

Transgender Issues and the Law in 2023

Introduction

1. At the Conservative Party's 2023 autumn conference, gender was a hot topic. Among other things, Government ministers announced proposals to change the NHS constitution to "protect the rights of women" and suggested that "biological men" should not share hospital wards with "biological women". Some transgender rights organisations have accused the Government of igniting a "culture war".ⁱ Such fraught political debates are likely to feature in this year's General Election campaign as well.
2. Recent years have seen many cases of note in this area. These include, at the appellate level, Bell v Tavistock [2021] EWCA Civ 1363; [2022] 1 All ER 416, a decision concerning the competence of young people diagnosed with gender dysphoria to consent to "puberty blockers", and R (ota Elan-Cane) v SSHD [2021] UKSC 56; [2023] AC 559, an unsuccessful judicial review of the unavailability of "X" markers on UK passports for people who identify as non-gendered or non-binary. I acted as counsel for an intervener in both cases.
3. 2023 was also a busy year for jurisprudence on transgender issues. In particular, the Scottish courts have handed down some noteworthy decisions, discussed in **Sections A and B** of this article. **Section C** summarises various cases which, following on from the Forstater decision in 2021, concern the "often vociferously conducted debate, regarding the respective balance between gender self-identification and gender critical views."ⁱⁱ Finally, **Section C** discusses the Higher Education (Freedom of Speech) Act 2023, the background to which is "alleged curtailing of freedom of speech" in universities,ⁱⁱⁱ including allegations in the press that some academics have been "no-platformed" due to their opinions on sex and gender.^{iv}

SECTION A - For Women Scotland Limited v the Scottish Ministers [2023] CSIH 37

4. The term "sex" in the Equality Act 2010 has recently been subject to authoritative interpretation by the Inner House of the Court of Session (the Scottish Court of Appeal) in For Women Scotland Limited v the Scottish Ministers [2023] CSIH 37, upholding a decision of Lady Haldane.^v While not binding on courts in England and Wales, a decision of the Inner House interpreting a UK-wide statute should be followed unless there is a "sufficiently compelling reason" not to do so, meaning the Inner House's decision is "clearly wrong".^{vi}
5. In an Opinion dated 1 November 2023, the Inner House has upheld the lawfulness of guidance by the Scottish Government concerning the "sex" of a person granted a Gender Recognition Certificate ("GRC") under the Gender Recognition Act 2004.

6. In sum, that guidance provided that if a transgender person holds a GRC in their “acquired” gender,^{vii} for example female, then that person’s sex is that of a woman for the purposes of the sex discrimination provisions of the Equality Act.
7. A campaign group called “For Women Scotland” (“FWS”) challenged this guidance as unlawful. In their view, holding a GRC does not affect the person’s “sex” within the meaning of the Equality Act 2010. FWS argued that “such persons remained biologically the gender assigned at birth” and that obtaining a GRC did not protect the holder against sex discrimination in their acquired gender (§5).
8. At first instance, Lady Haldane had concluded that the legal meaning of the term “sex” for the relevant statutory purposes is not limited to “biological or birth sex, but includes those in possession of a GRC”: Opinion of 13 December 2022, §53.^{viii}
9. The Inner House rejected FWS’s arguments, essentially in agreement with Lady Haldane. At §65, the court reasoned as follows:

“A person with a GRC in their acquired gender possesses the protected characteristic of gender reassignment for the purposes of section 7 [of the Equality Act 2010]. Separately, for the purposes of section 11, they also possess the protected characteristic of sex according to the terms of their GRC. For the purposes of section 11, individuals without a GRC, whether they have the protected characteristic of gender reassignment or not, retain the sex in which they were born ... A person with a GRC in the female gender comes within the definition of “woman” for the purposes of section 11”.

10. As such, the relevant guidance was not unlawful. The FWS’s reclaiming motion (i.e. their appeal from Lady Haldane’s decision) was dismissed.
11. As the Equality Act stands, a transgender person who holds a GRC is afforded protection against sex discrimination in their “acquired gender”, as opposed to that which they were assigned at birth. However, even a transgender person with a GRC may be excluded from single-sex roles or spaces in certain circumstances, subject to a proportionality test, as the Inner House explained at §§54-59 (see, in particular, Schedules 3 and 9 of the 2010 Act).
12. The FWS decision has caused some consternation. In a statement to the House of Commons on 5 December 2023 Kemi Badenoch MP, Minister for Women and Equalities, questioned the clarity of the law in this area. She said:

“... The complexity of the legal situation was reinforced by the judgment in December 2022 by Lady Haldane in the judicial review brought by For Women Scotland, upheld on appeal ... which effectively stated that a gender recognition

certificate changes a person's sex for the purposes of the protections conferred by the Equality Act. ...

