

## Change 2.2: New content on asking about sex at birth

### Changes we are consulting on in chapter 2

This section gives information on how requests about sex at birth should be made. It outlines the circumstances in which making such requests, with or without evidential proof of birth sex, may be unlawful.

#### Updated content - Asking about birth sex

2.2.1 It is important to be aware that some people, including some trans or gender non-conforming people, may find it distressing to be asked about their birth sex. Therefore, any necessary request about birth sex should be made sensitively, taking this into account.

2.2.2 Where obtaining information on birth sex is not necessary and proportionate, asking a trans person about their birth sex may risk unjustifiably interfering with their human rights under Article 8 of the European Convention on Human Rights (ECHR), which is respect for private and family life. Therefore, care should be taken, particularly by public authorities, that this is only done where necessary and justified.

2.2.3 Requests about birth sex are more likely to be justified where it is necessary and proportionate for a service provider, those exercising public functions or an association to know an individual's birth sex to be able to discharge their legal obligations under the Equality Act 2010 (the Act). Any request that is made should be done in a sensitive way which does not cause discrimination or harassment.

2.2.4 Discrimination or harassment could occur if, for example, individuals are asked about their birth sex in a way which may require them to disclose this information in public, or if the language or manner of a request is rude, combative or offensive.

2.2.5 Indirect discrimination could occur if a policy on how or when to ask for such information places some protected characteristic groups at a particular disadvantage and is not justified. However, where practical, it is likely to be best to adopt the same approach with everyone, rather than only asking some people for information, because this approach is less likely to be discriminatory against any one group.

2.2.6 If it is necessary to ask a person's birth sex, consideration should be given to whether it is reasonable and necessary to ask for evidence of birth sex. In many cases, it will be sufficient to simply ask an individual to confirm their birth sex. A service provider may make a rule that if someone is asked their birth sex and chooses to answer objectively falsely it will be grounds for exclusion from the service.

*Example 2.2.7 A trans woman goes to the office of a local support group and makes enquiries with the receptionist about the group counselling sessions they offer. Based on the needs of its service users, the group provides different sessions that are single-sex or mixed-sex. The receptionist reasonably thinks that the trans woman is a biological male and, as there are some other people waiting in the office, asks her to come into a side room to get more details about the support she is looking for. When they are in private, the receptionist explains the different group sessions that are offered and asks the trans woman what her birth sex is. When she confirms her birth sex, the receptionist provides her with the details of the mixed-sex groups she could attend.*

2.2.8 If there is genuine concern about the accuracy of the response to a question about birth sex, then a birth certificate could be requested. For the vast majority of individuals, this will be an accurate statement of their birth sex. However, it should be noted that a birth certificate may not be a definitive indication of birth sex. If a person has a Gender Recognition Certificate (GRC) they may have obtained an amended birth certificate in their acquired gender. In the unlikely event that it is decided that further enquiries are needed, such as confirmation as to whether a person has a GRC, then any additional requests should be made in a proportionate way which is discrete and sensitive.

2.2.9 It is important to be aware of legal provisions protecting privacy in the context of making such enquiries. If, in the course of these enquiries or otherwise, a service provider, those exercising public functions or an association acquires information that someone has a GRC or has applied for a GRC, onward disclosure of either that information or their biological sex without consent may be a criminal offence in some circumstances (read section 22 of the Gender Recognition Act 2004).

2.2.10 Read also the Data Protection Act 2018 and UK General Data Protection Regulations, which deal with processing personal data.

## Change 2.2: New content on asking about sex at birth

Progress

56%

### Change 2.2: New content on asking about sex at birth

This section gives information on how requests about sex at birth should be made. It outlines the circumstances in which making such requests, with or without evidential proof of birth sex, may be unlawful.

11. To what extent do you agree or disagree with the following statement:

The explanation of the legal rights and responsibilities set out in the new content on asking about sex at birth is clear. - required

- ☐ Strongly Agree
- ☐ Agree
- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Do not know

12. Is there anything you would change to make the explanation of the legal rights and responsibilities in this update clearer?

