

Change 4.1: New example on sex discrimination by perception

Changes we are consulting on in chapter 4

Chapter 4 explains what the Equality Act 2010 (the Act) says about direct discrimination in the provision of services, the exercise of public functions and associations for all the protected characteristics covered by this code of practice.

We have included the changes to this chapter that we are consulting on in the following sections.

Change 4.1: New example on sex discrimination by perception

This example explains how discrimination can occur based on a perceived protected characteristic, in the context of sex and gender reassignment. We are looking for feedback on the example in paragraph 4.1.3.

Updated content

Discrimination by perception

4.1.1 It is direct discrimination if service providers, those exercising public functions or associations treat an individual less favourably because the service providers, those exercising public functions or associations perceive that the individual has a protected characteristic even if they do not. However, this does not apply to the protected characteristic of pregnancy and maternity.

Example - 4.1.2 People with certain Irish surnames are subjected to more stringent checks by a holiday company and then excluded from making holiday bookings because they are assumed to be Irish Travellers. This is less favourable treatment because of race.

Example - 4.1.3 A trans woman is a member of an association and applies to become treasurer, but her application is rejected. She is told by the Chairman that this is because they want a man to take the role on as they do not think a woman could do the job as well. This is less favourable treatment because of sex. The trans woman would have a claim for direct discrimination because of her perceived sex as a woman. The fact that she is not a woman under the Equality Act 2010 would not prevent her bringing this claim of sex discrimination..

Change 4.1: New example on sex discrimination by perception

Progress

64%

Change 4.1: New example on sex discrimination by perception

This example explains how discrimination can occur based on a perceived protected characteristic, in the context of sex and gender reassignment.

20. 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 example on sex discrimination by perception is clear. - required

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

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

Example Response:

While I support the intent to clarify protections against discrimination based on perceived characteristics, I have concerns about the clarity and consistency of the example provided in paragraph 4.1.3. Below, I outline these concerns, focusing on the need to robustly protect women and girls as a sex class, and propose amendments to address contradictions and ensure legal clarity.

Concerns with Paragraph 4.1.3 - The example in paragraph 4.1.3 illustrates a case of discrimination by perception, where a trans woman is rejected for a treasurer role due to being perceived as a woman, with the assumption that a woman is less capable. While this example aims to demonstrate discrimination based on perceived sex, it introduces several contradictions and ambiguities that could undermine the legal protections for women and girls as a sex class under the Equality Act 2010. These issues include:

Conflation of Sex and Gender Identity: The example states that the trans woman is discriminated against because of her “perceived sex as a woman” but notes that she is “not a woman under the Equality Act 2010.” This creates confusion about the definition of “sex” under the Act, which is defined as biological sex (male or female). The example risks conflating sex (a protected characteristic under Section 11 of the Act) with gender

reassignment, which are distinct protected characteristics. This conflation could weaken the ability of women and girls to assert their rights based on biological sex, particularly in contexts where single-sex provisions are critical (e.g., women's services, sports, or prisons).

The statement that the trans woman “would have a claim for direct discrimination because of her perceived sex as a woman” is inconsistent with the Act's definition of sex. If the individual is legally male under the Act (absent a Gender Recognition Certificate), the discrimination would more accurately be based on gender reassignment (Section 7) rather than sex. This misapplication risks diluting the protections for biological females, who face unique forms of discrimination based on their sex, such as pregnancy, maternity, or sex-based violence.

The example's focus on a trans woman's perceived sex as a woman could be interpreted as prioritising the undefined term of gender identity, which is not a protected characteristic, over biological sex in discrimination claims. This risks creating a precedent where service providers or associations fear legal repercussions for maintaining lawful single-sex provisions, even when justified under the Act (e.g., for reasons of safety, privacy, or fairness). Without clear guidance, this could discourage organisations from exercising their rights to provide female-only services, to the detriment of women and girls.

To address these contradictions and strengthen protections for women and girls as a sex class, **I propose the following amendments to Chapter 4, particularly paragraph 4.1.3:** Clarify the Definition of Sex: Revise the example to explicitly state that “sex” under the Equality Act 2010 refers to biological sex (male or female), as confirmed by case law (e.g., *Forstater v CGD Europe* [2021]). If the discrimination in the example is based on the individual's gender reassignment rather than their biological sex, this should be clearly stated to avoid confusion.

For instance: **Amended Example 4.1.3:** A trans woman, who is legally male under the Equality Act 2010, is a member of an association and applies to become treasurer but is rejected. He is told by the Chairman that this is because they want a man to take the role, as they do not think a woman could do the job as well. This is less favourable treatment because of the protected characteristic of gender reassignment, as the rejection is based on gender presentation rather than biological sex. The trans woman would have a claim for direct discrimination because of **gender reassignment, not sex**.

Include a second example or additional commentary in Chapter 4 to illustrate how service providers or associations can lawfully maintain

single-sex provisions without being deemed discriminatory. This would clarify the application of exceptions under the Act (e.g., Schedule 3, Part 7 for single-sex services). Proposed Example 4.1.4: A women's domestic violence shelter refuses to appoint a trans woman (who is legally male) as a counsellor, citing the need to maintain a female-only service for the safety and privacy of service users. This decision is based on the individual's biological sex, not their perceived sex or gender identity. The shelter's decision is lawful under the Equality Act 2010, Schedule 3, Part 7, as it is a proportionate means of achieving a legitimate aim (ensuring the safety and comfort of female survivors of domestic violence).

Add a paragraph to Chapter 4 clarifying that perception-based discrimination claims must align with the protected characteristic as defined in the Act. For sex-based claims, this means the perception must relate to biological sex. This would prevent misinterpretation and ensure that claims of discrimination by perception do not inadvertently undermine the rights of women and girls.

Include explicit guidance in Chapter 4 on how service providers, public functions, and associations can uphold the rights of women and girls to single-sex provisions without fear of legal challenge. This could involve a dedicated section on the lawful use of exceptions under the Act, with examples specific to contexts such as sports, prisons, healthcare, and domestic violence services. This would reinforce the EHRC's commitment to protecting women and girls as a sex class, addressing concerns that the current example prioritises other characteristics over sex-based rights. By clarifying the distinction between sex and gender reassignment, addressing competing rights, and providing robust guidance on lawful exceptions, the EHRC can ensure that the Code of Practice upholds the rights of all protected groups while maintaining strong safeguards for women and girls as a sex class.

I urge the EHRC to adopt the proposed amendments to resolve contradictions, enhance legal clarity, and reaffirm the importance of sex-based protections in the Equality Act 2010.