament’s interpretation of the terms ‘man’ and ‘woman’ in relation to the UK’s Equality Act of 2010.<sup>[10]</sup> The Equality Act is the Act of UK Parliament that specifies protections against unlawful discrimination.

At issue was whether a Gender Recognition Certificate (GRC) would determine one’s sex, as according to the Equality Act and thereby the Scottish Act of Parliament. How ‘sex’ is to be interpreted is highly consequential. This is because the Equality Act’s (2010) definition of discrimination makes essential reference to the characteristic of sex, among other protected characteristics (see **Box 1**).

**Box 1.** Discrimination, according to the Equality Act.

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

If the protected characteristic is sex—

- (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
- (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy.<sup>[10]</sup>

Accordingly, unlawful discrimination cannot be understood without an operationalisable interpretation of protected characteristics. Whether one counts as a man or a woman for

legal purposes,<sup>ii</sup> as according to the Equality Act, will thus determine the forms of treatment they may be protected from or entitled to. This includes whether they would be a target of a policy addressing past discrimination against persons who share in that protected characteristic.

Following the UK's Gender Recognition Act (GRA) of 2004, a GRC legally recognises a person in accordance with their 'lived gender', subject to a Gender Recognition Panel's determination. ('Sex' and 'gender' are, unhelpfully for our purposes, used interchangeably in the Act.<sup>[11]</sup>) Applicants for GRCs must meet several explicitly stated criteria.<sup>[12]</sup> For instance, a person may only apply for a GRC if they are over 18 years of age; have previously been diagnosed with 'gender dysphoria'; have been living in their 'acquired gender' for over two years; and intend to live in this gender for the rest of their life.<sup>iii</sup> One does not need to have had surgery to alter their sex characteristics (sometimes termed gender/sex reassignment or gender-affirming surgery) to obtain a GRC.

For the purposes of interpreting the UK's Equality Act, the Court has considered only two options. First, that the terms 'man', 'woman', and 'sex' extend to 'certificated sex'—

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<sup>ii</sup> This qualification may puzzle some readers. One might think that whether someone is a man or a woman is simply a *factual* question, where its answer holds in all contexts and for all purposes. Yet, many legal concepts diverge from common parlance. A child, for example, is typically anyone's offspring of whatever age, or someone who has been adopted by adoptive parents. In UK law, however, the term usually refers to a *minor*, with consequences for one's rights and privileges. Likewise, most people think 'death' extends to cases where one's heart and lungs stop. However, in some jurisdictions, the law may instead define it as 'brain death,' with consequences for organ donation and inheritance. These examples show that the law often redraws the boundaries of familiar categories, and the same may be true of 'man' and 'woman'.

<sup>iii</sup> What it means to live in one's acquired gender is not defined in the GRA. However, government guidance to GRC applicants (available at <https://www.gov.uk/apply-gender-recognition-certificate>) explains that relevant 'evidence' must be supplied, including use of a name or title (such as Mr or Miss) that 'matches up with your affirmed gender.' Guidance also notes that to apply for a GRC, a formal diagnosis of 'gender dysphoria' is required. 'Gender dysphoria' is defined by the NHS as the "sense of unease that a person may have because of a mismatch between their biological sex and their gender identity". (<https://www.nhs.uk/conditions/gender-dysphoria/>) (For a philosophical critique of the idea that gender dysphoria, gender identity, or related concepts should primarily be understood in terms of a "mismatch," however, see <https://www.tandfonline.com/doi/abs/10.1080/15265161.2018.1557293> and <https://pmc.ncbi.nlm.nih.gov/articles/PMC8640116/>; but see also <https://www.tandfonline.com/doi/full/10.1080/24740500.2023.2441470>.) The Scottish Parliament voted to remove the requirement of a gender dysphoria diagnosis with a majority vote in favour of the Gender Recognition Reform Bill of 2022. (<https://www.theguardian.com/uk-news/2022/dec/22/scotland-passes-bill-making-it-easier-for-people-to-legally-change-gender>) However, the bill was struck down by Westminster using a Section 35 Order to block Royal Assent. (<https://www.theguardian.com/world/2023/jan/16/rishi-sunak-blocks-scotlands-gender-recognition-legislation>)

understood by the Court as one's sex as reflected in official documents such as a GRC—in addition to 'biological sex'.<sup>iv</sup> Second, that such terms refer *only* to 'biological sex', understood by the Court as the 'sex of a person at birth', presumably informed by one's physical traits such as genitalia possessed at birth.

