CLOISTERS

# THE IMPLICATIONS OF THE DECISION OF THE SUPREME COURT IN 'FOR WOMEN SCOTLAND' AND RECENT CASELAW

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*"We also hope to avoid the toxicity which has sometimes characterised the debate around how to balance the rights of biological women and transgender women by creating a space for debate and ultimately adjudication by the Courts"*
ECNI Legal Paper

## Terminology and abbreviations

1. As the Supreme Court noted in the For Women Scotland case[1] ("FWS"), in this arena even terminology can generate controversy. For convenience I adopt the terminology used by the Supreme Court. Thus:

    a. 'sex' and 'biological sex' mean the sex of a person as recorded at birth;
    b. 'certificated sex' means the sex attained by the acquisition of a Gender Recognition Certificate ("GRC") under the Gender Reassignment Act 2004; so a biological man with a GRC has a certificated sex of female, and a biological woman with a GRC has a certificated sex of male;
    c. 'trans man' means a person who is a biological woman, i.e. who was at birth of the female sex, but who has the protected characteristic of gender reassignment;
    d. 'trans woman' means a person who is a biological man, i.e. who was at birth of the male sex, but who has the protected characteristic of gender reassignment;
    e. A person has the protected characteristic of gender re-assignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a

[1] [2025] UKSC 16, [2025] ICR 899

process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex (s. 7(1) of the EqA)[2].

2. I also note that in Elan-Cane v Secretary of State for the Home Dept. [2021] UKSC 56 Lord Reed explained that *"the term "gender" is used to describe 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. An additional list of the abbreviations used in this Paper appears in an Appendix.

**Introduction**

4. I think it important to point out at the outset that this talk focuses primarily on the interpretation of the FWS decision and in particular on the provision of single-sex toilet facilities. Nothing I say here should be read as minimising or over-looking in any way the impact of less favourable treatment of transpeople more generally. As the Supreme Court pointed out in FWS (beginning at para. 248) a biological sex interpretation does not have the effect of disadvantaging or removing important protection under the EqA from trans people (whether with or without a GRC). A trans woman who is treated less favourably because of the protected characteristic of gender reassignment, will be able to bring a claim of direct discrimination on that basis. A trans woman who is treated less favourably not because of being trans (the protected characteristic of gender reassignment), but because of being perceived as being a woman, will be able to claim for direct sex discrimination on that basis.

5. Transgender people (irrespective of whether they have a GRC) are also protected by the indirect discrimination provisions of the EqA both in respect of any particular disadvantage suffered by them as a group sharing the characteristic of gender reassignment and, where members of the sex with which they identify are put at a

[2] Note that this is a wider definition than that originally contained in s. 82 of the SDA: "gender reassignment' means a process which is undertaken *under medical supervision* for the purpose of reassigning a person's sex *by changing physiological or other characteristics of sex*, and includes any part of such a process ..." Furthermore, as noted by the Supreme Court in FWS at para. 88, even the requirements in s. 2(1)(b) and (c) of the GRA for qualification for a GRC have not been interpreted to require biological men to prove that they have modified or intend to modify their physical appearance so as to "pass" as a woman in order to establish that they have been "living as" women.

particular disadvantage, insofar as they are also put at that disadvantage (see FWS paras. 258-260).

6. To establish unlawful harassment, it is simply necessary to establish a sufficient link between unwanted conduct and a relevant protected characteristic, and that the conduct violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the individual. The Supreme Court said at para. 256: *"Applied, for example, to the case of a trans woman with a GRC, who presents as a woman at work and is perceived as a woman, and whose trans status and GRC are confidential: if a colleague harasses her (by making sexualised references to what she is wearing, or degrading comments about how she looks) she can bring a claim for harassment related to sex. She can also bring a harassment claim related to the protected characteristic of gender reassignment …"*

**The Position in Great Britain**

**EHRC Guidance/Code of Practice**

7. Shortly after the Supreme Court gave its judgment in the FWS the EHRC in England produced interim guidance on the effect of FWS. That guidance, which provoked a good deal of controversy, was withdrawn shortly after. It was the subject of a judicial review challenge by the Good Law Project. The challenge raised two main points: first, that the EHRC was wrong to say employers need to provide gendered toilets; second, that it is permissible to provide trans inclusive men's and women's toilets (and indeed other facilities). Judgement was handed down on 13 February 2026 and is referred to below, where appropriate.

