



## **CPS Transgender Equality Management Guidance**

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# CPS Transgender Equality Management Guidance

## Introduction

The purpose of this guidance is to inform policy and practice development as well as providing employees within the Crown Prosecution Service (CPS) with good practice information in relation to managing transgender equality issues in employment and service delivery.

It includes the legislative responsibilities under the Equality Act 2010 (EA10), the Human Rights Act 1998 (HR98), the Data Protection Act 1998 (DP98) and Gender Recognition Act 2004 (GRA) - see section 3 for more detail.

It covers issues relating to employment, prosecutions and community engagement.

In relation to employment, this guidance is intended to support and complement HR policy and procedures. Similarly, in respect of prosecutions this guidance is complementary to prosecution policy and guidance.

Terminology is not fixed – however, a glossary is provided at the end of the document to assist understanding of commonly used phrases. You may find it useful to read this first if you are not acquainted with the language relating to trans issues (Page 22).

This document refers to 'transgender' as an umbrella phrase to describe all those whose gender identity and/or gender expression is not completely congruent with their birth sex.

However, in relation to gender reassignment as defined by the Equality Act we reflect the legal use of the term 'transsexual' to define a person who is proposing to undergo, undergoing or has undergone gender reassignment. Note that the term should only ever be used as an adjective, e.g. "a transsexual person" and never as a noun, e.g. "a transsexual".



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## Acknowledgements

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## Legislation

### Equality Act 2010 (EA10)

Gender reassignment, as one of the 9 protected characteristics<sup>1</sup>, is a characteristic that provides people with legal protection from direct discrimination; indirect discrimination; harassment; discrimination based on perception (e.g. a person is perceived to have reassigned gender); victimisation and discrimination based on association (e.g. partner, parent, sibling or friend of a transsexual person).

The protected characteristic of gender reassignment applies to a person who is proposing to undergo, is undergoing or has undergone a process to change their gender role and presentation (also referred to as transition). A person is legally covered from the point of 'proposal' – the person can stop the process and not lose legal protection.

This also means that to qualify for protection from direct and indirect discrimination on grounds of gender reassignment a transsexual person no longer has to show that they are under medical supervision.

The decision to live and dress permanently as a person of the opposite sex is determined to be reassigning gender.

Section 16 of the Act protects people undergoing gender reassignment from discrimination due to absence from work. It confirms that absence from work because of gender reassignment should be treated no less favourably than absence because of sickness, injury or any other reason.

This allows employers to treat gender reassignment absence differently from, but no less favourably than, sickness absence and can remove substantial disadvantage that would otherwise be experienced by trans people.

Victimisation occurs when an employee is treated less favourably because he or she has made a complaint under the Act. This does not require a comparator.

The Public Sector Equality Duty (the General Duty) came into force on the 5 April 2011. The General Duty requires public bodies to consider the needs of all individuals in their day to day work, in developing policy, in delivering services, and in relation to their own employees.

The General Duty requires the CPS, as a public authority, to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;

<sup>1</sup> Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion, sex and sexuality



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- Advance equality of opportunity between persons who share a relevant\* protected characteristic and those who don't share it; and
- Foster good relations between persons who share a relevant protected characteristic and those who don't share it.

(\* all except marriage and civil partnership)

The Equality Act 2010 (Specific Duties) Regulations 2011 came into force 10<sup>th</sup> September 2011. The specific duties ensure that public bodies are transparent about how they are complying with the public sector Equality Duty.

This means that the CPS is accountable to the people and communities that we serve. The specific duties require public bodies to publish:

- information to demonstrate their compliance with the Equality Duty, at least annually; and
- equality objectives at least every four years.

### **Data Protection Act (1998)**

Under this legislation, data relating to an individual's gender reassignment (which includes a change of gender status and name) is classed as 'sensitive information', and therefore attracts a higher degree of protection than usual, especially when a Gender Recognition Certificate is held (see Gender Recognition Act below).

### **Human Rights Act 1998**

Article 8 Right to Privacy, includes the right for information regarding change of gender to remain private and for transgender people and those associated with them to be treated with respect and dignity. Article 3 is an absolute right not to be subjected to degrading treatment. Linked to this in respect of defendants, we need to ensure that the right to a fair trial (article 6) and self expression (article 10) are also upheld.

### **Gender Recognition Act 2004**

This legislation provided for the Gender Recognition Certificate (GRC), the opportunity for a person who has transitioned to acquire a new "birth" certificate for their new gender status (for those whose birth was registered in the UK).

It is not possible to hold a GRC until two years "post transition" and even then valid reasons exist for some transgender people not to apply for legal recognition in their affirmed gender. They may be married or in a civil



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partnership, for example, and not intending to divorce/annul/dissolve (as currently required by the law<sup>2</sup>).

It is good practice and in keeping with the letter of the law to **regard all those who have transitioned gender role as if a GRC is held, from the point of social (or presenting) change onwards.**

The Act also created a **criminal** offence of unauthorised disclosure in Section 22 of the Act.

The CPS is the prosecuting authority responsible for progressing prosecutions of this offence.

Essentially it is an offence for a person to disclose information acquired in an official capacity about the gender history of the holder of a GRC to a third party without the transgender person's consent, as this is 'protected information'.

'Official capacity' includes someone who has acquired this information as a civil servant, police officer, employer or prospective employer.

The offence is punishable with a fine up to £5000.

There are only limited exceptions where it is **not** an offence to disclose protected information relating to a person including:

- if the information does not enable that person to be identified,
- if that person has agreed to the disclosure of the information,
- if the disclosure is in accordance with an order of a court or tribunal,
- if the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,
- if the disclosure is for the purpose of preventing or investigating crime,
- if the disclosure is made for the purposes of the social security system or a pension scheme.

**The CPS should take all possible steps to prevent unnecessary disclosure of protected information.**

### **Criminal Justice Act 2003 (Section 146)**

This Act was extended to include transphobic hate crime from 3 December 2012. The provision requires a Court to treat evidence that the offence involved a demonstration of transgender identity hostility or was motivated by such hostility as an aggravating feature which must result in an increase in sentence. At the same time, the law was amended to impose a mandatory life sentence starting point of 30 years for transphobic murder in line with other forms of hostility-based murder.

<sup>2</sup> Revoking this requirement is part of the Government Equal Civil Marriage Proposals 2012



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## Transgender Equality in the CPS Employment, Prosecution and Community Engagement Practices

The general duty of the CPS under the Equality Act 2010 covers eliminating discrimination, promoting equality and fostering good relations but it is also an anticipatory duty in that we should develop our policies and practice in anticipation of existing or future transgender employees or service users.

### Employment

It is **unlawful** and unacceptable to discriminate against someone at work or to treat them differently because they are transgender, perceived to be transgender or associated with someone who is transgender. The CPS considers transphobic language or behaviours to also be unacceptable in the workplace, even if the behaviour or language is not targeted at a specific person. The grievance and disciplinary procedures would apply in these circumstances.

For people diagnosed as having 'Gender Dysphoria', this condition has a substantial and long term adverse impact on day to day activities and as such they may be protected under the disability discrimination provisions of the Equality Act alongside the provisions relating to gender reassignment.

It is essential to treat people fairly and uphold the CPS Dignity at Work policy, wherein employees are entitled:

- To be treated with dignity, respect and courtesy;
- To a workplace free from bullying, harassment or victimisation;
- To experience no form of discrimination; and
- To be valued for their skills and abilities

Confidentiality is a primary issue of concern for many transgender employees or applicants.

**For any individual CPS employee, it would be a disciplinary matter and potentially a criminal matter if confidentiality is breached on an applicant or colleague's previous gender**

### Records and confidentiality

All documentation revealing an individual's previous gender status must be specially protected.

Any records of an individual which may disclose a previous gender status must not be contained openly within a personnel file, physical or electronic. Managers should ensure employees password protect electronic personnel files and maintain security for paper documents (e.g. sealed envelopes, locked files).