Understood in the first way, the targets of a gender representation objective to increase the proportion of women in non-executive member roles on public boards in Scotland would include persons with GRCs recognising them as women (though they were categorised as male at birth based on physical criteria). Understood in the second way, however, such persons would be *excluded* from the target class whose under-representation on public boards in Scotland was at issue.

The Supreme Court ultimately ruled that—

As a matter of ordinary language, the provisions relating to sex discrimination, and especially those relating to pregnancy and maternity, and to protection from risks specifically affecting women, can only be interpreted as referring to biological sex.[<sup>1</sup>]

Thus, persons with GRCs identifying them as women would not, according to this ruling, count as women for the purposes of interpreting and setting the bulk of anti-discrimination legislation in the UK. Importantly, it appears that the basis of this decision was the Court's impression that members of Parliament had an "ordinary language" interpretation of sex in mind as they contributed to and voted on this legislation. Moreover, the Court seemed to think that the specific content of that "ordinary language" interpretation is *inconsistent* with a 'certificated' understanding of sex but *consistent* with a 'biological' one.

The Court's task is to identify the meanings of words used in a statute that would give rise to a consistent and unambiguous reading, *given* that Parliament would have sought consistency and clarity when enacting a statute. (We summarise the Court's approach to statutory interpretation in **Box 2**.) However, as we discuss in the next section, it is not clear that this method is adequate in the context of issues that are highly complex, politically contested, and socially significant.

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<sup>iv</sup> It is important to note that GRCs only recognise a person as either male or female, and do not recognise someone as non-binary. (<https://www.gov.uk/apply-gender-recognition-certificate>; <https://www.nhs.uk/conditions/gender-dysphoria/>) Accordingly, under present UK law, an 'affirmed' or 'acquired gender' has an operative binary definition linked to the conventionally corresponding sex category (i.e., female for women and male for men).

**Box 2.** Statutory Interpretation at the Supreme Court.

The Court takes a general approach to statutory interpretation that is well-established, in that it has been employed on numerous occasions. In effect, the Court seeks to interpret statute in the context of both the whole statute and the social, cultural, and historical context under which the statute was enacted by Parliament.

Reflecting on the Court’s method of interpretation, Lord Thomas Bingham (*R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687) stated:

The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.[<sup>1</sup>]

Interpretation, as constrained by context, is to be further guided by the principle of consistency. The language employed in various sections of a statute is assumed to be consistent *in meaning across the whole statute*. As Lord George Leggatt has stated (*R (Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin)):

It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion – all the more so where the phrase has been expressly defined.[<sup>1</sup>]

## Impact on Institutions

Following the Court’s judgement, the UK’s Equality and Human Rights Commission (EHRC) developed interim guidance on policy.<sup>[13]</sup> Several institutions have updated their policies in adherence.

For instance, the British Transport Police amended its strip search policy. Prior to the judgement, a person with a GRC undergoing a police search would be searched by an officer whose sex conventionally corresponds with the category recognized by the detainee’s GRC. Now, interim policy states that strip searches are to be conducted “in accordance with the biological birth sex of the detainee”.<sup>[14]</sup> So, for instance, a person with a GRC recognising them as female would be searched by a police officer categorised as male at birth.

