

TRANSGENDER WORKERS RIGHTS

factsheet

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 and 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'.

Many 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. 41% of trans respondents to our most recent UNISON members survey feared for their job security if people knew they were trans. 60% of them had experienced transphobic comments from colleagues and managers.

The Equality Act 2010 protects people who are proposing to undergo, undergoing or have undergone a process (or part of a process) of gender reassignment. 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.

As of April 2011, the Equality Act 2010 place a duty on public employers to take positive steps to eliminate discrimination, promote equality of opportunity and foster good relations for transgender people. For more, see *Public sector equality duty*, below.

The Gender Recognition Act 2004 gives people the opportunity to apply for full legal recognition for their acquired gender and important measures to protect people's privacy (see section below on Records and confidentiality). However, not all transgender people can go through this legal process. Whether a person has a Gender Recognition Certificate has little or no bearing on their

employment. All transgender workers should be treated as the gender in which they live, whether or not they have applied for such legal recognition.

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. UNISON has developed an inclusive Equality Scheme to promote equality in everything we do. Gender identity is one of the equality strands for the scheme.

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.

UNISON is affiliated to Press for Change - the political lobbying and educational organisation campaigning for civil rights and liberties for all trans people (see last page for contact details).

DEFINITIONS

Gender identity: a person's internal sense of where they exist in relation to being male or female.

Transgender or trans person: a person whose own 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.

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 diagnosis of a consistent and 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 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 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. There is information about the application process at <http://www.grp.gov.uk>.

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. If a person was married before undergoing gender reassignment, they can't apply for a full GRC without dissolving their marriage, which many people are not prepared to do. However it is possible to get an interim certificate, dissolve the marriage and 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 brings together and builds on previous anti-discrimination legislation, including the Sex Discrimination (Gender Reassignment) Regulations 1999.

The Government Equalities Office and the Equality and Human Rights Commission have both published guidance for employers and employees. There is information on their websites.

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.

factsheet

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

As of April 2011, public bodies in England, Scotland and Wales have a statutory duty to give due regard to eliminating discrimination, advancing equality of opportunity and fostering good relations for transgender people.

In Wales, this general duty is already underpinned by specific duties to set strategic action plans, publish equality objectives, assess the equality impact of proposed policies and practices, and involve and consult affected groups. The Government has delayed the specific duties for England and Scotland. However, public bodies can only demonstrate that they are complying with the general duty by taking steps such as these.

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. Significantly, 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.

An employer is liable if an employee is harassed by a third party (such as client or member of the public) on at least two occasions, not necessarily by the same person, if the employer knows the harassment has taken place but failed to take reasonably practicable steps to stop it happening again. The Tory-led Government is considering whether to keep this provision, but for now it stands.

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.

Indirect Discrimination

Because transgender people could not change their legal sex until 2005, heterosexual transgender people were unable to marry, as their partner was the same legal sex. This led to indirect discrimination in gender-related benefits, such as passing on pension rights and insurance policies to partners or children.

It is now possible to gain legal gender recognition. It is also possible to form a civil partnership with a person of the same sex, giving the same workplace benefits as marriage. However, not all trans people can apply for legal gender recognition.

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.

UNISON believes that no one should be discriminated against on grounds of gender or marital/civil partnership status. All should have equal rights and access to benefits, whether married or unmarried, whether a registered civil partner or not, and whether their partner is of the opposite or same sex.

All contracts and agreements should be checked for possible discrimination.

Victimisation

It is unlawful to victimise someone because they have made a complaint of discrimination or given evidence or information in someone else's complaint.

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 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 a 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

factsheet

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 Criminal Records Bureau - www.crb.gov.uk – search under transsexual applicants. 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 02890 259100 or email accessni@ani.x.gsi.gov.uk in confidence.

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.

