

## Sex in the Equality Act FAQs



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## When and where is the debate?

Monday 12th June at 4.30pm in Westminster Hall.

## Is there evidence that lack of clarity about the definition of sex in the Equality Act is a problem?

Yes. This is an issue that has been raised consistently in consultations about the Gender Recognition Act and the Equality Act.

It was raised by respondents to the [public consultation about reforming the Gender Recognition Act in 2018](#). For example, the organisation Rights of Women responded:

“We are concerned that the current lack of clarity around the law could leave a women’s organisation seeking to rely on the exemption based on their interpretation of the law vulnerable to a legal challenge of unfair discrimination that could have devastating impacts on the service provider and the women they support. Equally trans women have a right to understand the extent of the rights they obtain via a GRC and where they stand in relation to lawful discrimination against them.”

In 2019, the Women and Equality Committee undertook an inquiry on [Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission](#). The issue was raised again. The committee reflected:

“When reading through the evidence on this issue, it struck us that different people were using the term ‘single-sex’ in different ways. For some, references to single-sex or women-only services meant services that did or would apply the exceptions to exclude trans women. One submission from a member of the public who described herself as ‘a woman who is increasingly concerned about the erosion of my rights’ stated that ‘[a]s soon as you say that transwomen are women, single sex spaces become mixed sex.’ Another individual, who described themselves as a ‘PTSD sufferer whose symptoms are triggered by males’ felt that: When a previously single sex provision becomes single gender it then it also becomes mixed sex, and unsafe for me and the multitudes of other women like me.”

The Committee concluded that non-statutory guidance would not be sufficient to bring clarity “in what is clearly a contentious area”. It recommended that the EHRC develop a dedicated code of practice concerning single-sex services, including “how and under what circumstances it allows those providing such services to choose how and if to provide them to a person who has the protected characteristic of gender reassignment”.

Concerns were raised again in 2021, when the Women and Equalities Committee undertook an [evidence-taking session on reforming the Gender Recognition Act](#). The committee recommended:

“The GEO should work to update the language in both acts in relation to sex and gender, ensuring consistency in the definitions used. It should be clear when an Act is referring to natal sex, legal sex and gender. The Government should also aim to update all official documents that conflate the terms sex and gender.”

The issue was raised again during [consultation on the proposed reform to the Gender Recognition Act in Scotland](#). There were different opinions regarding the effect of a GRC on the operation of the Equality Act. As the think-tank MBM said [in its submission](#):

“The Scottish Government believe that reform based on self-declaration will not affect who can access to single sex spaces. This position rests on the belief that GRCs have no effect under the Equality Act 2010. Their view is contrary to the UK Government and the EHRC and also at odds with the Scottish Government’s revised guidance for the Gender Representation on Public Boards Act 2018, which asserts that ‘where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person’s sex is that of a woman’. Both positions cannot be right, and it is likely that case law will be needed to settle this disagreement.”

There are practical examples of this uncertainty causing problems for [service providers](#), [sports organisations](#), [employers](#) and [individuals](#).

**More information:** [Our response to the government’s early reply to the petition](#) , [Single sex services report](#), [Lesbians without liberty report](#)

## What does the Equality and Human Rights Commission say?

Baroness Kishwer Falkner, Chair of the Equality and Human Rights Commission sent the Women and Equalities Minister a [letter](#) 3rd April 2023 stating that the EHRC’s view on the law has been that a gender-recognition certificate (GRC) changes a person’s sex for the purpose of the Equality Act, but that “it has not been straightforward for service providers and employers to apply the law, including in areas such as sport and health services”.

Following discussions during several board meetings, the EHRC has come to the view that if sex is defined to mean biological sex for the purposes of the Equality act, this would increase legal clarity and reduce risk for maternity services; providers and users of other services; gay and lesbian associations; sports organisers; and employers.

Baroness Falkner concludes that the proposal deserves further consideration, and recommends that the government undertake detailed policy and legal analysis if it wishes to pursue this.

**More information:** [Read the letter](#)

## What is proposed?

The government has not yet proposed a specific amendment, but it is clear from the minister’s letter and the EHRC’s response that what is being considered is **an amendment to clarify that having a GRC does not change a person from male to female (or vice versa) for the purposes of the Equality Act.**

Sex Matters has proposed a form of wording for an amendment. This would be added to the interpretation section (Section 212) of the Equality Act:

(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.

More information: [Our campaign briefing](#)

## Would this require primary legislation that would open up the Equality Act to further amendments?

We don't think so. When the Gender Recognition Act 2004 was passed, lawmakers recognised that it was an extraordinary piece of legislation, and that the implications of changing a person's legally recognised sex "for all purposes" were unclear. Lord Cambell of Alloway said in the House of Lords:

"I have never seen a statute quite in this form before. The Bill says 'becomes for all purposes', and it is not limited to the purposes of the Act. I do not understand what all the purposes are if they are other than the purposes of the Act."

