



# **Women's organisations and trans people: acting lawfully**

**A briefing for women's organisations**

July 2011

Understanding and supporting  
women and their organisations

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## About the Women's Resource Centre

The Women's Resource Centre (WRC) is a unique 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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## About this briefing

WRC has produced this briefing to help women's groups, services and organisations better understand the context and issues facing trans people and to outline the law as it relates to trans people in the UK, particularly in light of the Equality Act (2010).

**Trans people experience inequality and prejudice on a daily basis. It is crucial that women's organisations act lawfully and do not discriminate against trans people, particularly in regard to women-only services and employment.**

This briefing is an updated version of the legal information provided in *Trans awareness for women's organisations in the UK* published by WRC in November 2009. We hope to publish a fuller update of the 2009 briefing (with updated facts, recommendations and sources of help for becoming more trans aware and trans positive) in the near future.

**Disclaimer:** This briefing is not intended to provide definitive legal advice. At the time of publication, all care was taken to ensure the information contained in this briefing was accurate and correct. However, laws do change and data and contact details can become quickly outdated. Please always check information to ensure it is correct and up-to-date at time of use. If in doubt, seek legal advice. The WRC cannot take responsibility for changes to information in this briefing.

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# Definitions

**Acquired gender:** A term from the Gender Recognition Act of 2004 which means the gender that a person has transitioned to in order to match their self-perceived gender identity.

**Gender dysphoria:** The medically recognised term to describe anxiety and discomfort associated with feeling that the way you look on the outside, and the way you are expected to behave, does not match the way you feel. Dysphoria means “unhappiness”. This is not a mental illness, but sometimes support and treatment can help.

**Gender identity:** Refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex born in to or assigned at birth. It also refers to a person’s self-expression and identity in relation to social categories of masculinity or femininity. A person’s subjectively felt gender identity may be at variance with their sex or physiological characteristics.

**Gender reassignment/transition:** The process of transition that a person goes through when they change from being the gender they were assigned at birth – either male or female – to living in the gender with which they identify. This may or may not include medical treatment.

**Gender Recognition Certificate:** A certificate which constitutes legal recognition of a person’s acquired gender

**Female-to-male (F to M):** Refers to a person who has transitioned or is transitioning from female to male.

**Intersex people:** People who are born with anatomy or physiology which differs from norms associated with male and female anatomy.

**Male-to-female (M to F):** Refers to a person who has transitioned or is transitioning from male to female.

**Protected characteristics:** Different characteristics (forms of individual status or identity) protected by the legislation. They are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

**Sexual orientation:** Includes sexual desires, feelings, practices and identification which can be towards people of the same or different sexes. Sexual orientation is not the same as gender identity.

**Trans/transgender:** An all-encompassing term that includes all people that cross gender boundaries, permanently or otherwise. Trans includes, but is not limited to: people who live in the opposite gender to that registered at their birth, whether or not they have undertaken gender reassignment surgery, transvestites who cross-dress, intersex people who are born with anatomy or physiology which differs from norms associated with male and female anatomy, and others who do not identify

with traditional female and male norms. Some people may not identify with being male or female and may prefer 'third gender'. Trans is often linked with lesbian, gay and bisexual (LGB) communities, organisations and movements, and there is increasing visibility of trans people within these communities. However, trans is a **gender identity** and not a sexual orientation and the inclusion of trans within LGB is a source of some debate.

**Transphobia/transphobic discrimination:** A range of negative attitudes, feelings and behaviours towards trans people based on the expression of their internal gender identity. These can result in indirect and direct discrimination and violence towards trans people (e.g. hate crimes). Transphobia and transphobic discrimination can also be directed at non-trans people because they are associated with trans people (e.g. family members or friends) and those whom are wrongly perceived to be trans but are not.

**Transsexual:** The medically and legally recognised term to describe people who are intending to, are currently, or have undergone gender reassignment surgery. Individuals may or may not have a Gender Recognition Certificate or new birth certificate.

# The Equality Act (2010)

The new Equality Act (2010) brings together and simplifies equality and anti-discrimination legislation and regulations including the Gender Equality Duty, which was introduced under the Equality Act (2006), and the Sex Discrimination Act (1975) amongst many others.

The Act gives protection to a wider range of groups of people from discrimination and a wider range of circumstances in which people are protected. The nine “protected characteristics” covered by the Act are:

- Age.
- Disability.
- Sexual orientation.
- Marriage and civil partnership.
- Gender reassignment (with a wider definition than previously).
- Race.
- Religion or belief.
- Sex.
- Pregnancy and maternity.

