

PROPOSED CHANGE TO THE EQUALITY ACT DEFINITION OF SEX

Briefing from Humanists UK, June 2023



ABOUT HUMANISTS UK

At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by over 110,000 members and supporters and over 115 members of the All-Party Parliamentary Humanist Group. Through our ceremonies, pastoral support, education services, and campaigning work, we advance free thinking and freedom of choice so everyone can live in a fair and equal society.

SUMMARY

- The Gender Recognition Act (GRA) 2004, in combination with the Equality Act 2010, currently defines someone's legal sex as being either (i) the sex recorded on the original birth certificate or (ii) the sex recorded on a Gender Recognition Certificate under the GRA.
- The 2010 Act permits different treatment between people whose legal sex has been acquired through a Gender Recognition Certificate and people whose sex is as recorded on the original birth certificate, where such action is a proportionate means of achieving a legitimate aim. This covers single- and separate-sex services including refuges or changing facilities, sex-related employment requirements, and sex requirements in competitive sport.
- The Government is considering changing the definition of sex in the Equality Act, to instead mean 'biological sex' on the EHRC's advice, despite there being no such definition in UK law.
- The inclusion of trans people in some services has been controversial. But the change would create a de facto blanket exclusion of trans people from services they had previously enjoyed even where this has been without concern or complaint, and even where this cannot be said to be a proportionate means of achieving a legitimate aim.
- This would remove the current protection from discrimination of the c.7,000 people currently in possession of a Gender Recognition Certificate and undermine the Gender Recognition Act, leading to people being treated as if they have not changed their sex in questions of sex discrimination.
- It ignores the existence of, and would reinforce barriers for, intersex people who may have had the wrong sex recorded on their birth certificate and only have the protection of their legal sex via a Gender Recognition Certificate.

WHAT IS THE LAW NOW?

The Gender Recognition Act (GRA) 2004, in combination with the Equality Act 2010, currently defines someone's legal sex as being either (i) the sex recorded on the original birth certificate or (ii) the sex they have acquired through having a Gender Recognition Certificate under the GRA. The 2010 Act also protects people from discrimination on grounds of gender reassignment and defines this as proposing to undergo, undergoing, or having undergone, a process (or part of a process) of gender reassignment.¹

¹ Equality Act 2010, Section 7. <https://www.legislation.gov.uk/ukpga/2010/15/section/7>



The 2010 Act permits different treatment between people whose legal sex has been acquired through a Gender Recognition Certificate and people whose sex is as recorded on the original birth certificate, where such action is a **proportionate means of achieving a legitimate aim**. This covers, *inter alia*, single-sex and separate-sex services including refuges or changing facilities, sex-related Genuine Occupational Requirements,² and sex requirements in competitive sport. Women or trans people can also be excluded from service in the armed forces if this is a proportionate means of ensuring effective combat.³

Humanists UK were heavily involved in the development of the Equality Act 2006. Our Chief Executive at that time was on the steering group overseeing the development of the Act, and our current Chief Executive frequently deputised for her, including during meetings where the protected characteristics of gender reassignment and sex were discussed. We remained fully engaged in the field throughout the drafting and passage of the 2010 Act. We are clear that at the time of drafting, there was no ambiguity as to these definitions of sex nor gender reassignment as protected characteristics nor the interaction between them. We continue to believe that the existing equality law settlement is fit for purpose (although we do also note that a lack of Government or legal guidance or support on implementing the law has sometimes led to poor decisions in its implementation.)

WHAT IS BEING PROPOSED?

On 21 February 2023, the Minister for Women and Equalities asked the Equality and Human Rights Commission (EHRC) for advice on the protected characteristic sex in the Equality Act 2010. The EHRC published its response on 4 April, claiming that changing the meaning of sex to 'biological sex' would offer clarity to service providers.⁴

WHAT'S WRONG WITH THE PROPOSED CHANGES?

Contrary to the EHRC's claim, we believe changing a definition that has been working well would instead create confusion, enable unacceptable exclusion and unjustified discrimination, and strip existing rights-holders of recourse to claim those rights. It would also fuel social prejudice against transgender people at a time of intense media hostility towards them.

There is no definition of 'biological sex'

There is no definition of 'biological sex' in UK law. Nor have the EHRC offered a definition. In a recent meeting with the United Nations Independent Expert on the protection against violence and

² Genuine Occupations Requirements are exceptions to unlawful discrimination in relation to work. 'The exception applies where being of a particular sex, race, disability, religion or belief, sexual orientation or age – or not being a transsexual person, married or a civil partner – is a requirement for the work, and the person whom it is applied to does not meet it (or, except in the case of sex, does not meet it to the reasonable satisfaction of the person who applied it). The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. In addition, applying the requirement must be proportionate so as to achieve a legitimate aim.' See Equality Act 2010, Explanatory Notes, Part 1: Occupation <https://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/26/1>

³ EqA, Schedule 9, Part 1, Paragraph 4.

