

Transgender workers rights

This factsheet gives information about the rights of transgender people at work and good practice for employers and UNISON branches. It includes information on the law, support for members undergoing gender reassignment and checklists for negotiating for branches. In UNISON, transgender members organise together with lesbian, gay and bisexual members. There are many areas of common concern, but important areas of difference. There is a separate factsheet on *Lesbian, gay and bisexual workers rights*.

Introduction

A transgender person is someone who has a deep conviction that their gender - whether they are a man or a woman - does not conform to the sex they were assigned at birth. Many transgender people wish to change their name and personal details and live as a member of the gender with which they identify. The process is referred to as 'gender reassignment' or 'transitioning'.

Transgender workers face discrimination, despite the fact it is unlawful. Trans people have high levels of unemployment and self-employment. For those who are employed, incomes are well below the average. UK results of an extensive EU survey published in 2013 show that a third of trans respondents had been personally discriminated against at work in the past twelve months. There were high levels of non-reporting with nearly 80% saying neither they nor anyone else reported the discrimination they had experienced. This was because they had low expectations that a complaint would be taken seriously or dealt with.

UNISON policy

All transgender people have the right to equal treatment, protection from discrimination and the full support of the union. This is written into UNISON's rules, for example Rule B1.2.

Transgender members have the right not to be discriminated against by UNISON policies, practices, members or officers. Allegations of discrimination will be taken very seriously.

Branches need to be aware of trans equality issues and negotiate policies *before* one of their members or potential members experiences difficulties. The Scottish Transgender Alliance and UNISON have produced an introductory guide for reps, UNISON stock no 2726 – see page 11.

Definitions

Gender identity: a person's deeply felt internal and individual experience of gender, which may or may not correspond to the sex assigned to them at birth

Gender expression: a person's external gender-related behaviour and appearance, including clothing

Transgender or trans person: a person whose gender identity does not conform to the sex they were assigned at birth. These are inclusive, umbrella terms, including people who describe themselves as transsexual, transvestite or cross dressing people, and people who have a more complex sense of their own gender than either 100% female or 100% male

Gender binary: the classification of sex and gender into two distinct and disconnected 'opposite' forms of masculine and feminine

Gender variance: gender expression that does not match norms of female and male

Non-binary person: a person who does not identify as solely male or female. They may identify as both, neither or something entirely different

Transsexual person: legal/medical term for someone who lives (or wishes to live) permanently in the 'opposite' gender to that assigned at birth

Gender dysphoria: medical term for deep-rooted and serious discomfort or distress because of a mismatch between a person's biological sex and gender identity; overwhelming desire to live in the 'opposite' gender to that assigned at birth.

Gender reassignment: the process of transitioning from the gender assigned at birth to the gender the person identifies with. This may (or may not) involve medical and surgical procedures.

Legal sex: The sex recorded on your birth certificate

Gender Recognition Certificate: issued by the Gender Recognition Panel – signifies full legal rights in acquired gender and allows the issuing of a replacement birth certificate.

Summary of the law

Gender Recognition Act 2004

The UK Gender Recognition Act enables people aged over eighteen to gain full legal recognition for the gender in which they live. Applications are considered by the Gender Recognition Panel. Once a person receives a Gender Recognition Certificate (GRC), they are legally of that gender for every purpose and have all the rights and responsibilities associated with that gender.

Many trans people do not apply for a GRC. They may not be able to undergo permanent gender reassignment for health, personal, family, financial or other reasons.

As same sex marriage is not currently available in Northern Ireland, people in 'opposite' sex marriages cannot apply for a full GRC without dissolving their marriage (though they can then enter a civil partnership with the same person).

Employment rights do not depend on whether a person has a Gender Recognition Certificate. Employers should not ask for a person's GRC and it should never be a pre-condition for transitioning at work. To make an application for a GRC, a person needs to show they have been living – and working - in that gender for at least two years. So being asked to show a GRC as a condition of changing employment details is like being asked to show a full driving licence before you can apply for a provisional one.

Equality Act 2010

The Equality Act 2010 (England, Scotland and Wales) protects against discrimination because of gender reassignment in employment and service delivery. It covers all sizes and types of employer and all types of worker, including agency, contract and temporary workers. It bans direct and indirect discrimination and victimisation.

