



Understanding and supporting women and their organisations

TRANS AND WOMEN'S ORGANISATIONS: THE LEGAL POSITION

About the Women's Resource Centre

WRC is a charity which supports women's organisations to be more effective and sustainable. We provide training, information, resources and one-to-one support on a range of organisational development issues. We also lobby decision makers on behalf of the women's not-for-profit sector for improved representation and funding.

Our members work in a wide range of fields including health, violence against women, employment, education, rights and equality, the criminal justice system and the environment. They deliver services to and campaign on behalf of some of the most marginalised communities of women. There are over ten thousand people working or volunteering for our members who support almost half a million individuals each year.

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Introduction

The new Equality Act 2010 brings together and simplifies equality law that has been developed in various Acts and Regulations between 1970 and 2008 relating to Race, Gender and Disability.

The Act also covers a range of other characteristics, including transgender, that are now protected from discrimination and a wider range of circumstances in which people are protected. The law protects transgender people from discrimination in a wide range of areas, such as public functions, employment and the provision of goods and services.

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Overview

Gender Reassignment: Definition

- A person has the protected characteristic of gender reassignment if the **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.
- Under the Act 'gender reassignment' is a personal process (that is, moving away from one's birth sex to the preferred gender), rather than a medical process. It does not require someone to undergo medical treatment in order to be protected.
- The reassignment of a person's sex may be proposed but never gone through. People who start the gender reassignment process but then decide to stop still have the protected characteristic of gender reassignment.
- Transsexual people should not be routinely asked to produce their Gender Recognition Certificate as evidence of their legal gender. Their (new) birth certificate should be sufficient confirmation.

Single sex services and gender reassignment

- This Act contains **an exception to the general prohibition of gender reassignment discrimination** in relation to the provision of separate- and single-sex services. Such treatment by a provider has to be objectively justified and must be **a proportionate means of achieving a legitimate aim**.
- An example included in the Explanatory Notes of the Act is of a group counselling session provided for female victims of sexual assault, where clients attending the group session are unlikely to do so if a male-to-female transsexual person was there. Exclusion of transsexuals would be lawful.
- Any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in **exceptional circumstances**.
- Policy relating to transsexuals **should be applied on a case-by-case basis** in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances.
- Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. The provider will need to show that **a less discriminatory way to achieve the objective was not available**.

Work exceptions: Occupational Requirements, Sex and Transgender

- The Act provides a general exception to what would otherwise be unlawful direct discrimination in relation to work; this **includes an exception relating to the requirement of not being a transsexual person.**
- 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.** The burden of showing that the exception applies rests on those seeking to rely on it.
- An example included in the Explanatory Notes to the Act includes a counsellor working with victims of rape who might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing the victims further distress.

Analysis and Recommendations

- **The law has not yet been tested** in court and as such, there is no indication of the extent to which the prohibition of transgender discrimination will impact on women's organisations.
- Women-only organisations and services will need to address issues relating to whether or not to include trans people on a **case-by-case basis.**
- **WRC advises women-only organisations to be inclusive of trans women where possible.** It would be advisable to consult with trans organisations on any issues of concern.
- However, **there appears to be legal protection for women-only organisations that consider it necessary to exclude trans people from their staff or as service-providers, so long as it can be shown to be a proportionate means of achieving a legitimate aim.** This is particularly relevant to services for women who are victims of abuse or violence.

The Law

Gender Reassignment: Definition

S7 Equality Act 2010¹ states:

A person has the protected characteristic of gender reassignment if the **person is proposing to undergo, is undergoing or has undergone a process (or part of a**

¹ For full text of the Equality Act 2010 see:
<http://www.legislation.gov.uk/ukpga/2010/15/contents>

process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

The explanatory notes to the Act² state:

"This section defines the protected characteristic of gender reassignment for the purposes of the Act as where a person has proposed, started or completed a process to change his or her sex. A transsexual person has the protected characteristic of gender reassignment.

The section also explains that a reference to people who have or share the common characteristic of gender reassignment is a reference to all transsexual people. A woman making the transition to being a man and a man making the transition to being a woman both share the characteristic of gender reassignment, as does a person who has only just started out on the process of changing his or her sex and a person who has completed the process."

Examples:

- A person who was born physically male decides to spend the rest of his life living as a woman. He declares his intention to his manager at work, who makes appropriate arrangements, and she then starts life at work and home as a woman. After discussion with her doctor and a Gender Identity Clinic, she starts hormone treatment and after several years she goes through gender reassignment surgery. She would have the protected characteristic of gender reassignment for the purposes of the Act.
- 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.