8. The EHRC submitted a revised draft Code of Practice on Services, Public Functions and Associations to the Secretary of State for Women and Equalities, Bridget Phillipson, on 5 September 2025. This followed a six-week consultation period. The Secretary of State should now either approve the draft and lay it before Parliament, or give the EHRC written reasons why she does not approve it. To date she has done neither. The SoS answering questions in Parliament on 10 December 2025 said: *"The EHRC has given me a draft code of practice. We are working through it—it is a*

*lengthy document—and we will take this further as soon as we can."*[3] The draft Code has not been published, but media reports suggest that the over 50,000 responses the EHRC received to the consultation have not materially changed the approach set out in the consultation draft, which itself reflected the approach set out in the interim guidance. A Code of Practice on Employment is expected to follow the CoP on Services but at this stage it is impossible to say when that might be.

**So what did the Supreme Court decide?**

9. Before turning to consider the implications of the FWS decision, it is important to understand exactly what the Supreme Court decided. The Court unanimously held that the words 'woman', 'man' and 'sex' as they appear in the EqA refer to biological, rather than certificated, sex. This means that a trans woman with a GRC - even though a woman *"for all purposes"* pursuant to s. 9(1) of the GRA - remains a man for the purposes of the EqA. For a claim of direct sex discrimination under s. 13 of the EqA, for example, the appropriate comparator must therefore be a woman. Where gender reassignment is the protected characteristic relied upon, in the case of a male person proposing to or undergoing gender reassignment to the opposite sex, the correct comparator is likely to be a man without the protected characteristic of gender reassignment and similarly for a woman (see para. 134 of FWS).

10. Note that s. 9(1) only applies where a GRC has been issued. Everybody without a GRC is their biological sex for all purposes in UK law[4]. This includes the EqA and 1992 Regs. There is no law requiring that people who identify as the opposite sex (or who have a gender-identity that is different from their biological sex) must be treated as though they have acquired that sex/gender. Incidentally, GRCs are relatively rare: only around 9500 people in the UK have one[5].

[3] https://hansard.parliament.uk/Commons/2025-12-10/debates/97D69A36-43FB-4ADC-91E1-59D379464D8D/TransgenderPeopleSafeSpaces
[4] See Corbett v Corbett [1971] P 83, Bellinger v Bellinger [2003] 2 AC 467, HL, Forstater v CGD Europe [2022] ICR 1, EAT and FWS at para. 26.
[5] See analysis compiled by the PA news agency using data supplied by the Ministry of Justice. Some 1,169 GRCs were issued in the year to March 2025, more than three times the number in 2019/20, when it stood at just 364.

11. In my opinion the key paragraph summarising out the Supreme Court's rationale is para. 172:

> *"A certificated sex interpretation would cut across the definition of the protected characteristic of sex in an incoherent way. References to a "woman" and "women" as a group sharing the protected characteristic of sex would include all females of any age (irrespective of any other protected characteristic) and those trans women (biological men) who have the protected characteristic of gender reassignment and a GRC (and who are therefore female as a matter of law). The same references would necessarily exclude men of any age, but they would also exclude some (biological) women living in the male gender with a GRC (trans men who are legally male). The converse position would apply to references to "man" and "men" as a group sharing the same protected characteristic. We can identify no good reason why the legislature should have intended that sex-based rights and protections under the EA 2010 should apply to these complex, heterogenous groupings, rather than to the distinct group of (biological) women and girls (or men and boys) with their shared biology leading to shared disadvantage and discrimination faced by them as a distinct group."*

12. In support of this, the Supreme Court pointed out that the repeated references in sections 13(6), 17 and 18 of the EqA (which relate to sex, pregnancy and maternity discrimination) to a woman who has become pregnant or who is breast-feeding only make sense if sex has its biological meaning: *"These plain, unambiguous words can only be interpreted coherently as references to biological sex, biological females and biological males"* (para. 178).

13. The Supreme Court also referred expressly to Schedule 22 paragraph 2 of the EqA which is headed "Protection of women" and which relates to work and vocational training. It provides:

> *'2(1) A person (P) does not contravene a specified provision only by doing in relation to a woman (W) anything P is required to do to comply with—*

*(a) …*

*(b) A relevant statutory provision (within the meaning of Part 1 of the Health and Safety at Work etc Act 1974) if it is done for the purpose of protection of W (or a description of women which includes W); …*

*(2) The references to the protection of women are references to protecting women in relation to — (a) pregnancy or maternity, or (b) any other circumstances giving rise to risks specifically affecting women. …'*

14. The Court said that a certificated sex interpretation would make paragraph 2(2)(b) unworkable: it would be impossible to identify *"risks specifically affecting women"* because the same health or safety risks would also naturally and inevitably be risks that affect trans men with a GRC, who would be legally male on a certificated sex interpretation but remain biologically female, and therefore liable to be affected by the same risks (see para. 186). The Court concluded at para. 188:

> *'These provisions and the protection against pregnancy and associated (maternity and breast-feeding) discrimination in the EA 2010 are expressly tied to the plain and unambiguous words "woman", "maternity" and the pronouns "she" and "hers". There are no references to risks specifically affecting men, or to a man (or person) who has become pregnant, requires paternity leave or is breast-feeding. The only reference to a man in this context is in section 13(6)(b) which prevents men from complaining about the special treatment accorded to women in connection with pregnancy or childbirth These provisions are all incoherent and unworkable unless woman and man have their biological meaning.*

15. In my view the Workplace Health, Safety and Welfare Regulations (the 1992 Regs in Great Britain, enacted in identical form in the 1993 Regs. in Northern Ireland) are a 'relevant statutory provision' for the purposes of Schedule 22 para. 2(2)(b) having been made under s. 15 of the 1974 Act. Regulation 20 of the 1992 Regulations is headed "sanitary conveniences" and provides:

'(1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.

(2) Without prejudice to the generality of paragraph (1), sanitary conveniences shall not be suitable unless –

(a) the rooms containing them are adequately ventilated and lit;

(b) they and the rooms containing them are kept in a clean and orderly condition; and

(c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside.'

16. The effect of reg. 20(2)(c)[6] is that an employer must provide separate toilet facilities *"for men and women"* unless toilet facilities are provided in separate rooms, the door of which can be locked from the inside. Where sufficient facilities are provided in separate lockable rooms, there is no additional duty to provide separate toilet facilities for men and women.

17. The words 'men' and 'women' are not defined in the 1992 Regs (or the 1993 Regs). It has been suggested that the Supreme Court's interpretation of the words woman, man and sex in FWS only applies for the purposes of the EqA and does not necessarily apply to other legislation, in particular the 1992 Regs. On this argument, the words woman, man as used in the 1992 Regs could include (i) certificated sex and (ii) transpeople generally i.e. those without a GRC.

18. Whilst technically true (because the interpretation of the 1992 Regs was not directly in issue in the FWS case) in my opinion the express reference to Schedule 22 para. 2(2)(b) and the statutory provisions made under the Health and Safety at Work Act 1974 in both the EqA and the FWS decision means that inevitably the same interpretation will apply. This was also the conclusion of the ET in Hutchinson v

[6] This requirement is also set out in the HSE Approved Code of Practice L24 at paras. 193-199 which includes this: *"Unisex toilets are acceptable if each convenience is in a separate room with a door that can be secured from the inside"*; and see also Building Regulations 2010, Approved Document G (para. 3.6): *"Sanitary accommodation should be separate for use by men and women, or where provided in a single room, the accommodation should be in separate, lockable enclosures."*

County Durham and Darlington NHS Foundation Trust case no. 2501192/2024, decision dated 14 January 2026 a decision of the Newcastle Tribunal (EJ Sweeney)("the Darlington Nurses case") at para. 373:

> *'We are satisfied that, in keeping with the need for a coherent and workable structure, to enable those who have to regulate their conduct and comply with statutory duties, the meaning given to 'men' and 'woman' in [the 1992 Regulations] must logically be the same as under the Equality Act 2010'*

19. And see also para. 431:

> *'The reference to 'men' and 'women' in the 1992 Regulations must, in our judgement, be interpreted harmoniously and consistent with 'sex' and 'men' and 'women' under the Equality Act. This was not seriously contested by Mr Cheetham, who conceded that this 'may' be the case. Parliament cannot, in 1992, prior to legislating for transgender recognition, have intended those words to bear any meaning other than biological sex. Nothing in the Equality Act or in other legislation since 1992 changes that …'*

20. It was also the conclusion of Swift J in the GLP judicial review, see paras. 44-46 of his judgement.

21. I am aware that this is not a universally held view and I consider alternative arguments below.

**Implications of the FWS decision**

22. The EqA imposes duties on individuals and organisations not to discriminate unlawfully. It does so by regulating the practical day-to-day conduct of employers in relation to employees and workers (as well as service users and members of the public). In giving judgment in FWS the Supreme Court was at pains to point out that *"it must be possible for sex to be interpreted in a way that is predictable, workable*

*and capable of being consistently understood and applied in practice by … duty-bearers"* (para. 152 and see also para. 154).

23. Unless and until Parliament says otherwise, the decision in FWS on the proper interpretation of the EqA is binding on Employment Tribunals in Great Britain (and Northern Ireland) and employers must apply it when considering their obligations under the EqA.