As a result of the Haldane judgment, there is now confusion between biological sex and legal sex ... we need to look at this [judgment] very carefully. ... I would go so far as to say that the law is now a mess because of changing times. We need to provide clarity. We cannot assume that the wording as was intended in 2004 and 2010 still works in 2023, and we are carrying out work to fix that.”^{ix}

13. The references to “confusion” and “complexity” in the law are arguably overstated, in circumstances where section 9 of the Gender Recognition Act 2004 has long provided that the gender of a person holding a GRC is their “acquired” gender “for all purposes” (emphasis added). On the other hand, the Inner House reasoned that “there is generally no default meaning of sex or gender, and the terms are frequently used interchangeably” (§37), and that the Equality Act itself uses the terms interchangeably at times (§52). In the Supreme Court decision of Elan-Cane, Lord Reed stated that, in the context of that appeal, “gender” referred to “an individual’s feelings or choice of sexual identity, in distinction to the concept of “sex”, associated with the idea of biological differences which are generally binary and immutable” (§3). However, he noted that “public agencies generally use the terms of “gender” and “sex” interchangeably” (§5).
14. Ms Badenoch’s statement to the Commons suggests that reform to the Equality Act 2010 may be on the horizon. She cited a letter published by the Equality and Human Rights Commission (“EHRC”) in April 2023, in which the EHRC concluded that introducing a definition of the protected characteristic of “sex” as “biological sex” into the Equality Act 2010 “could bring clarity in a number of areas, but potential ambiguity in others.”^x
15. Finally, one commentator has argued that the Inner House’s decision underscores the potential practical importance, for transgender people, of acquiring a GRC:

“the consequence of having a GRC following [the Inner House’s decision] is a prima facie right to use the services of the sex which has been confirmed by the GRC ... the practical effect of the judgment is that the principles and presumptions where a trans-person is excluded from a single-sex space will differ depending on whether they have a GRC. A trans-person without a GRC excluded from a single-sex service or space is being treated differently because of their sex ... However, if a trans-person with a GRC is excluded from a service provided for those with the sex confirmed by their GRC, they are being treated differently because of the protected characteristic of gender reassignment. This is where the Court held that there is a prima facie right of access. In practice, it may be that exclusion is presumptively justified in the former case, but unjustified in the latter.”^{xi}

SECTION B - The 'section 35 Order' judicial review – Re Scottish Ministers' Petition [2023] CSOH 89

16. Shortly after the FWS judgment, on 20 December 2023, the Outer House of the Court of Session handed down another much-anticipated decision: Re Scottish Ministers' Petition [2023] CSOH 89. This case also involved Lady Haldane.
17. In brief, on 22 December 2022, the Scottish Parliament passed the Gender Recognition Reform (Scotland) Bill. The Bill would amend the Gender Recognition Act 2004 as it applies to Scotland by introducing a new, simplified process for applying for a GRC, and lowering the minimum age of applicants from 18 to 16.
18. In this case, the Outer House was asked to decide whether the Secretary of State for Scotland, Alister Jack MP, had acted unlawfully when he made an Order on 17 January 2023 preventing the Bill being submitted for Royal Assent; meaning it did not become law.
19. The Secretary of State, in making the Order, invoked a power under section 35 of the Scotland Act 1998. Section 35(1)(b) empowers him to prohibit submission of a Bill for Royal Assent if provisions of the Bill “make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters”. Reserved matters are listed in Schedule 5 of the 1998 Act.
20. This was the first time that the section 35 power had ever been used to ‘block’ a Bill. The Scottish Ministers sought to challenge the Order, arguing it was of no legal effect.
21. On behalf of the Scottish Ministers, the Lord Advocate, Dorothy Bain KC, argued that section 35 bestows a power of “last resort” (§65) and that this Order represented an “impermissible encroachment upon the separation of powers” (§63). She further argued that the two pre-conditions for the exercise of the power in section 35 had not been met: first, there was no modification to the law as it related to reserved matters, secondly, if there was such a modification, the Secretary of State erred in concluding it had the required “adverse effect”.
22. Perhaps the most important issue in dispute was the level of intensity of review to be applied by the court. On this, the parties were diametrically opposed. For the petitioners, the Lord Advocate argued that close supervision was needed, including of the reasons given for the Order (§33). By contrast, counsel for the Advocate General for Scotland (representing the UK Government) argued that in this context, low intensity review was appropriate: “**Rationality is the touchstone**” (§38-45).