In addition, the Equality Act 2010 Statutory Code of Practice (Services, public functions and associations)³ states:

- Under the Act 'gender reassignment' is a personal process (that is, moving away from one's birth sex to the preferred gender), rather than a medical process.
- The reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex; or the process may have happened previously. It may include undergoing the

² Equality Act 2010 Explanatory Notes, paragraph 41/2

<http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>

³ Equality Act 2010 Statutory Code of Practice (Services, public functions and associations), paragraphs 2.17-2.27

<http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>

medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.

- The Act requires that a person should have at least proposed to undergo gender reassignment. It does not require such a proposal to be irrevocable. People who start the gender reassignment process but then decide to stop still have the protected characteristic of gender reassignment.
- The Gender Recognition Act 2004 (GRA) provides that where a person holds a gender recognition certificate they must be treated according to their acquired gender (see the GRA for details on those who are covered by that Act; see also the Data Protection Act 1998 which deals with processing sensitive personal information). 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 confirmation.

Single sex services and gender reassignment

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

Gender reassignment

28(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a **proportionate means of achieving a legitimate aim**.

(2) The matters are—

- (a) the provision of separate services for persons of each sex;
- (b) the provision of separate services differently for persons of each sex;
- (c) the provision of a service only to persons of one sex.

(nb. The provision of single sex services are lawful under this section of the Act (Schedule 3, Part 7, s26/7))

The explanatory notes to the Act⁴ state:

"This paragraph contains an exception to the general prohibition of gender reassignment discrimination in relation to the provision of separate- and single-sex services. Such treatment by a provider has to be objectively justified."

Example:

- 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.

⁴ Equality Act 2010 Explanatory Notes, paragraph 739/40
<http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>

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

- The intention is to ensure that the transsexual person is treated in a way that best meets their needs. Service providers need to be aware that transsexual people may need access to services relating to their birth sex which are otherwise provided only to people of that sex. For example, a transsexual man may need access to breast screening or gynaecological services. In order to protect the privacy of all users, it is recommended that the service provider should discuss with any transsexual service users the best way to enable them to have access to the service.
- Any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances.
- A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user).
- Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available.

Work exceptions: Occupational Requirements, Sex and Transgender

Schedule 9, Part 1, s1 of the Equality Act 2010 states:

1 (1)A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—
(a) it is an occupational requirement,
(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

...

⁵ Equality Act 2010 Statutory Code of Practice (Services, public functions and associations), paragraphs 13.57-13.67
<http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>

(3) The references in sub-paragraph (1) to a requirement to have a protected characteristic are to be read—
(a) in the case of gender reassignment, as references to a requirement not to be a transsexual person (and section 7(3) is accordingly to be ignored);

The explanatory notes to the Act⁶ state:

*“This paragraph provides a general exception to what would otherwise be unlawful direct 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.**”*

This paragraph replicates the effect of exceptions for occupational requirements in current discrimination legislation, and creates new exceptions in relation to disability and to replace the existing exceptions for occupational qualifications in relation to sex, gender reassignment, colour and nationality. It differs from the existing exceptions for occupational requirements in that it makes clear that the requirement must pursue a legitimate aim and that the burden of showing that the exception applies rests on those seeking to rely on it.”

Examples:

- The need for authenticity or realism might require someone of a particular race, sex or age for acting roles (for example, a black man to play the part of Othello) or modelling jobs.
- Considerations of privacy or decency might require a public changing room or lavatory attendant to be of the same sex as those using the facilities.
- An organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL.
- Unemployed Muslim women might not take advantage of the services of an outreach worker to help them find employment if they were provided by a man.
- **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.**

⁶ Equality Act 2010 Explanatory Notes, paragraph 786-9
<http://www.legislation.gov.uk/ukpga/2010/15/notes/contents>

In addition, the Equality Act 2010 Statutory Code of Practice (Employment)⁷ 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 requirement 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.
- Examples of how the occupational requirement exception may be used include some jobs which require someone of a particular sex for reasons of privacy and decency or where personal services are being provided. For example, a unisex gym could rely on an occupational requirement to employ a changing room attendant of the same sex as the users of that room. **Similarly, a women's refuge which lawfully provides services to women only can apply a requirement for all members of its staff to be women.**

⁷ Equality Act 2010 Statutory Code of Practice (Employment), paragraphs 13.3-13.11
<http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>