24. The obligation to provide single-sex toilet and changing facilities ("facilities") arises not under the EqA but under the 1992 Regs. The 1992 Regs. impose duties on employers to maintain health and safety standards in workplaces, including by providing sanitary conveniences (reg. 20, set out above) and washing facilities[7]. Showers must be included in the washing facilities if they are needed because of the nature of the work or for health reasons. Workplaces must also contain changing facilities if special clothing is required for the work and workers cannot be expected to change in another room for reasons of health or propriety.[8]

25. As noted by the ET in the Darlington Nurses case at para. 371, once biological males are permitted to use facilities designated for women (unless they are provided in a separate lockable room and the facilities in the room are intended to be used by only one person at a time) then it cannot be said that separate facilities are provided for men and women. The ET's conclusion on this issue was set out at para. 373:

> '*… As soon as the Trust permitted Rose to use the female changing room in pursuance of its [Transitioning in the Workplace or 'TIW'] policy, it was in breach of [the 1992 Regulations] and was acting unlawfully … Therefore, we conclude that from the moment it permitted Rose to use the female changing room, the Trust was in breach of the 1992 Regulations.'*

26. This was also the view of Swift J in his judgement in the GLP judicial review, at para. 5:

[7] Reg. 21
[8] Reg. 24

> *"One clear consequence of the conclusion reached in For Women Scotland was that if, for example, a service provider provided a service to be used both by women and transsexual women, that service would not be a single-sex service."*

And see also para. 53 to the same effect.

27. In the light of the decision in FWS, as subsequently interpreted, I also take the view that permitting a trans woman to use facilities designated for women would breach the 1992 Regulations.

28. The ET also noted that there is nothing in the EqA that confers on a transgender employee the right to use the changing facilities that accords with their declared or affirmed gender. The Act does not translate into a positive right on the part of a trans woman to use female-only facilities, see also para. 375:

> *'We are of no doubt that senior people in HR and managers in theatres were of the view that Rose and other transpeople had a right to use the facilities of their choosing, irrespective of the views or rights of others. That came across very clearly in the evidence and is reflected in our findings of fact. Having considered the Equality Act we can see nothing there that would render 'lawful' a policy that gave biological males the choice to use a female changing room, effectively overriding the objection of female colleagues.'*

29. I agree that there is nothing in the EqA establishing a positive right on a transgender employee to use the facilities of their choice or corresponding with their chosen or acquired gender.

30. A policy permitting trans women to use female-only facilities is very likely to give rise to successful claims of unlawful harassment by female employees. The ET in the Darlington Nurses case accepted that:

a. such a policy amounted to 'unwanted conduct' on the part of the employer (see para. 359 - but that in the alternative ratifying and then implementing the policy undoubtedly amounted to 'conduct', see para. 360);
b. Such conduct obviously related to sex and gender reassignment (para. 349 & 361);
c. It had the effect of violating women's dignity and creating a hostile, humiliating and degrading environment (para. 363-364)[9];
d. And in all the other circumstances of the case, including the fact that the policy breached the 1992 Regulations and was therefore unlawful, reasonably did so (para. 382).

31. In my opinion the logic of those conclusions is hard to resist.

32. A policy permitting trans women to use female-only facilities is also very likely to give rise to successful claims of unlawful indirect discrimination by biologically female employees. A policy of allowing trans employees to use facilities of their choice or corresponding with their chosen or acquired gender clearly amounts to a 'provision, criterion or practice' ("PCP") for the purposes of s. 19 of the EqA. In my opinion any Employment Tribunal is very likely to adopt the reasoning of the ET in the Darlington Nurses case and accept that such a PCP puts – or would put – biological women at a particular disadvantage (for much the same reason that it has the effect of violating biological women's dignity and creating a hostile, humiliating

[9] The foundation for this conclusion is set out at paras. 266 – 267: *'266. We accept that, as a general rule, considerably more women than men feel or would likely feel personal insecurity, distress and fear if required to change clothes in a communal changing room shared with a member of the opposite sex. This reflected many of the accounts given by the Claimants in this case. We accept that this is rooted in the different cultural and societal experiences of women compared to men. Further, we accept that women will feel things differently at different stages of life as their relationship with their bodies (comparative to men) changes with age. There will be moments of acute awareness and sensitivity on the part of women that do not apply to men, for example during menstruation, during pregnancy or during menopause. During these periods, women may and very many do experience physical reactions, such as bleeding, incontinence, sweating or heightened emotions, which inevitably has an effect on their sense of self. They are inherently private matters and can affect women's perceptions of self and dignity. The relationship between a woman and her body is very different to the relationship between a man and his body.*
*267. It is, we find, a legitimate inference to draw from the empirical based research relied on and from the different relationship that women bear to their bodies than men, that women generally, compared to men generally, have or would have a greater sensitivity of having to undress (thereby exposing parts of their bodies or underwear) in the presence of members of the opposite sex …'*

and degrading environment). The real issue will be whether the employer can justify such indirect discrimination. I have no doubt that the policy might pursue legitimate aims[10] so the question is whether the policy is proportionate.