Legislators put in a safety clause (Section 23) to give future governments the power to sort out any problems with interaction with other legislation. 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."

Section 23 of the GRA gives the Secretary of State power to modify statutory provisions:

The Secretary of State may by order make provision for modifying the operation of any enactment or subordinate legislation in relation to—  
persons whose gender has become the acquired gender under this Act, or  
any description of such persons.

This can be done using a statutory instrument following "appropriate consultation".

More information: [Briefing for MPs](#)

## Does this require a new legal definition of "biological sex"?

No. Sex is already recognised as an immutable, binary, biological characteristic in common law. As Lord Nicholls of Birkenhead said in [Bellinger v Bellinger \[2003 UKHL\]](#):

“The distinction between male and female exists throughout the animal world. It corresponds to the different roles played in the reproductive process. A male produces sperm which fertilise the female’s eggs. In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport. It is not surprising, therefore, that society through its laws decides what objective biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction.”

More information: [Sex and the law](#)

## What does the protected characteristic “sex” currently mean in the Equality Act?

There are different views on this. There are two possibilities, which were recognised by [Lord True in a statement to Parliament](#) in May 2022.

- Male and female, and man and woman, relate to biological sex
- Male and female, and man and woman, relate to biological sex as modified by a gender-recognition certificate.

Lord True said:

“When drafting a bill it is necessary to take into account the fact that a person may change their legal sex by obtaining a Gender Recognition Certificate. The effect of section 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 man by virtue of a Certificate. In some cases, this might be the desired result but in others it might not.”

We believe that the desired result of the Equality Act was to continue to provide clear protection against sex discrimination for all women (meaning females), and for all men (meaning males), as had been provided by the Sex Discrimination Act 1975.

This is reflected in the judgment of [For Women Scotland v The Lord Advocate & Scottish Ministers \[2022\] CSIH 4](#), which found that the terms “woman” and “man” relate to biological sex.

This interpretation is also supported by a careful reading of the Equality Act. For example:

- **Pregnancy and maternity.** Section 13(6) of the Equality Act states that if a woman is treated less favourably because she is breastfeeding, this is sex discrimination, and that special treatment given to woman in connection with pregnancy or childbirth does not unlawfully discriminate against men. The meaning of these terms clearly relates to biological sex. Similarly, discrimination against women returning to work after having children, or against women who might get pregnant, is also considered

sex discrimination. This protection must apply to “trans men” and detransitioners who hold a GRC which reads “male”.

- **The basis for “reasonable objections”.** Similarly, schedule 3 part 7 sets out statutory justifications for single-sex and separate-sex services. These include situations where “a person of one sex might reasonably object to the presence of a person of the opposite sex” and those where “only persons of that sex have need of the service”. These conditions make sense only if “sex” means biological sex, not the holding of a certificate. Documentation cannot alter other people’s instinctive perceptions of a person, or change a person’s sex-based needs. If a service is provided separately to each sex on the basis that a person of one sex might reasonably object to the presence of a person of the opposite sex (for example in gym showers or a sauna), there is no reason to think this reasonable objection would be overcome by knowing that a person of the opposite sex has an official certificate misstating their sex.
- **The word “sex” is also used in the Act in relation to sexual orientation (Section 12).** A person who is heterosexual or homosexual is sexually attracted to a person of the opposite sex or the same sex in the sense of biology, and not because of any government certificate they may hold. It is legitimate to have a service that is only for lesbians (women with the protected characteristic of homosexuality), and not to include men who identify as women and are attracted to women (even if those men have gender-recognition certificates stating their “acquired gender” as female).

It is possible to argue conversely (as the Equality and Human Rights Commission does) that a GRC currently changes a person’s sex for the purpose of the Equality Act.

This was the conclusion reached by [Lady Haldane in the FWS2 case](#):

“I conclude that in this context, which is the meaning of sex for the purposes of the 2010 Act, ‘sex’ is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex. Such a conclusion does not offend against, or give rise to any conflict with, legislation where it is clear that ‘sex’ means biological sex.”

In either case, it is within the mandate of Parliament to decide whether this is the desired result, and to clarify the law accordingly.

**More information:** [Male and female in the Equality Act](#), [Being wrong about sex](#), [Was the concept of biological sex really ended in 2004?](#)

## **Would clarifying that sex in the Equality Act is not affected by a GRC remove rights from transgender people?**

**No.** Transgender people without a GRC would continue to be covered by the protected characteristics of “gender reassignment” and “sex” in the same way as currently.

