

## Gender reassignment

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### *Key points*

- Transgender people, whether they are pre or post-operative trans people or trans people who do not intend to have surgery, should be referred to in their preferred or acquired gender. They should not be addressed as if they remained in the gender that was assigned to them at birth.
- In cases where disclosure of birth gender is not essential this should be omitted; it should be possible in such cases to accept the person's chosen gender identity for nearly all court and tribunal purposes.
- 'Acquired gender' is the description used in the GRA to indicate the transition from the gender assigned to a person at birth to that person's affirmed gender.
- A history of non-fetishistic transvestite dressing, often from early childhood, forms part of the diagnostic criteria of primary gender dysphoria, but this is not to equate transgender people with transvestites.
- It is unlikely that a transvestite who cross-dresses in private and sometimes in public will cross-dress in court. However, this may not always be the case and a desire or need to cross-dress may still be a relevant and important issue, for example, in divorce or family proceedings, or as the background to an offence of violence against that person.
- Section 146 of the Criminal Justice Act 2003 now provides for sentences to be aggravated for any offence motivated by hostility towards the victim on the grounds that the victim was (or was presumed to be) a transgender person.
- Fundamental principles of equality and acceptance of diversity demand that no difference in treatment is accorded to trans people or transvestites due to their manner of dress since choice of clothing, whether or not it arises through an inescapable emotional need, should be respectfully tolerated unless there is an affront to public decency or a clear intention to insult the judicial process.
- It is misguided and potentially misleading to make any assumptions as to the sexual orientation of transvestites or transgender people, which can vary across the whole spectrum of sexuality.
- Many trans people will avoid contact with the criminal justice system, including making reports to the police or pressing charges.
- Press for Change's website [www.pfc.org.uk](http://www.pfc.org.uk) and the website of the Gender Identity Research and Education Society [www.gires.org.uk](http://www.gires.org.uk) have information about equality issues relating to trans people.

### *Introduction*

1. Transsexual people, also known as transgender or trans people, suffer from a medical condition known as gender dysphoria, Gender Identity Disorder being the formal

diagnosis. It has a classification in the International Classification of Diseases-10 (ICD-10), which defines transsexualism as being:

"A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex."

2. There is some controversy over whether gender dysphoria should be classified as a disorder and the new version of the Diagnostic Statistical Manual of Mental Disorders (DSM) will replace the diagnostic term Gender Identity Disorder with the term Gender Dysphoria. According to the 7<sup>th</sup> version of the World Professional Association for Transgender Health's Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, being transsexual, transgender, or gender nonconforming is a matter of diversity, not pathology.
3. Following treatment, which may involve cross-sex hormone therapy and, in some cases, gender confirmation, surgery, (referred to in the Gender Recognition Act 2004 as treatment for the purpose of modifying sexual characteristics) many transsexual people are strongly of the view that they no longer suffer from gender dysphoria, the treatment having been successful.
4. Gender reassignment is a protected characteristic under the Equality Act 2010, which states:

'A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.'
6. There is no requirement for a trans person to have undergone any medical treatment to be covered by the protected characteristic of gender reassignment, nor does a trans person have to be proposing to undergo, be undergoing or have undergone any process of physiological change.
7. As well as prohibiting discrimination because of a person's gender identity in most circumstances, the Equality Act 2010 also prohibits discrimination because a person associates with a trans person or is perceived to be a trans person.

### ***The process of gender reassignment***

8. The process of gender reassignment is complex and requires great personal determination.
9. Not all trans people undergo gender confirmation surgery, but for those that do, the surgical stage is part of a longer and larger sequence of events and processes that are intended to help the person's physical identity match their inner sense of gender identity.
10. Feminising/masculinising hormone therapy is the administration of oestrogens and/or anti-androgens to trans women and the administration of androgens to trans men, in order to produce changes that make them look and/or feel more like people of their

preferred gender. These take the form of tablets, patches or injections and the individual will need to take these hormones for the rest of their life.