## Example Response:

While Section 2.2 provides useful guidance on making such requests sensitively, it lacks clarity and practical examples, contains contradictions due to undefined terms like “gender” and “trans,” and fails to adequately protect women’s sex-based rights and public-facing workers, such as receptionists, who may face aggression or confusion when enforcing policies. Below, I provide feedback on these paragraphs, using the Equality Act’s definition of “transsexual person” (s.7) and emphasising the need for clear legal guidance to protect all parties.

Section 2.2 aims to guide duty-bearers (e.g., service providers, public bodies, associations) on requesting birth sex information in a manner that is necessary, proportionate, and non-discriminatory, reflecting the ruling that sex is biological. The Equality Act defines a “transsexual person” as someone with the protected characteristic of gender reassignment, meaning they are proposing to undergo, are undergoing, or have undergone a process to reassign their sex by changing physiological or other attributes (s.7). However, the Code’s use of “trans” and “gender

non-conforming” (2.2.1) deviates from this definition, creating ambiguity, as “trans” and “gender” are undefined in the Act. This risks confusion for duty-bearers, particularly in single-sex services, where clarity is essential to protect women’s sex-based rights under s.11. Additionally, the guidance does not sufficiently address the challenges faced by public-facing workers, such as receptionists, who may encounter aggression when requesting birth sex, especially from individuals misrepresenting their sex. The consultation’s limited scope—focusing only on ruling-related changes—also leaves uncertainty about whether related issues (e.g., privacy laws, worker protections) are open for feedback.

**Paragraph 2.2.1: “It is important to be aware that some people, including some trans or gender non-conforming people, may find it distressing to be asked about their birth sex. Therefore, any necessary request about birth sex should be made sensitively, taking this into account.”**

This paragraph highlights the need for sensitivity but uses “trans” and “gender non-conforming” instead of “transsexual person” (s.7), which is confusing. The Act does not protect “gender non-conforming” as a characteristic, and “trans” is undefined, risking misapplication to those not undergoing gender reassignment. The focus on sensitivity for transsexual persons is valid but overlooks the distress caused to women and workers when policies are unclear. For example, women accessing single-sex services (e.g., domestic violence shelters) may feel unsafe if biological males are present due to unclear policies. Public-facing workers, like receptionists, may face aggression from individuals misrepresenting their birth sex, yet the guidance offers no protection for them. Replace “trans or gender non-conforming” with “transsexual person” per s.7. Add guidance on protecting women’s safety and workers’ rights, e.g., “Requests for birth sex must balance sensitivity toward transsexual persons with the need to protect women’s sex-based rights and ensure worker safety.” Include guidance and protections for staff requesting accurate sex-based data.

**Paragraph 2.2.2: “Where obtaining information on birth sex is not necessary and proportionate, asking a trans person about their birth sex may risk unjustifiably interfering with their human rights under Article 8 of the European Convention on Human Rights (ECHR), which is respect for private and family life.”**

The reference to Article 8 is clear, but the use of “trans person” instead of “transsexual person” is inconsistent with s.7. The paragraph does not define “necessary and proportionate,” leaving duty-bearers uncertain about when requests are justified. The focus on transsexual persons’ privacy under Article 8 overlooks the competing rights of women to single-sex spaces, which are protected under the Act (e.g., Schedule 3, Part 7). For example, a women’s shelter must prioritise biological females to ensure safety, but the guidance does not clarify how to balance this with privacy rights. Provide examples of

“necessary and proportionate” requests, e.g., “A women’s prison may request birth sex to comply with single-sex provisions, ensuring women’s safety while respecting privacy through discreet inquiries.” These enquiries must have a protocol to follow, to protect duty-bearers and workers from any claims of discrimination or potential risk posed to themselves.