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Some records may need to make reference to birth sex such as pensions, insurance, security vetting, qualification certificates and any medical records. Access to this information must be restricted to only those who have consent. This group should be limited to, for example, the relevant and appropriate HR payroll and information management employees, pensions' employees and Occupational Health.

In many instances, particularly where an individual has a gender recognition certificate, a new employer will not generally need to be aware of the birth sex except in the exceptional circumstances previously mentioned.

### Recruitment

Any application for work may be made in the assumed gender of the applicant. There is no requirement for them to disclose details of this to a recruitment panel or line manager.

- Where a job offer is made, all applicants should be made aware at this point that there is a separate process on [Disclosure and Barring Service \(DBS\)](#) checks for transgender applicants, so that they do not have to reveal a previous name to the CPS.
- If an applicant fails a DBS check and it is advised that previous names would not be disclosed by DBS; this information **must** be treated with the highest degree of confidentiality.
- Where higher security clearance at National Security Vetting level (Security Check – “SC” and Developed Vetting – “DV”) is undertaken, vetting forms are completed online and nobody within the CPS will have sight of these forms at application for the higher clearance. Once the clearance is complete, the report will be sent to a named member of the Departmental Security Unit (DSU) to be reviewed by the Departmental Security Officer or her deputy only. The report will remain within the DSU, being locked in a safe within a secure room.
- In the case of identity checks in an Area, wherein the applicant produces ID in their previous identity with a name change deed, this information must be treated as highly confidential. The National Resourcing Centre can be contacted for advice on the ID check process.
- Certificates may have been issued in a previous identity and should therefore be treated as confidential. When qualification certificates (including legal practice certificates) must be produced for recruitment or other purposes, these can be sent directly to a single contact in the National Resourcing Centre.
- References from previous employers may also reveal a previous gender. References can also be sent to a single contact within the



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National Resourcing Centre, and any details revealing a previous gender must be kept confidential.

### Pay and Pensions

An employee or applicant holding a GRC is not obliged to disclose their previous gender status to the CPS.

However, it is advisable for them to liaise with the Departmental Security Officer to ensure mandatory security requirements are implemented, and liaise with National Pay and Benefits Centre to ensure NIC contributions are at the correct rate. Again, this must not be shared beyond the identified relevant and appropriate employees

Employees are obliged under the Gender Recognition Act to notify HMRC when they receive their GRC. For those with birthdates between 29/1/1947 and 5/12/1953 their legal sex determines whether they pay employee's NIC or not and if and when such deductions should stop. Therefore HMRC need to know their legal gender status and the date on which they received gender recognition, if obtained, because that date determines the change in the State Pension Age of the individual.

### Transition at work

Once an employee has raised the intention to change gender role, **he or she is protected from discrimination by the Equality Act 2010**. At this stage the person should be referred to by their new name (if relevant) and in accordance with their new gender role.

It is an important responsibility for managers to recognise and manage potential issues raised during the transition process of an employee.

An employee is entitled to expect that their employer will know what to do to ensure they are treated with dignity at work during this process.

- Transition can be difficult for an existing employee, who starts coming to work with a different gender status and presentation. It is essential that colleagues of the transgender person are prepared for the change (knowing how to address the person and being able to handle callers and visitors who may have known the person in their previous gender role). This must be done sensitively and in conjunction with the employee with consideration for their privacy.
- When someone is going through the transition process, this may raise issues for their colleagues, some of whom may not be aware of what is happening or, if they are aware, may have questions that they do not feel are appropriate to ask their colleague directly. Line management should provide information about what is happening, working closely with the transgender person or their representative to ensure that they are comfortable with what is shared.



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- It may be possible to arrange for briefing sessions to provide employees with useful information and answer questions delivered by the CPS LGBT employees support network, HR advisors, specialist Equality & Diversity employees or external transgender consultants.
- Employees must be allowed to use the toilets and facilities for their affirmed gender; they should not be directed to the accessible toilets in response to their change of gender role and any staff objections to sharing these facilities on the basis of the employee's transgender identity would be deemed as discriminatory behaviour.

Comment [L1]: Embed link to contacts  
pg 28

### The pre-transition period

It is vital to discuss with the employee how they would prefer to handle the transition and allow them to proceed at their own pace.

The transition period at work should be negotiated and agreed with the employee who is transitioning. This must be done sensitively and with respect for confidentiality. It would not be appropriate, for example, to make an announcement about the gender reassignment of an individual.

This period will require sensitive and careful handling, involving Areas/Divisions (Area/HQ Business Managers & HR Advisors) working closely with HR through a designated contact person coordinating a change of records.

In preparation for the transition, the employee should be encouraged to work with line management and HR advisor to prepare a flexible [Memorandum of Understanding](#)<sup>3</sup> that will encompass all the actions necessary to accommodate the change of role:

- Identifying a named confidential contact for the employee. This would normally be the line manager and Area/HQ HR Business Partner who will be able to support the employee throughout the transition process.
- Gaining consent for essential information to be shared with key individuals in HR, payroll, line management etc
- Identifying what support may be needed and when. The named contact will set up an initial meeting with the individual to discuss what support is needed and the most appropriate ways for this to be provided.
- The potential timescale for different stages of the transition
- Advising on pay and leave for any absences during the transition. The employee should be given the associated policies and procedures

<sup>3</sup> GIRES 2011 – Legal Protection and Good Practice for Gender Variant, Transgender and Transsexual People in the Workplace (page 7)



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relating to transition at work (e.g. managing attendance) and the named contact should be briefed on how to effectively support the transitioning employee.

- How and when the employee wants to inform others who need to know
- Discussing support and information needed for themselves and others. Additional support may be provided through LGBT Employees Network, a:gender, Departmental Trade Union Equality Officers, specialist Equality & Diversity employees, the provider of employee assistance/listening service or any other person with whom they are comfortable to talk about their decision.
- Implementing any support agreed for both the individual and others who need it. It may be possible for briefing sessions to be provided to colleagues by the CPS LGBT staff support network, HR advisors, EDCE Managers or external transgender consultants to provide employees with useful information and answer questions.
- Agreeing the date from which the individual will start work in their affirmed gender and how this will be shared with colleagues – including the use of appropriate toilets and changing facilities
- Considering whether an alternative working arrangement would be preferred, such as moving office
- Clarifying how HR and other additional support will be provided to the individual and other employees in a sensitive way
- In preparation for the date when the individual starts work in their affirmed gender, HR and the Area/HQ Business Manager will need to ensure that all contact details and personal records held centrally and locally, including building passes, have been changed to reflect the employee's new name and gender.

Confidentiality is of paramount importance, as is ensuring that the employee is comfortable with, and in control of, what is happening at work.

### Living in the affirmed gender

Once a person has transitioned they may not regard themselves as transgender, identifying only in their affirmed gender as a man or woman (although some people do not feel comfortable in either group and may live androgynously or in a non-gendered role).

It should be recognised that for some employees, in particularly lawyers whose livelihood is often dependent on their established name, there may be an added dimension for transition and that they may spend time in both gender roles, depending on their circumstances for some time – their gender presentation as assumed at birth whilst at work and their affirmed gender role and presentation when at home.



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Many people choose to live in their affirmed gender without surgery. For people who want to be considered for gender reassignment surgery or want to be recognised under the Gender Recognition Act, they will need to live continuously in the new gender role for 12 months or more. If they wish to obtain a gender recognition certificate under the Gender Recognition Act, they have to demonstrate they have lived in the affirmed gender for at least two years.

### **Medical treatment for gender reassignment**

#### **Surgery**

Not all transgender people undergo surgery, either as a choice or because it is not advised on medical or other grounds.

Most trans men do undergo chest reconstruction, and this may be done before, or around the time of transition.

Some people may take only the hormone treatment, however this does not mean they do not assume their new gender role and presentation.

Most surgeries related to gender reassignment can only be undertaken in a small number of locations and are major, requiring long periods of absence and/or convalescence. Other surgery may require less absence time e.g. breast augmentation/reconstruction or vocal surgery, but still has a significant impact on the duties a person may be able to undertake when returning to work e.g. lifting or driving.

