

## ***For Women Scotland* – Fractured reality of legal gender and the push towards trans legal personhood**

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### **Introduction**

The UK Supreme Court, through its judgment in [\*For Women Scotland\*](#), held that trans women, even those who have obtained a [Gender Recognition Certificate](#) indicating their female legal sex, will not be recognised as women for the purposes of the [Equality Act 2010](#)'s (EA's) sex discrimination provisions. The petitioners had [challenged the Gender Representation on Public Boards \(Scotland\) Act 2018 \(Act\)](#), a law that introduced a gender representation objective on public boards. However, the petitioners took issue with the Act's definition of 'woman' which included trans women with a GRC.

Despite its ruling, the Supreme Court went to great lengths to explain how its decision does not impact the rights of trans persons. It reasoned that trans persons could still claim associative discrimination based on sex, and discrimination based on gender reassignment. Moreover, in the context of representation, in the last paragraph of its decision, it observed: "There may well be public boards on which it is also important for trans people of either or both genders to be represented... Nothing in this judgment is intended to discourage the appointment of trans people to public boards..." (paragraph 267).

On one hand, the judgment reinforces a binary legal framework that creates practical impossibilities for trans women's representation. On the other hand, this paragraph can be seen as potentially opening space for recognising trans personhood as a distinct legal interest worthy of protections.

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### **The challenge of the binary framework**

UK law recognizes only two legal genders – male and female. The Gender Recognition Act 2004 (GRA) enables trans people to obtain recognition within this binary framework, but there is no legal recognition of non-binary identities or a separate “trans” category. Persons proposing to undergo, or undergoing the transition process, as well as those who have undergone the process (including those who have a GRC) have the protected characteristic of ‘gender reassignment’. Still, at every stage, their legal sex remains within the binary.

Prior to *For Women Scotland*, trans people with GRCs were understood to be legally recognised as having their acquired gender “for all purposes” under section 9(1) of the GRA. While the provision allows for exceptions where its effect can be disapplied, the judgment significantly reduces the threshold for something to count as an exception. As per the Supreme Court, for determining if a law creates such an exception, it does not need to explicitly disapply section 9(1); nor does such disapplication need to be ‘necessarily implied’ by the text. Instead, disapplication can be implied through interpretation based on the terms, context and purpose of the legislation.

This creates a situation where trans people increasingly exist in a legal twilight zone – recognised as having their acquired gender for some purposes but not for others. A trans woman with a GRC is legally female for some purposes but legally male for others, such as the EA. The judgment creates a *de facto* four-category system of legal sex (cisgender women, trans women, cisgender men, trans men), though the law still only formally recognizes two.

This fractured legal reality leads to the question – if trans women are not legally women for gender representation quotas, and UK law only recognizes binary categories, where do trans people fit? Can trans men and trans women constitute a separate category, one that is different from cis men and cis women? This will be difficult to justify under the current legal framework given that while the effect of section 9(1) is to create a liminal status, they are still considered

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‘male’ or ‘female’ depending on the particular legal domain. The protected characteristic of gender reassignment might be too broad, extending to those considering and undergoing the transition process. Moreover, its focus remains on those shifting between the binaries. It does not consider trans personhood as a separate legal status.

This might prompt us to ask whether paragraph 267 of the *For Women Scotland* judgment might be hinting at such a possibility. The Supreme Court explicitly recognised, although as obiter, that trans people may have specific interests as trans people that deserve representation and consideration. This suggests an emerging, if tentative, judicial recognition of trans personhood as a category worthy of legal protection, rather than merely as a sub-category of male or female. There seems to be no other way to provide for representation of a group having no formal legal status.

[There is some precedent for this – the law recognises hate crimes based on ‘transgender identity’.](#)

The Crown Prosecution Service clarifies that this refers to those “whose gender identity does not correspond with their birth gender”, and in the context of the law, includes “references to being transsexual, or undergoing, proposing to undergo, or having undergone a process or part of a process of gender reassignment.” Again, this is a limited, reactive imagination of transgender personhood. Their experience is recognised when someone else recognises them as such and commits a crime on that basis. It is prohibitive in nature, and not positive in a way where one is required to recognise one’s identity before appointment towards representation and not assess someone’s motives and experience after a crime has been committed.

The Supreme Court’s observation marks a shift from treating trans identity merely as a matter of moving between binary categories to recognizing it as a distinct group worthy of representation. It acknowledged that trans persons may have a unique “perspective” that should be “brought to bear in the board’s deliberations”, thereby implicitly recognising the distinctive lived experiences of trans people and the value these experiences bring to governance. However, on a practical note, the implementation of trans representation remains problematic – implementing such a measure would require either accessing confidential GRC information or requiring prospective

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appointees to disclose their gender history – both options raising serious privacy-related concerns. Then one may ask whether the court’s recognition has any value?

Paragraph 267, despite its limitations, may be offering a glimmer of hope, being an instance of what [Cowan identifies](#) as “optimistic legal realism”, noting how many trans people maintain “optimism about law's potential, while simultaneously maintaining a realistic view about law's limitations”.

### **Looking Forward**

While the judgment as a whole represents a significant setback for trans rights in the UK, paragraph 267 of *For Women Scotland* offers some hope. Failure, [as Halberstam suggests](#), can sometimes be productive, revealing the limitations of normative systems and opening space for [alternative futures](#). In the past both the [UK Supreme Court](#),<sup>1</sup> and [Parliament](#) have considered and rejected recognising non-binary identities. Yet, the Court’s observations might support revisiting the conversation on reform.

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<sup>1</sup> In *Elan-Cane v Secretary of State for the Home Department* [2021] UKSC 56, while the UKSC concluded that Article 8 of the ECHR did not impose any positive obligation on states to accommodate persons with non-binary identities, it did note that the UK Government’s consultation process for reforming the GRA had not yet been concluded, suggesting that the issue could be reconsidered if consultations fell short of considering non-binary persons.

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