## Protection from discrimination

For eight of the nine protected characteristics (except marriage and civil partnership), the Act prohibits direct discrimination, indirect discrimination, harassment and victimisation. The Act also prohibits discrimination arising from a failure to make reasonable adjustments for disabled people. The protection against discrimination and other unlawful conduct applies to:

- All aspects of employment (including contract workers, public office, qualifications bodies and trade unions and equal pay between women and men).
- The provision of goods, facilities and services (e.g. voluntary and community sector services).
- Carrying out public functions.
- Education (including schools and further and higher education).
- Disposal and management of housing and other types of premises.
- Associations (including clubs and political parties - the provisions extend protection in private clubs to sex, religion or belief, pregnancy and maternity, and gender reassignment).

## **Association and perception**

Although not written into the text of the Act, the Government has made clear that protection against direct discrimination or harassment based on a particular protected characteristic applies not only to a person with that characteristic but also to people who may not have that characteristic but are perceived to have it or are associated with someone who has it and are discriminated against for that reason. So, for example, protection is extended to a person who is perceived wrongly to be gay and to anyone who is associated with homosexuality such as a family member or friend or who is otherwise identified with homosexuality, for example publicly known to be campaigning on behalf of lesbian and gay rights.

## **Positive action**

The Act's new approach to positive action recognises that some equality groups are disadvantaged in some areas of life as a consequence of past or current discrimination and exclusion. The Act enables public, voluntary and private sector employers and providers of services to take steps to help particular groups overcome disadvantage, meet needs that are different from the needs of other groups or increase participation. Service providers include public authorities, schools and colleges, housing providers and associations. Therefore the Act makes it lawful to take positive action measures that involve different treatment of different equality groups which would otherwise be unlawful. However, implementing positive actions is *voluntary* not compulsory.

For positive action measures to be considered to be lawful three conditions must be satisfied:

1. The employer or service provider must reasonably think that the group in question suffers a disadvantage, has different needs, or has a disproportionately low level of participation
2. The employer or service provider takes action with the aim of enabling or encouraging the group to overcome or minimise their disadvantage, meeting their needs, or enabling or encouraging participation
3. The action is a proportionate means of achieving that aim - that is, that the action is both appropriate and necessary to achieve the aim.

Action that involves different treatment that does not meet all three conditions is likely to be unlawful.

## Women-only services

Previous laws contained a large number of exceptions to non-discrimination (e.g. Sex Discrimination Act). The Equality Act (2010) simply extends some existing exceptions, modifies or merely restates other exceptions.

**The Equality Act 2010 makes it clear that women-only (and girl-only) services are legal and appropriate<sup>1</sup>** in certain contexts; it is still legal and appropriate for public authorities to fund (and provide) women- services. This means that if a voluntary and community organisation normally provides services for one equality group only, it is lawful to continue to do so. Nothing has changed in this regard under the Equality Act.

**The Equality Act should not be interpreted to mean that both sexes should be treated the same.**

Single-sex services are permitted *where it can be shown to be the most effective way of providing those services* or where the service is needed by one sex only.<sup>2</sup>

The Act does *not* allow discrimination by an association with 25 or more members and who have some form of selection of its members. However, a club or association *may* restrict their membership to one equality group only but cannot restrict membership to a group defined by colour. Under the Act an association could be only for retired women or only for retired Afro-Caribbean women, but it could not be an association for retired Black women as this would be based on colour.<sup>3</sup> Religion or belief organisations, other than those whose main purpose is commercial, may, subject to specified conditions, restrict who can be a member or who can participate in its activities based on a person's religion or belief or their sexual orientation. However, it is *never lawful* to impose restrictions based on sexual orientation where the religion or belief organisation is *carrying out a contract with a public authority*.<sup>4</sup>

A charity may provide benefits to one equality group, *other than a group defined by colour*, but:

- Only if this is within its charitable instrument (e.g. constitution); and
- It is a proportionate means of achieving a legitimate aim; or
- Is for the purpose of preventing or compensating for a disadvantage linked to that equality group.<sup>5</sup>

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<sup>1</sup> Equality Act 2010, Schedule 3, Part 7

<sup>2</sup> Ibid.

<sup>3</sup> Equality Act 2010, Schedule 16, Paragraph 1(3)

<sup>4</sup> Equality Act 2010, Schedule 3, Part 4, Paragraph 18

<sup>5</sup> Equality Act 2010, Schedule 3, Part 7

## **Occupational Requirements**

Under the Equality Act 2010, it is unlawful for men or women to receive less favourable treatment in employment because of their sex or marital status – or indeed, to treat anyone with a protected characteristic unfavourably. However, in very limited circumstances, Schedule 9 of the Act provides an exception to this. The Act states<sup>6</sup> that it is lawful to have a requirement to have a particular protected characteristic, if, 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

Under the Act, it is lawful to discriminate in recruitment, training, promotion and transfer in a job for which the sex of a worker is an occupational requirement. Most women’s organisations that provide front-line services to vulnerable women (e.g. survivors of domestic or sexual violence) are able to recruit only females under this.

