

CAJ Submission to Equality Commission Legal Paper, focusing on interpretation of the characteristic of ‘men and women generally’ in the Section 75 equality duty

1. This paper is by way of follow up to an inquiry to the Equality Commission (ECNI) as to whether it has interpreted the protected characteristic of ‘men and women generally’ within the Section 75 equality duty as also encompassing gender identity as well as sex.
2. In April 2025 following the UK Supreme Court ruling in *For Women Scotland Ltd v The Scottish Ministers* (hereafter ‘FWS’)¹ CAJ wrote the ECNI to seek clarification of its position in relation to the interpretation of the scope of the protected characteristic of ‘men and women generally’ within Section 75 (s75). This followed FWS holding that the protected characteristic of ‘sex’ in the Equality Act 2010 in Great Britain means biological sex. The question on the ECNI position related as to whether the ECNI interpreted ‘men and women’ in s75 as relating to biological sex only or to also encompass gender identity.
3. The context of seeking clarification related to the likelihood of NI public authorities revising their policies in light of FWS and consequently undertaking s75 equality screening as to the impacts of revised policies including sex but also potentially gender identity. If so, this would be particularly relevant in the context of a read over of the FWS ruling in Northern Ireland in a ‘permissive’ manner in areas of provision prompting rights-balancing and proportionality assessments by public authorities, with in the s75 process. A ‘prohibitive’ reading in other areas of provision of FWS would also prompt consideration of mitigating measures and alternative policies.
4. The question was asked in the context of CAJ not being able to locate reference in written ECNI guidance on s75 that set out an ECNI position on the protected characteristic extending to gender identity, but Trans and LGBT groups informing CAJ that the ECNI had articulated this position verbally. An ECNI representative at a subsequent meeting in June appeared to confirm that the ECNI has previously advised that Trans persons had been included previously under the ambit of s75.²
5. The ECNI were therefore not able to respond to the CAJ query in April but on the 30 June wrote to CAJ to draw attention to the matter being dealt with in sections of the ECNI Legal Paper on FWS.³ The ECNI drew attention to the consultation on the same and suggested input. This submission is by way of response to the s75 scope issues within the ECNI Legal Paper and is structured under the following headings:
 - Section 75, ECNI and the Related Legislative Framework
 - Position on Scope in ECNI Legal Paper
 - Original Legislative Intent of Section 75
 - Impact of ECNI Guidance and Advice
 - Impact of EU law
 - Current ECNI Guidance and Practical Implications for Section 75

¹ [For Women Scotland Ltd \(Appellant\) v The Scottish Ministers \(Respondent\) - UK Supreme Court](#)

² Namely the Equality and Diversity Group in Local Councils, Meeting 2 June 2025.

³ ECNI ‘Legal paper and information: The meanings of “sex”, “men”, “women” and “gender reassignment” in equality and allied legislation in Northern Ireland and interim information for employers, service providers and public authorities’, [‘ECNI Legal Paper’](#), June 2025.

Section 75, ECNI and the Related Legislative Framework

6. The statutory equality duty under Section 75(1) of the Northern Ireland Act 1998, places obligations on designated NI public authorities to promote equality of opportunity on nine protected grounds which include the grounds of:
...(b) between men and women generally
7. The Section 75(2) 'good relations' duty does not cover this ground.
8. Schedule 9 of the Act places duties on public authorities to adopt Equality Schemes and to impact assess new or revised policies in relation to their implications for equality of opportunity. The Schedule also places duties on the ECNI, including that the ECNI shall:
offer advice to public authorities and others in connection with [the s75] duties
9. In relation to Equality Schemes, public authorities are to ensure that their Schemes:
...conform to any guidelines as to form or content which are issued by the Commission with the approval of the Secretary of State
10. The ECNI has consequently issued several formal advisory and guidance documents in relation to the application and interpretation s75 including:
 - [Section 75 of the Northern Ireland Act 1998 Practical Guidance on Equality Impact Assessment](#) (2005)
 - [Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities](#) (April 2010)
 - [Model Equality scheme](#) (2010)
11. The issue of the scope of the Section 75(1) equality duty and the interpretation its ground of 'men and women generally' was not dealt with by the UKSC in *FWS*, as the case related to the Equality Act 2010 in Great Britain. The Equality Act 2010 itself has a counterpart Public Sector Equality Duty (PSED) in s149. However, it covers 'sex' and 'gender reassignment' as separate protected characteristics. The same interpretation issue therefore does not arise and was not dealt with by *FWS*.
12. In addition, further to the UK-EU Withdrawal Agreement and Article 2 the Northern Ireland Protocol/Windsor Framework (Art 2 WF), the UK entered into a commitment that there would be no diminution in certain GFA rights in Northern Ireland as a result of the UK's exit from the EU. This includes 'in the area of protection against discrimination' in EU Directives, including Directive 2004/113/EC on equal treatment between men and women in goods and services and Directive 2006/54/EC on equality between men and women in employment. The ECNI is given an implementation role in the Art. 2 WF commitment.
13. The Sex Discrimination (Northern Ireland) Order 1976 (hereafter SDO), first outlawed sex discrimination against women in Northern Ireland (and men). The SDO followed the Sex Discrimination Act (SDA) 1975 in Great Britain. In the absence of single equality legislation, the SDO is still in force in Northern Ireland and covers direct and indirect discrimination in employment, training goods, facilities and services, maternity, and protections for women's only spaces.

