

SEX DISCRIMINATION (GENDER REASSIGNMENT)

A GUIDE TO THE SEX DISCRIMINATION (GENDER REASSIGNMENT) REGULATIONS 1999

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PART ONE - INTRODUCTION

What are the Sex Discrimination (Gender Reassignment) Regulations 1999 ?

The Sex Discrimination (Gender Reassignment) Regulations 1999 clarify GB law¹ relating to gender reassignment. They are a measure to prevent discrimination against transsexual people on the grounds of sex in pay and treatment in employment and vocational training. This reflects a ruling by the European Court of Justice that the dismissal of an employee undergoing gender reassignment is contrary to the European Equal Treatment Directive. The UK (and all Member States) is obliged to implement such European law.

The effect of the Regulations is to insert into the Sex Discrimination Act 1975 a provision which extends the Act, insofar as it refers to employment and vocational training, to include discrimination on gender reassignment grounds. Thus, for the purposes of employment and vocational training, discrimination on grounds of gender reassignment constitutes discrimination on grounds of sex, and is contrary to the Sex Discrimination Act. Employers who breach the Sex Discrimination Act 1975 in respect of discrimination on gender reassignment grounds will be liable in the same manner they would, for example, for discrimination against a woman on grounds of sex.

Detailed information about the Sex Discrimination Act 1975 can be found in the Department for Education and Employment's publication: *A Guide to the Sex Discrimination Act 1975*.

What is the purpose of this Guide ?

This Guide has no special legal status and is not intended to equate with a Code of Practice. Its purpose is to provide guidance in relation to the application of the Regulations; and to suggest some aspects of good practice for employers and employees on the issues which may be encountered in accommodating an individual for whom gender reassignment grounds exist in the workplace.

What is transsexualism and the process of gender reassignment?

Transsexualism affects an estimated 5,000 people in the United Kingdom. Medical treatment to enable transsexual people to alter their bodies to match their gender identity is highly successful. The process is known medically as "gender reassignment".

Diagnosis of transsexualism is carried out by a specialist in this area and may take a matter of months or a period of years. Preliminary diagnosis is followed by hormone therapy, and typically after around six months the physical appearance of the individual will begin to change. If an individual has not yet changed social gender, they can be expected to start to do so at around this stage, though they may maintain their usual gender role at work for rather longer. At some point over the next few months the individual will start to live full time as a member of their "new" sex, and their name and other records (e.g. driving licence and passport) may be formally changed. If there are no extraneous delays, (for example funding problems or waiting lists), the individual usually proceeds to corrective surgery after one or two years of hormone therapy. This period of therapy, during which the individual is expected to live and work in their new sex, is often referred to as the "real life test".

The extent of any surgical procedures will vary according to the needs of the individual. Most surgical procedures require less than two weeks absence from work, whilst some are more likely to require two or three months. It may contravene the Sex Discrimination Act to dismiss

¹ England, Scotland and Wales. The Regulations do not apply to Northern Ireland.

an individual because of impending gender reassignment treatment, in the same way that it is unlawful to dismiss a woman for pregnancy.

For the individual, living with transsexualism produces similar personal responses to those associated with any other life-altering condition, which will naturally lead to some individuals suffering stress. However once the issues are identified and gender reassignment commences, such problems are usually resolved.

Many transsexual people wish to keep their transsexual status as private as possible, whilst others are willing to discuss it confidentially or even openly. It is important that employers do not breach the personal privacy of employees, recognising that the right to disclose or discuss their medical history is the prerogative of the individual.

What is the legal position?

In the United Kingdom a person is allowed to change his or her personal details and to live as a member of the opposite sex to that recorded at birth. The majority of transsexual people also undergo medical treatment, which can include hormone therapy and corrective surgery. This is only provided following careful assessment by medical professionals, and may take some time.

While it is not at present possible for a UK citizen who has undergone gender reassignment to alter his or her Birth Certificate, it is possible to obtain other official documents in the new identity. These include a passport, driving licence and National Insurance Number.