When recruiting for female-only staff etc, it would be advisable to cite this section of the Act (Equality Act 2010, Schedule 9, Part 1, Paragraph 1), as would have happened under previous legislation (Employment (Sex Discrimination) Regulations 2005). The previous legislation has been replaced by the provisions in the Equality Act 2010.

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<sup>6</sup> Equality Act 2010, Schedule 9, Part 2, Paragraph 1

# Protections for trans people under the Equality Act and the exceptions

## Protection under “gender reassignment”

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 their sex by changing physiological or other attributes of sex.

Under the Act, “gender reassignment” is defined as a personal process (i.e. 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 (such as gender reassignment or other surgery, hormone treatment etc.).

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.

Trans 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.

## What about women-only services?

Generally, you are not allowed to discriminate against people who have the protected characteristic of gender reassignment.

However, *the Act does contain an exception to this rule in relation to the provision of separate- and single-sex services*. 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 trans person was there. In this example, exclusion of trans people would be lawful.<sup>7</sup>

However, such treatment (by the provider of the service) must be:

- Objectively justified; and
- a proportionate means of achieving a legitimate aim.

This exception must be applied as restrictively as possible. The denial of a service to a trans person should only occur in exceptional circumstances. Decisions about services and the exclusion of trans people should be applied on a case-by-case basis in order to determine whether the exclusion of a trans person is proportionate in the individual circumstances.

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<sup>7</sup> Equality Act 2010, Schedule 3, Part 7, Paragraph 28

Service providers will need to balance the needs of the trans person and the detriment to them if they are denied access the service, against the needs of other service users and any detriment that may affect them if the trans person has access to the service. You would need to show that a less discriminatory way to achieve the objective was not available.

It is important to note that challenges to a women-only service by a trans person has not, in the UK, been tested in court and as such there is no case law to provide further guidance.

## **What about employment?**

Again, the Act says that you generally cannot discriminate against trans people but there is an exception to this rule. 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;
- Must not be a sham or pretext; and
- 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. This means that you must be able to prove all of the above. You can not automatically exclude trans people.

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 trans person, even if she has a Gender Recognition Certificate, in order to avoid causing the victims further distress.

There is no guidance on what to do if someone is transitioning during employment, for example, if they have been recruited as a woman under an occupational requirement and they are transitioning to being a man. It would still be lawful to insist that the person in the post is a woman. Transitional arrangements should be made and discussed with the employee in question, local trans groups may be a source of information or advice.

## **What about volunteering?**

The Equality and Human Rights Commission has issued guidance in relation to volunteers. Depending on the type of contract, they may either be counted as employees or service users.<sup>8</sup> As a general rule, you should avoid discriminating against volunteers in the same way you would employees or service users.

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<sup>8</sup> EHRC, 2011, *How your organisation should treat volunteers* <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-service-providers/what-equality-law-means-for-your-voluntary-and-community-sector-organisation-including-charities-and-religion-or-belief-organisations/how-your-organisation-should-treat-volunteers/>

In regard to volunteers, there has not been a relevant case brought in UK courts. However, there has been a case in Canada.

Kimberley Nixon, a trans woman, approached the Vancouver Rape Relief (VRR) and Women's Shelter in 1995 seeking to be part of the training programme to become a counsellor. Nixon was not accepted onto the programme, and made a Human Rights Complaint about this. As a result VRR offered Nixon an apology and offered her a place on the fundraising group. These offers and requests were not accepted.

In 2002, the British Columbia Human Rights Tribunal heard Nixon's complaint of discrimination and this was upheld. The tribunal found that VRR had acted in good faith towards Nixon but had not proved that life experience as a girl and woman was a necessary prerequisite to becoming a peer counsellor. Damages of CN\$7,500 were awarded to Nixon.

In 2003, The British Columbia Supreme Court conducted a judicial review of the Tribunal decision based on VRR's application for review. The Supreme Court set aside the decision of the Tribunal, and found that the Tribunal had made an error in deciding that VRR had discriminated against Nixon. In 2005, Nixon appealed to the British Columbia Court of Appeal. The court decided that the VRR had the right to train women who had the shared experience of being 'oppressed since birth' as a result of being born and raised female.

In 2007, Nixon's leave to appeal was dismissed. VRR won the case, under s.41 of Human Rights code (group rights exemptions) which meant they could determine the criteria for membership to their organisation.<sup>9</sup>

## **What does it all mean for women's organisations?**

Under the Act, it appears that it is lawful for women-only organisations that consider it necessary to exclude trans people from their staff or as service-providers to do so. This is particularly relevant to services for women who are victims of male abuse or violence. But, the law has not yet been tested in court and as such, there is no indication of the extent to which the prohibition of trans discrimination could impact on women's organisations.