14. In 1996, the EU- European Court of Justice (ECJ) dealt with the case of *P v S and Cornwall County Council* ('P v S').⁴ This dealt with the scope of an earlier Equal Treatment Directive.⁵ This dealt with the question of whether an employee undergoing gender reassignment surgery was protected against discrimination on ground of sex (connected to gender reassignment). The case found that there was no remedy under the SDA, as it only covered "situations in which men or women were treated differently because they belonged to one sex or the other, and did not recognise a transsexual condition in addition to the two sexes."⁶
15. *P v S* led to the UK introducing the Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999 (SR1999/311) (alongside a similar regulation in Great Britain). These regulations amended the SDO to include a prohibition of discrimination on the grounds of 'gender reassignment'. This has been amended several times and includes employment and training, but is more limited in relation to goods, facilities and services. The definition in the SDO of the anti-discrimination ground of gender reassignment remains:

"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.⁷
16. Subsequently, the European Court of Human Rights (ECtHR) in *Goodwin v the UK*⁸, dealt with the case of a transwoman who had undergone NHS gender reassignment surgery for gender dysphoria for whom there was no provision for legal gender recognition. In the context of significant practical impacts flowing from this lack of legal recognition, a breach of the ECHR was found. Following this the UK introduced the Gender Recognition Act 2004 (GRA), which provided for a process to apply for a Gender Recognition Certificate where a panel issues a certificate if it determines that the applicant: has gender dysphoria; has lived in acquired gender for two years; and intends to live in acquired gender forever. Section 9(1) of the GRA provides that where a Certificate is issued, the person's gender becomes, for all purposes, the 'acquired gender'. This is qualified by s9(3) by any provision in the GRA or any other legislation (meaning that the persons gender is not the acquired gender if other legislation requires it not to be).
17. In summary, the focus of *FWS* was as to whether the protected characteristic of sex in the Equality Act 2010 referred only to biological sex or whether it could be read as including an 'acquired gender' by virtue of the process in the GRA. In practical terms, this related to whether transwomen (i.e., biologically male, gender identity as a women) could assert a right to access women's only provision.⁹ *FWS* held this was not the case and that the protected ground of 'sex' in the Equality Act 2010 referred to biological sex and qualified the provisions of the GRA on acquired gender.

⁴ *P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, [1996] ECR I-2143 ('P v S')

⁵ Council Directive 76/207/EEC (OJ 1976 L39 p 40) cited in *FWS*, para 55.

⁶ Cited in *FWS* para 55.

⁷ Section 2 SDO (as amended). This differs from the definition in the Equality Act 2010 which does not have the requirement of medical supervision (s7 "A person has 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.")

⁸ *Goodwin v United Kingdom* (Application No 28957/95) (2002) 35 EHRR 18

⁹ The specific subject of *FWS* related to women only provision on public boards.

Position on Scope in ECNI Legal Paper

18. As set out earlier the question in relation to s75 relates as to whether the protected ground of 'men and women generally' is capable of, and is interpreted by, the ECNI as covering gender identity as well as biological sex.
19. The three general areas of consideration in relation to this question appear to be:
 - What is the original legislative intent of s75 as to how the concept of 'men and women generally' should be interpreted?
 - How has the ECNI advised the provisions should be interpreted?
 - Has there been any modification of the definitions in s75 due to EU law?
20. The ECNI Legal Paper sets out that, in relation to 'men and women generally' in s75, there is no definition of 'men' or 'women' in the legislation and 'there is no reference to gender reassignment at all'. The Legal Paper then states more definitively that the s75 category as it stands is limited to biological sex and does not cover gender identity:

In Northern Ireland, there is a public sector equality duty contained in s75 NIA 1998. It requires public bodies to have due regard to the need to promote equality of opportunity between, among other groups, men and women generally but not for transgender people.¹⁰
21. The ECNI then states, however, that EU law, given continued effect by Art. 2 WF, *may* apply. In essence, the ECNI position is that s75 (and the categories within of 'women' and 'men') relate to biological sex only, *unless* this position has been changed by EU law given continued effect by Art. 2 WF.¹¹
22. This submission will now consider the three areas listed above in more detail before turning to the question of what ECNI now advises public authorities to do in relation to s75 (in this area) and how this might work in practice.

Original Legislative Intent of s75.

24. It would seem to be straightforward that the original intent of s75 was that the grounds of 'men' and 'women' were intended to cover biological sex only. The statute predates *Goodwin v UK*, the GRA and the incorporation of gender reassignment into the SDO. The ECNI does not explicitly state this understanding, but it is implicit in the above position.
25. The ECNI Legal Paper does note that the language in the much earlier SDO 1976 differs from that in the Equality Act 2010, as the latter defines 'woman' as 'means a female of any age', and the SDO defines it as "includes a female of any age".¹²

¹⁰ ECNI Legal Paper, page 28.

¹¹ "In short, unless the Courts and/or Tribunals in Northern Ireland are required to depart from FWS due to the application of Art 2 WF, in the Commission's opinion, FWS should be considered as prescribing the legally required interpretation of the EPA 1970, the SDO 1976 and s 75 NIA 1998. On that basis, there would be no significant difference between the implications of the decision in Birmingham and the implications in Belfast. It can be said with significant certainty that the Supreme Court interpreted the term "sex" in the EA 2010 to mean "biological sex", and "women" and "men" to refer to the biological sex of the person at birth, and that a GRC did not change a person's legal sex for the purposes of the EA 2010. The Commission understands this to be the central holding of the Court."

¹² ECNI Legal Paper paragraph 11A.

26. This has been picked up in some commentary as a suggestion that the difference in wording should mean a different interpretation for Northern Ireland law. The ECNI Legal Paper notes, however, that the SDO language is identical to that of the Sex Discrimination Act 1975 in Great Britain (SDA which was considered in *FWS*) and concludes that the drafting differences between the SDO and Equality Act 2010 make no material difference.¹³
27. In *FWS* in considering the SDA stated that “First, there can be no doubt that Parliament intended that the words ‘man’ and ‘woman’ in the SDA 1975 would refer to biological sex – the trans community of course existed at the time but their recognition and protection did not.”¹⁴ Then addressing the argument that the wording of ‘means’ and ‘includes’ should have a different interpretation stated:
- We do not consider this change to be significant in context. In both cases, the meaning conveyed is simply to make clear that boys and girls are also included within the definition of man and woman, respectively. We do not see the words “includes” and “means” as sufficiently distinctive to lead to any conclusions about whether the EA 2010 was intended to alter or maintain the position under the SDA 1975 that the terms refer to biological sex only.¹⁵
28. Given this ECNI may wish to more expressly state its interpretation of the original legislative intent of s75.

ECNI Guidance on the Interpretation of Section 75

29. The ECNI Legal Paper makes no reference to what Guidance and advice the ECNI has previously given on the question of interpreting ‘men and women generally’ in s75.
30. Chapters 5-7 of the *‘Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities’*¹⁶ constitute the most formal guidance in the form of ECNI guidelines, approved by the Secretary of State, on form or content of Equality Schemes. There is no reference in these or other chapters of the Guide to transgender, gender identity, or gender reassignment.
31. There appears to be no tailored guidance from the ECNI on s75 and gender identity or the interpretation of men and women generally.
32. The *body* of the ECNI 2005 practical guidelines and the 2010 ECNI Model (Equality) Scheme also contain no reference to gender identity, etc. However, an appendix in both documents, provides example lists of groups which would fall into each s75 ground (e.g. Protestant, Catholic, Hindu for religious belief). These appendices include under the category of ‘men and women generally: “*Men (including boys); women (including girls); transgender people; transsexual people.*”
33. It appears therefore the ECNI has not put in its formal guidelines or general guidance an interpretation of this s75 category to include gender identity but has implied this

¹³ ECNI Legal Paper, paragraph B6.

