



GENDER REASSIGNMENT

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About this guide

The Equality Act 2017 makes it unlawful to discriminate against or treat someone unfairly because of gender reassignment.

Understanding key terms

Explanations of these terms have been compiled as an introduction to what they mean in this guide. They are not meant to be comprehensive definitions. Terminology can be particularly difficult and sensitive in this area, it is evolving and there can be differences of opinion about terms.

Transgender: Used in the Equality Act to refer to a person who has the protected characteristic of gender reassignment. **'Transgender' is the only term used in legislation.**

Trans: An umbrella term including both transgender people and people with non-binary identities. This term is not found in any legislation.

Non-binary: Not identifying with the man or woman approach to gender. A non-binary person may say they are neither man nor woman, or may have some other sense of gender – for example, pan-gender, poly-gender, third gender. Non-binary identities are not explicitly covered by the Equality Act.

Transitioning: A term used by transgender people and other trans people. It can be a series of social, psychological, emotional and sometimes medical steps a person goes through to present in the gender identity they feel is correct for them. It can include telling family, friends and maybe their employer and colleagues, about, for example, an intention to transition. Steps are likely to vary and take different amounts of time for each individual. Also, be aware that not every person who transitions regards themselves as trans – for example, someone who has a Gender Recognition Certificate can legally call themselves a man or woman (depending on how they have affirmed their gender).

Gender identity: How a person perceives their sense of gender, which may vary from the sex they were assigned at birth. It may be used by those who are undergoing gender reassignment, those who are not, and those who have a fluid gender identity (see below). For example, some may identify as a woman, a man, a combination of woman and man, or some other sense of gender.

Gender dysphoria: Where a person experiences distress because of a mismatch between the sex they were assigned at birth and their gender identity. Also known as gender identity disorder and gender incongruence.



Gender questioning: People unsure whether they identify as a man, a woman or neither. They may experiment with different gender identities.

Gender expression: How people may choose to show their gender identity - for example, through how they dress, length of hair, or the way they act or speak.

Gender non-conformity: Where a person does not match the norms of the gender they were assigned to be, or are perceived to be. This can include identifying as neither man nor woman, or as a combination of both. Also known as gender variance. A gender non-conforming person may or may not identify as trans.

Gender fluid: A wider range of gender expressions that may change from day to day. For example, a person may identify more as a woman on some days and identify more as a man on others, or may feel that neither gender describes them accurately.

Affirmed gender: Trans organisations' preferred term for gender identity after transition. They dislike 'new' or 'acquired'.

What is gender reassignment discrimination?

The Equality Act protects employees from certain types of discrimination relating to gender reassignment.

The protected characteristic of gender reassignment currently has a specific meaning under the Act:

- it covers someone who proposes to go through, is going through or has gone through a process, or part of a process, to change his or her gender from man to woman or woman to man. A person making this change is described in the Act as a 'transgender' person
- gender reassignment does not have to involve any medical supervision. For example, a person who chooses to reassign his or her gender and lives permanently as the opposite sex without having any hormonal or surgical therapy is protected
- genders outside of man (which includes woman transitioning to man) and woman (which includes man transitioning to woman) are not explicitly protected under the Equality Act. They are the **non-binary identities** - for example, those who might identify as neither man nor woman. But there may be circumstances where



someone with a non-binary identity could be protected under direct discrimination by perception.

The Equality Act does not require any minimum length of continuous employment, or any employment at all in the case of a job applicant, for a discrimination claim to be made. It makes discrimination unlawful at all stages - from when a role is advertised and interviewed for, through to the last day of employment and beyond, including any job references.

How gender reassignment discrimination can happen

There are four main types of discrimination within the protected characteristic of gender reassignment under the Equality Act 2017:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation.

Employers should be aware that successfully dealing with a complaint of discrimination is not always the end of the matter. It is useful to think of how any future instances of discrimination might be prevented.

Direct discrimination

This breaks down into three different types of direct discrimination where someone is treated less favourably than others because:

- of their own gender reassignment – this is **ordinary direct discrimination**
- of the gender reassignment of someone they are associated with, such as a friend, family member or colleague – this is **direct discrimination by association**
- they are thought to be considering, thought to be undergoing or thought to have undergone gender reassignment, regardless of whether this perception is correct or not - this is **direct discrimination by perception**. This is the

type of discrimination where someone with one of the non-binary identities might be protected.

Direct discrimination in all its three forms could, for example, involve a decision not to employ someone, to dismiss them, withhold promotion or training, offer poorer terms and conditions or deny contractual benefits because of gender reassignment. In almost all circumstances it would be unlawful. However, the Act, in some limited circumstances, allows discrimination where a particular job requires the employee not to be a transgender person. This is known as an 'occupational requirement' but it is usually very difficult to prove that there is a genuine requirement rather than simply a preference. If you are considering arguing that you have a job with such an 'occupational requirement' we would strongly recommend you take advice prior to doing so.

For example... ordinary direct discrimination

Rianne, transitioning from man to woman, wants to continue in her job. However, her boss, Haru, says that until Rianne's transition is complete, she needs to move to the role of delivery manager on the same pay. Haru adds that it is in the interests of Rianne and the business that she temporarily has less contact with clients. Rianne replies that her effective job performance has not changed and she wants to stay in her current role. It is likely to be discrimination if the employer forces Rianne to change roles because of gender reassignment.

For example... direct discrimination by association

Adwin asks for a chat with company director Faye to discuss his interest in promotion to a management post in the firm. He is shocked when she is lukewarm about his interest, suggesting off the record that his personal life could be a problem. Faye was referring to his partner's transition to become a man. She says the post involves a lot of entertaining, often accompanied by their partner, and clients might be uncomfortable about his partner's transition. Adwin complains this would be discrimination because of his partner's gender reassignment.