PART TWO - APPLICATION OF THE SEX DISCRIMINATION (GENDER REASSIGNMENT) REGULATIONS 1999

The Sex Discrimination (Gender Reassignment) Regulations 1999 insert into the Sex Discrimination Act 1975 a provision which extends the Act to cover discrimination on grounds of gender reassignment in employment and vocational training. Therefore, any reference to discrimination in employment against men or women in parts II and III (so far as it applies to vocational training) of the 1975 Act should be read as applying similarly to discrimination on gender reassignment grounds. Thus, a claim can be brought against an employer or individual employee for any unlawful discrimination, including harassment. The Regulations cover only direct discrimination.

How is “discrimination on grounds of gender reassignment” defined ?

It is unlawful to discriminate against a person for the purpose of employment or vocational training on the ground that that person intends to undergo gender reassignment, or is undergoing gender reassignment, or has at some time in the past undergone gender reassignment. This ensures that the various stages of the gender reassignment process, including the very initial stage, where an individual indicates an intention to commence gender reassignment, are covered by the Regulations. It is not necessary for all three circumstances to apply for discrimination to have taken place.

Unfavourable treatment means treating a person less favourably on gender reassignment grounds than you treat, or would treat, a person for whom no gender reassignment grounds exist. This will also apply to recruitment, unless a Genuine Occupational Qualification exists.

Are there any exceptions from the provisions of the Regulations ?

Yes, in limited circumstances. It may not be unlawful to discriminate on grounds of gender reassignment where:

- a person's sex is a Genuine Occupational Qualification (GOQ) for that job;
- the job involves the holder conducting intimate searches pursuant to statutory powers (e.g. The Police and Criminal Evidence Act);
- the job involves the holder working in a private home and reasonable objection can be shown by the employer because of the intimate contact in those circumstances.

In addition, see the limited *temporary* exceptions which apply during the process of gender reassignment only.

How do the exceptions for posts with a Single Sex Genuine Occupational Qualification work ?

The new Regulations reflect the difficulties which can occur in relation to single sex occupations. Employers should already be aware that under the Sex Discrimination Act it is unlawful to discriminate on grounds of sex at the point of recruitment, except for certain jobs where a person's sex is a Genuine Occupational Qualification (GOQ) for that job (see s7(2), 7(3) and 7(4) of the SDA 1975). There are very few instances in which a job will qualify for a GOQ on the ground of sex. However, exceptions may arise such as where considerations of privacy and decency or authenticity are involved. This could include, for example, a job which requires the job holder to model clothes, or work in the presence of people who are in a state of undress. When a GOQ exists it also applies to promotion, transfer or training for that job. A

fuller description of the circumstances where a GOQ can exist are set out in paragraph 14 -17 of the Equal Opportunity Commission's Code of Practice on Sex Discrimination.

The GOQ provisions introduced by the Sex Discrimination (Gender Reassignment) Regulations acknowledge the unique situation of a person recruited for a specific single sex GOQ post who commences the gender reassignment process whilst still employed in that post. In such circumstances, the Regulations allow an employer to consider dismissing an individual or taking some other form of action. The employer must be able to show that, firstly, an applicable GOQ exists, and secondly, that any treatment accorded to the individual is reasonable in all the circumstances of the case. It is emphasised that an unreasonable action could well lead to a finding of unlawful discrimination, regardless of an existing GOQ. Action short of dismissal, such as re-deployment to another part of the organisation where no such single sex GOQ exists, might be negotiable, especially in larger firms, and should be the first option considered in such circumstances. Part Three of this Guide, describes good practice involving discussing options with the employee at an early stage to try to come to a mutually satisfactory arrangement.

What about recruitment to a post which has a Single Sex GOQ ?

With respect to recruitment to a post to which a GOQ applies, employers should be aware that failure to recruit a person to whom gender reassignment grounds apply and who is living and presenting in their "new" sex may be considered unreasonable and lead to claims of discrimination by those aggrieved. The onus will be on the employer to show that he or she acted reasonably in the circumstances.

Do the Regulations create any supplementary GOQs in the Sex Discrimination Act, relating specifically to Gender Reassignment grounds ?

