

## **Change 4.2: Removed reference to superseded caselaw**

### **Changes we are consulting on in chapter 4**

We removed content that explained that, for trans men holding a Gender Recognition Certificate (GRC), the protection from pregnancy and maternity discrimination under the Equality Act 2010 (the Act) arose from case law.

This case law set out that trans men were still protected irrespective of them having a GRC that stated that their legal sex was male. Following the For Women Scotland ruling, their legal sex is now female for the purposes of the Act, and they therefore have protection on that basis.

Updated content - Discrimination because of pregnancy and maternity

4.2.1 The Act provides protection against discrimination because of pregnancy and maternity in the provision of services, the exercise of public functions and in associations (s.17).

4.2.2 When explaining these provisions, we use the same language as the Act, which refers to discrimination against women on the grounds of pregnancy and maternity. The pregnancy and maternity provisions in the Act apply on the basis of biological sex and so trans men are included in the protections against discrimination provided by these provisions.

#### Change 4.2: Removed reference to superseded caselaw

Progress

67%

##### Change 4.2: Removed reference to superseded caselaw

We removed content that explained that, for trans men holding a gender recognition certificate (GRC), the protection from pregnancy and maternity discrimination under the Equality Act 2010 (the Act) arose from case law. This case law set out that trans men were still protected irrespective of them having a GRC that stated that their legal sex was male. Following the For Women Scotland ruling, their legal sex is now female for the purposes of the Act, and they therefore have protection on that basis.

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

The explanation of the legal rights and responsibilities set out in Change 4.2 is clear. - required

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

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

### Example Response:

While the revisions aim to reflect the For Women Scotland ruling and clarify the application of protections based on biological sex, I have identified several contradictions and ambiguities that require resolution to ensure robust legal protections for females as a sex class. Below, I outline these concerns and propose amendments to enhance clarity, consistency, and alignment with the Act's intent to protect women and girls.

**Ambiguity in Terminology and Scope of Protections** - The updated guidance (4.2.2) states that “the pregnancy and maternity provisions in the Act apply on the basis of biological sex and so trans men are included in the protections against discrimination provided by these provisions.” This phrasing introduces ambiguity by using “trans men” without defining whether this refers to biological females who identify as men or individuals with a Gender Recognition Certificate (GRC) whose legal sex is male but biological sex remains female. The lack of clarity risks undermining the Act's focus on biological sex as the basis for pregnancy and maternity protections, potentially confusing service providers, employers, and public bodies. The guidance correctly notes that, following the For Women Scotland ruling, trans men with a GRC have their legal sex recognised as

female for the purposes of the Equality Act. However, the statement in 4.2.2 that “trans men are included” could imply that protections extend beyond biological females, which contradicts the ruling’s emphasis on biological sex as the basis for these protections. This risks misinterpretation, as it may suggest that individuals who are not biologically female could claim pregnancy and maternity protections, diluting the Act’s intent to protect women and girls as a sex class.

The reference to “trans men” without a clear definition may lead to inconsistent application by organisations. For example, service providers might erroneously extend pregnancy and maternity protections to individuals who are not biologically female, or conversely, exclude biological females who identify as trans men due to misinterpretation of their legal sex status. This risks undermining the Act’s purpose and could lead to legal disputes.

To address these contradictions and strengthen legal protections for females as a sex class, I propose the following amendments to section 4.2 of the guidance: Clarify the Definition of “Trans Men” in Context Amend 4.2.2 to explicitly state that “trans men” refers to biological females who may identify as men, including those with a GRC, whose legal sex is female for the purposes of the Equality Act. This ensures alignment with the For Women Scotland ruling and avoids ambiguity. Suggested Wording: “The pregnancy and maternity provisions in the Act apply on the basis of biological sex. Biological females, including those who identify as trans men and those with a Gender Recognition Certificate (whose legal sex is female for the purposes of the Act), are protected against discrimination because of pregnancy and maternity.”

**Add a statement in 4.2.1 or 4.2.2 to explicitly affirm that pregnancy and maternity protections are exclusive to biological females, as only they can experience pregnancy and maternity.** This would prevent misinterpretation and ensure the guidance reflects the biological reality underpinning these protections. Suggested Wording (to be added to 4.2.1): “Protections against discrimination because of pregnancy and maternity under section 17 of the Act apply exclusively to biological females, as only they can experience pregnancy and maternity.”

Replace the phrase “trans men are included” in 4.2.2 with language that emphasises the Act’s focus on biological sex without introducing identity-based terminology that could cause confusion. This would maintain consistency with the Act’s reference to “women” as a sex-based category.

Suggested Wording: “The Act’s protections against discrimination because

of pregnancy and maternity apply to all biological females, including those who may identify as trans men, as these protections are grounded in biological sex.”

Include a brief note in 4.2 to guide organisations on applying these protections in practice, particularly in contexts involving GRC holders. This would help prevent misapplication and ensure that biological females are not denied protections. These amendments are necessary to uphold Legal Clarity: By explicitly tying protections to biological sex, the guidance aligns with the For Women Scotland ruling and the Equality Act’s intent, reducing the risk of misinterpretation. Using consistent, sex-based language avoids introducing identity-based terms that could dilute the Act’s focus on biological reality.

The updated guidance in section 4.2 is a step toward aligning with the For Women Scotland ruling, but it requires further refinement to eliminate contradictions and ensure robust protections for females as a sex class. The proposed amendments clarify the scope of pregnancy and maternity protections, reinforce the biological basis of these rights, and provide practical guidance for implementation. I urge the EHRC to adopt these changes to strengthen the guidance and uphold the Equality Act’s purpose of protecting women and girls.