The judgement has also impacted sport. The England and Wales Cricket Board has extended a policy that bans trans women and girls from playing cricket in top tiers of

competition to all levels of sanctioned competition.<sup>[15]</sup> The England Football Association has likewise barred trans women from participation in women's football.<sup>[16]</sup>

Perhaps the widest impact has been, and will be, on policies regarding the use of bathrooms and other single-sex facilities, including hostels and shelters. For instance, EHRC guidance states that workplaces and services open to the public must not permit trans women to use women's bathrooms and trans men to use men's bathrooms. However, where bathrooms are available to men and women, trans people should have access to usable bathrooms, such as mixed-sex bathrooms.<sup>[13]</sup> Barclays has imposed a ban on the use of women's bathrooms by trans women in its buildings.<sup>[17]</sup> And the National Health Service has been warned that it must update its policy on single-sex spaces in hospitals and GP surgeries or risk facing legal action.<sup>[18]</sup>

## Responses to the Ruling

Responses to the judgement have been sharply mixed, and such variance is revealing of the decision's highly polarising nature.

The EHRC's chairwoman, Baroness Kishwer Falkner, called the ruling a "victory for common sense," but only, she clarified, if one simultaneously recognises that "trans people exist, they have rights and their rights must be respected".<sup>[5]</sup> However, members of the UK's cultural sector jointly signed an open letter stating that the EHRC's guidance "overlooks the need to protect trans, non-binary and intersex people from discrimination," suggesting that the Court's decision does not in fact respect the rights of trans people (see also **Box 3** below).<sup>[19]</sup> The former leader of the Scottish National Party, Nicola Sturgeon questioned

the EHRC's guidance, worrying that it would make the lives of trans people "almost unliveable".<sup>[20]</sup>

**Box 3.** The Court's Decision and its Impact on People with Intersex Traits.

Due to a limited word count, we are unable to evaluate the decision's impact on the rights of people born with intersex traits or variations of sex characteristics (differences/disorders of sex development in some medical discourses). However, the treatment of such persons is of growing legal and ethical concern, both in the UK and elsewhere.<sup>[21, 22]</sup>

Most people born with intersex traits do not consider themselves to be transgender (and most trans people were not born with intersex traits). Most people born with intersex traits identify as either boys/men or girls/women, in a manner typically corresponding to their birth-assigned sex category.<sup>[23, 24]</sup> Nevertheless, some such persons self-identify as intersex (or as intersex men or women), non-binary, or in a manner that differs from the sex/gender category they were placed in as infants or adolescents by clinicians.

What is the place, therefore, of a person whose 'biological sex'—even as picked out by various physical markers—troubles the categories of 'man' and 'woman' invoked in UK law following the Court's ruling? (See also the fourth footnote of this article in relation to non-intersex persons who may identify as non-binary, genderqueer, and so forth.)

One should expect detailed legal analysis to follow. At least preliminarily, some have considered whether the Court's ruling is in accord with existing anti-discrimination law. Crash Wigley argues that the Court both failed to address the human rights incursions likely to follow the judgement and to interpret 'sex' in a way that is consistent with the rights of trans people, as outlined in the European Convention on Human Rights.<sup>[25]</sup> In response, Michael Foran argues that the Court *had* recognised "the importance of both biological sex and gender reassignment, [and] concluded that each is protected separately under the Equality Act".<sup>[26]</sup> (Like the characteristic of sex, what is termed 'gender reassignment' is a characteristic on account of which persons are to be protected from discrimination, under the Equality Act.)<sup>v</sup>

However, as stated above, the prohibitions and entitlements to do with discrimination on the basis of sex differ from those to do with discrimination on the basis of gender 'reassignment' (i.e., how one is legally categorised by virtue of holding a GRC). Differences are most notable in the operation of single-sex spaces and facilities, where sex and gender identity/reassignment are now to be construed as *necessarily* in conflict. When 'sex' in the

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<sup>v</sup> According to the Equality Act (2010), a person possesses 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."

Equality Act is interpreted as extending to ‘certificated sex’, single-sex spaces and facilities are legally required to admit persons into those spaces in line with one’s ‘acquired gender’, including as reflected on a GRC. This is no longer the case. People with GRCs will no longer be allowed to enter single-sex spaces or facilities congruent with their certificated sex (at least in principle, how this would be enforced in practice is unclear—see **Box 4**).