For example... direct discrimination by perception

Vihaan is the subject of rumours at work, but keeps silent about gender identity. Vihaan identifies as 'gender fluid'. Colleagues at the firm do not know Vihaan is gender fluid – instead, they think Vihaan is going through gender reassignment. Vihaan senses they feel uncomfortable, and notices being excluded from some office meetings, social gatherings and training opportunities. This is likely to be direct discrimination because Vihaan is perceived to be going through gender reassignment.

Indirect discrimination

This type of discrimination is usually less obvious than direct discrimination and can often be unintended. In law, it is where a provision, criterion or practice:

- is applied equally to a group of employees/job applicants
- has (or will have) the effect of putting those who share a protected characteristic at a particular disadvantage when compared to others without the characteristic in the group
- puts, or would put, an employee/job applicant at that disadvantage
- and, the employer is unable to justify it.

An employee or job applicant claiming indirect discrimination must show that the application of the 'provision, criterion or practice' puts, or would put, employees/job applicants who are transgender people at a disproportionate disadvantage when compared to employees/job applicants who are not transgender people. This is often demonstrated by statistics.

The individual employee or job applicant must then show that they have been disadvantaged by the application of the provision, criterion or practice. However, when the above two things can be shown, but the employer can show the provision, criterion or practice is appropriate, proportionate and necessary (this is known as objective justification) it would not be indirect discrimination.

For example... indirect discrimination

Francine is arranging a business trip abroad. Her manager is new to the firm and follows a 'safety net' approach to business travel overseas. He requires that all employees travelling abroad on business must take their birth certificate as additional proof of identity. He tells Francine that, as well as her passport, she will need to take her birth certificate as additional proof of her identity. Also, she will need to leave copies of both with her employer before she goes on the trip. Francine has not told her employer she transitioned because she wants to keep her past as a man confidential. She didn't want to apply for a Gender Recognition Certificate, so does not have a new birth certificate as Francine. To show her original birth certificate would 'out' her. Francine offers her photo driving licence as Francine instead. The manager's insistence on seeing her birth certificate is likely to be indirect discrimination because the requirement to take a birth certificate disadvantages transgender people and puts Francine at a disadvantage. Her driving licence could have been accepted as an alternative.

Where indirect discrimination may be justified

Indirect discrimination may be what the law calls objectively justified if the employer can prove the 'provision, criterion or practice' is 'a proportionate means of achieving a legitimate aim'. Employers should note this can be difficult to prove.

In attempting to demonstrate 'a proportionate means of achieving a legitimate aim', an employer must show:

- there is a legitimate aim such as a good business reason, but employers should note that cost alone is unlikely to be considered sufficient and
- the actions are proportionate, appropriate and necessary.

Both points apply, not just one of them.

The process of determining whether discrimination is justified involves weighing up the employer's need against the discriminatory effect on the group of employees who are 'transsexual' people. The more discriminatory the effect, the more difficult it will be to justify. It will be particularly difficult to justify discrimination where the same aim could have been achieved without discrimination or in a less discriminatory way.

Employers should scrutinise their policies, practices and rules to see whether they may be more difficult for 'transgender' people to comply with, and, if so, whether they can really be justified. Otherwise, they may inadvertently indirectly discriminate. For example, policies, practices and rules which were not discriminatory when introduced may become discriminatory over time, perhaps because of a change in the make-up of the workforce or a change in the law.

Harassment

Harassment is defined as 'unwanted conduct' and must be related to a relevant protected characteristic – in this case, gender reassignment. It must also have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

This can include bullying, threats, intrusive or inappropriate questions, excluding someone (ignoring, not inviting someone to meetings or events etc) and offensive

comments. It can be verbal, written or physical. Also, unwanted jokes and/or gossip the employee finds offensive or isolating can be harassment, and to say they were 'banter' is no defence.

In practice, the impact of unwanted conduct as perceived by the victim tends to take precedence over the perception of the harasser and their intent. Whether it is reasonable for the victim to feel the way they do is also taken into account.

Also, it is possible for an employee to make a complaint of harassment where they are not on the receiving end of the conduct, but witness it and it has a negative impact on their dignity at work or the working environment. The employee making a complaint of harassment in this situation need not be a transgender person.

Managers should be careful not to let their own views influence a situation or dismiss a concern because they don't deem the behaviour offensive themselves. It is important to remember that if an employee feels strongly enough to raise a concern or make a complaint, the employer should take it seriously and deal with it appropriately and correctly.

For example...harassment

Sarah works in accounts at a dealership – she has transitioned to live permanently as a woman. All colleagues are supportive apart from two. Helen and Gary don't agree with gender reassignment and, when they think no-one else can hear, refer to Sarah on purpose using 'he', 'him', or 'his' to upset her. This is even though, with Sarah's approval, they and their colleagues were told what language is acceptable and what is unacceptable. Helen and Gary's behaviour is likely to be harassment.

Victimisation

Victimisation is when an employee suffers what the law terms a 'detriment' - something that causes disadvantage, damage, harm or loss - because of:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination – for example, as a companion at a grievance hearing, and/or
- giving evidence relating to a complaint about discrimination, and/or
- raising a grievance concerning equality or discrimination, and/or



- doing anything else for the purposes of (or in connection with) the Equality Act, such as bringing a claim of discrimination to the Employment and Equality Tribunal.

Victimisation can also occur because an employee is suspected of doing one or more of these things, or because it is believed they may do so.

'Victimisation' is a term commonly misused and misunderstood, and only applies when it meets the explanation above. A 'detriment', for example, might include being labelled a 'troublemaker', being left out and ignored, being denied training or promotion, or being given a poor reference.

For example...victimisation

Fourteen months ago Greg gave evidence against a manager disciplined for speaking abusively to an employee about their gender reassignment. Now, Greg is applying to move to another post in the company as a career development opportunity. His application is turned down by the manager who was disciplined, saying that Greg's performance in his current role needs to improve before he can be considered again. Greg has had no previous complaints about his work and is sure he is being punished by the manager because he gave evidence against him. If Greg is correct, the manager's action is likely to be victimisation.