#### **Hormone treatment**

Hormone medication to feminise or masculinise appearance is an essential medication for many transgender people. It takes an average of about three months before any appreciable changes begin to be noticed; body fat levels change as well as skin texture and facial hair.

There may be many side effects as a result of undertaking, changing or coming off hormone treatment. It is important to be aware of these and to take them into account when effectively managing the transition process in the workplace.

Advice can be sought from the individual concerned and others supporting the transition process. Confidential information, support and signposting to specialist services can be provided by the CPS LGBT Network, the Civil Service network a:gender and [GIRES guidance](#).



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### Absences for medical treatment for gender reassignment

It is essential that absences are managed confidentially, sensitively, appropriately and in accordance with the departmental policies on [Managing Attendance](#) and [Special Leave](#). Under the Equality Act 2010, employees who are absent due to gender reassignment must not be treated less favourably than if their absence was due to sickness or injury.

Managers should take into account strict requirements that clinicians may impose on individuals undergoing gender reassignment, and the distances that employees may need to travel for appointments when managing absences for assessments, treatment and/or surgeries.

- Management action under the Managing Attendance policy (e.g. the issuing of an Attendance Improvement Notice) should not normally be taken in respect of reasonable gender reassignment-related absences, e.g. absence due to recuperation or sickness caused by treatment or surgery for gender reassignment.
- Disability leave policies are not appropriate for gender reassignment surgery, but can be used as a basis for treating absence appropriately if e.g. an individual suffers depression due to surgery failing or going badly.
- Advice must be sought from the HR Advisor, HR Business Partner and/or others supporting the individual.
- GEO 2010/11 Research Findings 'Barriers to employers in developing lesbian, gay, bisexual and transgender-friendly workplaces'.

### Monitoring information (Employment)

Public authorities are required to publish relevant information about employees and service users who are protected by the gender reassignment characteristic. [Civil Service policy](#) is NOT to collect gender identity information on individuals (i.e. data on numbers of transgender people).

The main purpose of this information is to demonstrate our compliance with the General and Specific Duties of the Equality Act, and to help us identify and tackle any areas for potential discrimination.

Due to the sensitivity around recording this information and concerns about vulnerability, it is recommended by the Government Equalities Office (GEO) that authorities undertake preparatory work to explore and address attitudes towards transgender issues in the workplace. This is reinforced by the CPS Dignity at Work framework and People Survey. GIREs has published [guidance](#) on monitoring attitudes towards gender nonconforming people and also on monitoring prevalence.



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- Questions formulated by CPS HQ to gather monitoring information about the experience of transgender employees should be sensitive to the range of experiences of gender variance and focussed on areas of potential discrimination e.g. monitoring complaints and grievances. [Equality & Human Rights Commission](#) guidance has been published "Collecting Information on Gender Identity".
- Employees should be absolutely and reliably reassured that any information gathered is confidential and secure. This may be achieved by consultation groups and focus groups, in particular online engagement under pseudonyms can be effective in gathering 'anonymous' feedback on policy and practices – support and guidance from the CPS LGBT Employees Network and the Civil Service a:gender network is vital.



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## Working with Transgender Communities

***'We will engage with communities so that we are aware of their concerns when we make decisions'***

### Core Quality Standard 12

This Core Quality Standard is also underpinned by our public sector equality duty. The CPS Equality & Diversity Objectives 2012-15 considers gender reassignment issues alongside the other protected characteristics.

#### Engaging communities and external stakeholders

Sometimes umbrella lesbian, gay, bisexual and transgender (LGBT) organisations have been included as representing the issues faced by all of these communities. The CPS needs to continue to check that these groups include transgender people in their representation and understand trans equality issues, or look for groups that do, and include them in our engagement activities. In particular this is important for our national Community Accountability Forum and other national stakeholder engagement groups, and Local Scrutiny and Involvement Panels.

Ideally we need to consider transgender specific engagement where available and appropriate, for example ensuring involvement in developing understanding of handling transphobic hate crime cases.

Area Equality, Diversity & Community Engagement Managers will have local contacts with organisations who work with trans communities. GRES also publishes a [directory](#) of the groups that offer support to transgender people.

#### Benefits of working with trans communities

The CPS provides a public service which needs to be accessible and effective for all communities.

Sometimes the way that the service is traditionally provided has meant that some groups have either been excluded or the service has not been appropriate to their needs.

There are benefits from engagement for both the trans communities and the CPS.

For trans communities, their understanding of the CPS as both an employer and a prosecution authority will be increased and confidence and willingness to support the prosecution process is likely to be enhanced.

For the CPS, knowledge about transgender issues will be raised thereby enabling us to effectively meet our duties under the Equality Act and enhance



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our capacity to handle prosecution cases affecting trans communities effectively.

- Our policies and practices can be improved by taking on board the views of communities. We value the clear benefits in engaging with communities and see these actions as part of fulfilling our equality duty.
- Communities who feel excluded from the CPS will have low confidence in the CJS; they are most likely to feel disenfranchised and not feel the sense of justice that included communities may feel. This is one of the reasons behind low reporting of transphobic hate crime.
- It is essential that we engage with trans communities and groups to learn from their experiences. This will enable our prosecution and employment practice to be appropriate, sensitive and effective.
- Community engagement will improve both the experience and perception of fairness and the appropriateness of services provided.



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### **How the Prosecution Process May Affect Transgender People**

The CPS, as part of the wider CJS, has a responsibility to ensure fair and appropriate treatment of transgender people. This is not only in line with our corporate commitments as expressed in the Core Quality Standards but also supports our commitments to ensure due regard to our obligations arising from the Equality Act 2010.

The public sector equality duty of the Equality Act expects the CPS and the wider CJS to not only eliminate discrimination but to also promote equality and foster good relations.

In ensuring fair treatment for trans communities, we have to guard against and challenge some of the assumptions and stereotypes commonly associated with transgender people.

#### **Monitoring Trans equality for crimes, victims and defendants**

We have to ensure that along with other CJS agencies, particularly the police, that we can identify and monitor trans equality issues for victims and defendants.

Accurate data will enable the CPS to identify if there is any disproportionality in relation to transgender victims and defendants and take action to address any identified issues.

We have to ensure that we can identify and monitor transphobic hate crime and take the appropriate steps to ensure that our case management information is accurate in order to provide the best possible support to victims and witnesses.

Dealing with gender reassignment issues in prosecutions is still quite uncommon, but we are determined that prosecutors experiences should be shared in order to ensure defendants, victims and witnesses do not have a negative experience of the CPS in relation to the handling of their gender identity.

Any prosecutor who deals with a case involving a transgender person should highlight this to the Strategy & Policy Directorate and EDU, who have an interest in identifying the ways in which the courts are dealing with cases involving transgender victims and witnesses and improving our ability to deal with issues effectively.



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## Transgender victims and witnesses

Transgender people can be victims of crime in much the same way as any other people, including being a victim of hate crime, sexual or domestic violence.

If the crime wholly or partly relates to the victim being transgender (or being perceived to be transgender) – this is a transphobic hate crime.

**Assumptions on the 'credibility' of a witness based solely on their gender identity or transgender status are discriminatory and must be avoided.**

## Considerations

The possibility of disclosure of previous gender history might deter some trans people from reporting crimes and supporting the prosecution process.

- Staff should ensure that victims and witnesses' transgender identity is only shared if necessary with criminal justice partners and with their consent.
- It is good practice to ensure that when attending court the witness is treated according to their affirmed gender role e.g. in terms of address, access to appropriate toilet facilities, personal searches by officers of the same gender.
- If a witness, including police officers, has transitioned since the alleged crime took place, it is possible that the defendant will not recognise the witness. In such circumstances, the CPS must have sensitive discussions with the witness and an agreement should be reached with the defence legal team, court staff and the judge or magistrates regarding how this is handled.
- Transgender victims and/or witnesses may also be eligible for [special measures](#) under Section 46 of the Youth Justice and Criminal Evidence Act, when they are vulnerable (for example under 18 or disabled) or intimidated. This can be in relation to the nature of the offence, for example hate crime, it may be in relation to the nature of their evidence or in relation to their safety for the fear of being 'outed' to the defendant or wider community.
- There are limited occasions where it may be necessary to mention that the victim or witness is transgender, even if they are in receipt of a GRC. However, the established practice of the court is that where disclosure of birth sex is not essential it should be omitted – therefore it should be possible to accept the person's presenting gender expression for nearly all court purposes.





