

# Update the Equality Act to make clear the characteristic “sex” is biological sex: briefing on the petition and amendment

The [petition calling on the government to make the Equality Act clear](#) has reached 100,000 signatures. It calls on the government to exercise its power under S.23 of the Gender Recognition Act to issue a Statutory Instrument modifying the operation of the Equality Act 2010 by specifying that the terms sex, male, female, man and woman mean biological sex and not “sex as modified by a Gender Recognition Certificate”.

## What could an amendment look like?

(X) In this Act, references to female persons and women:

(a) also refer to a person who was born female and has acquired the male sex under the GRA 2004

(b) do not refer to a person who was born male and has acquired the female sex under that Act.

(X) In this Act, references to male persons and men:

(a) also refer to a person who was born male and has acquired the female sex under the GRA 2004

(b) do not refer to a person who was born female and has acquired the male sex under that Act.

## Why are we asking for this?

Women (and men) face discrimination because of their sex. People often need different facilities and services based on sex. Organisations that provide single-sex services need clarity about the law. Single-sex associations, sports, charities and schools are also legitimate. All of this is allowed for by the Equality Act.

Transgender people are protected from being discriminated against because they are transgender (through the protected characteristic of gender reassignment). This does not give them the right to override other people’s consent when it comes to their privacy, dignity and autonomy about sharing spaces with the opposite sex.

A minority of trans people have a Gender Recognition Certificate. The **Gender Recognition Act 2004** was brought in to allow people to change the sex recorded on their birth and death certificates, and in relation to pensions and marriage (following the case of *Goodwin v UK [2002]*). The aim was to protect the privacy of personal information. However, in reality their sex has not changed. A certificate cannot change the perceptions or rights of others.

Section 9 of the GRA changes a person’s legally recognised sex “for all purposes”, but legislators recognised that this might not always give the intended effects in other acts. Therefore they put in a safety clause (Section 23) to give governments the power to sort out any problems later. As the notes to the legislation explain:

“This power... is provided due to the entirely novel nature of this legislation. Legislation has made distinctions on the basis of gender [sex] for centuries, and the use of gender-specific terms, though it has reduced, nevertheless continues in some contexts.”<sup>1</sup>

This was recognised again last year in a statement made to Parliament by Lord True and Mark Spencer MP:

“The effect of S.9 of the Gender Recognition Act 2004 is that a reference to a ‘woman’ in legislation, without more, will include someone who is a woman by virtue of a Certificate and will not include someone who is a

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<sup>1</sup> Gender Recognition Act, explanatory notes.

man by virtue of a Certificate. In some cases, this might be the desired result but in others it might not.”<sup>2</sup>

## What is the current legal situation?

The Equality Act 2010 brought together dozens of previous laws on sex, race, disability and age discrimination. The simplest reading of the intention of parliament is that it sought to continue to provide clear protection against discrimination on the basis of sex. But there is no explicit disapplication of the Gender Recognition Act. This has led to confusion, uncertainty, and controversy about whether possession of a GRC makes a difference to the “sex” of a person when their rights or position under the Equality Act 2010 are considered.<sup>3</sup>

Recent court cases have disagreed. In *For Women Scotland v The Lord Advocate & Scottish Ministers [2022] CSIH 4*, it was found that provisions in favour of women “by definition exclude those who are biologically male”.<sup>4</sup> However, a subsequent judgment, *For Women Scotland [2022] CSOH 90*, found that “sex” is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act.

The Government can use the power built into the GRA to resolve the issue and protect everyone’s rights.

## What would this amendment do?

It would make it clear that “sex” and “gender reassignment” are separate protected characteristics, and that the terms sex, male, female, man and woman in the Equality Act relate to biological sex. Making this clear would resolve the uncertainty for women, transgender people, employers, schools and service providers. It would make it much easier to provide clear guidance and written policies that everyone understands.

It would ensure that the Equality Act is consistent with human rights (including Articles 3, 8, 9, 10, 11 and 14) which are undermined if people are not allowed to have single-sex associations, charities, schools, colleges and services, and if women may be forced to share intimate spaces with men and to pretend they are women in this context (and vice versa). It would also make clear that biological women (and men) are a separate group from transgender people in the Public Sector Equality Duty, allowing both groups to be considered clearly.

It would also make clear that the duty on public bodies to consider the impact of policies on groups with different protected characteristics requires considering the impact on the two groups “male” and “female” separately from the impact on the group of people with the protected characteristic of gender reassignment.

## Would this harm trans people’s rights?

No. Transgender people have the protected characteristic of gender reassignment whether they have a GRC or not. Where sex-based rules create difficulties for people with a transgender identity, service providers may be able to offer an alternative. This should not differ according to whether the person has a GRC or not.

## How has the government responded so far?

The government responded on 26th January 2023 and we [analysed that response](#).

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<sup>2</sup> Lord True and Mark Spencer (2022). [Review of legislative drafting: statement made on 23rd May 2022 \(Statement UIN HCWS47\)](#).

<sup>3</sup> Employment Lawyers Association (2020). [Evidence to Women and Equalities Committee on the Gender Recognition Act](#).

<sup>4</sup> [For Women Scotland v The Lord Advocate & Scottish Ministers \[2022\] CSIH 4](#).