33. The question of whether it can ever be proportionate to use unlawful means (in this case, a policy which contravenes the 1992 Regulations) in order to achieve a legitimate aim was answered by the Court of Appeal in the case of Allen v GMB [2008] ICR 1407. The EAT had held that *"the fact that the objective might be achieved by using unlawful, even dishonest practices does not necessarily mean that the means are disproportionate once it is accepted that the aim itself is legitimate …"* The Court of Appeal disagreed. Maurice Kay LJ giving the leading judgment noted that if an aim were achievable only by disproportionate means *"then it would not be susceptible to justification. To conclude otherwise would be to license disproportionality."*

34. Consistent with this, the ET in the Darlington Nurses case held that the measure taken in order to achieve the aim of respecting the gender identity of all employees was not appropriate *"because it was a breach of the 1992 Regulations"* as well as amounting, on its findings, to unlawful harassment on the part of the employer (para. 436). Conversely, rejecting an argument that excluding the trans employee from the facilities of her choice would have amounted to a breach of that person's Art. 8 ECHR right to respect for private life[11], the ET noted that any such interference would have been justified not least because it was 'in accordance with the law', namely the 1992 Regulations[12].

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[10] In the Darlington Nurses case the ET accepted that it was legitimate to want to (i) balance the competing rights of employees, (ii) to respect the gender identity of employees and (iii) to adhere to relevant legislation and guidance (as it existed at the time) in relation to the provision of single-sex facilities.'

[11] See Goodwin v UK (2002) 35 E.H.R.R. 18 at para. 90: " … the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone is not quite one gender or the other is no longer sustainable."

[12] The Tribunal also pointed out that requiring women to share facilities with a trans woman amounted to an interference with their Art. 8 rights and the employer could not justify that interference because it *"was in breach of domestic law, under regulation 24 of the 1992 Regulations."* See paras. 443-444.

35. The ET did not accept that there was, in truth, any balancing of rights because the trans employee in fact had no legal right to use facilities of their choice or corresponding with their chosen or acquired sex. Furthermore, in balancing the discriminatory effect of the PCP against the reasonable needs of the employer to respect the gender identity of its employees, the ET rightly pointed out that it is relevant to consider whether a lesser measure was available, and concluded (at para. 437):

> *"A lesser measure clearly was available. This was to provide Rose, the only transgender employee using the female changing room with alternative, suitable and dignified facilities in which to comply with the Trust's Uniform policy. In our judgement, this would have respected Rose's gender identity and would have respected the biological sex of the Claimants. It would achieve equal respect for both characteristics. It is a fallacy that in order rightfully to respect Rose's rights Rose must be given access to the female changing room."*

36. Again I find the ET's logic and reasoning persuasive.

**Alternative interpretations / theories**

37. I accept of course that the decision the Darlington Nurses case is just one first-instance decision. It is not binding and there have been at least two other decisions which analyse the law and facts differently.

38. Kelly v Leonardo UK Ltd, case number 8001497/2024, decision dated 24 November 2025 is a decision of the ET sitting in Edinburgh (EJ M Sutherland). In that case the Tribunal dismissed the claimant's claims of harassment and indirect discrimination arising out of the employer's policy (or practice) of allowing trans women to use facilities designated as for women. The decision is not easy to follow and appears to be contradictory in a number of places. The legal analysis in particular is poorly reasoned.

39. The claimant's harassment claim was dismissed principally because she had not established, on the facts, that the conduct had the effect of violating her dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Tribunal found that the claimant continued to use a toilet block even after trans employees were permitted access to it and she was *"not upset by operation of the policy which had no practical effect."* The material paragraph is 294:

> *'Whilst a toilet access policy based upon asserted gender identity could have had the effect of violating the dignity of a member of staff or create a degrading environment for them, in the circumstances of this case it was not reasonable for the application of the toilet access policy to have the effect of violating the claimant's dignity or create a degrading environment for her because it had no practical effect upon her dignity or environment.'*

40. However the Tribunal accepted in principle that a toilet access policy based upon asserted gender identity could have had the effect of violating the dignity of a member of staff or create a degrading environment for them. I would be surprised if in future, cases fail because a particular claimant is unable to establish that such a policy satisfied the harassment criteria in the light of the Darlington Nurses decision (and see in particular the material referred to at footnote 9, above).

