

Change 2.3: New content on defining sex at birth

Changes we are consulting on in chapter 2

This content defines 'sex', 'man' and 'woman', and explains how a Gender Recognition Certificate (GRC) does not change a person's legal sex for the purposes of the Equality Act 2010 (the Act).

Updated content

What the Act says about sex

2.3.1 Sex is a protected characteristic and refers to a male or a female of any age. In relation to a group of people it refers to either men and / or boys, or women and / or girls (s.11(a) and (b) and s.212(1)).

2.3.2 The Supreme Court in *For Women Scotland* ruled that 'sex', 'woman' and 'man' in the Act mean biological sex, biological woman and biological man. This is the sex of a person at birth.

2.3.3 A Gender Recognition Certificate (GRC) does not change a person's sex for the purposes of the Act. Read paragraphs 2.1.1 to 2.1.9 for more information on GRCs. Read paragraphs 2.2.1 to 2.2.10 for more information about when and how it may be appropriate to request information or evidence of birth sex.

2.3.4 A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (read paragraphs 2.1.6 to 2.1.9) or sexual orientation (read paragraphs 2.4.1 to 2.4.6).

2.3.5 There are specific provisions which apply where the treatment of a woman is because of her pregnancy and maternity, or because she is breastfeeding (s.13(6)(a) and s.13(7)).

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Progress  59%

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This content defines 'sex', 'man' and 'woman', and explains how a GRC does not change a person's legal sex for the purposes of the Equality Act 2010.

14. 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 defining sex at birth is clear. - required

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

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

Example Response:

General Support for Change 2.3 - The updated content in sections 2.3.1 to 2.3.5 provides clear and necessary guidance that aligns with the Supreme Court's ruling, reinforcing that sex in the Equality Act refers to biological sex. This clarity is essential for protecting women's sex-based rights, particularly in contexts such as single-sex spaces, services, and protections related to pregnancy and maternity (s.13(6)(a) and s.13(7)). The explicit statement that a Gender Recognition Certificate (GRC) does not change a person's legal sex for the purposes of the Act is a critical step in ensuring legal accuracy and safeguarding women's rights.

Section 2.3.1: Sex as a Protected Characteristic - "Sex is a protected characteristic and refers to a male or a female of any age. In relation to a group of people it refers to either men and/or boys, or women and/or girls (s.11(a) and (b) and s.212(1))." This section accurately reflects the Equality Act's definition of sex as a protected characteristic and appropriately includes age considerations, ensuring clarity that the Act applies to both adults and children. The reference to sections 11(a), 11(b), and 212(1) is legally sound and helps duty holders understand the scope of the protected characteristic.

However, to further centre women's rights, the guidance could explicitly

note the importance of this definition for protecting sex-specific provisions, such as single-sex spaces and services, which are critical for women and girls. Suggested addition: “This definition underpins the Act’s provisions for sex-based rights, including access to single-sex spaces, services, and protections for women and girls.” This addition would emphasise the practical implications of the definition, particularly for women’s safety and dignity.

Section 2.3.2: Supreme Court Ruling on Biological Sex: “The Supreme Court in *For Women Scotland* ruled that ‘sex’, ‘woman’ and ‘man’ in the Act mean biological sex, biological woman and biological man. This is the sex of a person at birth.” This section is clear and robust, directly referencing the *For Women Scotland* ruling to affirm that sex in the Act refers to biological sex at birth. This is a critical clarification that aligns with the legal precedent and protects sex-based rights. The use of “biological woman” and “biological man” is precise and avoids ambiguity. To enhance its impact, the guidance could briefly explain why this ruling is significant for women’s rights, particularly in preventing the erosion of sex-specific protections: “This ruling ensures that the Act’s protections for women, including single-sex exemptions, are based on biological sex, safeguarding the rights of women and girls.” This would reinforce the ruling’s importance without altering the section’s legal accuracy.

Section 2.3.3: Gender Recognition Certificate (GRC) and Legal Sex
Content: *“A Gender Recognition Certificate (GRC) does not change a person’s sex for the purposes of the Act. Read paragraphs 2.1.1 to 2.1.9 for more information on GRCs. Read paragraphs 2.2.1 to 2.2.10 for more information about when and how it may be appropriate to request information or evidence of birth sex.”* This section correctly states that a GRC does not alter a person’s legal sex under the Equality Act, which is essential for maintaining the integrity of sex-based rights. However, as noted in the prior response, it requires further clarification to ensure practical enforceability and to prevent misinterpretation by duty holders.
Reinforce Legal Precedent: The section would benefit from explicitly referencing the *For Women Scotland* ruling to ground the statement in legal authority: “In line with the Supreme Court’s ruling in *For Women Scotland*, a Gender Recognition Certificate (GRC) does not change a person’s biological sex for the purposes of the Equality Act 2010.” The section should explicitly acknowledge that this provision protects women’s sex-based rights, particularly in areas like female-only services, sports, and workplaces: “This ensures that women’s sex-based rights, including access to single-sex spaces and services, are upheld in accordance with the Act.” These revisions would make the section more robust, practical, and aligned with the needs of women as a protected group. This ties the provision directly to the authoritative ruling, enhancing its legal weight.

Section 2.3.4: Comparator for Sex Discrimination

Content: “A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (read paragraphs 2.1.6 to 2.1.9) or sexual orientation (read paragraphs 2.4.1 to 2.4.6).”

This section is legally accurate, clearly stating that the comparator for sex discrimination is based on the opposite biological sex, consistent with the Supreme Court ruling. The distinction that sex does not include gender reassignment or sexual orientation is crucial to prevent conflation of protected characteristics, which could undermine women’s sex-based rights.

To further clarify, the guidance could briefly note that this definition ensures fair and accurate application of sex discrimination provisions, particularly for women in contexts like employment or service provision. Suggested addition: “This ensures that sex discrimination claims, particularly for women, are assessed based on biological sex, maintaining clarity in the application of the Act’s protections.” This addition reinforces the section’s purpose without altering its legal foundation.

Section 2.3.5: Pregnancy and Maternity Protections: “There are specific provisions which apply where the treatment of a woman is because of her pregnancy and maternity, or because she is breastfeeding (s.13(6)(a) and s.13(7)).”

This section correctly highlights the specific protections for women related to pregnancy, maternity, and breastfeeding, which are inherently tied to biological sex. It is a strong affirmation of women’s sex-based rights in these contexts. The reference to sections 13(6)(a) and 13(7) is precise and helpful for duty holders. To strengthen its focus on women, the guidance could explicitly connect these protections to the biological definition of sex, reinforcing that only biological women are entitled to these provisions under the Act. “These protections apply exclusively to biological women, as defined by the Act, reflecting the unique sex-based experiences of pregnancy, maternity, and breastfeeding.”

This would align the section with the Supreme Court ruling and emphasise the centrality of biological sex in these protections. Across all sections, the guidance should consistently highlight the importance of biological sex for protecting women’s rights, particularly in areas like single-sex spaces, sports, and maternity protections. This would ensure the guidance is not only legally accurate but also practically supportive of women as a protected group. To enhance usability, the guidance could include brief examples in each section illustrating how duty holders (e.g., employers, service providers) can apply these provisions. For instance, an example in

2.3.3 could show how a women's refuge can lawfully prioritise biological sex without breaching the Act. The suggested additions and revisions ensure that the guidance is robust, enforceable, and unequivocally protective of women and girls under the Equality Act 2010.