23. Ultimately, the Outer Court of Session dismissed the Scottish Ministers' petition for judicial review. In so doing, Lady Haldane's Opinion rejected any suggestion that the Order had been improperly motivated by a policy disagreement as to the substance of the Bill. As to the standard of review, she concluded that context was crucial (§70):

"The nature of the power that has been invoked, whilst a constitutional one, is described and delineated within the four walls of the [Scotland Act 1998]. There are preconditions to its exercise set out in section 35(1)(b). There is a specified time frame ... far from being an impermissible intrusion upon the constitutional settlement, section 35 is an intrinsic part of it. It follows also that the power, being exercisable only upon certain preconditions being fulfilled, is not an unfettered one. Its exercise is properly subject to review by the courts but the intensity of that review is less than that described in the cases relied upon [by the petitioners] where fundamental human rights are involved..."

24. Lady Haldane was, similarly, unpersuaded by the petitioners' reliance on the principle of legality and on an analogy with the Supreme Court decision of R (ota Evans) v Attorney General [2015] UKSC 21; [2015] AC 1787 – in which the Attorney General purported to override a decision of the Upper Tribunal – in support of their argument for a high level of scrutiny (§24, §71):

"The principle of legality has no application to the present case where the question is not whether the executive is seeking to override the rule of law, or otherwise interfere with a reasoned decision of a court or other Tribunal ... [or] using a statutory power to interfere with a fundamental or constitutional right. Rather, the question is whether a statutory power ... is engaged, and, if so, whether the Order pronounced thereunder has been promulgated lawfully. ... The political context is an important one and the touchstone remains that of rationality. The level of intensity of review has to be viewed in that context and is as a consequence less than that employed where fundamental human rights are at stake, or where there is a challenge to the rule of law as was the case in Evans..."

25. As to the first pre-condition in section 35, Lady Haldane concluded that section 9 of the Gender Recognition Act 2004 had "in substance been amended by the Bill". It was common ground that section 9 "operates as the interface between the Bill and the Equality Act, which is within the reserved area of Equal Opportunities". (§67)
26. Further, Lady Haldane rejected the petitioners' criticisms of the decision-making process followed and their arguments as to the second pre-condition in section 35, the required "adverse effect". In particular, the petitioners submitted that the Secretary of State had irrationally "failed to acquaint himself with the relevant facts and material" before making the Order. Lady Haldane concluded that Secretary of

State had taken sufficient, rational steps to inform himself. In making his decision, he had before him various materials compiled by the Cabinet Office's "Equality Hub". The approach taken to gathering information was "reasonable in all the circumstances". This included the constraints of the four-week statutory timeframe for making the Order, which the respondent had argued was important context in judging the sufficiency of the evidence-gathering exercise. (§72-74)

27. At a political level, the outcome of this case is highly significant for relations between the current UK and devolved governments. In its response to the decision, the Scottish Government stated that, in its view: "The current process for gender recognition places disproportionate barriers to trans people accessing their rights" and expressed its hope that a future UK Government may lift the section 35 Order. However, the Scottish Ministers have chosen not to appeal the decision.^{xii}
28. From a legal perspective, the case is equally significant. The Outer Court of Session determined the appropriate standard of review in a novel constitutional context, and one with significant implications for devolution. In essence, the court accepted submissions on behalf of the UK Government that, while intense scrutiny is appropriate in fundamental human rights or 'rule of law' cases, this was not that kind of case. Rather, the Secretary of State was making an expert, predictive judgement, in an area of high government policy.
29. One commentator had argued that in the circumstances, including the "democratic pedigree" of the Scottish Parliament, the court would "closely scrutinize the reasons given before upholding the maiden exercise of an extraordinary power".^{xiii} The distinction of this case from that of Evans, in which the separation of powers and rule of law were held to demand a more searching review, is also of wider importance. It is, perhaps, unfortunate that these interesting issues will not be considered further at the UK Supreme Court level.