However, you must be able to show that the decision or action is:

- Objectively justified; and
- Must be a proportionate means of achieving a legitimate aim.

The 'burden of proof' is on the organisation. This means that it is your responsibility to prove that you can meet the above criteria.

Your reasoning and evidence should be robust. You should take care to ensure you have gone through a thoughtful process if you reach a decision to exclude trans

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<sup>9</sup> Case Study: Vancouver Rape Relief cited in WRC (2009) *Trans awareness for women's organisations*. WRC: London. [http://www.wrc.org.uk/includes/documents/cm\\_docs/2009/0/5\\_090915\\_trans\\_briefing.pdf](http://www.wrc.org.uk/includes/documents/cm_docs/2009/0/5_090915_trans_briefing.pdf)

people. You should keep records of how you came to this decision such as minutes of meetings, any research which shows potential impact of excluding and including trans people and any evidence showing other options of how your organisation could support a trans person in need of a support service.

Women-only organisations and services will need to assess whether or not to exclude trans people on a case-by-case basis. You can not just apply a 'blanket' policy across your whole organisation or all of your services. The exception to exclude trans people must be applied as restrictively as possible. The denial of a service to a trans person should only occur in exceptional circumstances and you must be able to show evidence for why you have taken this action.

**If in doubt you should seek legal advice.**

To see the relevant sections of the Act, please see Appendix 1 at the end of this briefing.

Women's organisations have always shown solidarity with other discriminated against groups. As equalities organisations, it is important that we work towards equality for all. We actively encourage women-only organisations to work with trans organisations to become 'trans positive'. Please see the next section for more information.

## Where can I find out more?

Briefing by WRC on '**Trans awareness for women's organisations in the UK**' (2009). Provides information on statistics on trans people and the trans voluntary and community sector and recommendations for good practice. For details of trans organisations, please see this briefing.

Please note that the **legal information section is now out of date** (refer to this guide) and the **details of some of the contacts listed may have changed**:  
[http://www.wrc.org.uk/includes/documents/cm\\_docs/2009/0/5\\_090915\\_trans\\_briefing.pdf](http://www.wrc.org.uk/includes/documents/cm_docs/2009/0/5_090915_trans_briefing.pdf)

The first resource from the Shine @ Galop project is now available. It is called '**Shining The Light: 10 Keys To Becoming A Trans Positive Organisation**'. Galop works to prevent and challenge homophobic and transphobic hate crime in Greater London. Galop aims to reduce crimes against lesbian, gay, bisexual and transgender people, and campaign for an improved criminal justice system.

Download their guide here:  
<http://www.edf.org.uk/blog/wp-content/uploads/2011/06/Shining-the-light-low-res.pdf>

Find out more about Galop here: <http://www.galop.org.uk/>

Engender has produced a report entitled '**Women Thinking Trans Issues: A Report on Findings of Participatory Action Research on the Inequality of Access to NHS Services by Trans**'. Engender is a membership organisation working on an anti-sexist agenda in Scotland and Europe to increase women's power and influence and make visible the impact of sexism on women, men and society.

Download the report here:  
<http://www.engender.org.uk/UserFiles/File/Projects/Engender%20report%20V3.pdf>

# Appendix 1 – relevant sections of the Equality Act

## Gender reassignment: definition

S7 Equality Act 2010 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 process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.”<sup>10</sup>

The explanatory notes to the Act 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.

## Example

- 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.”<sup>11</sup>

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

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<sup>10</sup> For full text of the Equality Act 2010 see: <http://www.legislation.gov.uk/ukpga/2010/15/contents>

<sup>11</sup> Equality Act 2010 Explanatory Notes, paragraph 41-42:

<http://www.legislation.gov.uk/ukpga/2010/15/notes/division/2/2/1/4>

- “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 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.”<sup>12</sup>

## **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:

“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.<sup>13</sup>

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 Act state:

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<sup>12</sup> 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/>

<sup>13</sup> Equality Act 2010 Explanatory Notes, paragraphs 739-740: <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/2/16/20/7/5>

“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.”<sup>14</sup>

In addition, the Equality Act 2010 Statutory Code of Practice (Services, public functions and associations) 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.”<sup>15</sup>

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<sup>14</sup> 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/>

<sup>15</sup> Equality Act 2010 Explanatory Notes, paragraphs 739-740: <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/2/16/20/7/5>

## **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).

....

(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).”<sup>16</sup>

The explanatory notes to the Act 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.

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<sup>16</sup> Equality Act 2010, Schedule 9, Part 1, s1

- 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.”<sup>17</sup>

In addition, 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 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.”<sup>18</sup>

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<sup>17</sup> Equality Act 2010 Explanatory Notes, paragraphs 786-789:

<http://www.legislation.gov.uk/ukpga/2010/15/notes/division/2/16/26>

<sup>18</sup> 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/>