There is similar protection in Northern Ireland under the Sex Discrimination (Gender Reassignment) Regulations (NI) 1999.

The Act makes clear that it is not necessary for people to have any medical diagnosis or treatment to gain this protection; it is a *personal* process of moving away from one's birth gender to the preferred gender. A person remains protected, even if they decide not to proceed with transitioning.

People discriminated against because they are wrongly perceived to be trans, or who are discriminated against because of their association with trans people or issues, are also protected.

Summary of gender reassignment employment protection:

It is unlawful to discriminate against a person for the purpose of employment (recruitment, promotion, access to benefits, selection for redundancy, vocational training etc) on the grounds that the person intends to undergo gender reassignment, is undergoing gender reassignment or has undergone gender reassignment.

The employer is automatically liable for discriminatory actions by anyone acting on their behalf, whether or not it was done with their knowledge, unless the employer can show that they had taken all reasonable steps to prevent such actions.

Branches should make sure that transgender workers are recognised and respected as the gender in which they live. This is the case whether or not they have had medical treatment or acquired a Gender Recognition Certificate. Recognition of change of gender for employment purposes is usually from the point at which the person begins living in their new gender.

It is not acceptable to treat a person undergoing gender reassignment as belonging to neither one sex nor the other, even for a short period of time.

Public sector equality duty

Public bodies in England, Scotland and Wales have a statutory duty to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations for transgender people. A similar duty has been in force in Northern Ireland since 2000. While the Northern Ireland duty does not name gender reassignment as a protected characteristic, the principles apply.

Having due regard means consciously thinking about the three equality duty aims as part of the decision-making process, such as employment, service delivery and financial decisions. This includes decisions on cuts and redundancies.

Complying with the duty may involve treating some people better than others to combat historic disadvantage.

Specific duties underpin the general duty, showing how public bodies can meet its requirements. These are different in England, Scotland and Wales, with those for England being the least detailed or prescriptive. Whatever the specific duties, the general duty remains the same and public bodies can only demonstrate that they are complying with the general duty by taking steps such as assessing the impact on equality of their policies and practices. UNISON's advice on the public sector equality duty is stock number 3062. You can also find information in the Knowledge section of the UNISON website (member only content).

Harassment

The Equality Act specifically outlaws harassment. It does not matter whether or not a harasser *intended* their behaviour to be offensive - the effect is just as important. Harassment does not have to be targeted at a particular person who is known or thought to be trans. It is enough that transphobic language, imagery, 'jokes' or actions violate a person's dignity or create a hostile environment. The viewpoint of the person experiencing harassment must be taken into particular account, alongside other factors, when deciding if harassment has taken place.

The Act also forbids sexual harassment – unwelcome sexual advances, touching, sexual assault, sexual 'jokes' or materials of a sexual nature that violate a person's dignity and create an intimidating or offensive environment.

Employers must take positive steps to support and protect *all* workers from harassment by co-workers, service users and members of the public. This should include well publicised policies, monitored to check their effectiveness, and training of managers and all staff. Branches should ensure the harassment policy includes specific reference to gender identity and gender reassignment.

Branches should make sure that transgender workers are treated as the gender in which they live, irrespective of legal sex. Transgender workers should have equal rights and equal access to benefits, including equal recognition of their partner and family.

All contracts and agreements should be checked for possible discrimination.

Occupational requirements

In the vast majority of cases, the gender of a worker is of no relevance to their ability to do a particular job. However, the Equality Act 2010 does allow for an exception where being of a particular sex is an 'occupational requirement' of that post. It might apply where the work necessarily involves conducting intimate searches, or where services are provided to one gender only, such as a women's refuge.

The Equality Act makes it clear that the employer must act reasonably in applying an occupational requirement. For example, conducting intimate searches is unlikely to be a main part of any particular post. The employer must consider whether these tasks could be carried out by someone else. Also, the occupational requirement must be identified at the beginning of the recruitment process and stated in the application pack.

If a member who is intending to transition permanently works in a single sex position or organisation, it is probably best for the member, the employer and any service users if redeployment can be negotiated. Branches should make sure that options are discussed early on, to reach the best outcome.