41. The Tribunal's finding in relation to the indirect discrimination claim is perhaps surprising. The claimant asserted, amongst other things, that (biological) women have a greater interest in asserting the right to bodily privacy than (biological) men; that (biological) women are more prone to modesty norms. She referred to the broad effects of menstruation, pregnancy and the menopause. These are matters which weighed heavily with the Darlington Nurses ET, but which carried very little weight with the Leonardo ET e.g. *"it is not accepted that a woman who is menstruating has a greater need of bodily privacy than a man who is defecating"* and *"Further it cannot be said that the toilet access policy was intrinsically liable to put women to a particular disadvantage in comparison with men given that the male toilet block had urinals (with implications for their bodily privacy)."*

42. I do not think these are particularly apt comparisons[13].

43. The Tribunal found (para. 347) that there was:

> *'.. no reasonable basis upon which it could be concluded that the application of the toilet access policy (permitting access based upon asserted gender rather than sex) put female staff to the particular disadvantage in comparison with male staff of being more fearful, at greater risk of violence and sexual assault, or having a greater impact on their privacy needs.'*

44. One potential key difference between the Leonardo case and the Darlington Nurses case is that in the former the complaint was brought by just one person whereas in the latter a number of biologically female nurses gave evidence about their objection to a trans woman using the female facilities. The Leonardo Tribunal clearly attached weight to the fact that no other women had apparently complained. I do not think this is necessarily the right way of looking at it. Under s. 19(2)(b) of the EqA the test is whether a PCP puts *"or would put"* women at a disadvantage i.e. it is not dependent on showing that other women in fact objected.

45. I should record that, as with the harassment claim, the Tribunal also held that the claimant herself was not upset by the operation of the toilet policy and had therefore not suffered any individual disadvantage.

46. Turning to the issue of justification, the claimant asserted (para. 365) that the toilet access policy could not be an appropriate means to achieve its aims (conceded, as in the Darlington Nurses case, to be legitimate) because it was unlawful under the 1992 Regs to permit trans employees to have access to female-only facilities. The ET dealt with this at para. 366:

> *'A range of factors approach is applied when considering whether to enforce a contract which is being performed illegally including: the seriousness of the*

[13] I am reminded of attempts made in the 90s to compare pregnant women with sick men both of whom need a period of absence from work, before the Court Justice pointed out the fallacy of such a comparison in Webb v EMO Air Cargo (UK) Ltd [1995] 1 WLR 1454, and the SDA was amended to make plain that in relation to discrimination on grounds of pregnancy, no comparator is required.

*illegality and public policy concerns; the knowledge and intention of the parties; would it further the purpose of the rule, act as a deterrent, avoid inconsistency and maintain the integrity of the legal system (Patel v Mirza [2016] UKSC 42). By analogy a failure to comply with the 1992 Regs would not automatically render the toilet access policy an inappropriate means to achieve the aim. In any event, as noted above, the respondent did not fail to comply with the 1992 Regs.'*

47. I confess that I struggle to see the relevance of point made in the first sentence (enforcement of an illegal contract) and the case of Patel v Mirza (which concerned a claim for restitution of monies paid by the claimant to the defendant under an illegal agreement) does not establish any principle of law that applies to claims of indirect discrimination. It does not appear that the case of Allen v GMB was cited to the Leonardo Tribunal.

48. The last sentence ('the respondent did not fail to comply with the 1992 Regs.') refers back to paras. 195-245 of the judgement and is a rather confusing section of the judgment. The claimant submitted that permitting access to trans employees renders toilets mixed-sex, and therefore unsuitable for the purposes of the 1992 Regs. (para. 227). It is not clear how the Tribunal dealt with this submission. At para. 232 the Tribunal states that what it describes as the 'indistinguishability problem (the fact that it is difficult, if not impossible, to distinguish between trans people with a gender recognition certificate and those without)

*'only arises if Regulation 20(1) mandates that access must be controlled on the basis of biological sex or certified gender. However all that Regulation 20(1) requires is the provision of "suitable and sufficient sanitary conveniences." Any requirement to control access to those facilities (presumably through effective and enforced policy) is limited to what is reasonably practicable for the purpose of ensuring health, safety and welfare (including their bodily privacy) and moral propriety between the sexes. This does not necessarily mandate either a biological or certified gender approach,*

*which may be counter to the primary purpose and in any event not reasonably practicable.'*

49. The Tribunal appears to be saying that whilst reg. 20 of the 1992 Regs. requires an employer to provide suitable and sufficient toilet facilities (on a single-sex basis), there is nothing in the regulations that requires an employer to control access to those facilities. At para. 213 the ET states:

> *'... the relevant ACOP does not articulate any requirement to control access to the toilet facilities. Accordingly, any requirement to control access (presumably through effective and enforced policy) must therefore be limited to what is reasonably practicable for the purpose of ensuring health, safety and welfare (including their bodily privacy) and moral propriety.'*

50. I do not follow the reasoning. The Tribunal appears to have super-imposed a requirement to control access to toilet facilities and decided that the employer, in so doing, is only required to do what is reasonably practicable. In my view the statutory obligation is clear: the employer must provide suitable and sufficient single-sex toilet facilities. An employer who knows that a facility provided for women is being used by biological men, and permits that state of affairs to continue, cannot claim to have discharged its statutory obligation because a facility that is being used by both biological women and men is not single-sex. In other words, an employer does not 'provide' single sex-facilities for the purposes of reg. 20 without also ensuring that the facilities are used by just one sex.