**Paragraph 2.2.3: “Requests about birth sex are more likely to be justified where it is necessary and proportionate for a service provider, those exercising public functions or an association to know an individual’s birth sex to be able to discharge their legal obligations under the Equality Act 2010.”**

This paragraph is vague without examples of “legal obligations” (e.g., single-sex services under Schedule 3). The term “trans person” again deviates from s.7. The lack of clarity risks undermining women’s sex-based rights. For instance, a gym offering women-only sessions must know birth sex to comply with the Act, but the guidance does not address how to handle potential aggression from individuals claiming a different sex. Workers need clear legal backing to enforce such policies without fear of harassment. Specify obligations, e.g., “Single-sex services, such as women’s refuges, may require birth sex to comply with Schedule 3, ensuring women’s safety.” Add worker protections: “Staff enforcing such policies should be supported by clear protocols to avoid aggression.”

**Paragraph 2.2.4: “Discrimination or harassment could occur if, for example, individuals are asked about their birth sex in a way which may require them to disclose this information in public, or if the language or manner of a request is rude, combative or offensive.”**

The paragraph effectively highlights discriminatory practices but lacks guidance on avoiding escalation when individuals respond aggressively. Public-facing workers, like receptionists, health care workers etc, are vulnerable to aggression from individuals misrepresenting their birth sex. The guidance does not protect workers or clarify their *rights to refuse service to those who are combative, which is critical for single-sex spaces protecting women*. Add worker protections, e.g., “If a person responds aggressively to a lawful birth sex request, staff may refuse service, provided this is proportionate and non-discriminatory, to protect staff and service users.”

**Paragraph 2.2.5: “Indirect discrimination could occur if a policy on how or when to ask for such information places some protected characteristic groups at a particular disadvantage and is not justified.”**

The reference to indirect discrimination is clear but lacks examples, making it hard for duty-bearers to assess policies. The guidance does not address how policies might disadvantage women as a protected group (s.11) if biological males access single-sex spaces due to unclear verification processes. Workers also need clarity to avoid legal challenges. Provide

examples, e.g., “A policy requiring public disclosure of birth sex may indirectly discriminate against transsexual persons but must be balanced against women’s rights to single-sex spaces.” Include worker guidance: “Policies should include staff training to handle requests consistently.”

**Paragraph 2.2.6: “If it is necessary to ask a person’s birth sex, consideration should be given to whether it is reasonable and necessary to ask for evidence of birth sex. In many cases, it will be sufficient to simply ask an individual to confirm their birth sex.”**

The suggestion to rely on self-confirmation is practical but risky without safeguards against false claims, as noted in the paragraph’s allowance for exclusion if someone answers “objectively falsely.” Allowing self-confirmation without verification undermines women’s sex-based rights in sensitive contexts (e.g., prisons, shelters). Workers, such as receptionists, may face aggression when challenging false claims, yet the guidance offers no support for de-escalation or legal protection. Strengthen safeguards, e.g., “In high-risk settings like women’s shelters, verification (e.g., ID documents) may be required to protect female service users, with clear protocols to support staff facing aggression.”

**Paragraph 2.2.7 (Example): Describes a trans woman (biological male) asked about birth sex privately by a receptionist to assign her to mixed-sex support groups.** The example is helpful but uses “trans woman” instead of “transsexual person” and does not address potential aggression, deceit (sex by deception) or women’s concerns about mixed-sex groups. Women in single-sex groups may feel unsafe if biological males are present, even in mixed-sex alternatives. The receptionist’s vulnerability is ignored. Use “transsexual person” and add: “The receptionist must ensure women’s single-sex groups remain exclusive to biological females, while offering mixed-sex options as well. Staff should be trained to handle aggressive responses, but they require legal backing and clear guidance.”