Don't forget that a person with a Gender Recognition Certificate is legally of that sex for all purposes.

There are an even smaller number of cases where an employer may be able to claim an occupational requirement that the postholder not be transsexual. Where this is claimed by a religious organisation, they will need to show that applying the requirement is a proportionate means of achieving a legitimate aim – it must be crucial to the post and not a sham or pretext.

Equality policies

It is unlawful to discriminate against trans workers, whether or not this is stated in an employer's equal opportunities policy. However, unless it is spelt out, the rights of transgender people remain invisible, trans applicants or workers remain unsure about how they will be received and other staff and service users may not understand their responsibilities to treat trans people with respect. Branches should make sure that policies refer specifically to discrimination on grounds of gender identity and gender reassignment.

Recruitment and interviews

Branches should negotiate recruitment policies and procedures that give transgender workers a fair deal and which make it clear to candidates that discrimination is not tolerated. This starts from the very beginning - job adverts should state that applications from transgender people are welcome and be placed in LGBT media.

There is absolutely no obligation for a transgender person to disclose their gender history as a condition of employment. For most people, this is a very private matter. Many transgender people have experienced prejudice and harassment as a result of disclosure. However, if they do choose to talk about it, it would be unlawful to use this as a reason for not offering them the job. Similarly, it is unlawful to dismiss someone for not disclosing their gender history, or for disclosing this at a later date.

Records and confidentiality

Confidentiality is crucial. Some transgender members may be out at work about their gender history. This is their decision alone. Being out to one person or small group of people does not necessarily mean a person wants to be out to everybody. Branches should insist that the employer's personnel records for transgender people do not refer to any previous name and that records made before a change of name are updated.

There may still be some records which identify a person's gender history, such as records of absence for medical treatment. For people without a Gender Recognition Certificate, some records, for example pensions and insurance, may show their legal sex. Access to any records showing the change of name and any other details associated with a person's transition, should be restricted to staff who 'need to know' for specific reasons. 'Need to know' are those directly involved in the administration of a process, for example the personnel officer, or the person who authorises payments into a pension scheme. Breaches of confidentiality should be treated in a serious manner and can be unlawful harassment.

The law recognises the seriousness of confidentiality. The Gender Recognition Act gives anyone applying for or holding a Gender Recognition Certificate particular privacy rights. It is a criminal offence to pass on information acquired 'in the course of official duties' about someone's gender recognition, without the consent of the individual affected. 'Official duties' include employment, trade union representation or supply of business or professional services.

Some UNISON members have to undergo criminal records checks because of the nature of their work. There is a procedure for transgender workers which protects their confidentiality with employers while enabling the necessary checks against previous names. For England and Wales, contact the Sensitive Casework Manager at the Disclosure and Barring Service sensitive@dbs.gsi.gov.uk or PO Box 165 Liverpool L69 3JD. For Scotland, phone the Disclosure Scotland helpline on 0870 609 6006 and ask to speak to the Operations Manager in confidence.

In Northern Ireland, phone the Access Northern Ireland helpline on 0300 200 7888, email accessni@ani.x.gsi.gov.uk in confidence or see the Access NI transgender policy at dojni.gov.uk.

The need for scrupulous confidentiality applies to our union work as well. Union records must be kept up to date and old records which refer to a previous name/gender must be destroyed (or if they must be kept and cannot be updated, their security ensured). There is an agreed process for purging previous name information from the union's membership database.

Monitoring

It is increasingly common for employers to carry out workforce monitoring. UNISON is strongly in favour of policies, practices and staff attitudes to be monitored, to measure the implementation of trans equality. However we urge extreme caution in seeking to monitor the number of trans staff in any organisation. There is separate UNISON guidance on workforce monitoring for sexual orientation and gender identity on our website.

Transitioning at work – agreeing a process

Gender transitioning is often a very stressful time for a trans person. They will have spent a long time thinking about it and may face rejection from family and friends. How it is handled at work can make all the difference. It is very important that the employer agrees how the process will be handled with the person concerned, right from the start. Issues to consider include:

- Whether the member wants to stay in their current post or be redeployed
- The expected point or phase of change of name, personal details and gender
- Whether the member wishes to inform line managers, co-workers and service users themselves, or would prefer this to be done for them
- What amendments will be required to records and systems

- Whether existing policy on issues such as confidentiality and harassment address transgender equality and if not, how these will be amended
- What training managers and co-workers will need and when and by whom this will be carried out
- The expected time scale of any medical and surgical procedures
- What time off will be required for treatment and/or possible side effects.