**Box 4.** Problems with Enforcement of the Legal Use of Single-Sex Spaces?

People are not ordinarily asked to present a GRC—or any legal documentation—when entering bathrooms or other single-sex facilities (perhaps with some exceptions, such as certain shelters). Enforcement of policies regarding single-sex spaces might thus depend on visual or stereotyped judgements about sex or gender presentation, which are unreliable and risk wronging or disrespecting individuals. Moreover, the ruling would appear to apply symmetrically to trans men, who—being legally female, according to the ruling—would be required to use women’s facilities. This creates the paradoxical result that someone who presents as, and would ordinarily be perceived as, male would be compelled to use women’s spaces, arguably undermining the rationale (or one of the main rationales) invoked to exclude trans women from such spaces in the first place.

## Political and Social Significance

One reason for polarity in response to the Court’s judgement is that the stakes are widely perceived to be very high. Consider the matter of bathroom, shelter, or changing-room policy. Some have argued that spaces delineated by ‘biological sex’ can support the felt or actual safety of women experiencing vulnerability, particularly those “trying to heal from terrifying acts of cruelty”, such as rape or sexual assault.<sup>[27]</sup> In reply, it is sometimes noted that trans women too face high rates of physical and sexual violence, and thus also have claims to safety and dignity in such spaces.<sup>[28, 29]<sup>vi</sup></sup>

Another reason for polarity is that disagreement about the meaning of ‘sex’ and ‘gender’ in the public domain is seemingly intractable. As the Court’s decision has shown, views on sex and gender shape what our institutions look like: *who* has access to *what* depends on shared conceptions of sex and gender. But the views on the table seem strictly incompatible.

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<sup>vi</sup> Here, we simply note the two claims cited in this paragraph to stress the political and social significance of issues to do with sex and gender. However, it is outside of the scope of this paper to adjudicate on these claims (or similar ones).

Contrary to the Court’s inquiry, perhaps there is not just one thing called ‘sex’ for us to inquire about.<sup>[30]</sup> <sup>vii</sup> Some regard sex and gender to be conceptually and practically distinct,<sup>[31]</sup> where gender (or gender identity), in contrast to sex, is best understood in terms of various sex-linked social norms one takes to be relevant (in a particular sense) to oneself.<sup>[32; however, see 33]</sup> By contrast, advocacy groups supporting the Court’s decision have argued against views which distinguish between gender and sex recorded at birth (i.e., they take one’s gender to simply be one’s sex), most notably by raising the initial challenge to the Court.<sup>[34]</sup>

Intractable disagreement about the relevant stakes over and interpretations of ‘sex’ and ‘gender’ is evidence that there is more complexity than one might, at first glance, attribute to the matter. There may even be complexity of a kind that courts of law, and perhaps even Parliament, cannot easily contend with. This raises two worries.

First, the Court’s interpretation may be incorrect. Recall that the Court’s method of statutory interpretation involves understanding terms in context and offering a consistent and unambiguous reading of statute (see **Box 2**). In arriving at their interpretation, the Court heard from several advocacy groups supporting a ‘biological’ interpretation of sex. Advocacy groups aimed at promoting the rights of lesbians, including Scottish Lesbians and the LGB Alliance, argued that sexual minorities would not be regarded as distinct groups on the basis of a ‘certificated’ interpretation of sex. The Court appears to have been persuaded by such arguments, ultimately concluding a ‘certificated’ interpretation of sex would render other provisions in the Equality Act “incoherent or as giving rise to absurdity”.<sup>[1]</sup>

As was their stated method, the Court pursued consistency and clarity across the whole statute. It settled on an interpretation even in the absence of direct evidence that Parliament intended a ‘biological’ interpretation of sex in every instance. We might think, however, that in cases of particular political contestation and social significance—such as where there may be a negative impact on certain social groups, especially the vulnerable or disadvantaged—a higher standard must be met. Indeed, perhaps direct evidence of Parliament’s intent would be both practically and ethically necessary to land on a definitive interpretation of statute. It is altogether possible that Parliamentarians intended to leave the definition of sex open, or that due to the complexity involved, different interpretations of sex were assumed in