An employee is protected under the Equality Act from victimisation if they make, or support, an allegation of discrimination in good faith – even if the information or evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence maliciously.

Key areas of employment where gender reassignment discrimination can happen

Six particular areas of employment where gender reassignment discrimination can occur are:

- recruitment
- pay, and terms and conditions of employment
- promotion opportunities
- training opportunities
- dismissal

- selection for redundancy

Recruitment

To avoid discrimination and follow best practice, an **employer when recruiting should** generally take the following steps when:

- **writing the essential documents:** be careful when compiling an advertisement, job description and person specification for a vacancy. Stay clear of any reference which might be interpreted as disadvantaging someone who is undergoing or has undergone gender reassignment, or is intending to. So where possible, use gender-neutral language – for example, 'they' instead of 'he or she' and 'their' instead of 'his or her'. There can be exceptions – see the 'Occupational requirements' section in this guide – but they are rare. Further, an employer **should not** include anything irrelevant to the job, and should avoid wording it is unsure about or thinks might be open to legal challenge
- **pinpointing skills, experience and qualifications for the job:** be clear on exactly what is needed for the post so managers are objective in assessing and selecting candidates. This should reduce the chances of ruling out a candidate because they propose to go through, are going through or have completed a process, or part of a process, of gender reassignment
- **advertising:** avoid solely using one kind of place or media. Use at least two different channels so as not to end up with candidates from too narrow an audience. And be mindful, if spreading word of vacancies through existing employees and managers, that relying only on 'word of mouth' is likely to perpetuate any imbalance in the make-up of the workforce and yield only a small pool of candidates
- **asking for personal information:** make sure the personal information requested is relevant to the job and/or administration of the recruitment process. Avoid asking for a title (for example, Mr), but if it is necessary allow the applicant to give a title of their choice or no title. Also, asking for a previous name should be done sensitively, only where really needed, treated as confidential and stored securely.

In an interview, do not assume the applicant's gender by their appearance - simply ask how they would like to be addressed. Avoid asking them direct or indirect questions of a personal nature unrelated to the job and their

application – for example, do not ask or comment specifically about their gender. Where such information is volunteered, interviewers should take care not to be influenced by it. They should thank the applicant for their openness, say that if appointed they would be supported, and that the information, unless the applicant decides otherwise, is confidential and will not be shared with others. Then, focus on the main purpose of the recruitment process – to see if they have the skills, experience and qualifications needed for the job. Plus, be careful to only make enquiries relevant to the recruitment process if contacting, with the applicant's consent, a previous employer – it is highly likely the applicant will not want to be 'outed'.

- **using an equality monitoring form:** allow the candidate options to answer 'Prefer not to say' or 'Use your own term' to the question about gender, and keep that question separate from one about sexual orientation. This form should be anonymous and kept separate from the application form, any CV and the rest of the recruitment process.
- **dealing with a very sensitive gender identity matter:** have a person the organisation can turn to who knows how to handle such issues in the workplace. This could be someone in HR if the organisation has such a department, a small firm could call in an outside expert, or the candidate might suggest an advisor who might help. This can be reassuring for both employer and applicant. Such an issue might be that names and/or gender on a trans applicant/employee's documentation – for example, on their passport, driver's licence or qualification certificates – do not tally.
- **on the phone:** don't assume that because someone sounds to be a particular gender that they are that gender. Follow the cues they give, and don't ask for a title unless it is really necessary. Or, ask the person how they would like to be addressed.
- **using a recruitment agency:** tell the agency it must comply with the Equality Act. Generally, an employer **must not** suggest it would prefer candidates who are not transsexual people, and the agency **must not** follow such an unlawful instruction, unless an 'occupational requirement' applies.

For example... discrimination in recruitment

Rupert, who is transitioning from man to woman, applies for a job in the name of Rupert and attends the interview for the marketing manager's post as a woman. Two weeks later Rupert is told she has been turned down because of not meeting the criteria for the post. Rupert has extensive experience in marketing management, yet was barely asked about this or her skills. Rupert saw the job still advertised four weeks later and believes she was turned down because of gender reassignment. If

true, this is likely to be discriminatory.

Pay, and terms and conditions of employment

It is important to ensure there are no terms and conditions (including contractual benefits) that disadvantage or exclude someone because of their own gender reassignment, perceived gender reassignment or association with someone else's gender reassignment. For example, this might include pay, a bonus scheme or being allowed to work flexibly.

However, an employer may be able to justify different terms and conditions if there is an important factor or factors behind them not related to gender reassignment. For instance, these might include job experience, qualifications and where the job is based geographically.

For example... discrimination in terms of employment

Barry informs his manager, Charlene, he needs to take leave for assessments at a clinic as part of his transition to a woman. She says he can have the time off, but will not get paid for it. This is likely to be discriminatory, as Barry must not be paid any differently than if he were off work sick, injured or having treatment for a health issue.

For example... discrimination in terms of employment

Barry informs his manager, Charlene, he needs to take leave for assessments at a clinic as part of his transition to a woman. She says he can have the time off, but will not get paid for it. This is likely to be discriminatory, as Barry must not be paid any differently than if he were off work sick, injured or having treatment for a health issue.

Promotion

In promotion opportunities, employees must not be discriminated against because of their own gender reassignment, perceived gender reassignment or association with someone else's gender reassignment.

For example, it would be discriminatory to:

- turn down applications from people because they are proposing to reassign their gender
- discourage an employee from applying because they are reassigning their gender



- not promote an employee who is the best person for the job because it is believed they would not fit in because they have reassigned their gender.

However, there can be exceptions – see the “Occupational requirements” section further into this guide – but they are rare.