¹⁴ *FWS* [51]

¹⁵ *FWS* [174]

¹⁶ Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities:

<https://www.equalityni.org/ecni/media/ecni/publications/employers%20and%20service%20providers/s75guideforpublicauthoritiesapril2010.pdf>

in an appendix in two of its s75 documents. As alluded to earlier, LGBT groups have also stated that the ECNI has verbally informed them of an interpretation (prior to *FWS*) that the S75 criteria did extend to gender identity.

34. In the absence of reference to this in the ECNI Legal Paper (or on how the ECNI has advised on this matter), it is not clear the extent to which public authority practice has been to include this consideration in screenings and how it has operated. Therefore, we would suggest that the ECNI clarifies its previous advice on this s75 ground and gender identity and how this has been reflected in public authority practice and any learning from this.

Impact of EU Law

35. In summary, the ECNI Legal Paper concludes that the *FWS* ruling will read over to Northern Ireland equality legislation (including s75) *unless* there is an EU law provision that has changed the meaning of the terms ‘man’, ‘woman’ and ‘sex’ that is given continued effect by Art. 2 WF. The ECNI Legal Paper states:

In short, unless the Courts and/or Tribunals in Northern Ireland are required to depart from *FWS* due to the application of Art 2 WF, in the Commission’s opinion, *FWS* should be considered as prescribing the legally required interpretation of the EPA 1970,¹⁷ the SDO 1976 and s 75 NIA 1998.¹⁸

36. The ECNI Legal Paper states that the EU law point particularly relates to “*the judgment of the Court in the seminal case of P v S and Cornwall County Council, Case C-13/94, decided in 1996*” and subsequent EU law rulings impacting on *P v S*.¹⁹
37. The ECNI Legal Paper points out that the Supreme Court did not consider Art. 2 WF, given as *FWS* did not concern Northern Ireland (albeit it is worth noting that the primary EU law point re the *P v S* case and the consequent 1999 regulations, were dealt with in *FWS*).²⁰
38. As alluded to above, the implementation the judgement of *P v S* by the UK was undertaken through regulations which added an additional protected characteristic of ‘gender reassignment’ to existing sex discrimination legislation (rather than by amending the definition of ‘man’ or ‘women’ in the SDO and SDA).
39. The ECNI approach is to seek what is essentially (in lay terms) an advisory opinion from the Courts in Northern Ireland on the EU law point. The ECNI sets out its interim approach in the final section of the ECNI Legal Paper.

Current ECNI Guidance and Practical Implications for Section 75

40. To summarise the ECNI position and approach, in general terms, it appears to be:
- As things stand the terms ‘men’ and ‘women’ in s75 mean and are to be interpreted as referring to biological sex only.

¹⁷ EPA -Equal Pay Act.

¹⁸ ECNI Legal Paper, para B6.

¹⁹ ECNI Legal Paper Citing ‘P. v. S. and Cornwall County Council, Case C-13/94; K.B. v. National Health Service Pensions Agency, Case C-117/01; Sarah Margaret Richards v. Secretary of State for Work and Pensions, Case C-423/04; MB -v- Secretary of State for Work and Pensions, Case C451/16.’

²⁰ *FWS*, paras 54-62, 265(iii)

- However, sometime before the end of 2020 (possibly back before 1998) there might have been a significant development in EU law (unnoticed at the time by the ECNI or other authorities) that means s75 could or should also be interpreted as encompassing gender identity.
 - If this is the case, it is possible that this EU law development might engage rights given continued effect by Art. 2 WF, so could retrospectively apply in NI.
 - The ECNI is asking the Courts for a ruling if this is the case or not.
41. The ECNI Legal Paper consequently states as interim guidance that, until there is such a ruling, public authorities in applying s75 *must* consider ‘biological sex’ but ‘could’ also consider ‘gender reassignment’ if and until the courts rule otherwise:
- In terms of s75, whilst there is uncertainty about the extent to which the public sector equality duty extends to the protected characteristic of gender reassignment, this should not distract organisations from having ‘due regard’ to the need to promote equality of opportunity between ‘men and women generally’ in relation to biological sex. Public bodies could also consider the impact on people with the protected characteristic of ‘gender reassignment’ pending clarification on how far this duty extends.²¹
42. Whilst the above implies the extension to ‘gender identity’ is an option, the following paragraph appears to go further by recommending that, where possible, both ‘biological sex’ and ‘gender identity’ are both considered when assessing conflicts of rights over separate and single sex services (whilst reiterating screening must be done for biological sex). The ECNI sets out the comparator for ‘gender identity’ as between transgender and non-transgender persons. The ECNI Legal Paper states:
- It is recognised that there may be some circumstances in which there is the potential for a ‘clash of rights’, for example, between biological women and transwomen in relation to matters like separate sex and single sex services. In these circumstances, it is recommended that, in so far as is possible, a public authority considers the impacts that their proposed decisions may have on (a) men and women generally, and (b) on transgender people compared to non-transgender people. There must always be due regard given to the need to promote equality of opportunity between men and women generally.²²
43. The ECNI guidance in the Legal Paper at present does not further elaborate on balancing exercises and considerations that may take place in assessing the interface of competing rights (within a s75 process or otherwise). It also does not elaborate as to a reading of whether the application of FWS would involve a prohibitive or permissive approach in different scenarios. There may be rights under consideration in relation to matters such as women’s only changing rooms (safety, dignity, etc.) that differ to considerations regarding general women’s only groups (free association, etc).