Transgender people with a GRC and transgender people without a GRC would be covered by the protected characteristics of “gender reassignment” and “sex” in the same way.

That is:



- A “transman” would be protected from unlawful gender-reassignment discrimination on account of being trans, and unlawful sex discrimination on account of being female.
- A “transwoman” would be protected from unlawful gender-reassignment discrimination on account of being trans, and unlawful sex discrimination on account of being male.

Transgender people would also remain protected against discrimination based on their perceived sex. This means that, in the event that a “transman” was treated detrimentally because someone perceived them as male, or a “transwoman” was treated detrimentally because someone perceived them as female, they could also bring a claim in any situation covered by the Equality Act.

More information: [Why sex matters for human rights](#), [Male and female in the Equality Act](#), [Being wrong about sex](#), [Was the concept of biological sex really ended in 2004?](#)

## Is it incompatible with international law and human rights?

**No, on the contrary.** Protection against sex discrimination is a core part of human-rights legislation. Protecting transgender people against discrimination because of being trans cannot depend on removing some transgender people (those with a certificate) from protections against discrimination because of their sex. “Transmen” who become pregnant (or who are discriminated against because they can become pregnant, or are coming back to work after maternity leave) should not lose protection against sex discrimination because they have a GRC.

Nor can equality law be used to force other people to pretend that a person has changed sex, in a situation where it is reasonable to object to sharing an intimate space with members of the opposite sex.

More information: [Why sex matters for human rights](#)

## Would this mean that trans people are forced to use single-sex services for their birth sex?

**No.** The Equality Act does not force individuals to use any particular service. It provides them with means for seeking a remedy if they are treated detrimentally, including being excluded from using services.

The single-sex and separate-sex exceptions in the Equality Act provide for service providers to lawfully set sex-based rules and to expect people to comply with them.

The Equality Act does not give male people who identify as female the right to use female-only services, or female people who identify as male the right to use male-only services.

This does not mean that people are *forced* to use single-sex services for their own sex. In many situations where there are male and female facilities, an individual unisex option can be provided which does not rely on anyone declaring their sex or answering personal questions.

More information: [EHRC guidance on single and separate sex services](#), [what does case law say about single sex services](#)

## Would it mean that women are forced to share single-sex services with “transmen” who just look like men?

No. Service providers are able to manage their services in order to keep everyone safe and comfortable, including acting on perception. This can mean excluding someone from a women’s facility who has had surgery and hormone treatment to look and sound like a man.

A service provider would be covered by Schedule III paragraph 28 of the Equality Act, which allows for lawful gender-reassignment discrimination when providing a single-sex service.

More information: [The transman “gotcha”](#)

## Would this disadvantage people with DSDs (“intersex” conditions)?

No. Doctors check babies for disorders for sexual development (DSDs) soon after birth if there are indications such as undescended testicles or if a baby’s genitals look different. Tests may be done to help get a clear diagnosis and decide whether any immediate treatment is needed. Infants with DSDs are registered as male or female on their birth certificate according to these determinations. In very rare cases where it is determined that sex registered on the birth certificate was incorrect, [there are processes in place](#) to facilitate this correction. These do not involve a gender-recognition certificate.

More information: [DSD Families](#)

## Does this mean that trans people could not go to work safely, use services that met their needs, or use public spaces freely?

[Scottish Trans Alliance](#) complains that this means that trans people would be “treated in line with their biological sex at birth by services and public bodies, and when participating in public life” this would mean that trans people “could not go to work safely, use services that met our needs, or use public spaces freely”.

This is not true. Transgender people *without* a GRC are already regarded by the Equality Act as being the same sex they always were. Such people (who constitute the great majority of trans people) are already able to work safely and use services that meet their needs. What they do not have is a right to use opposite-sex facilities.

It can be disappointing with a strong desire to be the opposite sex, that neither law nor medicine can make this happen.

The Equality Act does not prescribe that services and public bodies should treat people differently because of their sex. Rather, it should treat them *equally*, and treat men and women differently only where there is a specific justification, such as those that justify providing a single-sex service.

A gender recognition certificate does not change a person’s sex in relation to the material reason for single and separate sex services, nor does it change how other people see a person, or dictate that they must agree to pretend they are the opposite sex, or to ignore their sex.



In general, trans people should be treated by employers and service providers like all other people, that is equally, and with respect. They should be granted equal access to mixed-sex facilities. They may not wish to (and it may not be practical) to use communal facilities provided on the basis of their sex, and it is often possible to provide alternatives which offer greater individual privacy.

**More information:** [Sex and the law](#), [Why sex matters for human rights](#)