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### Steps the CPS can take to avoid all unnecessary reference to gender history

- checking that all relevant papers regarding prosecutions involving transgender victims, witnesses or defendants make reference to the correct presented gender status
- ensuring that prosecuting counsel understand their responsibilities under the Gender Recognition Act when acting on behalf of the CPS
- considering the powers of the court to grant anonymity about the gender identity of a victim or witness and make reporting restrictions: effectively barring the media from publishing information about the victim or witness. Reporting restrictions can be applied for under [special measures](#) and in certain circumstances, a witness anonymity order can be granted under the Coroners and Justice Act (2009) (See also contempt of court and reporting restrictions under [Legal Guidance](#)). It should be noted that reporting restrictions under special measures are only available for those giving evidence i.e. not in cases involving a guilty plea.



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### Transphobic Hate Crime

There is specific guidance on legal provisions in the [CPS Guidance on Prosecuting Cases of Homophobic & Transphobic Hate Crime](#).

The CPS Policy on Homophobic and Transphobic Hate Crime defines these crimes as 'any incident perceived to be homophobic or transphobic by the victim or any other person'.

The Policy also gives a definition of transphobic:

'A fear of or a dislike directed towards trans people, or a fear of or dislike directed towards their perceived lifestyle, culture or characteristics, whether or not any specific trans person has that lifestyle or characteristic. The dislike does not have to be so severe as hatred. It is enough that people do something or abstain from doing something because they do not like trans people.'

Transphobic hate crime is taken seriously by the CPS; however there are issues about under-reporting. The CPS dip-sampling exercise undertaken in 2011 identified that each CPS Area handled at least one case of transphobic hate crime in a 12 month period.

[UK research](#) indicates that around 62% to 73% of transgender people have experienced harassment or violence because of their identity. This included verbal abuse, threatening behaviour, physical assault and sexual assault. Between 2009 and 2011, 3 successful prosecutions took place of killers of transgender women<sup>4</sup> - these cases have raised questions about the additional vulnerability of transgender people working in the sex industry.

We have to increase community confidence in order for people to come forward and [report these crimes](#).

<sup>4</sup> Robyn Browne, Andrea Waddell & Destiny Lauren  
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### Example of Transphobic Hate Crime Case

May 2012, Wales

The victim was outside a shop when she and her friend were subject to transphobic abuse from a group of males outside the shop. The victim is transgender and is in the transition process of gender reassignment from male to female. As she has left the shop she passed the group and heard one of them shout "IS THAT A MAN?" behind her. Feeling that this was deliberately directed at her the victim confronted the group of males about their behaviour at which point one of the male has turned to her and said "I'M NOT FUCKING LISTENING TO YOU! I DON'T GIVE A TOSS! GET BACK IN YOUR FUCKING CAR YOU TRANNY!"

The victim contacted the local PCSO and reported the incident. This incident was witnessed by the victims' friend who is also transgender and a further passer by.

From the descriptions provided two defendants were identified. Officers also identified other members of the group who were present. Some verbally confirmed that the defendant was responsible for "CHOPSING" or answering back to the victim. However, one of the group provided a written statement. One youth was charged with an offence of using threatening, abusive words or behaviour with intent (section 4 Public Order Act).

The CPS applied for a video link for the victim and witness, and undertook a pre-trial visit to court.

The day before the trial the defence offered to accept a plea to an alternative charge of using threatening abusive words or behaviour (section 5 Public Order Act), the prosecutor and the victim to discuss and explain the decision to accept the offer.

The victim attended the sentencing when the youth was given 18 hours reparation and imposed with a restraining order to last indefinitely, and was satisfied with the outcome. Section 146 was not applied at sentence.

The youth appealed his sentence and this was changed to a 5 year restraining order.

### Key issues to consider when handling transphobic hate crime

- The CPS case management system (CMS) allows for crimes perceived to be transphobic hate crime to be flagged (currently as part of the homophobic/transphobic flag). It is important for case file notes to identify that the case is transphobic in nature and for instructions to prosecuting advocates to make reference to any evidence of hostility



## CPS Transgender Equality Management Guidance

and the need to highlight this to the court for the purposes of sentencing.

- Transphobic hate crime in relation to evidencing hostility is defined by the motivation of the offender, not the actual gender identity of the victim. Therefore it is important not to become distracted about whether or not the victim is transgender.
- The joint ACPO/CPS arrangements 'Witness Care: Focusing on Greatest Need' provide minimum standards which identify the victims of crimes with a transphobic element as being in greatest need. The CPS victim and witness care services should be able to meet the needs of transgender victims of hate crimes. The list of organisations provided gives contacts who are specialists in supporting transgender people and should be considered alongside any local directory for victim and witness care support. Well supported victims are better placed to support the prosecution process.
- Often homophobic language can be used to target a trans victim; in prosecuting cases such as these prosecutors should be alert to the context of the incident and the victim's perception. By prosecuting a case as a homophobic crime, trans victims may feel that their identity has been overlooked or their experience minimised. If homophobic language is assessed as the best evidence for application of Section 146, the CPS should first offer a meeting to explain this to the victim. It will be important to draw attention to this tension in all hate crime cases: we flag on the basis of the victim's perception but we can only prosecute on the basis of evidence of what and the offender did and why.
- Offences targeted at transgender people can occur without the abusive language that is often prevalent in such hate crime. (e.g. constantly using the wrong pronoun, emphasising the presenting gender in a sarcastic tone, or feigning confusion, "he, she, whatever". It will be important to consider the wider context when considering evidence of motivation or hostility including any relevant previous convictions on the part of offenders that might suggest conscious targeting of the community.
- The value of a victim personal statement should not be underestimated and early efforts should be made to ensure that individuals are aware of the statement, its use and value.
- Prosecutors should ensure all relevant evidence of the aggravation is put before the court and remind the court that as an aggravating feature this should attract an uplift in sentencing. It is important that the application and result of the sentence uplift is recorded on CMS in order to comply with prosecution policy. Ultimately, when published in the annual hate crime report, it will also inform individuals and

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## **CPS Transgender Equality Management Guidance**

communities and send a clear message to the whole of society that hate crime is treated seriously by the criminal justice system.

- Prosecutors should consider additional forms of support that can be provided in order to safeguard victims from further harassment, abuse or retaliation: the use of appropriate bail conditions, appropriate ancillary orders such as restraining orders (especially when the defendant is known to the victim) and reporting restrictions.
- In relation to addressing transphobic hate in professional sport arenas, prosecutors are reminded of the provision of the Football Offences Act which provides a charge of 'indecent or racist chanting'.
- Increased use of social media to commit transphobic and other hate crimes via e.g. Facebook or Twitter, are posing new challenges for criminal prosecutions.

All CPS Areas have specialist hate crime prosecutors and coordinators; it is recommended that advice should be sought from the individuals in these roles when handling a case of transphobic hate crime.

### **Prosecution of breaches of Section 22 of the Gender Recognition Act (GRA)**

As the prosecution authority responsible for taking forward criminal prosecutions of breaches of the GRA, we are also responsible for monitoring the decisions we make. This also reflects our regard for our duties under the Equality Act.

Trans communities hold the belief that there have been many incidents of breaches of this legislation, and low levels of action adversely affect community confidence. Combined with this is the concern that prosecutions of a breach of the GRA would in fact 'out' a victim.