11. The transition process, which will usually involve a period of living continuously in a gender role that is congruent with the trans person's gender identity, is known within the trans community as 'transitioning'. A trans person will not be eligible for surgery unless they have lived continuously in a gender role that is congruent with their gender identity for at least a year. In many cases a period of two years is required. This period is sometimes referred to as the 'Real Life Experience' / 'Real Life Test', although these terms are somewhat controversial within the trans community.
12. Gender confirmation surgery for a trans woman (i.e. a male to female trans person, which is the greater number of trans people) typically involves penectomy (removal of the penis) and orchidectomy (removal of the testes) together with the fashioning of a neo-vagina from the scrotal material. Additional surgery may take place for more cosmetic changes, such as breast enhancement, tracheal shave to reduce the size of the Adam's apple, and shortening the vocal chords to raise pitch. Facial reconstruction may also be available. The latter procedures will tend to be privately funded.
13. For a trans man (i.e. a female to male trans person) the initial surgery tends to be mastectomy (removal of the breasts). Total hysterectomy (removal of the womb) is not universal. Surgery for trans men may also involve salpingo-oophorectomy (removal of the fallopian tubes and ovaries). Phalloplasty (the creation of a penis) is a difficult operation with a guarded prognosis. Many trans men prefer to have the creation of a micro-penis for urination, and do not pursue full phalloplasty.

### ***The Gender Recognition Act 2004***

14. The Gender Recognition Act (GRA) 2004 came into force on 4 April 2005. It creates a framework for the legal recognition of transgender people in their reassigned sex. The Act was the response to the judgment delivered at Strasbourg on 11 July 2002 in the case of *Christine Goodwin v. the United Kingdom* (application no. 28957/95) in which the European Court of Human Rights held unanimously that there had been violations of Ms Goodwin's Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the European Convention on Human Rights. They found that the UK Government had a positive obligation under international law to secure the Convention rights and freedoms for trans people and had to rectify these ongoing breaches.
15. The GRA provides for the grant of a Gender Recognition Certificate (GRC), and for the decision to be made by a judicial body, the Gender Recognition Panel.
16. The Gender Recognition Panel comprises judges and medical members, and determines applications for a GRC under the GRA.
17. The public website for the Gender Recognition Panel is at [www.grp.gov.uk](http://www.grp.gov.uk).
18. The GRA permits a person of either gender to make an application for a GRC on the basis of living in their acquired gender or having changed gender under the law of a country or territory outside the UK.

19. The Panel must grant the application if satisfied that the applicant has or has had gender dysphoria, has lived in the acquired gender throughout the period of two years ending with the date on which the application is made, intends to continue to live in the acquired gender until death and complies with certain evidential and medical requirements.
20. It is worth emphasising at this point that gender confirmation surgery, as outlined above, is not a pre-requisite to the grant of a GRC. The Panel will be told why surgery has not been undergone or is not planned.
21. There are sometimes medical reasons as to why surgery has not been, or cannot be carried out. Gender confirmation surgery is major surgery which carries the usual risks associated with that. A person's physical condition may preclude safe general anaesthesia or otherwise contra-indicate surgery.
22. Funding problems may be a reason for delay in surgery; the availability of funding under the National Health Service, and indeed preliminary assessment and treatment, varies throughout the UK.
23. Not all trans people will apply for a Gender Recognition Certificate for a variety of reasons, including that entitlement to a certificate, in the case of a person who is married or in a civil partnership, will depend upon them first divorcing their spouse/dissolving their civil partnership. Many transgender people do not want to take this step because their relationship with their spouse/civil partner has accommodated and transcended the gender transition.
24. For those applicants for a GRC who are married or in civil partnerships, on satisfaction of the usual criteria the Panel will issue an interim certificate, which is limited in time and purpose. It enables an application for a divorce/dissolution to be made within six months of the grant of the Interim Certificate, which becomes a ground for divorce of itself. The Family Court will then convert the Interim Certificate into a full GRC.
25. A person who has been issued with a full GRC is entitled to marry in their acquired gender and their acquired gender becomes their gender for all purposes save that, under the GRA it does not affect their status as the mother or father of a child born prior to the grant of the GRC (section 12).
26. If a trans prisoner has been granted a GRC, that person will be accommodated in a prison appropriate for people of their acquired gender.
27. The fact that a person does not have a Gender Recognition Certificate should not be assumed to mean that they are not a trans person; they are entitled to respect and legal protection as appropriate in the gender role in which they are living.
28. The GRA states that it is an offence for a person who has acquired protected information in an official capacity about a person's application for a GRC to disclose that information to any other person. The GRA outlines a number of circumstances in which it would not be an offence to disclose the information, including, among others, that the information does not enable the individual to be recognised, that the individual has agreed to the disclosure of the information, that the disclosure is in accordance with the order of a court or tribunal, or that the disclosure is for the

purpose of preventing or investigating crime. This important issue is dealt with further below.