²¹ ECNI Legal Paper, Annex 2, para 24.

²² ECNI Legal Paper, Annex 2, para 25.

44. There are also practical complexities regarding seeking to conduct a s75 assessment on two separate grounds, with potential interfaces of rights between them, within the same protected characteristic in s75.
45. This does not arise as such in the case of the equivalent PSED in Great Britain, as 'sex' and 'gender reassignment' are separate protected grounds. FWS did though consider the scenario if 'sex' had differential meanings in the PSED (i.e., covering both 'biological sex' and 'gender reassignment' within one ground), highlighting some the complexities to consider:

239. If, in the context of equality between the sexes, the interests of trans women (biological males) who have GRCs (so are legally female) must be considered and advanced as part of the group that share the protected characteristic of being "women", the PSED will require data collection and consideration of a heterogeneous group containing biological women, some biological males with a GRC (trans women who are legally female) and excluding some biological females with a GRC (trans men who are legally male). This is a confusing group to envisage because it cuts across and fragments both biological sex and gender reassignment into heterogeneous groupings which may have little in common. Any data collection exercise will be distorted by the heterogeneous nature of such a group. Moreover, the distinct discrimination and disadvantage faced by women as a group (or trans people) would simply not be capable of being addressed by the PSED because the group being considered would not be a group that, because of the shared protected characteristic of sex, has experienced discrimination or disadvantage flowing from shared biology, societal norms or prejudice. Whereas the interests of biological women (or men) can be rationally considered and addressed, and likewise, the interests of trans people (who are vulnerable and often disadvantaged for different reasons), we do not understand how the interests of this heterogeneous group can begin to be considered and addressed.

242. Moreover, the different needs of and disadvantages faced by transsexual people (whether or not they have a GRC) can – and in the case of the PSED must – be considered separately without conflating these distinct protected characteristics. To do otherwise is detrimental to both groups. Indeed, a certificated sex reading of sex suggests that the needs and interests of transsexuals without a GRC are different from those with a GRC, though their circumstances may often be indistinguishable. In addressing the need for greater representation of women on public boards, it is hard to see what possible difference it could make to the board in question whether the trans woman in question does or does not hold a GRC.

243. ... The group based rights and duties are concerned with identifying the shared needs and disadvantages that affect women as a group, or trans people as a group. If the first group were to include men and the second group people who are not trans people, it is unlikely that they would have the same needs or share the same disadvantages that would justify their inclusion in the particular group. Equally, the fact that some members of the group do not wish to benefit from a particular measure designed to reduce,

say under-representation of that group, does not mean that they do not share the same needs and disadvantages as the group in question.

46. The complexities are also present with the issue of a comparator. The ECNI is recommending that the comparator for transgender persons is non-transgender persons. Whilst this is clearly the comparator for gender-identity based discrimination, its application to contestation over access to female only spaces is more complex. If a transwoman who is biologically male's comparator is a non-transperson who is also biologically male, then there is no differential treatment in being excluded from women's only spaces. Some of the complexities of this are discussed in *FWS*:

Accordingly, where sex is the protected characteristic, a woman relying on [the relevant anti-discrimination provisions] must compare her treatment with the treatment that was or would have been afforded to a man whose circumstances are not materially different to hers; in other words, a similarly situated man.

Where gender reassignment is the protected characteristic, 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...²³

47. Given this ECNI guidance (in a scenario where the courts hold gender identity can be considered within this same s75 category), should further consider the complexities of having two separate protected characteristics and an interface between them protected under one s75 ground would work in practical terms.

CAJ, September 2025

²³ *FWS*, para 134.