**Paragraph 2.2.8: Notes that a birth certificate may not reflect birth sex if a GRC has been obtained, and further inquiries must be discreet.** This clarifies the GRC’s impact but is confusing without explaining its limited role under the Equality Act. The guidance does not address the GRC’s irrelevance for Equality Act purposes (per the ruling) or how to verify birth sex without risking privacy violations, or incorrect data as birth certificates can be altered to indicate the incorrect biological sex. This leaves workers exposed to legal or personal risks. Clarify: “A GRC does not change legal sex under the Act, so birth certificates may be unreliable. In such cases, discreet inquiries (e.g., private confirmation) should protect privacy and women’s rights.”

Single-sex provisions uphold respect for women’s and girls’ sex-based

rights under the Equality Act. LGB Alliance ([lgballiance.org.uk](http://lgballiance.org.uk)), an intervenor in the Supreme Court case, argues that lesbian organisations can exclude “transwomen” (biological males) to maintain same-sex spaces, preserving the integrity of sexual orientation-based services. Transgender Trend ([transgendertrend.com](http://transgendertrend.com)) warns that affirming trans identities in schools (e.g., allowing trans girls into girls’ spaces) erodes respect for female students’ boundaries, with a 2020 BBC investigation finding 74% of girls aged 12–15 faced unwanted sexual comments in mixed-sex settings.

**Paragraph 2.2.9: Warns that disclosing GRC status or biological sex without consent may be a criminal offence under s.22 of the Gender Recognition Act 2004.** The reference to s.22 is clear but lacks guidance on balancing this with Equality Act obligations. Workers may fear legal repercussions when requesting birth sex, especially in single-sex contexts where women’s safety is paramount. The guidance does not clarify how to comply with both laws. Add: “Requests for birth sex must comply with s.22 by ensuring confidentiality, but duty-bearers will prioritise Equality Act obligations (e.g., single-sex spaces) with clear, lawful protocols.”

**Paragraph 2.2.10: Refers to the Data Protection Act 2018 and UK GDPR for processing personal data.** The cross-reference is relevant but lacks specific guidance on data handling in birth sex requests. The guidance does not address how to protect workers or ensure women’s rights when processing data, creating legal uncertainty. A recommendation would be to include: “Data on birth sex must be processed securely per GDPR, with staff training to minimise conflict and protect women’s single-sex spaces.”

**Additional Concerns: Women’s Rights, Worker Protections, and Undefined Terms.** The guidance prioritises transsexual persons’ privacy (Article 8, s.22 GRA) but underplays women’s rights to single-sex spaces (s.11, Schedule 3). This imbalance risks undermining women’s safety in contexts like shelters or sports. For example, allowing self-confirmation of birth sex (2.2.6) without verification could enable biological males to access women-only services, violating the Act’s provisions.

**Recommendation:** Explicitly state that women’s sex-based rights take precedence in single-sex services, e.g., “Duty-bearers must ensure single-sex spaces remain exclusive to biological females, as per Schedule 3, even when requesting birth sex sensitively.” Public-facing workers are vulnerable to aggression when requesting birth sex, especially from individuals misrepresenting their sex. The guidance (e.g., 2.2.7) does not provide protocols for de-escalation or legal protection, leaving workers exposed to harassment or accusations of discrimination. Add: “Staff facing aggression when requesting birth sex should be supported by clear policies, including the right to refuse service to combative individuals,

provided this is proportionate and lawful.”

Undefined Terms “Gender” and “Trans”: The Code’s use of “trans” and “gender non-conforming” (2.2.1) deviates from the Act’s “transsexual person” (s.7), which refers to those undergoing gender reassignment. “Gender” is undefined in the Act, which focuses on biological sex (s.11) and reassignment processes, not gender identity. This creates confusion, as “trans” could imply a broader group, and “gender non-conforming” lacks legal basis. This ambiguity risks misapplication, especially in single-sex contexts. Replace “trans” and “gender non-conforming” with “transsexual person” per s.7. **Clarify that “gender” is not a protected characteristic, and requests for birth sex apply only to legal birth sex under the Act.**