

Sex is Complicated

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The definition of sex in the EA 2010 makes clear that the concept of sex is binary, a person is either a woman or a man.... Although the word “biological” does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman. These are assumed to be self-explanatory and to require no further explanation. (For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16 at para 171)

The judgment in *For Women Scotland* quickly taxonomises sex into two distinct categories; biological sex and certified sex. Throughout the judgment, this taxonomy is utilised to show that whilst biological sex is coherent and stable, certified sex brings a number of absurdities when applied to cases such as pregnancy and single sex services. In the crescendo of the judgment, the judges note that this clarification of the terms man and woman provides greater clarity and coherency to the law in this area.

Unfortunately, however, the Justices of the Supreme Court failed to provide a definition of what would constitute biological sex. Their desire for simplicity is based on a lack of understanding of human anatomy and physiological development. In doing so, the Justices ignore the reality of those born with variations in sex characteristics (sometimes referred to as intersex embodiment or those with disorders/differences of sex development). Indeed, the Court at para 177 claimed that pregnancy protections were a strong indicator of a biological approach to ‘man’ and ‘woman’ in the EA 2010 “*Since as a matter of biology, only biological women can become pregnant, the*

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protection is necessarily restricted to biological women.” Yet, it has been well documented that intersex embodied people can become pregnant both through assisted reproductive technology,¹ and also through natural conception despite having a solitary X or XY chromosome/s.²

An example might help to clarify the concerning impact of this decision for those with variations of sex characteristics. Androgen Insensitivity Syndrome (AIS) (one of at least 50 different intersex variations) occurs in people with XY (typically male) chromosomes. For these people, androgen receptors in the body are unable to respond to testosterone. As a consequence, *in utero* the foetus develops complete (CAIS) or partial (PAIS) female genitalia but does not develop a uterus, ovaries, or fallopian tubes. As we do not routinely chromosomally test newborns, these children are visibly assessed by clinicians and typically assigned female at birth. In adolescence these people then go on to develop the secondary sex characteristics of women. PAIS may lead to partial masculinisation and genital ambiguity at birth whereby the clinician or a multi-disciplinary team will decide to which sex the child should be assigned. Typically, infants may be assigned female and genital surgeries to align with sex assignment may follow. Crucially, this sex assignment decision is not infallible, and the child may develop secondary sex characteristics – and a gender identity – that do not align with their assigned sex at birth.

How might the Supreme Court understand someone with AIS based on the judgment in *For Women Scotland*? Immediately, the clarity of biological certainty is brought into question. The appeals to ‘common sense’ fail to clarify whether biological sex refers to chromosomes, hormones, gametes or genitalia or what might happen where these characteristics are not aligned. Moreover, the Justices fail to address how individuals should *evidence* biological sex. Indeed, birth registration is a form of certification that reflects the sex an infant is *assigned* at birth. The experience of intersex embodied people is that this may be a ‘best guess’ or administrative decision made by a healthcare practitioner in partnership with families. Where medical practitioners assign

¹ Jacqueline K. Hewitt et al., “Fertility in Turner Syndrome,” *Clinical Endocrinology*, 79 (2013): 607.

² M Dunic et al., “Report of fertility in a woman with a predominantly 46,XY karyotype in a family with multiple disorders of sexual development,” *J Clin Endocrinol Metab*, 93(1) (2008) Jan: 182-9; Erratum in *J Clin Endocrinol Metab*, 93(3) (2008) Mar: 1083; Kutluk Oktay et al., “Fertility preservation in women with Turner Syndrome: A comprehensive review and practical guidelines”, *J Ped & Adolescent Gyn*, 29(5) (2016): 409-16; Serdard Sahinturk et al., “A fertile patient with 45X/47XXX mosaicism,” *Genetic Counseling*, 26(1) (2015): 29.

the wrong sex, there are limited formal mechanisms through which to rectify this administrative error. One option for individuals is to ascertain a GRC and be issued with a new birth certificate. Whilst direct discrimination of people with variations of sex characteristics is likely covered in an employment context in the way the Court discusses imputed characteristics (*English v Thomas Sanderson Blinds Ltd* [2009] ICR 543) this would not necessarily cover our AIS woman in relation to single sex service provision, sporting facilities or women only shortlists. In each of these examples, if the Court were to take chromosomes as the constitutive measure of biological sex then women with AIS could be lawfully excluded.

In our view, this highlights the difficulties of the Court's reasoning. Many women with AIS identify strongly as women. A variation of sex characteristics does not equate to being or feeling non-binary.³ A court decision that places them outside of the gender with which they identify seems unusual, cruel and frankly, discriminatory. A more reasoned judgment could have better engaged with the actual realities of biological sex.

In contrast to their aim, the Supreme Court's inability to define biological sex has and will continue to generate a huge amount of uncertainty. Ironically, by appealing to common sense understandings of biology the Court has shown how *gendered* (by which we mean culturally produced) our understandings of sex truly are.⁴ In actuality, biology is hugely complicated and the interactions between different aspects of sex characteristics leave binary conceptualisations of male and female in doubt. Comparatively, certified sex provides the stability, consistency and predictability that the Supreme Court was looking for.

³ Fae Garland and Mitchell Travis, *Intersex Embodiment: Legal Frameworks Beyond Identity and Disorder* (Bristol University Press, 2023).

⁴ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990).