Charging decisions on this offence should be highlighted with HQ directorates (Strategy & Policy Directorate and EDU), as these will be monitored and published centrally as part of the CPS Equality & Diversity information required under the Equality Act 2010.



## CPS Transgender Equality Management Guidance

### Example of potential breach of section 22 GRA

Prior to reassignment, Annette was a member of a professional body.

She informed them of her reassignment and the issue of a GRC and asked for their register to be amended to her new gender specific name.

The organisation updated their register with the new name but the online register (visible to all other members) continued to contain a link to her previous name.

Despite repeated requests, the organisation had failed to amend the register.

Annette reported the matter to Police for investigation.

Annette raised the issue to the CPS in a community engagement meeting.

The prosecutor explained that the CPS could only make a decision if the Police were to conduct an investigation and present evidence of a possible offence. The prosecutor further explained the elements of the Section 22 offence and what needed to be proved for a prosecution to be brought. The prosecutor confirmed that on the facts alleged there did appear to be a justification for a police investigation into a potential criminal offence.

Annette raised a concern about the reporting of any prosecution if it came to Court. Disclosure for the purposes of court proceedings is exempted by the GRA, but it seemed incongruous if in prosecuting for one breach of Section 22 that the CPS actually exposed Annette to publicity. The prosecutor explained the CPS could seek reporting restrictions as special measures and there may be other avenues we could explore as well under the general reporting restrictions.

Annette later informed the prosecutor that the professional body had finally acted to remove the information about the previous identity from the register – she suspected the threat of police involvement did the trick. Annette was satisfied with that outcome and did not want the Police to take further action.



## **CPS Transgender Equality Management Guidance**

### **Sexual Offences**

In relation to sexual offences, the CPS will need to consider the affirmed gender of the victim and this should be handled sensitively.

- **Rape**

The general principle to be applied is that the appropriate charge is the one that properly reflects the practical act complained of by the victim. It is irrelevant for the purposes of charge selection whether any relevant part of the victim's anatomy is 'as born' or via surgery.

Where there is forcible penile penetration of a woman whose birth sex was male but who has undergone surgery to create a vagina or of a man whose birth sex was female and has undergone surgery where a penis is created and they have retained their vagina, rape is the appropriate charge.

If the motivation for the rape has a transphobic element, evidence should be presented accordingly.

- **Indecent assault**

The affirmed gender, irrespective of possession of a GRC, should be used to determine the appropriate charge.

Therefore, any indecent assault – such as the fondling of a transgender woman's breasts – should be regarded as indecent assault on a woman, contrary to Section 14 of the Sexual Offences Act 1953 or Section 3 of the Sexual Offences Act 2003.

Again, if the motivation for the assault has a transphobic element, evidence should be presented accordingly.

### **Domestic violence**

Transgender victims should be supported in the same way as any other victims of domestic violence, with appreciation of the additional obstacles to reporting these crimes and supporting the prosecution.

Domestic violence for transgender victims may also have a transphobic element, for example violence or harassment due to familial rejection or disapproval. Such cases should be flagged as both domestic violence and transphobic on CMS, and the victims' vulnerability should be addressed.



# CPS Transgender Equality Management Guidance

## Transgender defendants

The CPS needs to ensure that we show full regard to the Human Rights Act and our duties under the Equality Act when we make decisions that impact on all defendants.

Police should provide early information of any GRA implications arising for transgender defendants, particularly so that the CPS is alert to data handling and press reporting issues.

In cases where there has been a complaint, either criminal or misconduct, made about arresting officer(s), the police Professional Standards Department should seek to make this information known to prosecutors (see ACPO/CPS Disclosure Manual paragraphs 18.28 – 18.30).

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## Charging

Given the CPS involvement in early charging advice, this gives prosecutors the opportunity to ensure that transgender people are addressed sensitively and treated accordingly in their presented gender; this includes raising with police the use of the correct gender and pronouns in all documentation..

## Court proceedings

In situations where the defendant is referred to by the victim or witness in the incorrect gender title (Miss, Ms, Mrs or Mr) or pronoun (he, she, her or him) during court proceedings, the prosecution should ensure that their own response is in the correct gender of the defendant. This also prevents the prosecutor enjoining any potential breach of the GRA.

## Previous convictions

There may be instances when it is necessary to refer to the previous convictions of a transgender person when those convictions may appear under a previous gender status and/or name.

Wherever possible, these convictions should be referred to neutrally and without reference to the different name under which they are listed as convictions. This is no different from current practice where people who have aliases simply have their convictions read out under the name which they are charged, without reference to the fact that the convictions were acquired under a different name.

## Surrender of a passport or driving licence for bail conditions or driving offences

This may be in the birth sex as opposed to the presenting gender of a defendant. Documents that have not been updated or replaced and, therefore, are not consistent with the trans person's current gender role and



## CPS Transgender Equality Management Guidance

presentation, should not be unnecessarily disclosed. If there is no alternative, care must be taken to limit disclosure of the previous identity, in the same way as any other sensitive information, potentially protected under s22 of the GRA.

### Summons or warrant

This may have been issued in accordance with the birth sex of a defendant, who has subsequently transitioned to live under a new name and/or altered gender status. The same principle as applied to previous convictions (above) should be applied here in relation to gender neutral reference.

Documents that may subsequently be used in court which might bear the defendant's original name, should be re-issued in the new name, or redacted and corrected in such a way that the change of gender status is not apparent.

### Considerations in applications for remand to custody or bail

Transgender people who are taking hormone medication **must** not have their treatment interrupted whilst held in cells or remanded in custody. This can have a negative impact on mental health; severe depression, attempted or actual suicide. Defendants may become increasingly visible and vulnerable to verbal, sexual or physical abuse.

In respect of bail, it should be considered that trans defendants who are under medication will be traceable through their medical supervision if their bail conditions are breached.

Transgender defendants will normally be remanded into a facility that accords with their legal gender status (i.e. that which is on their birth certificate or GRC).

Transgender people may be particularly vulnerable if remanded to custody. Pre-operative transgender people as well as those not undergoing surgery may be particularly vulnerable to transphobic sexual and physical abuse.

The Prison Service is the body responsible for making case by case decisions for transgender defendants on remand to be separated from other defendants on remand based on risk assessment.



# CPS Transgender Equality Management Guidance

## Contacts

### CPS LGBT Employees Network

Email: [lgbt.co-chair@cps.gsi.gov.uk](mailto:lgbt.co-chair@cps.gsi.gov.uk)

### CPS Areas

- [Equality, Diversity & Community Engagement Managers](#)
- [HR Advisors](#)

### CPS Equality & Diversity Unit

Email: [equality@cps.gsi.gov.uk](mailto:equality@cps.gsi.gov.uk)

#### a:gender

Civil service network for employees who share the need for a permanent change of gender or who identify as intersex

Telephone: 020 7035 4253

Email: [agender@homeoffice.gsi.gov.uk](mailto:agender@homeoffice.gsi.gov.uk)

Website: [www.agender.org.uk](http://www.agender.org.uk)

#### DBS

Contact details for transgender applicants:

Telephone: 0151 676 1452

Email: [DBSsensitive@DBS.gsi.gov.uk](mailto:DBSsensitive@DBS.gsi.gov.uk)

#### DEPEND

An organisation offering free, confidential and non-judgmental advice, information and support to all family members, spouses, partners and friends of trans people in the UK.

Website: [www.depend.org.uk](http://www.depend.org.uk)

Address: BM Depend, London, WC1N 3XX

#### EQUALITY & HUMAN RIGHTS COMMISSION (EHRC)

A statutory body with the responsibility to protect, enforce and promote equality across the seven "protected" grounds - age, disability, gender, race, religion and belief, sexual orientation and gender reassignment.

Website: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

Telephone: 0207 3117 0235

Address: 3 More London, Riverside Tooley Street, London SE1 2RG

#### GENDERED INTELLIGENCE

Community Interest Company working with trans youth (under 25).