<https://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/26/1/3>

⁴ Equality and Human Rights Commission, 'Clarifying the definition of 'sex' in the Equality Act, 4 April 2023, <https://www.equalityhumanrights.com/en/our-work/news/clarifying-definition-'sex'-equality-act>



discrimination based on sexual orientation and gender identity, the EHRC even admitted that in the context of its recommendation, they intended to define women in a way that excluded trans women.⁵

They claim to solve problems the law already adequately caters for

As it stands, the Equality Act 2010 already guarantees:

- that single-sex services can continue to be restricted to people of one sex only;⁶
- that services can continue to be provided separately (whether identically or differently) for people of one sex only;⁷
- that it will continue to be possible to restrict employment to people of one sex only;⁸
- that communal accommodation can continue to be provided to people of one sex only.⁹

With reference to all of the above, services can treat people with the protected characteristic of gender reassignment (i.e. people whose sex was acquired since birth whether or not they hold a GRA) differently, or exclude them completely, where the action taken is a **proportionate means of achieving a legitimate aim**. The Courts have backed this approach.¹⁰

The EHRC claims that a biological definition will protect single sex-and separate sex services, associations reserved for women or men, spaces for lesbians and gay men, sex-related genuine occupational requirements, and fairness in competitive sport. But a balance of rights in all these areas is already encompassed by the proportionate means/legitimate aim test.

The EHRC also claims that the Equality Act currently fails to protect trans men who are pregnant and whose legal sex is male. But it does not identify why trans men cannot be covered by 'maternity and pregnancy' as a protected characteristic. While the relevant sections of the Equality Act use only female pronouns,¹¹ there is no reason to exclude pregnant trans men or non-binary people from its protection.¹² In fact, there is already a legal argument to suggest the existing law satisfactorily covers

⁵ United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 'Country visit to the United Kingdom of Great Britain and Northern Ireland (24 April – 5 May 2023), End of mission statement', para 22. <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/statements/eom-statement-UK-IE-SOGI-2023-05-10.pdf>

⁶ See EqA, Schedule 3, Part 7, Gender reassignment, paragraph 28, <https://www.legislation.gov.uk/ukpga/2010/15/schedule/3/paragraph/28> which is an exemption from Section 29 <https://www.legislation.gov.uk/ukpga/2010/15/section/29>

⁷ Ibid.

⁸ EqA, Schedule 9, Part 1, Paragraph 1 <https://www.legislation.gov.uk/ukpga/2010/15/schedule/9/paragraph/1>

⁹ EqA, Schedule 23, Communal accommodation, Paragraph 3 <https://www.legislation.gov.uk/ukpga/2010/15/schedule/23/paragraph/3>

¹⁰ See *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, <https://www.judiciary.uk/wp-content/uploads/2020/04/McConnell-and-YY-judgment-Final.pdf>. Mr McConnell had a GRC stating he was male and wished to be registered as the father of the child he had given birth to. The Court of Appeal held that the exception in section 12 of the GRA 2004 applied so that the fact that Mr McConnell had a GRC stating he was male did not affect his status as the mother of the child to whom he had given birth.

¹¹ See EqA, Section 17 <https://www.legislation.gov.uk/ukpga/2010/15/section/17>, and Section 18, <https://www.legislation.gov.uk/ukpga/2010/15/section/18>

¹² Francis Ray White, 'Trans Pregnancy: An International Exploration of the Transmasculine Practices of Reproduction' University of Westminster, April 2018, pp 12-13. <https://transpregnancy.leeds.ac.uk/wp-content/uploads/sites/70/2018/05/Trans-Pregnancy-policy-review-UK.pdf>



trans men and non-binary people as the language in the relevant sections of the Equality Act relates purely to pronouns, rather than sex, which are not changed by the GRA.¹³

They create confusion by transferring the rights of trans women to trans men

The EHRC claims that a biological definition of sex will provide greater clarity for the freedom of association for women and men, and for lesbians and gay men by removing, 'for instance' trans women from women-only spaces, and trans women who are attracted to women from lesbian support groups. However, this ignores that by the same logic, a biological definition would subsequently open up women-only spaces to trans men, or lesbian support groups to trans men who are attracted to women. The EHRC makes no statement as to whether this is either desirable or intended.

In the same way, the EHRC further claims that a biological definition would 'correct [the] perceived anomaly' that a trans woman, but not a trans man, could apply for a role where there is a Genuine Occupational Requirement (GOR) for the post-holder to be female. Again, this would mean that a trans man could hold a role where there is a GOR to be female – a point on which the EHRC fails to address.