51. Furthermore, this argument (that reg. 20 only requires the provision of single-sex toilet facilities and says nothing about access to those facilities) was run by the Good Law Project in its challenge to the interim guidance published by the EHRC in April last year and rejected, see paras. 36-40. Swift J was referred to the Leonardo judgment and commented pithily:

*"I have considered the relevant part of the Tribunal's reasons (paragraphs 207 – 245) but none of the points set out there cause me to doubt any of the conclusions above or the meaning and effect of regulation 20."*

52. I do know that currently many employers in Great Britain are taking a 'wait and see what happens' approach (in respect of both the anticipated guidance from the EHRC and the Good Law Project judicial review – which may be the subject of an appeal). Whilst I understand the desire to await some definitive guidance or ruling, this does not change my view about what the law actually requires. Unless and until Parliament says otherwise, employers and service providers are obliged to act in accordance with the decision in FWS.

53. The Leonardo Tribunal also noted that it was required to carry out a balancing exercise when assessing justification but that it was impossible to do so *"without a finding of disadvantage because there is nothing to weigh in the balance …"* (para. 376). It accepted a submission made by the respondent that any disadvantage would have been minor. For the reasons set out above, I am sceptical about the the finding of 'no disadvantage'.

54. The other recent case is the decision of the Dundee Employment Tribunal (EJ Kemp) in the case of Peggie v Fife Health Board case number 4104864/2024, decision dated 8 December 2025. The Peggie Tribunal rejected an argument that trans women had to be excluded from a female changing room and that permission given by the employer for trans women to use those facilities was unlawful. The Tribunal said that as the 1992 Regs. create criminal liability, whether the *"definitions in FWS should be read across to the 1992 Regulations went beyond an issue that we are able to determine"* (para. 858) and that consequently *"we did not consider that the 1992 Regulations were of any assistance in determining the claims before us, and we rejected the claimant's arguments on the basis of them."*

55. Nonetheless the Tribunal concluded that the claimant had been subjected to unlawful harassment when a trans woman used the female facilities on at least three occasions whilst she (the claimant) was present. The Tribunal accepted that the claimant was

subjected to unwanted conduct (a trans woman entering and using the female changing room). Such conduct violated her dignity and she felt intimidated and embarrassed (paras. 1077 & 1087-1088). The Tribunal also accepted that it was reasonable for the conduct to have that effect (para. 1091) and that it related to sex (para. 1079). That accords with the more traditional analysis carried out by the Tribunal in the Darlington Nurses case. In short, the Tribunal upheld this part of the claim without having to rely on the 1992 Regulations[14].

56. In relation to the claim of indirect discrimination the Tribunal was not satisfied that there was *"sufficient evidence of what is normally referred to as group disadvantage"* in relation to either of the pleaded PCPs (see para. 1177 & 1208).

57. The Tribunal went on to find that whilst the PCPs pursued legitimate aims, the means used were not proportionate in the period September 2023 (when the claimant first complained) to April 2024 (when rosters were changed to avoid contact between her and the trans employee) but were for before and after that period (paras. 1191-1196 & 1219). It is not entirely clear why the Tribunal reached this conclusion; it is not well-reasoned. The Tribunal refers to back to its application of what it calls the 'Bank Mellat' test, which as far as I can tell means paras. 955-957 of its reasons. In those paragraphs the Tribunal concludes that permission for the trans employee to use the female facilities *"ought to have been revoked"* because of the *"severity of the impact on the claimant"* which was not "overridden by the objective". None of this properly engages with the justification test. And it is hard to square the Tribunal's finding of severe impact with its earlier finding that there was no group disadvantage.

58. For these reasons I do not find the Peggie decision to be particularly persuasive.

**The position in Northern Ireland**

59. The EqA applies in England and Wales and, apart from s. 190 (improvements to dwelling houses) and Part 15 (family property), Scotland. Only sections 82 (offshore work), 105(3)&(4) (expiry of Sex Discrimination (Election Candidates) Act 2002) and

[14] The Tribunal dismissed a harassment claim based on a period of time when the claimant and the trans employee were not rostered to work together but this was only because there was never any chance that they would come into contact in the changing room.

199 (abolition of the presumption of advancement) form part of the law of Northern Ireland.

60. The relevant law in Northern Ireland is set out in the Sex Discrimination (Northern Ireland) Order 1976 ("SDO") as amended by the Sex Discrimination (Gender Reassignment) (Northern Ireland) Order 1999. The SDO broadly mirrored the Sex Discrimination Act 1975 before the latter's repeal by the EqA. As noted above, the 1992 Regs are replicated, so far as relevant, in the 1993 Regs.