Website: [www.genderedintelligence.co.uk](http://www.genderedintelligence.co.uk)



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## **CPS Transgender Equality Management Guidance**

### **GENDER RECOGNITION PANEL**

The Gender Recognition Panel has been established under the Gender Recognition Act 2004 to assess applications from transsexual people for legal recognition in their "acquired" gender.

Website: [www.grp.gov.uk](http://www.grp.gov.uk)

Telephone: 0845 355 5155

Address: PO Box 6987, Leicester LE1 6ZX

### **GENDER TRUST**

A registered charity which specifically helps adults who are transsexual, gender dysphoric or transgender.

Website: [www.gendertrust.org.uk](http://www.gendertrust.org.uk)

Telephone: 01273 234024

Address: PO Box 3192, Brighton BN1 3WR

### **GENDER IDENTITY RESEARCH & EDUCATION SOCIETY (GIRES)**

A registered charity that promotes education based on research into gender identity and intersex issues and supports the right of individuals to live according to their gender identity, rather than the role imposed upon them in accordance with their birth sex. Provides training, literature, policy documents, trans focus groups and family support.

Website: [www.gires.org.uk](http://www.gires.org.uk)

Email: [info@gires.org.uk](mailto:info@gires.org.uk)

Telephone: 01372 801554

Address: Molverley, The Warren, Ashted, Surrey KT21 2SP

### **GENDYS**

A network for all those who have encountered gender identity problems personally; transsexual, transgender and gender dysphoric people of either sex, and for those who provide care, both professional and lay.

Website: [www.gender.org.uk/gendys/](http://www.gender.org.uk/gendys/)

Address: Gendys Network, BM Network, London WC1N 3XX

Email: [gendys@gender.org.uk](mailto:gendys@gender.org.uk)

### **MERMAIDS**

Family support group for children and teenagers with gender identity issues.

Website: [www.mermaidsuk.org.uk](http://www.mermaidsuk.org.uk)

Address: BM Mermaids, London, WC1N 3XX

### **PRESS FOR CHANGE**

Press for Change is a political lobbying and educational organisation which campaigns to achieve equal rights and liberties for all transgender people in the UK, through legislation and social change.

Website: [www.pfc.org.uk](http://www.pfc.org.uk)

Address: Press for Change, BM Network, London WC1N 3XX



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### **QWEST FTM UK**

A charity that furthers the interests of and provides support for FtM (female to male) identified people and their families in the UK

Website: [www.westernboys.org](http://www.westernboys.org)

Email: [info@qwestftmuk.org](mailto:info@qwestftmuk.org)

Telephone: 01823 650 700

### **TG F.A.C.T.**

Facilitating, Assisting, Counselling and Training In support of gender transition at work.

Website: [www.positive2.belland.org.uk](http://www.positive2.belland.org.uk)

Telephone: Tina Livingstone 07814 492690

### **The Rubicon Society**

Trans Support Group

Telephone: 020 8252 2623

### **TREC**

Trans resource empowerment centre. Support for trans people including a wide range of programming and empowerment activities

Website: [www.transcentre.org.uk](http://www.transcentre.org.uk)

### **BIRTH PARENTS INFORMATION**

Helpline: 01582 539 891. Information for parents of trans children.

### **THE BEAUMONT TRUST, BM. CHARITY. LONDON WC1N 3XX.**

Help over the entire issue of Trans people.

**THE BEAUMONT SOCIETY. BM 3084 LONDON WC1N 3XX.** The Beaumont Society is a national self help body run by and for those who cross-dress or are transsexual.

Website: [www.beaumontsociety.org.uk/](http://www.beaumontsociety.org.uk/)

### **UK INTERSEX ASSOCIATION**

An education, advocacy, campaigning and support organisation working on behalf of intersex people.

Website: [www.ukia.co.uk](http://www.ukia.co.uk)

### **W.O.B.S. WOMEN OF THE BEAUMONT SOCIETY. BM 3084 LONDON WC1N 3XX.**

Help and support for partners of trans people.



## CPS Transgender Equality Management Guidance

### Glossary<sup>5</sup>

#### Cross-dresser

Most people who are cross dressers do not experience any discomfort with their gender identity and do not wish to transition their gender role. Nor do they usually seek modification of their bodies. The term 'transvestite' is associated with cross dressing, though some cross dressers would not identify as such and the term is not commonly used.

Under the EA10, legal protection is given to someone who is cross-dressing as part of the process of reassigning their gender (transitioning) or to someone who is perceived to be transgender due to being cross-dressed.

#### Gender

Gender consists of two related aspects; the person's internal perception of who they are is the 'gender identity'; the way the person behaves and lives in society and interacts with others is the *gender role or expression*. Most people in the general population are cisgender; in other words, their perception of themselves is congruent with their sex appearance, and with their gender role.

#### Gender reassignment

Under the Equality Act 2010 (EA10), a person has the protected characteristic of *gender reassignment* if they are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex. This is a personal process that may involve medical interventions such as counselling, psychotherapy, hormone therapy or surgery, but does not have to. In this guide, *gender reassignment/change of gender role* is used to describe the process of change and *gender transition* to describe the time when gender role is changed.

#### Gender Dysphoria (GD)/ Gender Variance/ Gender nonconforming

Dressing or behaving in a way that is perceived by others as being outside cultural gender norms may be described as gender variance or gender nonconformity. Gender dysphoria describes the persistent personal discomfort that occurs when the physical sex does not match the gender identity. The social role is also expected to conform to the sex appearance, so this, too, feels uncomfortable for the individual concerned. (The term "gender identity disorder" is considered pathologising and is gradually disappearing from the vocabulary). It should be noted that these refer to all cases whether or not surgery is actively sought.

#### Gender Recognition Certificate (GRC)

The Gender Recognition Act provided for the legal recognition of the trans person in their 'acquired' (i.e. affirmed) gender and the opportunity to acquire a new "birth" certificate for their new gender. This is called a Gender Recognition Certificate and replaces the original birth certificate in all official documentation. Those in existing marriages or civil partnerships are currently

<sup>5</sup> based on guidance from EHRC & Home Office/a:gender the workplace and gender guide



## CPS Transgender Equality Management Guidance

obliged to annul them – an Interim GRC is issued that lasts for 6 months during which time the annulment application must be made.

### GRS - Gender Reassignment Surgery

An individual must complete live continuously in the gender role that is congruent with the gender identity for 12 months before undergoing genital surgery. Separate opinions from two clinicians are required for referral for genital reassignment surgery. Some other procedures, such as chest surgery may be undertaken before this stage, and others after, according to the needs of the individual undergoing reassignment.

Surgery is not obligatory to reassign gender and for some, the risks will be outweighed by the potential benefits.

### Affirmed Gender

This refers to the post-transition gender role of a person who has undergone gender reassignment. Those who have transitioned to the affirmed gender role, and who have a GRC, have 'acquired' a new gender status. It is possible for an individual to transition fully to the affirmed gender without surgical intervention.

### Hormone treatment

Typically, hormone medication has a very positive effect on a [transgender person's wellbeing](#).<sup>6</sup> Currently, within several NHS Gender Identity Clinics, hormone treatment is not prescribed until the psychiatrists are confident about the person's condition of gender dysphoria. The time taken to complete this assessment process can range between three months and five years after the second consultation. However, it is no longer contingent upon a change of gender role. Some hormone treatment medication can have serious consequences for the person's health and must be regularly monitored by a GP. Once hormone treatment starts, any physical changes may take a while. However, these changes may be painful and uncomfortable. Any changes in this treatment may also have an impact. Depression and other emotional difficulties may manifest during this initial treatment phase. Problems may also occur should medication be withheld at any time or for any reason. Regular blood tests are undertaken and appointments with an endocrinologist may be required.

### Physical sex

This is simply the sex with which body organs particularly genitalia (upon which sex is registered at birth) and gonads (testes and ovaries). In most of the population the sex appearance is clearly male or female. However, 'intersex' conditions occur in about 1% of the population, some of which give rise to ambiguous genitalia and therefore may be wrongly described on the birth certificate. This may cause a mismatch between the individual's gender identity and gender role, therefore later adjustment, in the same way as for trans people, may be necessary. (The term Disorders of Sex Development has recently been introduced but is unpopular with the population affected).