For example... discrimination in promotion

Engineer Lee applies for promotion to a more senior line manager’s role. He is shocked when told the post has gone to Tom because Tom was the stronger candidate. Tom is a member of the team Lee currently supervises. Lee cannot understand the decision, as he knows Tom has no previous management experience, less technical engineering knowledge and fewer qualifications. Lee suspects the real reason he didn’t get the job was that the managing director has not forgiven him for not saying, when he first applied to the firm, that he had undergone gender reassignment, even though Lee was not obliged to tell the firm. If Lee is correct, the managing director’s decision is likely to be discriminatory.

Training

Withholding training from an employee because of their gender reassignment, perceived gender reassignment or association with someone else’s gender reassignment would be discriminatory. Also, an employer should be sensitive about when an employee - who is absent from work because they propose to go through, are going through or have gone through gender reassignment - starts, undertakes or completes any training. It should be mindful of the employee’s needs in these circumstances to avoid any potential discrimination.

Further, an employer should ensure training opportunities are mentioned to all relevant employees and are equally accessible for staff who propose to go through, are going through or have gone through gender reassignment. Failure to do so could be discriminatory.

For example... discrimination in training

Francoise’s colleagues will be attending a residential course to improve their career prospects. But Francoise, who has transitioned from man to woman, is told that not everyone can go on the course this time, so she must wait for another opportunity. She suspects her employer is stalling as another employee overheard a managers’ conversation that they were worried that Francoise’s use of the women’s toilet facilities at the course could cause problems, and for that reason it was better that she didn’t go. If this is true, the managers’ decision is likely to be discriminatory.

Dismissal

It is unlawful for an employer to dismiss an employee because of their gender reassignment, perceived gender reassignment or association with someone else's gender reassignment.

For example... discrimination in dismissal

Clive is struggling with gender dysphoria and identifies as a woman. She has seen consultants and psychiatrists about the possibility of gender reassignment, and has now started transitioning. The appointments, treatments and recuperation mean she has been off work for 25 days in six-months, which his manager says has triggered the company's absence management procedures. Because of Clive's number of absences, she is dismissed. However, another employee has been off work for 25 days with a broken leg, and has not had to face the absence procedures or been dismissed. The company's action against Clive is likely to be discriminatory because of gender reassignment.

Redundancy

An employee must not be at a disadvantage or discriminated against in a redundancy process because of their gender reassignment, perceived gender reassignment or association with someone else's gender reassignment. For example, an employer must not target a 'transgender' employee because it disagrees with gender reassignment, or because they are absent for reasons connected with gender reassignment.

Risk of discrimination tends to be in two key areas:

- the criteria an employer uses to select employees for redundancy
- how an employer manages the redundancy process.

For example, including a 'transgender' employee's absences because of gender reassignment in the criteria for selecting staff for redundancy could be discriminatory. And the employer should make sure an employee absent because of gender reassignment is still consulted properly throughout the redundancy process.

For example... discrimination in redundancy

Jarmila is selected for redundancy. She feels her manager has been cool towards her since her gender reassignment, plus there has been upset with some colleagues purposely asking inappropriate questions or making spiteful

comments. She believes her employer's reaction is to make her redundant. Unless the employer can demonstrate that the redundancy is genuine and her selection has not been influenced by her gender reassignment, the decision is likely to be discriminatory.

Considerations for everyone

Employers, managers, HR personnel, employees and their employee or trade union representatives should make sure they understand what gender reassignment discrimination is and how it can happen, their rights and responsibilities, the employer's policy for preventing discrimination, and what behaviour and actions are unacceptable.

Further, although the non-binary identities are not specifically covered by the Equality Act, it is advisable and should be best practice for an employer's policies to also support people with these identities in the workplace so they feel included. Employers should work with employee representatives or recognised trade unions to consider how best to educate the rest of the workforce, including managers, to help them understand and support a colleague's or job applicant's trans identity.

Together they should also develop a policy to support trans employees in ways that are supportive of other staff.

Employer and employees should be very careful regarding questions related to an individual's gender reassignment as these might be or become discriminatory, particularly if they are intrusive or handled insensitively. They should also take the same care concerning people with non-binary identities to avoid causing offence and mistrust.

Disclosing Gender identities

The job applicant: A 'transgender' person is not required to tell a prospective employer they have changed gender if they get the job. A person who has transitioned before starting a job is likely to want to be accepted for who they are now. However, if they do disclose their gender reassignment to their new employer, it must be kept confidential and treated as sensitive personal information unless they clearly agree what information can be shared.

Similarly, an applicant with one of the non-binary identities should not be expected to tell a prospective employer. It should always be up to them to decide whether to disclose or talk about their gender identity – some fear being misunderstood and/or treated unfairly. However, there are some non-binary identities –for example, gender

fluid – where they may feel they have to tell the employer. But the employer should not press them to say what their gender identity is - they may not want to talk about it at all.

The employee: A person who is starting (or intending) to go through gender reassignment will in practice have no choice but to tell their employer. Options are for the employee to agree with the employer what information can be shared with who and when, or in a large organisation to apply to be transferred, after transition, to a new role where their gender reassignment will not be revealed.

Other general rules: Employers and colleagues must not 'out' an employee or applicant as trans as they could breach laws, such as the Human Rights Act 2001, giving rights to a private life. Also, apart from in certain circumstances, it is a criminal offence to reveal, without the person's permission, that they hold a gender recognition certificate or have applied for one. It is also an offence to disclose their previous gender before they got a gender recognition certificate.

If an employee or applicant who is trans decides that some information can be shared, the employer should, without pressuring the employee, talk to them about:

- what they do and don't want their colleagues to know
- who will be told, who will do the telling, where, when and how, and
- whether the employee will be there.

It is advisable that communication of any information to be shared is noted and recorded, and happens before the employee changes their appearance. Employees disclosing their trans identity to a supportive employer can feel more comfortable at work, with a likely improvement in their morale and productivity, too.

Depending on the employee's role, it may be beneficial to discuss and agree whether some limited information about their trans identity or gender reassignment should be communicated to clients and customers the employee regularly deals with.