Yes. In addition to the provisions of s7 of the SDA, the new Regulations introduce supplementary GOQs relating to gender reassignment grounds. These include provisions which relate to intimate physical searches pursuant to statutory powers (e.g. Police and Criminal Evidence Act); and a private home exception where reasonable objection can be shown by an employer because of the need to preserve privacy and decency.

Financial and organisational concerns may not automatically constitute reasonable grounds for applying a GOQ. It may be that where a job involves only occasionally undertaking the duties for which a GOQ applies, employers consider instead re-allocation of tasks.

Do the Regulations apply to Ministers of Religion ?

The Regulations do not apply to employment for the purposes of an organised religion where, in order to comply with the doctrines of that religion, or to avoid offending the susceptibilities of a significant number of its followers, the employment is restricted to people who are neither undergoing, nor have undergone, gender reassignment.

Are there any exceptions which apply only during the process of gender reassignment ?

Provision is also made in limited circumstances to excepting posts where individuals have to share accommodation, and it is not reasonable on privacy or decency grounds for an individual to do so with either sex while in the process of undergoing gender reassignment (for example, work on board a ship where private facilities are not provided). In such a case, an employer must be able to show that it would not be reasonable to expect him or her to provide alternative accommodation for an individual undergoing gender reassignment.

Where an individual already working in a post requiring him or her to share accommodation commences gender reassignment, an employer should attempt, where possible, to take all reasonable steps short of dismissal in dealing with such circumstances. This could include, for example, redeployment, or temporary replacement of the individual while undergoing gender reassignment.

It is also not unlawful for an employer to make special arrangements where a post requires the holder to provide vulnerable individuals with personal services promoting their welfare, or similar personal circumstances, and in the reasonable view of the employer, those services cannot be adequately provided by a person whilst undergoing gender reassignment. It is envisaged that this exception will apply only in very rare circumstances and is not a general defence for discrimination on gender reassignment grounds against individuals who provide such personal services.

It should not be assumed that vulnerable people automatically include children, patients undergoing medical treatment, elderly people, mentally ill people or any other group. The onus is on the employer not only to show that a particular individual, or individuals are vulnerable but also to show that he or she acted reasonably in concluding that the personal welfare services in question could not be effectively carried out by a person undergoing gender reassignment.

How much time do the Regulations allow for medical treatment ?

The Regulations do not specify a minimum or maximum time employers should allow a person undergoing medical and/or surgical treatment related to the process of gender reassignment. However an employer must not treat any less favourably a person absent while undergoing gender reassignment than he or she treats, or would treat, a person absent due to illness or to some other cause. In the latter case the employer should act reasonably and have regard to all the circumstances. To illustrate, "some other cause" could include arrangements for an employee to take leave, either paid or unpaid, to nurse a sick relative, or take a sabbatical.

However, as with any major treatment, there is always a small possibility that complications arising as a result of medical treatment for transsexualism could result in a prolonged incapacity for work. If incapacity continues *beyond the normal expectations for the process undergone*, a transsexual employee could be retired on medical grounds in the same way as any other person who becomes unfit for duty.

Part III suggests good practice for dealing with the absence of an employee undergoing the gender reassignment process.

Do the Regulations cover protection from harassment ?

Yes. Harassment of an individual on the ground of gender reassignment - either by his or her employer or by fellow employees - will give rise to unlawful discrimination. Such discrimination should be dealt with in the same serious manner as harassment is dealt with for any member of staff who is being discriminated against, for example, on the basis of their sex or race.

Do the Regulations provide protection from victimisation of individuals ?

Yes. The Regulations make unlawful victimisation on gender reassignment grounds, just as it is unlawful to victimise someone for asserting their rights on grounds of sex. For example, the new regulations make it unlawful to victimise an individual following a complaint made in good faith that they have been discriminated against on ground of gender reassignment. It is equally unlawful to victimise someone who gives evidence on behalf of a person who has complained.

Why do the Regulations not extend protection to transsexual people in the provision of goods and other services ?