## **CPS Transgender Equality Management Guidance**

### **Sexuality**

One of the most common misconceptions about gender dysphoric people is that this is the same as being gay, lesbian or bisexual. Sexual orientation is separate and unrelated to gender dysphoria. The sexual orientation of gender dysphoric people may be heterosexual, gay, lesbian, bisexual or asexual.

### **Transsexual**

An adjective that describes people whose sex, as registered at birth, is not congruent with their gender identity. Usually people respond to their discomfort by undergoing a personal process of gender reassignment to bring their outside characteristics and their gender expression, in line with their gender identity. The word transsexual is not often used by people who may be so described, because they prefer the terms 'trans' or 'transgender'. Those that have completed the process may regard themselves as men or woman, having resolved the conflict between their gender identity and gender expression.

Also used by the EA10 to define people who fall within the definition of those people with the protected characteristic of gender reassignment (above).

### **Transgender (often abbreviated to "trans")**

This is often used as an 'umbrella term' to include all people who experience gender dysphoria and express this in some way. *Transgender* includes transsexual people but is much wider to embrace a wide variety of gender expression including those who have no intention of permanently changing gender role and may use a variety of self-descriptions, such as poly-gender, pan gender, gender queer. A few do not identify as either men or woman and are non-gender.

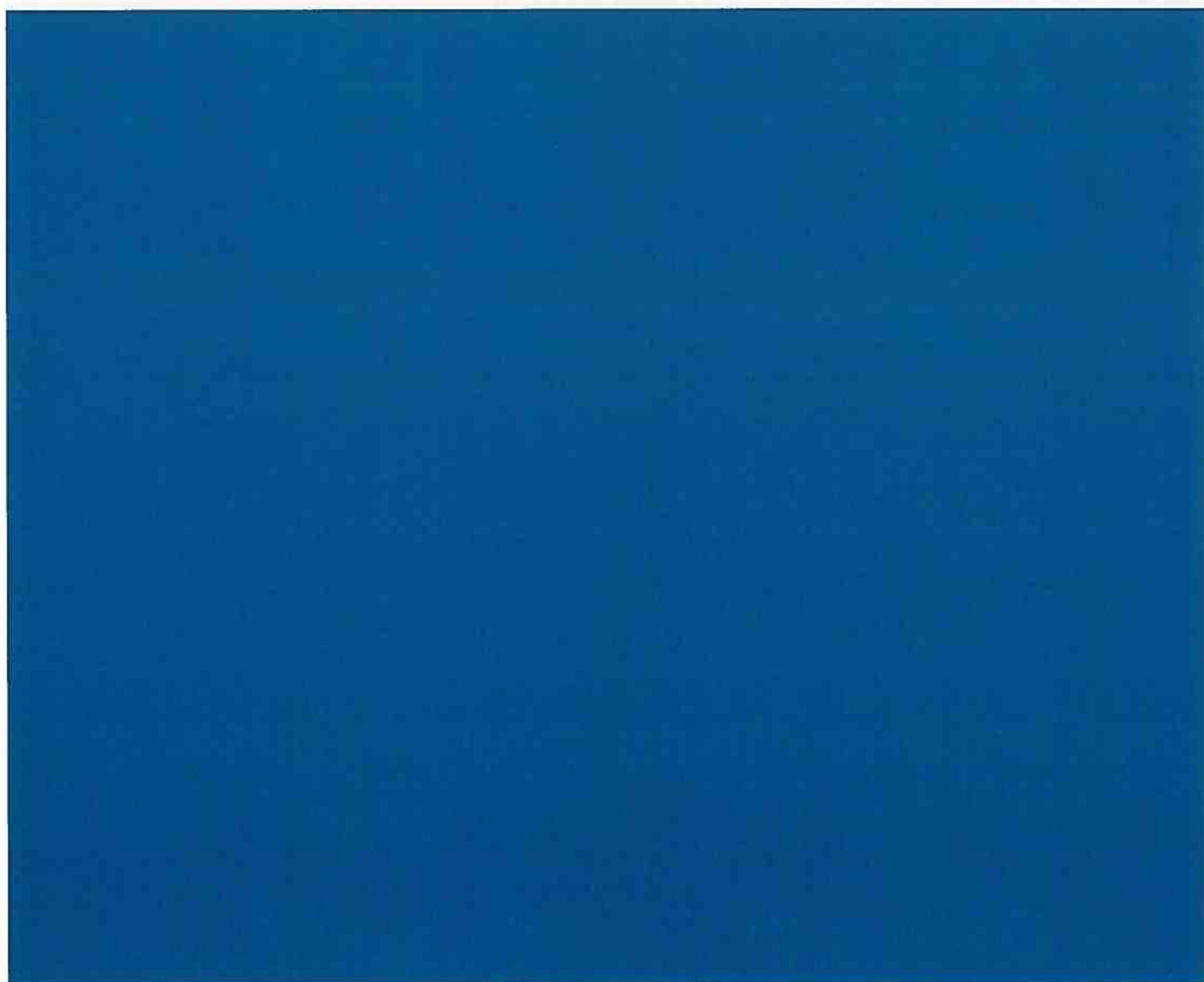
### **Trans Man**

A trans man is a person who was registered female at birth, but who identifies as a man. FtM (female to male) is convenient, but rather impolite shorthand

### **Trans Woman**

A trans woman is a person who was registered male at birth, but who identifies as a woman. MtF (male to female) is convenient, but rather impolite shorthand.







# CPS Transgender Equality Management Guidance

## Introduction

The purpose of this guidance is to inform policy and practice development as well as providing employees within the Crown Prosecution Service (CPS) with good practice information in relation to managing transgender equality issues in employment and service delivery.

It includes the legislative responsibilities under the Equality Act 2010 (EA10), the Human Rights Act 1998 (HR98), the Data Protection Act 1998 (DP98) and Gender Recognition Act 2004 (GRA) - see section 3 for more detail.

It covers issues relating to employment, prosecutions and community engagement.

In relation to employment, this guidance is intended to support and complement HR policy and procedures. Similarly, in respect of prosecutions this guidance is complementary to prosecution policy and guidance.

Terminology is not fixed – however, a glossary is provided at the end of the document to assist understanding of commonly used phrases. You may find it useful to read this first if you are not acquainted with the language relating to trans issues (Page 22).

This document refers to 'transgender' as an umbrella phrase to describe all those whose gender identity and/or gender expression is not completely congruent with their birth sex.

However, in relation to gender reassignment as defined by the Equality Act we reflect the legal use of the term 'transsexual' to define a person who is proposing to undergo, undergoing or has undergone gender reassignment. Note that the term should only ever be used as an adjective, e.g. "a transsexual person" and never as a noun, e.g. "a transsexual".



# CPS Transgender Equality Management Guidance

## Acknowledgements

The CPS is grateful for the advice and input given by the CPS Community Accountability Forum Transgender Equality Sub-Group:

a:gender  
TransWirral  
Laws Training  
Galop  
GIRES  
Laws Training  
Press for Change  
TREC  
GADD  
Lancashire LGBT  
Press for Change

CPS Equality and Diversity Unit  
CPS Human Resources Directorate  
CPS Strategy and Policy Directorate  
CPS Merseyside and Cheshire  
CPS LGBT Staff Network Co-Chair  
CPS Equality and Diversity Unit (Author)



# CPS Transgender Equality Management Guidance

## Legislation

### Equality Act 2010 (EA10)

Gender reassignment, as one of the 9 protected characteristics<sup>1</sup>, is a characteristic that provides people with legal protection from direct discrimination; indirect discrimination; harassment; discrimination based on perception (e.g. a person is perceived to have reassigned gender); victimisation and discrimination based on association (e.g. partner, parent, sibling or friend of a transsexual person).