Support a trans employee

It is likely to be daunting for an employee to tell an employer that they are planning to reassign or are reassigning their gender, or about their trans identity. The employer, or manager who has been approached, should:

- Listen and agree to support the employee through gender reassignment or in their trans identity. Employers may want to get advice in confidence from an equality expert
- Get explicit permission from the employee to talk in confidence to the organisation's HR department, its equality champion or trans expert and/or occupational health department, if the organisation has them, and/or trade union rep if they have already been approached by the employee, or an outside expert if necessary
- Be aware that no two gender reassignment situations or two trans identities are likely to be exactly the same, so as much as possible follow the employee's lead, adopt an approach that meets their needs, agree what steps need to be taken before, during and after any transition, and schedule meetings to help reassure them along the way and deal with any unforeseen matters
- Agree with them when will be the first day at work they will present in the gender identity they are transitioning to or have transitioned to. They may prefer to take a short break to prepare before that 'first day'. On that 'first day' being accompanied by a particular colleague or their manager may help. And make sure everything is in place – for example, are their colleagues aware, and have their pass and personal records been changed?
- Stay prepared to be the person who is willing to listen, and help them deal with any negative reactions in the workplace, for as long as they say they need that support. This is because work can be a stable place for them when they may be struggling in other areas such as family relationships
- Also, be aware of the points in the following sections, How to respect an employee's gender identity, Absence from work because of gender reassignment and Adaptations at work to help trans employees
- A sizeable organisation may want to set up, develop or team up with a support network for all of its trans employees so they can help one another. This would often be within a firm's LGBT network, a regional or local trade union LGBT group or through the help of a trans charity.
- If relevant, discuss and agree a plan of how any media inquiries would be dealt with, should they arise.

How to respect an employee's gender identity

Treat the employee or job applicant with respect and accept the gender identity they present in, but do not make assumptions about their gender

because of their appearance. For example, Brian is at the start of openly reassigning his gender from man to woman and is wearing women's clothing. However, don't assume the employee now wants to be referred to as 'she' – ask the employee how they wish to be known.

If and when the employee/applicant indicates they are ready to talk about their gender identity, they should be referred to in the terminology they have requested. Also, colleagues should be given a little time to adjust to an employee presenting in a different gender identity. Initial hesitation should not be mistaken as a negative reaction.

Don't try to work out if someone is cross-dressing

Employers and employees should not try to make a distinction whether a colleague is a cross-dresser or 'transgender'. A cross-dresser is a person who wears clothes usually expected to be worn by someone of the opposite sex. They are unlikely to do this permanently or seek medical advice. Under the Equality Act, cross-dressers are not regarded as 'transgender' people as they do not intend to live permanently in the gender opposite to their sex at birth. But while cross-dressers are not specifically protected under the Act, if they are discriminated against because they are perceived to be a 'transgender' person or because they are perceived to have a particular sexual orientation, they may be in a position to claim discrimination under the protected characteristic of gender reassignment in the first situation, or because of sexual orientation in the second.

Terminology

Unacceptable terminology: Derogatory and abusive terms about someone who proposes to go through, is going through or has completed a process to reassign their gender from man to woman or from woman to man are unacceptable and discriminatory. In discrimination, it is generally how the recipient perceives words and actions rather than the intention of the person delivering them.

The term 'banter' is often used when there is disparity between what was intended by one person and how it has been perceived by another. Employers should manage these situations with care. Sometimes a situation, where a 'joke' or 'banter' has caused offence or upset, can be dealt with by a manager having an informal discussion with an employee and explaining that they have caused offence, and to make sure they do not do it again. And in a situation where someone has used a



word by mistake, or there has been a misunderstanding, a manager may be able to handle it informally.

However in other situations, where a term or perhaps the employee's previous name or wrong pronoun (for example, 'he' instead of 'she') has been used on purpose and maliciously, the employer should look into the matter formally. There is more information about handling complaints further on in this guide and the companion guide, Discrimination: what to do if it happens, at www.mirs.org.im/equality

Be sensitive in referring to non-binary identities

As mentioned at the start of this guide, genders outside of man (including woman transitioning to man) and woman (including man transitioning to woman) are not specifically protected under the Equality Act. However, it is best practice for employers and employees to also make sure they do not use terms which offend the non-binary identities. Employers and employees should stay aware that there can be considerable sensitivity and differences of opinion over words and terms regarding trans issues, and that this can be a complex area. Also, they need to take into account that the acceptability or unacceptability of terms may change over time, and sometimes quite quickly.

Acceptable terminology: An organisation may decide not to use titles at all in the workplace or in dealing with suppliers or customers. Where an organisation does prefer to use titles, it should be sensitive to alternatives to Mr, Mrs, Miss and Ms an employee or job applicant would want to use, including no title. Where there is uncertainty around what terminology an employee or job applicant would find acceptable or unacceptable, the employer would be best approaching them to tactfully ask how they wish to be referred to. Depending on the individual's gender identity, they may also not want to be referred to as 'he' or 'she', but as, for example, 'they' or 'ze'. Where required, and with the employee's agreement, the employer should then make clear to relevant colleagues what terminology is acceptable and unacceptable.

Adaptations at work to help trans employees

Managing changeover of an employee's personal details: It is advisable for an employer to sensitively ask a trans employee or job applicant how they want to be addressed and to sensitively check at key stages in gender reassignment if this has changed, and accept and use that terminology. Other staff, if the employee is agreeable, should be told by the employer to use that terminology.



Employer and employee should agree what details need to be changed – for example, in personal records, the pass to get into work, staff rotas, computer logins, email address, pay slip, National Insurance and pension, and what will happen to the 'old' records including those on paper. It is important that no old records are overlooked, only to re-emerge sometime later and cause problems, such as a criminal offence for revealing they hold a gender recognition certificate.

Appearance and dress code: There can be many reasons why an employer may have a dress code. For example, to communicate a corporate image, ensure customers can easily identify a member of staff, or for health and safety reasons in the running of the workplace.