The Regulations have been introduced to reflect the ruling of the European Court of Justice that discrimination on grounds of gender reassignment is contrary to the EC Equal Treatment Directive. The Directive applies only to the fields of employment and vocational training. These Regulations therefore have to be limited to employment and vocational training and do not impact on the existing provisions in the Sex Discrimination Act relating to coverage of goods, services and facilities.

PART THREE - GOOD PRACTICE IN ACCOMMODATING INDIVIDUALS FOR WHOM GENDER REASSIGNMENT GROUNDS APPLY IN THE WORKPLACE

Equal Opportunities Policies

Equal opportunities policies which refer to discrimination on grounds of sex should also include discrimination on grounds of gender reassignment. Employers who wish to promote anti-discriminatory practice in general may well have policies and procedures about topics such as sexual orientation, culture and religion, age and HIV status as well as race, sex and disability: they may consider it appropriate to add "gender reassignment" to their list.

Equal Opportunities in Recruitment

It should not be expected that job applicants and interviewees will necessarily wish to disclose transsexual status since many consider it a very private matter. It is not a question that should ever be asked at interview, just as, for example, a woman should not be asked about her plans to have children. However, individuals for whom gender reassignment grounds apply should be aware of the limited exceptions to the requirement that employers must not discriminate. In circumstances where an exception might apply, an individual would be expected to disclose his or her transsexual status. Where no exception exists, questions relating to gender reassignment are irrelevant.

Accommodating an employee's transition to the new gender - agreeing a process

One of the most important factors in the successful management of an employee's transition from one sex to the other is to discuss with them how they would prefer to handle it, and to follow a process agreed with them. Issues which may be considered include:

- whether the employee is to stay in their current post or be redeployed;
- the expected timescale of the medical and surgical procedures; and the time off required for medical treatment;
- the expected point or phase of change of name, personal details and social gender;
- whether the employee wishes to inform line manager, colleagues and clients themselves, or would prefer this to be done for them; and whether training or briefing of colleagues or clients will be necessary, and at what point and by whom this will be carried out;
- what amendments will be required to records and systems;
- whether a transsexual employee is adequately covered by existing policy on issues such as confidentiality, harassment and insurance and if not how these will be amended;
- agreeing a procedure for adhering to any dress code;
- agreeing the point at which the individual will commence using single sex facilities in their new gender (e.g. toilets);

Good practice example: *D, a popular and respected teacher in a comprehensive school, announced an intention to transition to male. In consultation with D, the head teacher and governors drafted a plan of action to include:*

- *telling colleagues;*
 - *telling parents;*
 - *telling pupils;*
 - *handling the inevitable media interest.*
- In the event, having been well briefed, parents and pupils were happy to accept D in his new role.*

Understanding the likely timescale for treatment

It is good practice to discuss as far as possible in advance what time will be required to undergo gender reassignment treatment. Employers should try to allow some flexibility so that employees may undergo this treatment, and are reminded that it may constitute unlawful discrimination if their treatment of an individual absent while undergoing gender reassignment treatment is less favourable than their treatment of those who are or would be absent because of illness or other medical treatment.

Discussing the point of gender change for employment purposes; and agreeing the process for informing contacts.

There is no general need or obligation to inform colleagues, clients and the public that an employee is intending to undergo, is undergoing, or has undergone gender reassignment. Such information is necessary only where the relationship with someone who knew the person prior to their change of status is to continue. It is usually good practice for employers to take responsibility for informing those who need to know, although the wishes of the individual should be respected as far as possible. In some circumstances the transsexual person may wish to be the one to make a personal explanation to some or all of their contacts; in this case the employer will need to know when the disclosure is to take place and at what depth, so that they can agree and provide appropriate support. Education should take place on two levels: general information about transsexualism, and specific information to enable people to understand the situation of the particular person involved. At the point of change of gender, it is common for transsexual people to take a short time off work and return in their new name and gender role. This is often used as an opportunity to brief others.