The protected characteristic of gender reassignment applies to a person who is proposing to undergo, is undergoing or has undergone a process to change their gender role and presentation (also referred to as transition). A person is legally covered from the point of 'proposal' – the person can stop the process and not lose legal protection.

This also means that to qualify for protection from direct and indirect discrimination on grounds of gender reassignment a transsexual person no longer has to show that they are under medical supervision.

The decision to live and dress permanently as a person of the opposite sex is determined to be reassigning gender.

Section 16 of the Act protects people undergoing gender reassignment from discrimination due to absence from work. It confirms that absence from work because of gender reassignment should be treated no less favourably than absence because of sickness, injury or any other reason.

This allows employers to treat gender reassignment absence differently from, but no less favourably than, sickness absence and can remove substantial disadvantage that would otherwise be experienced by trans people.

Victimisation occurs when an employee is treated less favourably because he or she has made a complaint under the Act. This does not require a comparator.

The Public Sector Equality Duty (the General Duty) came into force on the 5 April 2011. The General Duty requires public bodies to consider the needs of all individuals in their day to day work, in developing policy, in delivering services, and in relation to their own employees.

The General Duty requires the CPS, as a public authority, to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;

<sup>1</sup> Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion, sex and sexuality



## **CPS Transgender Equality Management Guidance**

- Advance equality of opportunity between persons who share a relevant\* protected characteristic and those who don't share it; and
- Foster good relations between persons who share a relevant protected characteristic and those who don't share it.

(\* all except marriage and civil partnership)

The Equality Act 2010 (Specific Duties) Regulations 2011 came into force 10<sup>th</sup> September 2011. The specific duties ensure that public bodies are transparent about how they are complying with the public sector Equality Duty.

This means that the CPS is accountable to the people and communities that we serve. The specific duties require public bodies to publish:

- information to demonstrate their compliance with the Equality Duty, at least annually; and
- equality objectives at least every four years.

### **Data Protection Act (1998)**

Under this legislation, data relating to an individual's gender reassignment (which includes a change of gender status and name) is classed as 'sensitive information', and therefore attracts a higher degree of protection than usual, especially when a Gender Recognition Certificate is held (see Gender Recognition Act below).

### **Human Rights Act 1998**

Article 8 Right to Privacy, includes the right for information regarding change of gender to remain private and for transgender people and those associated with them to be treated with respect and dignity. Article 3 is an absolute right not to be subjected to degrading treatment. Linked to this in respect of defendants, we need to ensure that the right to a fair trial (article 6) and self expression (article 10) are also upheld.

### **Gender Recognition Act 2004**

This legislation provided for the Gender Recognition Certificate (GRC), the opportunity for a person who has transitioned to acquire a new "birth" certificate for their new gender status (for those whose birth was registered in the UK).

It is not possible to hold a GRC until two years "post transition" and even then valid reasons exist for some transgender people not to apply for legal recognition in their affirmed gender. They may be married or in a civil



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partnership, for example, and not intending to divorce/annul/dissolve (as currently required by the law<sup>2</sup>).

It is good practice and in keeping with the letter of the law to **regard all those who have transitioned gender role as if a GRC is held, from the point of social (or presenting) change onwards.**

The Act also created a **criminal** offence of unauthorised disclosure in Section 22 of the Act.

The CPS is the prosecuting authority responsible for progressing prosecutions of this offence.

Essentially it is an offence for a person to disclose information acquired in an official capacity about the gender history of the holder of a GRC to a third party without the transgender person's consent, as this is 'protected information'.

'Official capacity' includes someone who has acquired this information as a civil servant, police officer, employer or prospective employer.

The offence is punishable with a fine up to £5000.

There are only limited exceptions where it is **not** an offence to disclose protected information relating to a person including:

- if the information does not enable that person to be identified,
- if that person has agreed to the disclosure of the information,
- if the disclosure is in accordance with an order of a court or tribunal,
- if the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,
- if the disclosure is for the purpose of preventing or investigating crime,
- if the disclosure is made for the purposes of the social security system or a pension scheme.

**The CPS should take all possible steps to prevent unnecessary disclosure of protected information.**

### **Criminal Justice Act 2003 (Section 146)**

This Act was extended to include transphobic hate crime from 3 December 2012. The provision requires a Court to treat evidence that the offence involved a demonstration of transgender identity hostility or was motivated by such hostility as an aggravating feature which must result in an increase in sentence. At the same time, the law was amended to impose a mandatory life sentence starting point of 30 years for transphobic murder in line with other forms of hostility-based murder.

<sup>2</sup> Revoking this requirement is part of the Government Equal Civil Marriage Proposals 2012



# CPS Transgender Equality Management Guidance

## Transgender Equality in the CPS Employment, Prosecution and Community Engagement Practices

The general duty of the CPS under the Equality Act 2010 covers eliminating discrimination, promoting equality and fostering good relations but it is also an anticipatory duty in that we should develop our policies and practice in anticipation of existing or future transgender employees or service users.

### Employment

It is **unlawful** and unacceptable to discriminate against someone at work or to treat them differently because they are transgender, perceived to be transgender or associated with someone who is transgender. The CPS considers transphobic language or behaviours to also be unacceptable in the workplace, even if the behaviour or language is not targeted at a specific person. The grievance and disciplinary procedures would apply in these circumstances.

For people diagnosed as having 'Gender Dysphoria', this condition has a substantial and long term adverse impact on day to day activities and as such they may be protected under the disability discrimination provisions of the Equality Act alongside the provisions relating to gender reassignment.

It is essential to treat people fairly and uphold the CPS Dignity at Work policy, wherein employees are entitled:

- To be treated with dignity, respect and courtesy;
- To a workplace free from bullying, harassment or victimisation;
- To experience no form of discrimination; and
- To be valued for their skills and abilities

Confidentiality is a primary issue of concern for many transgender employees or applicants.

**For any individual CPS employee, it would be a disciplinary matter and potentially a criminal matter if confidentiality is breached on an applicant or colleague's previous gender**

### Records and confidentiality

All documentation revealing an individual's previous gender status must be specially protected.

Any records of an individual which may disclose a previous gender status must not be contained openly within a personnel file, physical or electronic. Managers should ensure employees password protect electronic personnel files and maintain security for paper documents (e.g. sealed envelopes, locked files).



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Some records may need to make reference to birth sex such as pensions, insurance, security vetting, qualification certificates and any medical records. Access to this information must be restricted to only those who have consent. This group should be limited to, for example, the relevant and appropriate HR payroll and information management employees, pensions' employees and Occupational Health.

In many instances, particularly where an individual has a gender recognition certificate, a new employer will not generally need to be aware of the birth sex except in the exceptional circumstances previously mentioned.

### Recruitment

Any application for work may be made in the assumed gender of the applicant. There is no requirement for them to disclose details of this to a recruitment panel or line manager.

- Where a job offer is made, all applicants should be made aware at this point that there is a separate process on [Disclosure and Barring Service \(DBS\)](#) checks for transgender applicants, so that they do not have to reveal a previous name to the CPS.
- If an applicant fails a DBS check and it is advised that previous names would not be disclosed by DBS; this information **must** be treated with the highest degree of confidentiality.
- Where higher security clearance at National Security Vetting level (Security Check – “SC” and Developed Vetting – “DV”) is undertaken, vetting forms are completed online and nobody within the CPS will have sight of these forms at application for the higher clearance. Once the clearance is complete, the report will be sent to a named member of the Departmental Security Unit (DSU) to be reviewed by the Departmental Security Officer or her deputy only. The report will remain within the DSU, being locked in a safe within a secure room.
- In the case of identity checks in an Area, wherein the applicant produces ID in their previous identity with a name change deed, this information must be treated as highly confidential. The National Resourcing Centre can be contacted for advice on the ID check process.
- Certificates may have been issued in a previous identity and should therefore be treated as confidential. When qualification certificates (including legal practice certificates) must be produced for recruitment or other purposes, these can be sent directly to a single contact in the National Resourcing Centre.
- References from previous employers may also reveal a previous gender. References can also be sent to a single contact within the