

Birmingham City Council Equality Act 2010 Fact Sheet

GENDER REASSIGNMENT EQUALITY

The Equality Act (2010) protects people who share a protected characteristic from discrimination and harassment. The protected characteristics include: **age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.**

This Fact Sheet looks at the protection afforded to people who share the protected characteristic of **GENDER REASSIGNMENT**. It is part of a series of fact sheets, which considers the Equality Act, and other relevant legislation pertaining to each of the nine protected groups.

WHAT IS GENDER REASSIGNMENT?

For the purposes of the Act a person has the protected characteristic of gender reassignment if that person “is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”¹. Key points about the legal definition of gender reassignment include: -

- The Act regards ‘gender reassignment’ as a personal process (i.e. moving away from one’s birth sex to the preferred gender), rather than a medical process. It may include undergoing the medical gender reassignment treatment, but it does not require someone to undergo medical treatment in order to be protected
- A person is protected once they have “proposed” to change their sex, even if they later change their mind. This is the case whether or not they are under medical supervision
- The Act provides that a transsexual person is one who has the protected characteristic of gender reassignment.

Example: A person who was born physically female decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully ‘passes’ as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment for the purposes of the Act

Source: [Equality Act 2010: Explanatory Notes \(Revised Edition\) August 2010](#)

¹ The Equality Act 2010 Code of Practice (Services, public functions and associations), par 2.17

http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf

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APART FROM TRANSSEXUALS DO OTHER TRANSGENDERED PEOPLE QUALIFY FOR LEGAL PROTECTED?

There are a range of different gender identities within the transgendered community, including transsexuals and transvestites. However, it is only transsexual people who are explicitly protected under the Equality Act. Transgendered people who do not intend to transition are not directly protected, although aspects of the Act may afford protection from discrimination and harassment in certain circumstances. See below for further details.

WHAT PROTECTION IS AFFORDED TO PEOPLE WHO HAVE THE PROTECTED CHARACTERISTIC OF GENDER REASSIGNMENT?

Those who share the protected characteristic of gender reassignment (i.e. transsexual people) are protected from:

Direct Discrimination – i.e. when a person is treated less favourably than another person because of gender reassignment

Indirect Discrimination – i.e. where a rule, a policy or a practice applies to everyone but particularly disadvantages transsexual people. Indirect discrimination can be justified if it can be shown that the rule, policy or practice is intended to meet a legitimate objective in a fair, balanced and reasonable way

Harassment – i.e. unwanted behaviour related to someone's gender reassignment which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them

Victimisation – i.e. where a person is treated badly because they have made or supported a complaint related to the Act. It is not necessary for the victim to be a transsexual².

In addition, section 16 of the Equality Act has specific provisions to protect the right of transsexuals to have time off work in much the same circumstances as someone who is absent due to illness or injury.

Example: A female to male transsexual person takes time off work to receive hormone treatment as part of his gender reassignment. His employer cannot discriminate against him because of his absence from work for this purpose.

Source: [Equality Act 2010: Explanatory Notes \(Revised Edition\) August 2010](#)

² Equality Act 2010: What do I need to Know? A Quick Start Guide To Gender Reassignment For Voluntary and Community Organisations. Government Equality Office

The Equality Act introduces two supplementary forms of Discrimination that may offer protection from discrimination or harassment for other transgendered people:

- a) **Discrimination by Perception** – e.g. A person is discriminated against or harassed because he or she is thought to be transsexual (This can include cross dressers)
- b) **Discrimination by Association** – e.g. A person is discriminated against or harassed because he or she is associated with a transsexual.³

ARE THERE EXCEPTIONS?

The Act contains exceptions to the general prohibition of gender reassignment discrimination. In limited circumstances transsexual people can be excluded from separate and single sex facilities⁴.

The Equality Act 2010 Statutory Code of Practice (Services, public functions and associations)⁵ states:

If a service provider provides single or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service, who is proposing to undergo, is undergoing or who has undergone, gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate.

Example – Single Sex Service: A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.

Source: [Equality Act 2010: Explanatory Notes \(Revised Edition\) August 2010](#)

Example – Toilet facilities: If a transsexual member of staff has a Gender Recognition Act Certificate or is post operative and visually and for all practical purposes indistinguishable from someone of her acquired gender it would be unlawful to deny her access to the female toilets.