SECTION C - Other developments in 2023

30. Finally, 2023 saw further litigation involving what are often termed "gender critical" views. This has aptly been described as a "hugely contentious discussion", where "conversations ... often happen in the very public space of social media."^{xiv}
31. The background is a well-known ruling of the Employment Appeal Tribunal in 2021 that "gender critical" views are capable of being a protected belief within section 10 of the Equality Act 2010 and Articles 9 and 10 of the European Convention on Human Rights: Forstater v CGD Europe [2021] UKEAT 105; [2022] ICR 1.
32. Specifically, the views at issue in Forstater were (§1):

“the belief that biological sex is real, important, immutable and not to be conflated with gender identity. She considers that statements such as “woman means adult human female” or “trans women are male” are statements of neutral fact and are not expressions of antipathy towards trans people or “transphobic”.”

33. The EAT concluded that although the claimant’s philosophical belief was potentially offensive to some, it did not meet the threshold of “not worthy of respect in a democratic society”. The EAT reasoned that only in “extreme cases” would a philosophical belief fail to qualify for protection at all; although the manifestation of such beliefs may, in some circumstances, justifiably be restricted (for example, the EAT said, “calling a trans woman a man “may” be unlawful harassment” in some cases, §104. This is a fact-specific question).
34. The case therefore proceeded to an Employment Tribunal. Ms Forstater’s claim that her employer had discriminated against her because of her “gender critical” beliefs was upheld. In June 2023, she was awarded compensation of £106,404.31.^{xv}
35. Numerous cases raising similar issues have followed in the wake of Forstater. In Mackereth v DWP [2022] EAT 99 [2022] ICR 1609, for example, the EAT upheld the Tribunal’s conclusion that a policy requiring a doctor to address transgender service users according to their “presented gender” / using their preferred pronouns was objectively justified, dismissing the doctor’s claim of indirect discrimination. Further, and hot off the press, is the Employment Tribunal’s decision of 8 January 2024 in Meade v Westminster City Council (case nos. 2201792/2022 and 2211483/2022), upholding a social worker’s claim that her employer (the council), and her professional regulator Social Work England, discriminated against her on grounds of “gender-critical” beliefs expressed by sharing posts on Facebook. The Tribunal noted the “often vociferously conducted debate, regarding the respective balance between gender self-identification and gender critical views.” (§25)
36. Such disputes have implications beyond the Employment Tribunal, however. Two developments in 2023 are noteworthy in this regard.
37. First, the decision of the First-tier Tribunal (“FTT”) in Mermaids v Charity Commission [2023] UKFTT 563 (GRC) on 6 July 2023. In this case, registered charity “Mermaids” sought to appeal against the Charity Commission’s decision to register “LGB Alliance” as a charity. LGB Alliance describes itself as providing “support, advice, information and community to men and women who are same-sex attracted.”^{xvi} Mermaids describes itself as “supporting trans, non-binary and gender-diverse children, young people and their families”.^{xvii} Before the FTT, Mermaids’ Chief Executive argued that LGB Alliance was “concerned with promoting “anti-trans ‘gender critical’ beliefs”” (§40). LGB Alliance disagreed with Mermaids’ characterisation of its activities. Its witnesses told the FTT that it was opposed to “the

concept of gender identity”, considers sex to be “binary and immutable”, and believed that children should be “unconstrained by gender stereotypes” (§43).

38. The Tribunal dismissed Mermaids’ appeal on the basis that it does not have the legal right, i.e. standing, to challenge the Charity Commissioner’s decision: concluding it was not a person “who is or may be affected by the decision”. The Tribunal observed that (§76):

“Mermaids profoundly disagrees with the Commission’s Decision emotionally, politically and intellectually ... As noted by the Commission, they may well have valid cause for complaint as to what LGBA and its activists have said in the past. However ... the fact that Mermaids and those they support have been affected emotionally and/or socially is insufficient to provide them with standing to bring this appeal, no matter the depth of the feelings resulting from the Decision or the strength of their disagreement.”