In some cases, the EHRC freely acknowledges that this is a problem. It highlights that in some cases trans women would no longer be able to bring claims of direct or indirect discrimination as a woman, including under equal pay provisions, but this right would be transferred to trans men. The proposed change would mean that trans people would be treated as if they are not trans in questions of discrimination on the basis of sex and would therefore continue to be discriminated against.

They assume a blanket exclusion of trans people is desirable

The EHRC claims that the biological definition would 'make it simpler to make a women's only-ward a space for biological women'. It says that sports associations would no longer have the 'additional burden' of having to prove that a trans woman should be excluded 'in the interests of fairness or safety'. Creating a biological definition of sex also creates a de facto blanket exclusion of trans people to the services and spaces they have previously enjoyed as a consequence of holding a GRC. This is why the proportionate means/legitimate aim tests are effective at balancing the competing rights of different individuals.

The proportionate means/legitimate aims test assumes inclusion is the starting point but allows for exclusions in particular circumstances. If there is no legitimate aim being pursued in excluding trans women, or exclusion is not a proportionate means of achieving it, then how can such exclusion be rationally justified? The EHRC's proposed definition of sex would mean that exclusion could be assumed as the starting point, offering little recourse for trans people to gain inclusion.

The EHRC claims that data disaggregated by sex may be 'seriously' distorted or 'impoverish our understanding of social and medical phenomena' if data is collected on the basis of 'legal not biological sex'. However, the latest data available shows that less than 7,000 people in the UK have legally changed their sex so the distortions cannot be said to be significant in any way.

The EHRC quotes an academic study which states: 'removal of sex as a category risks erasing lesbians and gay men from meaningful categories for analysis' as 'small errors can make a big difference when

¹³ Deriving from *R (McConnell) v Registrar General for England and Wales*.



the baseline category is also small'. But the EHRC fail to address why a data collection on the basis of 'biological sex' is more desirable than that of 'legal sex', nor explain why data collection cannot also include gender identities when it is necessary or relevant.

They undermine the Gender Recognition Act 2004

The Gender Recognition Act 2004¹⁴ (GRA) enables trans people to apply for a Gender Recognition Certificate (GRC) so that their affirmed gender is legally recognised in the UK through a rigorous and stringent application process.¹⁵

In 2018, the Government launched a public enquiry to reform the Gender Recognition Act with the aim of making it less bureaucratic and less intrusive, and to treat trans people with respect as equal members of society. The Government clearly stated that the reform of the GRA would not change the Equality Act 2010.¹⁶ Despite this, the proposed reform was unfortunately abandoned in 2020.¹⁷ To date, less than 7,000 people in the UK have legally changed their sex.¹⁸

The effect of the proposal would undermine the Gender Recognition Act for those holding a GRC and those yet to apply. Those holding a GRC would effectively have their legal sex denied and their sex recorded on the original birth certificate reapplied to them. Meanwhile those who wish to apply for a GRC would struggle to do so, as the application requires proof of living in their affirmed gender for two years. This would become impossible if trans people face a blanket exclusion from the spaces open to their affirmed gender, and can only access services by identifying as the sex recorded on the original birth certificate.

They reinforce barriers for intersex people

The consideration of intersex people is entirely absent from the EHRC's letter. An intersex person may well have the wrong sex recorded on their birth certificate. Intersex is an umbrella term used to describe physical sex development which differs from what is generally expected of males or females. While these variations are present from birth, they may be untraceable until puberty or even later in life.¹⁹ As it stands, if the wrong sex is recorded, this can be corrected through the GRA which is anecdotally described as working relatively well for intersex individuals. The proposed change would render this process meaningless for intersex people in these circumstances.

For more details, information, and evidence, contact Humanists UK:

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¹⁴ Gender Recognition Act 2004, <https://www.legislation.gov.uk/ukpga/2004/7/contents>

¹⁵ Gender Recognition Act 2004, Section 2, <https://www.legislation.gov.uk/ukpga/2004/7/section/2>

¹⁶ Government Equalities Office, 'Trans People in the UK' 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf

¹⁷ Government Equalities Office, Statement made on 22 September 2020, <https://questions-statements.parliament.uk/written-statements/detail/2020-09-22/hcws462>

¹⁸ Government Equalities Office, 'Gender Recognition Certificate: applications and outcomes' 29 June 2022. <https://www.gov.uk/government/publications/gender-recognition-certificate-applications-and-outcomes/gender-recognition-certificate-applications-and-outcomes>

¹⁹ Government Equalities Office, 'Government calls for evidence on people who have Variations in Sex Characteristics' 17 January 2019, <https://www.gov.uk/government/news/government-calls-for-evidence-on-people-who-have-variations-in-sex-characteristics>

