

Transgender workers rights

This factsheet gives information about the rights of transgender workers and good practice for employers and UNISON branches. It includes information on terminology, the law, support for trans members and negotiating checklists. 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 with a deep conviction that their gender 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 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. An evidence review commissioned by the Government Equalities Office, published by the National Institute of Economic and Social Research in July 2016, showed discrimination in recruitment and promotion, with many trans people working below the level of their education and qualifications. Many trans people (up to 50% of respondents) experienced harassment and bullying at work. They reported extremely poor service from HR departments, lack of understanding of trans issues by managers and little support when they faced discrimination and harassment. Consequences of this include restricted job choice, reduced progression and inability to be out at work.

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. UNISON and the Scottish Transgender Alliance have produced an introductory guide for reps, UNISON stock no 2726 – see page 12.

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 society's 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

Gender fluid: having a gender identity which varies over time

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 a different 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 Gender Recognition Act enables people over eighteen to gain full legal recognition for the binary gender (female or male) 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 wish to or they may not be able to, for a range of personal reasons. There is currently no legal category for people with a gender identity outside the binary. The 2016 Commons Select Committee report on transgender equality called on the government to look into this.

Employment rights do not depend on whether a person has a GRC. Employers should not ask for a person's GRC and it can never be a pre-condition for transitioning at work. To apply for a GRC, a person needs to show they have been living 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. The Sex Discrimination (Gender Reassignment) Regulations (NI) 1999 provide similar protection in Northern Ireland.

The Act makes clear that it is not necessary for people to have any medical diagnosis or treatment to gain 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 transition.

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 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) because that 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 attend work. This is whether or not they have medical treatment or acquire a Gender Recognition Certificate. Recognition of a change of gender at work is usually from when the person begins living in their new gender.

Some people do not transition permanently from one binary gender to the other. Increasingly, employers are recognising non-binary or gender fluid identities and accommodating these at work. The key point is that the trans member is an individual and should be listened to and respected as such, rather than assumptions being made.

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.

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 is in force in Northern Ireland.

This means consciously thinking about the three equality duty aims as part of decision-making, including on employment, service delivery, financial decisions, cuts and redundancies. It may involve treating some people better than others to combat historic disadvantage.

UNISON's advice on the public sector equality duty is stock number 3062 and in the Knowledge section of the UNISON website.

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. Branches should ensure the harassment policy includes specific reference to gender identity and gender reassignment. UNISON's guide on harassment at work is stock number 1359.

Occupational requirements

In the vast majority of cases, a worker's gender 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 Act makes it clear that the employer must act reasonably. For example, conducting intimate searches is unlikely to be a main part of any post. The employer must consider whether the tasks could be carried out by someone else. Any occupational requirement must be identified at the beginning of the recruitment process and stated in the application pack.

If a member intending to transition works in a single sex position or organisation, it is probably best to negotiate redeployment. Discuss options 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. 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.

Reviewing policies and procedures

It is unlawful to discriminate against trans workers, whether or not this is stated in an employer's policies. However, unless it's 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 responsibility to treat trans people with respect. Branches should make sure that policies refer specifically to discrimination on grounds of gender identity and gender reassignment, are inclusive of non-binary people and that unnecessary references to gender are removed.

Recruitment and interviews

Branches should negotiate recruitment policies and procedures that give transgender workers a fair deal and make it clear to candidates that discrimination is not tolerated. Job adverts should welcome applications from transgender people 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 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. Being out to a small group of people does not necessarily mean a person wants to be out to everybody. Branches should insist that personnel records do not refer to any previous name and 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 such records should be restricted to staff who 'need to know'. 'Need to know' applies to those directly involved in administering personnel records or authorising payments into a pension scheme, for example. Breaches of confidentiality should be treated in a serious manner and can be unlawful harassment.

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 are procedures for transgender workers which protect their confidentiality with employers while enabling the necessary checks against previous names. Details of the confidential procedure are available online from the Disclosure and Barring Services.

The need for scrupulous confidentiality also applies to our union work. Union records must be kept up to date and records referring to a previous name/gender must be destroyed. If they cannot be destroyed or updated, their security must be ensured. There is an agreed process for purging previous name information from the union's membership database – details from RMS operations at the UNISON Centre.

Monitoring

UNISON is strongly in favour of policies, practices and staff attitudes being monitored, to measure the implementation of trans equality. However we urge caution in seeking to monitor the number of trans staff in any organisation. There is separate UNISON guidance *LGBT workforce monitoring* at unison.org.uk/out.