Source: EHRC [Equality Act starter kit "Facilities & the Equality Act: An exercise"](#)

³ Press for Change: <http://transequality.co.uk/Legislation.aspx> [18/04/12]

⁴ See Schedule 3. Part 7. s28 of the Equality Act 2010 ('Services and Public Functions: Exceptions – Separate and Single Sex Services')

⁵ The Equality Act 2010 Code of Practice (Services, public functions and associations), paragraphs 13.57 – 13.67
http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf

An exemption also applies in the area of occupational requirements. The Equality Act 2010 Statutory Code of Practice Employment states:

An employer may apply, in relation to work, a requirement to have a particular protected characteristic if the employer can show that having regard to the nature or context of the work:

- the requirement is an occupational requirement
- the application of the requirements is a proportionate means of achieving a legitimate aim (see paragraphs 4.25 to 4.32); and
- the applicant or worker does not meet the requirement; or,
- except in the case of sex, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement

In the case of gender reassignment and marriage and civil partnership, the requirement is not to be a transsexual person, married or a civil partner.

Example – Occupational Requirement: A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.

Source: [Equality Act 2010: Explanatory Notes \(Revised Edition\) August 2010](#)

What about positive action? - The Act contains provisions for employers and service providers to develop and introduce positive action measures and initiatives aimed at addressing inequality and disadvantage specific to a protected characteristic including gender reassignment. As stated in the Equality Act 2010 Code of Practice (Services, public functions and associations) Statutory Code of Practice:

The Act contains provisions which enable service providers to take proportionate action to achieve fuller and more effective equality outcomes for members of groups that are socially or economically disadvantaged or excluded, or who otherwise face the consequences of past or present discrimination or disadvantage. These are known as the 'positive action' provisions.⁶

DO PUBLIC BODIES HAVE A DUTY TO PROMOTE TRANSGENDER EQUALITY?

The Equality Act includes a public sector Equality Duty which requires public bodies, when exercising their functions, to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between people with different protected characteristics. The duty therefore, requires the City Council, as a local authority, to consider how its policies and practices can be designed to promote equality for transgender people, as for other equality groups defined by the Act.

⁶ The Equality Act 2010 Code of Practice (Services, public functions and associations) Statutory Code of Practice states: par 10.1-10.32. http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf

What is a Gender Recognition Certificate? - Under the Gender Recognition Act 2004 a transsexual can apply to have his or her “acquired” gender legally recognised, providing the following criteria has been met:

- lived permanently in their preferred gender role for at least two years
- been under medical supervision⁷ and assessed as having gender dysphoria, now or in the past
- currently unmarried
- able to declare that they intend to live permanently in their new gender role for the remainder of their life

Successful applicant will be issued with a Gender Recognition Certificate (GRC) and a (new) Birth Certificate. Where a person holds a GRC they must be treated according to their acquired gender. Personal records held by organisations must be up-dated.⁸ Key points about the Gender Recognition Act include:

- Holders of GRC are able to marry someone of the opposite sex or form a civil partnership with someone of the same sex (Civil Partnership Act 2004) to that acquired by him or her⁹
- In most circumstances, information pertaining to someone who has applied for GRC or has acquired a GRC must not be shared unless the individual concerned has given their explicit consent. This includes disclosure about a person’s previous gender/sex¹⁰.
- Transsexual people should not be routinely asked to produce their Gender Recognition Certificate as evidence of their legal gender. Such a request would compromise a transsexual person’s right to privacy. If a service provider requires proof of a person’s legal gender, then their (new) birth certificate should be sufficient confirmation¹¹

⁷ “Medical supervision” refers to psychiatric or psychological assessment.

⁸ For further information about GRA see (**GENDER RECOGNITION ACT, EXPLANATORY NOTES** (Available at http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpgaen_20040007_en.pdf), and Press for Change – <http://www.pfc.org.uk/GRA2004.html>)

⁹ <http://transequality.co.uk/Legislation.aspx>

¹⁰ www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/tra... [18/04/12]

¹¹ Equality Act 2010 Statutory Code of Practice Services, public functions and associations
www.equalityhumanrights.com

Resources

1. Press for Change – The UK’s Leading Experts in Transgender Law – Provide legal advice, training and research to trans people, their representatives, and public and private bodies. www.pfc.org.uk
2. Gender Identity Research and Education Society – Provides information for trans people, their families and the professionals. www.gires.org.uk
3. “Collecting information on gender identity” Report by Equality & Human Rights Commission. Available on the EHRC website www.equalityhumanrights.com
4. Government Equality Office’s Transgender e-bulletins. Available at: www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/e-bulletin/
5. The Government’s “Advancing transgender equality: a plan for action” December 2011 produced by the Government Equality Office. Available from www.homeoffice.gov.uk/equalities
6. Equality and Human Rights Commission www.equalityhumanrights.com