Good practice example: *T worked for a local authority. She agreed with her employer that she would herself explain to long standing clients about her impending transition, but that they would also be interviewed by a manager and those who expressed unease would be offered a new contact. Her employer arranged briefing by outside trainers for all her colleagues.*

Amending Personal Records and References

Where it is reasonable and practicable, it is good practice for employers to update their records to ensure that any references reflect current name, title and sex. In some instances, it may be necessary to retain records relating to an individual's identity at birth, eg for pension or insurance purposes. Access to any such records showing the change of name and any other details associated with the individual's transsexual status, (eg records of absence for medical treatment in this connection) should be restricted to staff who require such information in order to perform their specific duties. These staff could include those directly involved in the administration of a process, for example the Examining Medical Officer, or the person who authorises payments into a company pension scheme. It does not refer to colleagues, clients or line managers. Breaches of confidentiality should be treated in the same serious manner as disclosure of personal details of any other member of staff.

Transsexual people in employment may choose voluntarily to disclose at a secondary level, for example, answering an equal opportunities questionnaire, or asking for support from a line manager. Again, strict confidentiality should be observed. If giving a reference for someone moving to a new job, a reference should be in the name which will be used in the new job and not "hint at" a former name. It may sometimes be necessary for a transsexual person to disclose a previous identity in order for references from past employers to be obtained. Once again, strict confidentiality and respect for dignity should be applied.

Insurance matters

Employers registering staff for corporate insurance and benefits policies are advised to inform their underwriters if they know of a transsexual employee's status, since some insurers automatically invalidate a policy if a major fact such as gender reassignment is not disclosed. The employer should inform the employee before disclosing the information. If an employer is unaware that an employee has reassigned gender, the obligation to disclose falls upon the employee, who could also be held liable in the event of an incident for which no valid insurance cover existed.

Pensions

Everyone born after April 1955 now receives state pension at 65. But women born before 1950 can claim state pension at 60, and those born between 1950 and 1955 can claim it at a point between 60 and 65. Because, for state pension purposes, transsexual people can only be regarded as the sex recorded at birth, those born prior to April 1955 can only claim state pension at the age appropriate to this sex - that is for transsexual women at age 65 and for transsexual men at 60. It is the responsibility of the employer to take suitable steps to keep confidential the reason for the individual's apparently early or late retirement.

Flexibility regarding Dress Codes

Many employers operate a Dress Code system. It is good practice to allow enough flexibility in the dress code to accommodate the process of transition from one sex to the other.

Good practice example: *M was working as a sales assistant when she began her transition to female. Her employer discussed the possibility of temporary redeployment out of the public gaze, but M preferred to remain with her team. The company dress code was therefore relaxed along similar lines as for Muslim women and other groups, giving M flexibility over hair length and style, jewellery and make-up, prior to the point at which she felt comfortable in a skirt rather than trousers and without reference to any specific point of change of social gender. For a period some customers perceived her as female and others as male, but M felt happy to accept this, and indeed used the perceptions of customers as an indicator of when to begin presenting as unequivocally female.*

Use of Single Sex Facilities

The employer and employee should agree the point at which the use of facilities such as changing rooms and toilets should change from one sex to the other. An appropriate marker for using the facilities of the employee's "new" sex may, for example, be the point at which the individual begins to present permanently in the sex to which they identify. It is not acceptable to insist for the long term on a transsexual employee using separate facilities, for example a disabled toilet. Transsexual employees are entitled to expect support from their employer including any necessary discussions and explanations with other members of the workforce or members of the public. Similarly, a transsexual employee should be granted access to "men only" or "women only" areas according to the sex in which they permanently present.

The role of the Equal Opportunities Commission

The Equal Opportunities Commission is a principal source of advice and guidance to the public on the Sex Discrimination Act. That now includes advice and guidance regarding the

provisions of the Act which relate to discrimination on grounds of gender reassignment. The EOC's address from 5 June 2000 is Equal Opportunities Commission, Arndale House, Arndale Centre, Manchester M4 3EQ, Tel. 0161 833 9244, Fax 0161 838 8312 E-mail: info@eoc.org.uk Its Web site is: www.eoc.org.uk.

This Guide was produced in consultation with the UK Parliamentary Forum on Transsexualism, chaired by Dr Lynne Jones MP.

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