61. There are some differences between wording used in the EqA and wording used in the SDO. For example, in the EqA *"woman means a female of any age"* whereas under the 1976 Order *"woman includes a female of any age"*. However, the ECNI does not consider that any differences in drafting would, in and of themselves, require Courts and Tribunals in Northern Ireland to depart from FWS[15]. In other words, *if* the FWS approach should be followed in Northern Ireland as a matter of law, the ECNI would not interpret 'sex' in Northern Ireland Equality Law to mean 'certificated sex' or 'gender'. I agree with that approach.

62. However, the ECNI is not sure that the FWS approach should be followed in Northern Ireland. It published a legal paper in June 2025 setting out its view that *"significant legal uncertainties remain"* because the Supreme Court judgment *"did not consider the Article 2 commitments under the Windsor Framework"*. Article 2 of the Windsor Framework[16] commits to no diminution of the 'rights, safeguards and equality of opportunity' provisions of the Belfast/Good Friday Agreement. The ECNI believes that as a consequence *"the situation in Northern Ireland, in respect of this matter, is much more nuanced and complicated, and there is significant uncertainty due to our unique legal landscape"*.

63. Following a 12-week period of consultation which closed in September last year, the ECNI has now applied for leave in the High Court in Northern Ireland for an advisory

[15] ECNI court application, referred to below, at para. 5.9.
[16] Formerly known as the 'Protocol on Ireland/Northern Ireland'.

declaration to clarify how the terms 'sex, 'men' and 'women' should be interpreted under Northern Ireland's equality laws.[17]

64. I should also note that in the case of Re Dillon's Application for Judicial Review [2024] NICA 59 the Northern Ireland Court of Appeal has already held that, in Northern Ireland at least, EU law retains the qualities of direct effect and of primacy over inconsistent national laws (including Acts of Parliament). An appeal against that decision was heard by the Supreme Court in October last year and judgment is awaited.

65. The question is thus whether the outcome of one or other of these cases might have a direct bearing on the position in Northern Ireland and in particular whether they might result in a different interpretation of the terms 'sex', 'man' and 'woman' in the SDO from that given by the Supreme Court in FWS. Aidan O'Neill in an opinion prepared for 'For Women Scotland'[18] robustly answered that question in the negative. In short he advised that trans people do not have greater protection in the workplace under EU law or the ECHR than they do under existing UK law[19], so that the application of the ECHR and/or principles or rules of EU law – even if required in Northern Ireland as a result of the Windsor Framework and the Belfast/Good Friday Agreement – cannot result in any different interpretation of existing law. In other words, nothing in UK law, following FWS, on the issue of the protection against discrimination because of gender reassignment can be said to be incompatible with the ECHR or EU law.

66. I note that in the GLP judicial review it was also claimed that the statements of law made in the EHRC's interim guidance gave rise to a breach of the European

[17] The application and supporting evidence is available on the ECNI website: https://www.equalityni.org/SCJ
[18] Available here: https://forwomen.scot/wp-content/uploads/2025/09/Aidan-ONeill-KC_-FWS-judgment-in-NI-24Jul2025.pdf
[19] UK law was amended following the decision of the Court of Justice in P v S and Cornwall CC [1996] ECR I-2143 to introduce new and distinct provisions concerned with discrimination on grounds of gender reassignment (s. 2A of the SDA 1975 and regs. 4A and 4B of the SDO). As the Supreme Court records in FWS, para. 62, these new provisions did not amend the definitions of 'man' and 'woman'; and at para. 199: *"the EA 2010 recognises sex and gender reassignment as distinct and separate bases for discrimination and inequality, giving separate protection to each."* The enactment of the GRA was prompted by the judgment of the European Court of Human Rights in Goodwin v United Kingdom (Application No 28957/95) (2002) 35 EHRR 18 and by a declaration of incompatibility made by the House of Lords in Bellinger v Bellinger [2003] UKHL 21, [2003] 2 AC 467.

Convention on Human Rights and in particular art. 8. This too was rejected, see paras. 96-100 (as it had been in the Darlington nurses case, see para. 34 above).

67. Given that the Court will in due course decide whether the ECNI's application is admissible it might be thought facile for me to say anymore at this stage.

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## Appendix

1. 1992 Regs: the Workplace (Health, Safety and Welfare) Regulations 1992
2. 1993 Regs: the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993
3. EHRC: the Equality and Human Rights Commission
4. ECNI: Equality Commission for Northern Ireland
5. EqA: Equality Act 2010
6. FWS: For Women Scotland Ltd v Scottish Ministers [2025] 3 LRC 632
7. GRA: Gender Recognition Act 2004
8. GRC: Gender Recognition Certificate
9. HSE: Health and Safety Executive