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<sup>vii</sup> One broad class of views holds that gender simply is one’s sex, and sex is biological, binary, and immutable. This is the reading the Court has, in effect, favoured. However, even among scientific experts who specialise in sex and gender research, including scholars of human biology, such a view is often seen as, at best, an oversimplification, and at worst, simply inconsistent with the observed complexity of sex, which involves natural variation along multiple dimensions (see: <https://pubmed.ncbi.nlm.nih.gov/38840819/>; <https://www.nature.com/articles/518288a>). As evidence of the as-yet “unsettled” nature of conceptual questions around sex and gender even among scientific specialists, see the recent call for papers debating such questions by one of the leading sex research journals (<https://link.springer.com/article/10.1007/s10508-025-03190-7>).

different sections of the statute. Doubt along these lines cannot be assuaged by the customary method of statutory interpretation used by the Court.

Second, perhaps Parliament itself is not well-placed to decide on certain socially contested matters. In engaging in statutory interpretation, the Court ultimately assumed that the meaning of ‘sex’ is indeed a matter for Parliament to decide, and that the law should employ concepts as Parliamentarians use them. But it nonetheless seems an open question whether (or under what conditions, if any) Parliament should decide, *inter alia*, who is a man and who is a woman.

## Procedural Justice and Public Consultation

Given the foreseeable consequences of the Court’s ruling, and the complexity involved in issues related to sex and gender, scrutiny of the procedure employed by the Court is needed. Was the Court’s judgement made justly? And if not, what should have been done instead? Whether we answer yes to the first, and therefore whether we are to answer the second at all, depends on the Court’s proper role.

Whatever one’s view of sex and gender, one might argue—as the Court does—that the Court’s role is not to “adjudicate on the arguments in the public domain on the meaning of gender or sex”, but to address “the meaning of the words which Parliament (had) used”.<sup>[1]</sup> But given the wide-reaching implications of the ruling, we must more carefully consider the Court’s role in public discourse. Even beyond material effects, the ruling may shape how people think and talk. It may persuade members of the public to adopt one particular view of sex and gender, for instance. The Court *licenses* one particular interpretation of the meaning of ‘sex’ by employing this interpretation as an authoritative body of the state; and enforces this interpretation when institutions must conform to its ruling in setting policy, as they have already begun to do. Conceiving of the Court as engaging solely in statutory interpretation shirks a responsibility: even if the Court is not strictly accountable for shaping the views of the public, it may nonetheless be answerable for doing so.

However, it is not obvious that the Court can, or should, reinterpret its role in light of intractable disagreement. After all, any legal challenge seen by the highest court of a state is in some way contentious. The question then is whether the Court *must* engage in statutory interpretation for the sake of precision or clarity, even at the risk of privileging one side of the issue. Perhaps cases of statutory interpretation that are *particularly* controversial and/or depend on politically contested matters, *and* which carry significant foreseeable risks—such as psychological harm, physical violence, or material deprivation—to the already vulnerable, lie outside of the scope of the Court’s role. This would not be without precedent.

On 20 June 2025, a majority of members of the UK Parliament voted in favour of a bill to legalise assisted dying.<sup>[35]</sup> But this issue has long been debated in the UK. In 2015, when considering the case of Tony Nicklinson, who suffered from a stroke that left him paralysed and who later challenged the UK's laws against assisted suicide at the High Court and the Supreme Court, Lord Justice Roger Toulson stated that matters regarding the right to die are “matters for Parliament to decide”.<sup>[36]</sup> Perhaps this applies to the matter of defining ‘sex’ and ‘gender’ also, as uncertainty about appropriate interpretation of these terms may be a matter for Parliament itself to resolve. As representatives of the people, Parliament may have a duty to not just adjudicate on arguments in the public domain, but state explicitly how relevant terms are to be interpreted. If so, the Court’s inferences about the meanings of significant terms should be licensed by clear and unambiguous expression of intent.