Communicating news to other workers or service users

There is no general need to inform co-workers or service users that a worker is undergoing gender reassignment. It is necessary only where the working relationship is continuing through transition. It is usually good practice for employers to take responsibility for informing those who need to know, but the wishes of the individual should be given priority.

Education needs to cover general information about transgender people and specific information on the situation of this particular person. The right of all people to work in dignity and free from discrimination and the unacceptability of harassment must be made clear.

Branches should work with management on this process. It is important to:

- Give the name the person wishes to be known by in their new gender and emphasise the importance of using the correct name and gender pro-noun (he or she) in future
- Include sufficient information to convey the facts
- Not go into too much detail
- Respect the wishes of the transgender person and their right to confidentiality in terms of discussing detailed personal aspects
- Pitch the information at a level and style appropriate to the audience
- Include details of how colleagues might seek further information.

Negotiating paid time off for treatment

People who decide to undergo medical or surgical procedures for gender reassignment will need some time off work. It is unlawful to treat trans people less favourably for being absent from work for gender reassignment than they would be treated if they were ill or injured.

In terms of best practice, branches should seek to negotiate adequate paid time off, distinct from other sick leave. Gender reassignment treatment should **not** be regarded as elective or

cosmetic. Time off should ideally be recorded separately from sickness absence and not used for absence management or monitoring purposes by the employer.

The process of gender reassignment

Diagnosis is carried out by a specialist and may take months or years. Waiting lists for NHS funding for treatment vary around the UK, but they can be substantial. Appointments may involve travelling long distances, so are likely to take a whole day. Preliminary diagnosis is usually followed by hormone therapy. Typically, the person's physical appearance begins to change after about six months. Some people start to live full time in their new gender role before they begin hormone therapy; others remain in their usual gender role at work for longer. People usually continue to work throughout this period, but it can be an extremely stressful time.

When a person starts to live full time in their new gender, their name and other records will be changed. From this point they should be treated as belonging to their new gender for employment purposes. They may go on and have surgery after one or two years of hormone therapy. Some people may require more than one operation. The time off following this will vary greatly, from one week to around 12 weeks, depending on the nature of the surgery and the physical demands of the person's job.

Capability procedures

Employers should be made aware of possible side effects of medication and the general stress of transitioning, which can affect work performance. People sometimes need reduced hours or duties for a temporary period when they return to work following surgery. Together with the member, branches should meet the employer to discuss options around a temporary reduction of hours or duties or (if the member wants this) relocation. Some employers may try to dismiss workers for lack of capability. Branches must make it clear to the employer that this is unacceptable and may well be unlawful.

Redeployment and retirement

Usually people want to stay in the same job through gender transition. But sometimes a worker may want to be redeployed or retired. In large organisations, redeployment should be relatively easily. If it is not an option, it is important that active steps are taken to prevent harassment or lack of support from colleagues or managers. It must not be left to the member to deal with any prejudice.

Branches should make sure that difficulties meeting the member's preferences on redeployment are not turned into grounds for dismissal or retirement. If redeployment does take place, it should probably coincide with the change of gender, so the member starts their new post in their new gender role.

Negotiated retirement packages should be equivalent to those offered to other workers taking early retirement.

Non-binary members

Some people do not feel comfortable thinking of themselves as simply either male or female. They may feel their gender identity is more complicated to describe. Some may identify their gender as right in the middle between male and female. Others may feel mainly male, but not 100% male (or vice versa, not 100% female).

Due to society's expectation that all people, including transgender people, will identify as just either male or female, it can be very difficult to work out how to express a gender identity which is neither simply male nor female. Some people may therefore experience a long period of uncertainty about how they relate to the highly gender-stereotyped world around them.

Non-binary people also span a very wide range of desire to access medical gender reassignment services. Some have no interest at all in physically changing their body. Others may wish to partially physically transition (for example taking hormones but not having any surgery or, alternatively, having some surgery without taking hormones). Some others will follow the same transition route as transsexual people, but reject identifying simply as the gender they transition to.