Pensions and insurance

Everyone born since April 1955 receives their state pension at 65. But women born before 1950 can still claim state pension at 60. Transgender people without a Gender Recognition Certificate are paid their state pension according to the sex recorded at birth. If someone retires earlier or later than others of their gender because of their legal sex, branches should ensure the employer keeps the reason for this confidential.

Male to female transgender people who gain a Gender Recognition Certificate after turning 60 can have their state pension backdated to their 60th birthday.

Employers registering workers for corporate insurance and benefits policies need to check with their underwriters if they need to provide information about any transgender worker's status. Some insurers automatically invalidate a policy if the transgender status of a person without a Gender Recognition Certificate is not disclosed.

Branches should make sure the employer gets written consent from the worker *before* disclosing information, and that the information is provided in confidence. If the employer doesn't know about the worker's transgender status, the obligation to disclose this passes to the worker.

TRANSITIONING AT WORK – AGREEING A PROCESS

Gender transitioning is often a very stressful time for a trans person. 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, harassment and insurance address transgender equality and if not, how these will be amended
- What training of managers and co-workers will be needed 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, service users and the public that a worker is undergoing gender reassignment. It is necessary only where the working relationship is continuing though 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 will be important to:

factsheet

- 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 and satisfy people's curiosity
- Not go into too much detail
- Respect the wishes of the transgender person and their right to medical 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 medical 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.

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. See the section below on communicating with other workers.

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.

Single Sex Facilities

Transgender workers should have access to single sex areas according to the gender in which they attend work. The employer and worker should agree the point at which the use of facilities such as changing rooms and toilets 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 for the long term on transgender workers using separate facilities, for example a unisex wheelchair accessible toilet. 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

Branches should negotiate flexibility in dress codes to accommodate the process of transition.

CHECKLIST OF NEGOTIATING POINTS

Branches should negotiate with employers to ensure:

- gender identity and gender reassignment are included in equality policy and practice and there is well publicised compliance with the law

factsheet

- 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
- transgender people who have not acquired Gender Recognition Certificates are advised of the legal implications of their status for pensions and other 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 on our website at www.unison.org.uk/out

BRANCH ORGANISATION

Branch checklist

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 given information about support groups, including our own self-organised groups.

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 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, UNISON Centre 130 Euston Road London NW1 2AY.

Visit UNISON's LGBT webpages for up to date advice, information and events – www.unison.org.uk/out Sign up for the monthly e-bulletin and hard copy mailings on LGBT issues. Find the contact for your regional LGBT group, who can put you in touch with your branch LGBT group or advise you on how to set up a group.

If you don't have internet access, or for help when you need it, call UNISONdirect on 0845 355 0845 (voice) or 0800 0 967 968 (minicom) between 6 am and midnight, Monday to Friday and 9 am to 4 pm on Saturday.

UNISON welcomes comments on this factsheet and examples of good agreements you negotiate. Please write to or email us:

UNISON Membership Participation Unit
130 Euston Road London NW1 2AY
out@unison.co.uk
www.unison.org.uk/out

USEFUL ORGANISATIONS

Information on the **Gender Recognition Act and Gender Recognition Panels** including frequently asked questions and application forms for gender recognition www.grp.gov.uk

Press for Change - www.pfc.org.uk - political lobbying, education and campaigning for equal rights and liberties for all trans people. UNISON is affiliated. BM Network, London WC1N 3XX editor@pfc.org.uk

Scottish Transgender Alliance – www.scottishtrans.org – training and good practice guidance on trans equality issues. Equality Network 30 Bernard Street Edinburgh EH6 6PR 07020 933 952 info@scottishtrans.org

GIRES – www.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

Gender Trust – www.gendertrust.org.uk - support for all affected by gender identity issues. 113 Queens Road, Brighton BN1 3XG 0845 231 0505 info@gendertrust.org.uk

FTM Network - www.ftm.org.uk - support for transgender men
BM Network, London WC1N 3XX membership@ftm.org.uk