However, an employer should allow an employee to follow the organisation's dress code in a way which they feel matches their gender identity. If there is a staff uniform, they should be supplied in plenty of time with an option which fits their wishes – this is particularly important when an employee is transitioning. Further, a gender-neutral dress and appearance code can be helpful. In other words, an employer is advised not to base a dress code on gender. So, for example, an employer could say staff may choose between a smart skirt or smart trousers.

Use of toilet, changing and shower facilities: Assume the employee or job applicant knows how to choose the facilities that match their gender identity. An employer should make clear to all staff that it agrees an employee, once living and working in their gender identity, can use the facilities they feel best match that identity. Some organisations may have some gender-neutral facilities, and a trans employee or job applicant may feel more comfortable using these, but generally should not be told they have to. Neither should they be told to use a toilet for the disabled. Provision of some facilities with private cubicles are likely to be appreciated by all the staff.

Company bullying and harassment policies: As employers have a 'duty of care' to all their employees, it is advisable that they include in their policies that they will not tolerate bullying or harassment of an employee or job applicant because of their gender identity. Bullying and harassment can be a complicated area – find out more in our companion guide Equality and discrimination: understand the basics at www.mirs.org.im/equality

Company health insurance scheme: It may be advisable for an employer to include treatments and procedures for gender reassignment in its scheme so 'transgender' employees do not feel excluded.

Absence from work because of gender reassignment

It is discriminatory to treat an employee, who is absent from work to undergo gender reassignment, less favourably than someone who is absent from work for another reason - for example, because they are ill, injured, recuperating, or having counselling or medical appointments.

Depending on an employer's policy for managing absence, it may wish to record absences because of gender reassignment, but should take great care if including them in 'managing absence triggers' - these are the number of days' absence when managers would consider warnings, and ultimately dismissal, unless attendance at work improves. An employer would have to be able to justify such a policy regarding gender reassignment as 'a proportionate means of achieving a legitimate aim', which could prove difficult. For aspects of gender reassignment, some employers also offer limited special leave, which may be paid or unpaid depending on the employer's policy.

It is likely to be discriminatory to include absences because of gender reassignment in selection criteria for redundancy.

The amount of absence and overall length of a transition will depend on factors such as the employee's needs, the availability and location of medical consultations and treatments, and maybe the employee's own funds. For example, the employee's transition may include consultations with medical staff, assessments with psychiatrists, hormone treatment, surgery, removal of facial hair or a hair transplant, and sessions to adjust their voice, and waits between these steps. Such transitions for a man to a woman, or from woman to man, can span years, depending on the individual case. Ultimately, it would rest with the Employment and Equality Tribunal hearing the matter to decide whether an employee had been treated less favourably for being absent from work because of gender reassignment.

It is also advisable to make allowances in the 'transgender' employee's job performance during transition and for a short period afterwards. For example, surgery and/or medication are likely to have temporary side effects. The employee may ask to move to another role, if available and some of their current duties are causing them difficulties during or after transition, and/or a phased return to work after transition. The employer should consider these, but must not force the employee into another role.

Trans and mental health

A person questioning their gender may worry and/or be stressed if they experience a negative reaction from family, friends, colleagues or others, and this can lead to mental health problems such as anxiety and depression. Research has found that trans people are more likely to be affected by mental health problems – for example, lobby group Stonewall says almost nine out of every ten trans people have or had depression compared to one in four of the rest of the UK population.

Matching core 'occupational requirements' of the job

In very limited circumstances it may be lawful for an employer to specify that a job applicant must not have the protected characteristic of gender reassignment. In law, this approach is known as an 'occupational requirement' and it can provide the employer with a defence to a discrimination claim.

Further, there could be circumstances in a religious context where there was a requirement for job applicants not to be 'transgender' people - for example, to comply with the doctrines of the religion where they are key to the job, as in a cleric or minister.

Also, it is not enough for an employer to simply decide they would prefer not to employ a 'transgender' person. Any such requirement must:

- be crucial to the post, and not just one of several important factors, **and**
- relate to the nature of the job, **and**
- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim an occupational requirement.

All three points apply to an occupational requirement, not just one or two of them. There is more on 'legitimate aims' in this guide's section, Indirect discrimination. An occupational requirement should be reassessed each time the job is advertised, even though it may have been valid for the same post in the past. Circumstances may have changed, meaning the occupational requirement may no longer be applicable.

Generally, an employer should think carefully, and consider seeking legal advice, before claiming an occupational requirement, as it can be **difficult to justify** and will be rare. Also, a job applicant might make an Employment and Equality Tribunal

claim where an occupational requirement appears unjustified. An occupational requirement can only be used in a defence against claims of direct discrimination. An employer should also be aware that an 'occupational requirement' that says a job must be held by a man must also allow applicants who have reassigned to that gender, unless it can rely on an additional 'occupational requirement' that applicants must not be a 'transgender' person. The same principle applies for an 'occupational requirement' that says a job must be held by a woman. Such instances would have to be determined according to all three points which apply to an occupational requirement and on a case-by-case basis.

Impact of other protected characteristics and laws

The protected characteristic of gender reassignment can be affected by or interact with other protected characteristics. For example:

- **Religion or belief:** There is a very specific provision in the Equality Act where for some jobs in an organised religion, the employer could refuse to employ a 'transgender' person because gender reassignment was contrary to the religious doctrine of the organisation or contrary to a strongly and widely-held belief by members of that religion. While this could apply where the religion's doctrine is key to the job – for example, a minister or cleric – it is far less likely to apply where the doctrine is not involved in the role – for example, a cleaner.
- **Sex:** For example, a job applicant or employee, who is not known to have a 'transgender' history and experiences sex discrimination as a woman, may be covered under the protected characteristic of sex.
- **Sexual orientation:** Gender identity is not the same as sexual orientation. It should also be understood that a person's gender reassignment or gender identity may have nothing to do with their sexual orientation, nor should it imply any particular sexual orientation. A trans person might be heterosexual, gay, lesbian or bisexual. After transition, a person's sexual orientation may stay the same or change.
- **Marriage and civil partnership:** People may in certain circumstances now change their legal gender without having to end their marriage. In civil partnership, where one of the partners wants to change their gender, the couple may be able to convert their relationship into a marriage. And if both civil partners want to change gender, they may be able to stay in a civil partnership.
- **Disability:** If someone has a mental health condition related to their gender dysphoria (see the section, Understand key terms, earlier in this guide) and it



has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, they may be protected under the protected characteristic of disability.