Single sex facilities

It is increasingly common for at least some changing and toilet facilities to be available to all, irrespective of gender. Where facilities are single sex, transgender workers should be able to use them according to the gender in which they attend work. For workers who are transitioning, the employer and worker should agree the point at which the use of single sex facilities should change from one sex to the other. This will usually be the point at which the person begins to live permanently in the gender with which they identify.

It is not acceptable to insist on transgender workers using separate facilities from other workers, for example a unisex wheelchair accessible toilet, just because they are trans.

Transgender workers are entitled to support from their employers, including discussions and explanations with co-workers or service users. It is the employer's responsibility to manage their attitudes. If these practicalities are mismanaged it can cause bad feeling and hostility between co-workers.

Dress codes

Many workers appreciate dress codes which do not differentiate according to gender. Where dress codes are different for men and women, branches should negotiate flexibility for members in the process of transition and for other members who require it.

Checklist of negotiating points

Branches should negotiate with employers so that:

- gender identity and gender reassignment are included in equality policy and practice and there is well publicised compliance with the law
- transgender equality is clearly included in any equality objectives and equality scheme, including specific actions in equality plans and checks in equality impact assessments
- all workers are trained and informed about transgender people's rights - that harassment and discriminatory behaviour will not be tolerated
- there are clear procedures for members undergoing transition
- workers undergoing gender reassignment have paid leave from work for specialist medical appointments and for surgery, recorded separately from sickness absence and not used for absence management purposes
- all records are kept up to date, old records destroyed and confidentiality is practised scrupulously
- all workers are treated as the gender in which they live and work, irrespective of their legal sex
- consideration is given to any single sex facilities and gender-specific dress codes
- transgender people who have not acquired Gender Recognition Certificates are advised of any legal implications of their status for pensions and other gender-related benefits.

We urge all employers to adopt positive equality policies, not simply ban discrimination. There is a model statement on sexual orientation and gender identity online at unison.org.uk/out.

Branch organisation

Branches should make sure:

- all members are clearly informed that discrimination on grounds of gender identity and gender reassignment will not be tolerated by the union at any level
- training and information is provided to those who have a role in advising and representing members
- union records are kept up to date, old records destroyed and the highest levels of confidentiality ensured
- transgender members are encouraged to get involved and active in all aspects of our union's work
- transgender members are given information about specialist support groups, if needed.

In UNISON, transgender members and lesbian, gay and bisexual members work together in coalition. Branches should encourage transgender members to participate in UNISON's lesbian, gay, bisexual and transgender members self-organised group and should support local LGBT organisation.

Further information

UNISON/Scottish Transgender Alliance introductory guide for reps supporting trans members, stock no 2726, is at www.unison.org.uk/out or available from UNISON LGBT officer (see below).

For help when you need it, call UNISON *direct* on 0800 0857 857 (voice) or 0800 0 967 968 (minicom) between 6 am and midnight, Monday to Friday and 9 am to 4 pm on Saturday.

Visit UNISON's LGBT webpages for up to date advice, information and events – unison.org.uk/out (members sign in to see all documents). Sign up for the monthly LGBT e-bulletin. Find your regional LGBT group, who can put you in touch with your branch LGBT group or advise you on setting up a group.

For more on LGBT equality: **Carola Towle, national officer, LGBT equality**
UNISON 130 Euston Road London NW1 2AY
out@unison.co.uk

Useful Organisations

Press for Change - pfc.org.uk - education and campaigning for equal rights and liberties for all trans people. BM Network, London WC1N 3XX office@pfc.org.uk

Scottish Transgender Alliance – scottishtrans.org – guidance on trans equality issues and support for trans people. Equality Network 30 Bernard Street Edinburgh EH6 6PR 0131 467 6039 info@scottishtrans.org

Focus: the identity trust – thefocustrust.com – advice and support for trans people and their families in Northern Ireland

GIRES – gires.org.uk - Gender Identity Research and Education Society – information for trans people, their families and the professionals who support them admin@gires.org.uk

Gendered Intelligence - genderedintelligence.co.uk - workshops and creative programmes to improve the quality of young trans people's lives and generate debate around gender

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