Transitioning at work – agreeing a process

Gender transitioning can be a very stressful time for a 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 work with the person concerned, right from the start. Issues to consider include:

- 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 are required to records and systems, including whether systems allow for non-binary gender identities
- What practical arrangements need to be in place, such as security passes, email addresses, any gendered uniform
- 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 need; when will it happen and who will carry it out
- The expected time scale of any medical and surgical procedures

- What time off will be required for treatment and/or possible side effects
- Whether the member wants to stay in their current post or be redeployed.

Communicating with other workers or service users

There is no general need to inform co-workers or service users. It is necessary where the working relationship continues through transition. It is usually good practice for employers to take responsibility for informing those who need to know, but the individual's wishes should be given priority.

There should be general information about transgender people and relevant information about the particular person. Their right to work in dignity and free from discrimination and the unacceptability of harassment must be made clear.

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

- Give the name or names the person wishes to be known by and emphasise the importance of using the correct name and gender pronoun (he, she or they)
- 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 when discussing personal aspects
- Pitch the information at a level and style appropriate to the audience
- Include details of how to get further information.

Gender reassignment under medical supervision

Trans people, including non-binary people, may take hormones and/or have surgery. Trans people are a diverse group and there is no one 'correct' way to transition. Accessing NHS gender identity services requires diagnosis by a specialist and may take months or years. Waiting lists vary around the UK but can be substantial. Appointments may involve travelling long distances, so are likely to take a whole day. This can be an extremely stressful time for people.

There is no need for managers to have details about a person's medical treatment except in relation to expected time off or necessary adjustments at work during or following treatment.

Negotiating paid time off for treatment

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.

Best practice is for branches 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.

Capability procedures

Employers should be made aware of possible side effects of medication and stress of transitioning, which can affect work performance. People sometimes need reduced hours or duties for a temporary period following surgery. Together with the member, branches should discuss options with the employer. 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 discrimination.

Redeployment and retirement

Most people want to stay in the same job through transition. Occasionally, a worker may want to be redeployed or retired. The earlier this is raised, the better the chance of a good outcome. If redeployment does take place, it will usually coincide with the change of gender.

Branches should make sure that difficulties meeting the member's preferences on redeployment are not turned into grounds for dismissal or retirement. Active steps should be taken to prevent harassment and ensure support from colleagues and managers.

Non-binary members

Some people don't feel comfortable thinking of themselves as simply male or female. Their gender identity is more complicated. Some may identify 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 simply male or female, it can be difficult to work out how to express a gender identity which does not fit neatly into the gender binary. Some people experience a long period of uncertainty about how they relate to the highly gender-stereotyped world around them. However, growing numbers of

people are identifying as non-binary. UNISON supports the call for their recognition under the law, at work and in service provision.

Workplace and union records should provide for non-binary gender identities. UNISON membership records do not require members to register a binary (female or male) gender. Title options include the non-gendered Mx.

Gendered facilities

It is increasingly common – and increasingly welcome - for at least some changing and toilet facilities to be available to all, irrespective of gender. Where facilities are gendered, all workers should be able to use them according to the gender in which they attend work.

It is not acceptable to insist on transgender workers using specific facilities, for example a non-gendered wheelchair accessible toilet, just because they are trans.

Transgender workers are entitled to support from their employer, including appropriate discussions with co-workers and service users. It is the employer's responsibility to manage attitudes. If these 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 others who require it, such as non-binary members.

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
- policies and procedures are checked for unnecessary or non-inclusive references to gender and acknowledge and accommodate non-binary identities
- all workers are trained and informed about transgender people's rights - that harassment and discriminatory behaviour will not be tolerated

- all workers are treated as the gender or genders in which they live and work, irrespective of their legal sex
- there are clear procedures for members who are transitioning at work
- workers undergoing medical gender reassignment have paid leave from work for specialist appointments and treatment, 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
- consideration is given to any gendered 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).

UNISON stock items can also be downloaded or ordered from unison.org.uk/onlinecatalogue.

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.org.uk/out for advice, information and events. 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 one up.

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

Useful organisations

Scottish Transgender Alliance scottishtrans.org guidance and support on trans equality

Gendered Intelligence genderedintelligence.co.uk debate and training on gender and workshops to improve the quality of young trans people's lives

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

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

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