To find out more about the above protected characteristics, go to www.mirs.org.im/equality

Develop trans inclusive policies

Trans inclusive policies will need to be endorsed from the very top of the organisation through to middle managers, all staff and employee or relevant trade union representatives, both in principle and practice if they are to be effective. Broadly, the policies should sensitively support employees intending to transition, who are transitioning or have transitioned. Matters covered should include:

- transitioning at work including time off and whether it is paid
- dress code
- toilet, changing and shower facilities
- the employee's personal records and other details such as their company pass
- whether, for example, they want to stay in their current workplace or transfer at the start of transition, or after transition, to another branch of the organisation if that is feasible
- when, if and how colleagues can be told about a transition or gender identity
- how an employee should report any gender reassignment discrimination or unacceptable behaviour towards employees with non-binary identities, and how a manager should handle such matters
- maternity/paternity/adoption leave if they or their partner is having a baby, adopting a child or having a baby through a surrogacy arrangement.

Also, an employer should make sure its other policies do not discriminate against 'transgender' employees or job applicants, or alienate employees or job applicants with non-binary identities. Gender-free language, where possible, may help here – for example, using 'they' instead of 'he or she' and 'their' instead of 'his or her'.

Job references

Be careful to use the correct name, and title if that is really necessary, in giving a job reference for a trans employee or ex-employee. It is advisable to contact the employee or ex-employee to make sure these are correct and not 'out' them to their prospective employer.

Support an employee with a family member transitioning

Employers and colleagues should be aware that the impact on an employee with a family member who is transitioning can be considerable, including difficulties for them in handling this change to family life. An employee who has disclosed such circumstances to their employer will need to be treated sensitively and may need support such as some time off. And remember, it is a type of direct discrimination to treat an employee less favourably than others because of the gender reassignment of someone they are associated with.

How employees should raise complaints

There are two ways a complaint of alleged discrimination may be handled, informally or formally. An employer should be sensitive to the wishes of the employee who has raised a complaint and discuss with them which way they would prefer the matter to be dealt with. They should come to an agreement on this, but it is for an employer to decide whether to pursue disciplinary measures against an employee.

Some complaints may be dealt with **informally**, where the employer has a quiet word with those involved to reach a resolution which has the desired effect and to which they can all agree. However, the employer is advised to keep a note of the matter. Dealing with a complaint this way can prevent it escalating, allow it to be dealt with sensitively without the formality of a grievance process and possibly avoid the matter ending as an employment tribunal claim.

But, it is not uncommon for complaints of alleged discrimination to evoke strong feelings for both the person who has made the complaint and the person that the complaint has been made against. Such a complaint is very likely to go through the **formal** approach, using the organisation's formal grievance procedure, and possibly its disciplinary procedure, too.

All employers should have discipline and grievance procedures, and each employee's contract of employment should include information on where the details can be easily found. How employees should raise complaints, including the option of raising the matter with a trade union representative, is covered in more detail in the



companion guide, Discrimination: what to do if it happens, at www.mirs.org.im/equality

It includes help for employers and employees in deciding whether to handle a matter informally or formally.

When an employee experiences discrimination

When an employee makes a complaint that they have been a target of discrimination, an employer should be mindful that the employee may feel they have been personally attacked. Handling the situation sensitively with the complainant, the person(s) accused of discrimination and any witnesses is essential, whether this is being done informally or formally.

For example... How an informal complaint can work

Xiang has recently transitioned and is back at work for the first time as a man. Plans were made for his return including new computer log-in details. However, he finds he can only log in using his previous name, and once logged in the screen still displays that name. Two colleagues find it amusing, upsetting him. He decides to talk to his manager about the pair's insensitivity. The manager, already embarrassed by the IT glitch, has a quiet word with the pair, saying there's nothing funny about the situation and that he doesn't want to see a repeat of their conduct. They apologise, saying they didn't mean to upset Xiang. Xiang accepts the apology.

For example... How a formal approach can work

Chrissie is beaten to promotion by colleague Jannine. She is disappointed and so annoyed she maliciously tells another colleague: "Did you know, Jannine used to be a man". Gossip starts. Jannine had told only a few friends outside of work about her transgender history, but that information had somehow reached Chrissie. Jannine discovers Chrissie is the source and submits a formal written grievance to her employer. It is investigated by a manager from another department, and after a grievance hearing it is decided that Chrissie's conduct will be dealt with as a disciplinary matter. Also, the employer is looking at how Jannine can be supported as a 'trans' employee

When an employee observes discrimination

An employee who witnesses discrimination is just as entitled to raise a complaint as the victim. What has been observed should be taken seriously by the employee who has seen it and by the employer who receives a complaint about it from the witness. The main issue is that discrimination is allegedly

taking place. Also, the employer should be mindful that the witness feels strongly enough to make a complaint. As with a complaint from an employee alleging discrimination aimed at them, a complaint about discrimination which has been observed should be handled just as sensitively.

For example... How an informal approach can work

Margaret overhears three colleagues passing thoughtless comments about another colleague who is undergoing gender reassignment. Margaret is both annoyed and upset by the remarks and feels they need to stop. So, she speaks to her supervisor, who says he will speak to the trio. He tells them the remarks are unacceptable and that he will be sending them on equality training so they fully understand why their behaviour has caused offence and must not happen again. Margaret feels the supervisor has handled the matter effectively.