### ***Legal requirements conflicting with individual interests***

29. When courts and tribunals come into contact with transsexual people, the requirements of the law may conflict with the needs and interests of the person involved.
30. Section 22 of the GRA makes it an offence for a person who has obtained “protected information” in an official capacity to disclose that information to any other person. Protected information is information about a person’s application for legal recognition of their acquired gender or, if they have legal recognition, their gender history.
31. There are a number of exceptions to section 22, one of which (s22(4)(e)) is that it is not an offence to disclose protected information if the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal.
32. In the case of a trans person, disclosure of birth gender may be essential but this will be rare. It will usually be possible to accept a person’s acquired gender for court and tribunal purposes without further inquiry which may not only be intrusive and offensive, but could breach Article 8 rights which arguably mean that the disclosure would need to be relevant and necessary for the proper disposal of the legal proceedings.
33. The policy intention behind S22 appears to have been that disclosure would only be permissible if made for the purpose of court proceedings; that is to say not as a generality within proceedings but as relevant to the fundamental purpose of the proceedings themselves. There are obvious instances when it will be made for this purpose e.g. for the recovery of a debt incurred in the previous name/gender, and, in those instances, disclosure is legitimate and necessary, however judges should be aware of the sensitivities and of ‘outing’ someone where their gender is not relevant to the issue in the case.

### ***Guidelines***

34. The Association of Chief Police Officers (ACPO) recognises that dealing with transgender (and transvestite) people can raise difficult and sensitive issues. It has therefore adopted guidelines, which it has circulated to all forces in England and Wales. These guidelines may be usefully adapted to provide sound advice to all involved in the administration of justice. The main points are:
  - a. Everyone must be treated fairly and with respect for their personal dignity.
  - b. Where there is a question relating to a person’s gender, the person should be asked what gender they consider themselves to be, and what gender they would prefer to be treated as. In this respect, wherever possible, a person should be treated, identified and addressed in accordance with their wishes. (Thus a transgender offender may be more appropriately searched by an officer of the opposite gender to that shown on the transgender person’s birth certificate.)

- c. Transgender people should not be accommodated or dealt with in a manner that is fundamentally inconsistent with their chosen gender identity.
  - d. No-one should be put in a situation where they may face hostility or ridicule.
35. The NOMS has a Prison Service Order in relation to the management, treatment and care of prisoners who have or have had gender dysphoria, which uses similar criteria, designed to respect the dignity and privacy of the transsexual prisoner as far as is possible within that difficult context.

### ***Difficulties and social stigma***

36. Since the coming into force of the Gender Recognition Act 2004 on 4 April 2005 more than 8,000 people in Britain have successfully established that they have changed their sex, some many years ago. People continue to transition between the genders and most of them blend invisibly into society in their acquired gender.
37. Whilst acceptance is improving with the understanding that gender nonconformity is an internationally recognised human phenomenon, the personal difficulties associated with gender reassignment are still huge.
38. There remains a certain mistrust of non-conventional gender behaviour generally, and, unfortunately, many trans people experience social isolation and/or discrimination. Social stigma, although lessening and now the subject of legislation under the Equality Act 2010, takes many forms, from experiencing personal violence in the home and in public arenas, to job or home loss, financial difficulties, loss of contact with families and communities, and to difficulties in personal relationships. There is a 'trans community', which is highly web-savvy, and internet information abounds. Trans people, therefore, have access to support and advice from other members of the trans community, as well as information about the difficulties that a person may face when transitioning to a gender role that is congruent with their gender identity. The process of gender reassignment must be understood against that background, and a level of respect accorded to this difficult decision.