

Make the Equality Act clear – PPC briefing: 3rd June 2024

The Conservative Party has announced that its election manifesto will include a pledge to rewrite the Equality Act to make clear that sex means biological sex. What does this mean, and why does it matter?

Why does the definition of sex in the Equality Act matter?

The Equality Act is the law that protects everyone – male and female – against sex discrimination, sex-based harassment and sexual harassment at work, in education and as service-users. The public-sector equality duty requires public bodies to ensure that their policies do not adversely affect women or men.

In most circumstances, the Equality Act outlaws discrimination based on sex: you can't advertise for a "waitress", or pay women less. But there are important exceptions:

- The act expressly permits separate-sex services (both everyday ones such as toilets and hospital wards and specialist ones such as rape-crisis centres). It also permits sports for women and girls, and single-sex associations (such as Girlguiding and associations for lesbians or gay men).
- The act allows employers to restrict jobs to one sex or the other, when that is needed (such as advertising for women only to work as counsellors in a rape-crisis centre).

These provisions are crucial for women and girls who depend on single-sex services and sport for privacy, dignity, fairness and safety. Service providers need to be able to have clear policies about single-sex spaces.

When men who identify as women are allowed to come in, spaces cease to be single-sex and women's rights are overridden.

Why is the law not already clear?

The Equality Act already has a separate protected characteristic called "gender reassignment" that covers the people who are now often referred to as "trans". This gives people who have undertaken or are undertaking a personal "transition" legal protection against, for example, losing their job or being turned away by a pub because they are trans. Personal transition rarely involves medical treatment or surgery. The Equality Act does not require anything other than self-declaration, but it does not entitle anyone to be treated as if they were the opposite sex. **It does not give these people the right to use services and spaces intended for the opposite sex, or to oblige others to pretend they have changed sex.**

In recent years, service providers and employers have become confused because of pressure from organisations claiming that "trans women are women" – in other words, that people born male who declare themselves to be women are women and should be allowed to use women's services and spaces.

The law is also complicated because a tiny minority of transgender people have a gender-recognition certificate (GRC) provided in accordance with the **Gender Recognition Act 2004** (GRA). This law was passed to allow people to change their legally recorded sex for some administrative purposes, such as marriage and pensions. Getting a GRC does not require any surgery or hormonal treatment. Most people who "transition" do not have genital surgery.

In recent years it has become clear that the interaction between the Gender Recognition Act and the Equality Act is causing confusion and putting both women and transgender people at risk. Lawyers cannot agree whether possession of a GRC makes a difference to the "sex" of a person when considering how they are protected against sex discrimination under the Equality Act 2010. There is an ongoing court case against the Scottish government that will come to the UK Supreme Court later this year, and which will also have implications for England and Wales.

What would amending the Equality Act do?

An amendment to sort out the confusion about the Equality Act could be as simple as this:

“Section 9(1) of the Gender Recognition Act 2004 is to be disregarded for the purposes of construing this Act.”

It would make clear that the Equality Act deals with “sex” and “gender reassignment” as two separate protected characteristics, and that the terms sex, male, female, man and woman in the Equality Act relate to actual, biological sex, not to the sex people identify as or wish they were, even if they have a gender-recognition certificate.

Making this clear would resolve the uncertainty for women, transgender people, employers, service providers and public bodies. It would make it much easier to provide clear guidance and written policies that everyone understands and that are fair to everyone.

It would also make clear that the duty on public bodies to consider the impact of policies on women means considering the group consisting of all female people – not a mixed-sex group including some men.

Would this harm trans people’s human rights?

No. Transgender people have the protections under the Equality Act that relate to the characteristic of gender reassignment, whether or not they have a GRC. But this does not give them access to opposite-sex services and spaces. In practice, those deciding who can use which services cannot depend on determining if someone has a GRC. Nor can they make decisions based on appearance or asking about medical treatments. Service providers may offer a unisex alternative to separate-sex provision. This protects everyone’s privacy and avoids conflict.

Is this policy calling all “transwomen” predatory men?

No. Female-only provision is not only to exclude predators; it excludes all males. It is not just about safety; it is about privacy, dignity and peace of mind. It is simply not possible to distinguish between predatory men and other men.

All people who identify as “transwomen” are male. Most of them have not had genital surgery, but in any case it is neither feasible nor appropriate to ask people about their genitals before deciding whether to grant them admission to a service or space. In order to provide a space that is female-only, a service provider needs to have a policy that makes clear that it is female-only: no men are permitted to access the provision, however they identify.

Is this policy seeking to distinguish between genuine “transwomen” and fakers?

No. It is not possible for service providers – or other users – to distinguish between a man who genuinely feels himself to be a woman and a man who wants to use women’s spaces for other reasons. In either case, women and girls must not be forced to share space that is intended as female-only at a cost to their own privacy, dignity and safety. A female-only service is provided to meet the needs of women and girls.

Service providers need to be able to have rules and policies wherever they provide a service or facility aimed at meeting the needs of women (or men) separately from each other.

When a rape-crisis centre advertises for a female counsellor, or says that it provides a female-only service, or a gym says a set of showers are female-only, all male people should understand that it is not appropriate to seek access.

The government and the law must be absolutely clear about this. These issues cannot be resolved by forcing women into uncertainty and negotiation over their boundaries in situations where they are already physically vulnerable.

Women saying “NO” are asserting essential boundaries, not starting a negotiation.