For example... How a formal approach can work

Employee Mary sees Luciana – formerly a male employee who has decided to live permanently as a woman without undergoing any medical procedures – being roughly forced into a corner by three other women and threatened unless she agrees to leave the firm. Mary tries to intervene and later asks Luciana if she is going to report the incident. Luciana says no, she's thinking of leaving. Mary is so incensed by the other women's behaviour, she submits a grievance.

Luciana's employer had made it known to all staff that she could use the female facilities. After an investigation, Luciana, Mary and the alleged harassers are called as witnesses at a grievance hearing. It becomes clear Luciana has been regularly harassed, including being ignored, having things thrown at her in the female toilet, called a 'pervert' and the incident Mary saw.

The firm upholds the complaint and decides to follow a disciplinary procedure – the ring leaders who assaulted Luciana are dismissed and others involved in the other incidents are given final written warnings

How employers should handle discrimination complaints

When an employer receives a complaint about gender reassignment discrimination, it should take the matter very seriously, and listen carefully and with empathy to what the employee says. A complaint – or grievance as it is also known – might be handled in an organisation **informally** or **formally** depending on the nature of the complaint, its seriousness, the possible action that may need to be taken, or the outcome desired by the person making the complaint, as explained in the previous section, How employees should raise complaints.

However, if an employer or manager becomes aware that discrimination is taking place because of someone's gender reassignment, it is important they do not wait until a complaint or grievance is raised. The sooner action is taken the more easily it can be resolved and it is less likely the employer would be liable for the discriminatory actions of the employee/s involved. An employer should discuss with the employee raising the concern whether the employee wishes to have the matter dealt with informally or formally. They should come to an agreement on this.

It is for an employer to decide whether to pursue disciplinary measures against an employee. However, it should ensure it investigates complaints thoroughly and follows disciplinary procedures where warranted. Any inaction by the employer could damage staff morale in general and possibly culminate in the employee who made the complaint submitting a claim to an Employment and Equality Tribunal.

How employers should handle a complaint of alleged discrimination is covered in more detail in companion guide *Discrimination: what to do if it happens* at www.mirs.org.im/equality. It includes help for employers and employees in deciding whether to handle a matter informally or formally.

To help give a better understanding of when to use an informal approach or a formal one concerning alleged gender reassignment discrimination, both employers and employees should assess the following examples.

When to consider an informal response

It is likely an employer will use an informal response when it and the parties involved agree that this is likely to be the best way forward. Such an approach will be largely based on the employer having conversations with the parties concerned to investigate the matter in the hope of resolving it, without using the organisation's formal grievance procedure.

If the matter turns out to be relatively straightforward, the informal approach can have the advantage of resolving the matter sooner, with less stress and cost than if the matter went through the formal grievance route. Also, it can make it easier for work relationships to be rebuilt.

When considering whether an informal response is appropriate, an employer should be mindful of the outcome the complainant is seeking and the outcome that might be necessary from its point of view. Also, an employer can explain to an employee that an informal approach still means the complaint is being treated seriously and, in the circumstances, is potentially the best way to try for the most desirable outcome

for all concerned. However, if an informal approach doesn't work or turns out to be inappropriate, the matter could still be dealt with formally.

For example... Informal response to informal complaint

An employee has undergone gender reassignment to become Karl. Colleague Malcolm keeps on referring to Karl by his previous name, Clare. Karl has frequently reminded Malcolm to please not do this, but Malcolm, who says he has always had trouble getting names right, continues. Karl is worried the practice will spread to others so asks his manager if he will speak to Malcolm about the importance of getting his name right. Malcolm is apologetic, saying he's never made the error on purpose, adding he will make sure he gets Karl's name correct. Karl is satisfied how the manager has handled the matter.

When to consider a formal response

The formal response, usually using the employer's formal grievance procedure including a hearing, is likely to be the way forward when the allegation of discrimination cannot be resolved informally. It is even more likely if the complaint is particularly serious and could also lead to a disciplinary investigation. However, there can be other circumstances where the need for a formal response can arise, as highlighted in the final example, Formal response to informal complaint.

For example... A formal grievance

Talulah has undergone gender reassignment. Having the required skills, experience and qualifications, she applies for promotion. She gets an interview which she thinks goes well, but is not selected for a second interview. She overhears gossip that she was not picked because the recruiting manager does not want a 'transgender' person on his team. She is furious and submits a formal written grievance. A senior manager investigates, a hearing is held and the complaint is upheld because the recruiting manager cannot justify why Talulah wasn't given a second interview. A disciplinary investigation is started against the recruiting manager and Talulah is encouraged to apply for another promotion.

For example... Formal response to informal complaint

Ward has told his employer and team members he is starting gender reassignment. Then, colleague Carlos becomes uncooperative towards only him. In a catch-up with his manager, Ward confides that he is now finding Carlos obstructive. Later, the manager's one-to-one with Carlos reveals that Carlos refuses to recognise gender reassignment and now wants to move to another team away from Ward. And Carlos remarks that he has made his views known on social media. The manager tells



Carlos his conduct towards Ward is unacceptable, reminds him that it is his job to cooperate with Ward, and that he will look further into these matters. An investigation reveals Carlos's social media posts are a serious breach of the firm's social media policy. Carlos is invited to a disciplinary hearing, given a final written warning and told he faces dismissal if there is a repeat of his conduct towards Ward.



Acknowledgement

This guide is based on the Acas publication “Gender reassignment discrimination : key points for the workplace” and has been adapted for the Isle of Man. MIRS acknowledges, and thanks Acas for, their consent to use their source material.

Manx Industrial Relations Service

The Manx Industrial Relations Service (MIRS) is an independent organisation funded by Government and we provide a free, impartial and confidential service on any employment relations matter. We are here to help employers, employees and trade unions work together for the prosperity of the Isle of Man.

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the MIRS website www.mirs.org.im

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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