We may nonetheless evaluate the Court’s judgement, as is. The spectrum of views of the public have not yet been made well clear to members of the Court. Challenges to the ruling have focused on the lack of consultation appropriately sensitive to the stakes and interests involved. Dr Victoria McCloud, a former judge in the British High Court, has lodged a legal challenge against the ruling at the European Court of Human Rights, having stated that “Trans people were wholly excluded from (the) court case.”<sup>[2 4]</sup> Applications for intervention from two trans legal experts, including McCloud, were denied by the Court without a clear statement of justification. Indeed, it is challenging to see how a judgement on anti-discrimination law made without appropriate consultation can be procedurally just.

Indeed, we might think that a *minimal* demand for procedural justice is that the evidence relevant to an issue is made known to the Court. We regard this demand to be minimal because for any legal decision to be procedurally just, the relevant and available facts must be taken into account. This would apply irrespective of the politically or morally salient content of those facts. This demand is all the more pressing, however, in the context of matters as central to justice as equality between persons. Accordingly, the Court ought to have consulted more broadly in this case.<sup>viii</sup> (At the very least, justification ought to be provided for why only some stakeholder groups were heard from.)

More fundamentally, it is not clear what range of voices Parliament initially heard in crafting the Equality Act, and if the construal of ‘sex’ as ‘biological sex’ was intended by Parliamentarians in every instance. Moreover, as we alluded to, it may even be an open

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<sup>viii</sup> In order to develop clear policy guidance, the EHRC undertook a consultative process to seek feedback from the public, particularly affected stakeholders. The process, which lasted four weeks longer than initially planned, ended on 30 June 2025 (<https://commonslibrary.parliament.uk/research-briefings/cbp-10259/>). The EHRC’s revised guidance will then be put before Parliament before it is to take effect. Our contention that the Court’s role and method should be carefully considered nonetheless holds, given its potential downstream effects, and its capacity to license some interpretations of controversial terms.

question as to whether the legal meaning or extension of the concepts of man and woman should be ones for Parliamentarians to decide (at least without proper consultation of all relevant stakeholders). This is, however, a topic for further research. On the one hand, it might be that just as with assisted dying or abortion, uncertainty must be resolved by Parliament upon consideration of appropriately wide representation of argument and debate. Yet, on the other, it might be that there are issues so politically and ethically challenging that even if adjudicated on, their complexity can never be adequately translated to law.<sup>ix</sup>

## Conclusion

Anti-discrimination legislation makes essential reference to aspects of ourselves that are central to who we are as people. Questions about which characteristics must be protected by law, and why, are matters to which we should all give thought and, importantly, matters over which we ought to have a say. The moral weight of the issue and the lack of broad consultation by the Court suggest that the Court's decision was not arrived at justly. Whether there is room for recourse, however, will depend on whether *standard* procedures regarding evidence and statutory interpretation were properly adhered to, and if so, whether such procedures are ultimately legally appropriate, and more importantly, just. Indeed, whether this should be brought back to Parliament is a further question.

The challenge for healthcare practitioners is to understand how to adjust their personal and professional judgements in light of regulatory change. This is especially pressing in cases where legal obligations conflict with ethical obligations to provide respectful and non-discriminatory care. There is an open question about how to approach medical care, treatment, and service, ethically in addition to—or perhaps even as opposed to—lawfully, one that requires detailed analysis of the cases practitioners might encounter. If the Court's role really is limited to statutory interpretation, then the lesson for practitioners, and indeed the wider public, is that the meaning of 'sex' and 'gender' are still contestable. 'Sex' may not mean 'biological sex' in all contexts, simply *in virtue of* the Court's ruling. Indeed, it may ultimately be that the Court's ruling reflects no ground truth about the meaning of 'sex' and 'gender'. And if so, discrimination on the basis of sex is still an open matter for us to come to understand.

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<sup>ix</sup> One of us has previously argued that in the context of contested cultural practices, attempts in law to resolve certain conceptual distinctions (e.g., between 'therapeutic' and 'non-therapeutic' or between 'religious' and 'cultural') can end up being quite paradoxical, or even seemingly absurd, in part due to the need for law to make use of its own resources (such as prior decisions) rather than 'starting from scratch' for the sake of conceptual clarity, consistency or even accuracy (<https://pubmed.ncbi.nlm.nih.gov/28541496/>).

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