39. Second, the Higher Education (Freedom of Speech) Act received Royal Assent on 11 May 2023. Inter alia, this imposes new duties on the Office of Students (“OfS”) and universities in England to promote freedom of speech and academic freedom “within the law”. Compliance with new free speech duties will be enforced through conditions on providers’ registration. The Act also places new duties on students’ unions, to be monitored by the OfS.
40. As well as the obvious regulatory implications of the new law for those subject to it and for the OfS, the Act is remarkable for its creation of a new statutory tort. This enables individuals who suffer loss as a result of breach of specified freedom of speech duties to bring a civil claim against a higher education provider or students’ union. However, the individual must first pursue their complaint under a “relevant complaints scheme” (section 4). This includes a new free speech complaints scheme established by the Act. The OfS is currently consulting on proposals for the scheme, which is expected to operate from 1 August 2024. ^{xviii}
41. It remains to be seen how the courts will interpret this important new legislation and approach any related claims or challenges. Given the availability of complaints schemes, it may take time for a significant body of case-law to emerge. It is notable that the speech which the Act seeks to promote is “freedom of speech within the law” (see sections 1, 3 and 5). Given the obvious potential for interactions between free speech and equalities and human rights legislation, the Act is likely to generate interesting and complex legal issues.

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12 January 2024

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- ⁱ See e.g.: <https://www.ft.com/content/0832548c-3750-4500-82c2-455e6f92faa7> ;
<https://www.standard.co.uk/news/politics/trans-women-hospital-wards-tory-conservative-party-conference-steve-barclay-b1110934.html> ; <https://www.theguardian.com/society/2023/oct/03/trans-hospital-patients-in-england-to-be-banned-from-female--and-male-only-wards#:~:text=Barclay%20also%20confirmed%20he%20would,%2D%20or%20female%20only%20wards.>
- ⁱⁱ *Meade v Westminster City Council* (case nos. 2201792/2022 and 2211483/2022) at §25.
- ⁱⁱⁱ <https://commonslibrary.parliament.uk/research-briefings/cbp-9215/>
- ^{iv} <https://www.thetimes.co.uk/article/200-academics-tell-of-death-threats-and-abuse-as-battle-rages-for-free-speech-hp99fnzjh>
- ^v https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2023csih371cb71fe0-ea75-4892-b423-4751efe6e075.pdf?sfvrsn=554ad62c_1
- ^{vi} *Jwanczuk v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156 - [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2023/1156.html&query=\(jwanczuk\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2023/1156.html&query=(jwanczuk))
- ^{vii} “Acquired gender” is the terminology of the Gender Recognition Act 2004.
- ^{viii} [2022] CSOH 90 - <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh90.pdf>
- ^{ix} <https://hansard.parliament.uk/commons/2023-12-06/debates/E7306EC2-EFCB-4331-BD82-F01FDF67CCBF/GenderRecognition>
- ^x <https://www.equalityhumanrights.com/media-centre/news/clarifying-definition-sex-equality-act>
- ^{xi} Lance Baynham “Let’s talk about sex: case note on *For Women Scotland Limited v The Scottish Ministers* [2023] CSIH 37, 5 December 2023 <https://ukhumanrightsblog.com/2023/12/05/lets-talk-about-sex-case-note-on-for-women-scotland-limited-v-the-scottish-ministers-2023-csih-37/>
- ^{xii} <https://www.gov.scot/publications/scottish-government-response-section-35-order-judicial-review/>
- ^{xiii} Paul Daly “Reviewing the Lawfulness of the UK Government’s Section 35 Order”, 18 January 2023 <https://www.administrativelawmatters.com/blog/2023/01/18/reviewing-the-lawfulness-of-the-uk-governments-section-35-order/>
- ^{xiv} <https://www.bbc.co.uk/news/uk-62061929>
- ^{xv} *EJ Glennie* Judgments of 6 July 2022: <https://www.judiciary.uk/wp-content/uploads/2022/08/Forstater-JR-AG.pdf> and 30 June 2023: https://assets.publishing.service.gov.uk/media/649eeb7e06179b00113f76a6/Ms_M_Forstater_vs_CGD_Eur_ope.pdf
- ^{xvi} <https://lgballiance.org.uk/>
- ^{xvii} <https://mermaidsuk.org.uk/>
- ^{xviii} <https://www.officeforstudents.org.uk/consultations-on-free-speech/consultation-on-the-ofs-s-new-free-speech-complaints-scheme/executive-summary/>