



Transgender Management Guidance

Equality and Diversity Unit

Contents

Introduction	page 1
Glossary of common terms	page 1
Legislation	page 6
What does that mean for CPS in employment, prosecution and community engagement	page 9
Working with Transgender Communities	page 15
How the Prosecution Process may affect Transgender People	page 17
Contacts	page 20

Transgender Management Guidance

1. Introduction

The purpose of this guidance is to provide the CPS with good practice information in relation to transgender issues. It includes the new legislative responsibilities (see section 3 for more detail) and covers employment, prosecutions and community engagement.

2. Glossary of common terms

● Gender

This is how we perceive ourselves and others. It can be expressed as femininity or masculinity. It differs according to country, custom and culture and has little to do with physical or birth sex.

● Gender identity

This is the gender with which we identify or feel that we belong.

● Physical sex

This is simply the sex with which body organs (physical appearance) match and so will be male or female. There is a rare condition where the sex of a person is ambiguous. This was traditionally known as "hermaphrodite" and is now more commonly called "intersex". Most intersex people are not gender dysphoric (see page 2).

- **Gender role**

This is to do with how we behave in society. Society at large determines “acceptable” behaviour for men and women which include, for example, how we dress and who we have relationships with. These are variable according to where we live and clearly will vary over time and occasion.

- **Attributed gender**

This is the gender that other people perceive us to be and is usually an unconscious act determining us as male or female. This is mainly based on how we express our gender and not necessarily our mode of dress.

- **Gender Dysphoria (GD)**

This is a condition that occurs when a person’s physical sex does not match their gender as perceived by them (also called “gender identity”). It should be noted that this refers to all cases whether or not surgery is actively sought.

- **Transvestite**

This is the term for someone who dresses in the clothing of the other sex. Most transvestites are not transsexual and do not wish to change their birth sex or sexual characteristics. They may also be known as “cross dressers”. They are generally happy to change back and forth between the two sexes.

● **Transsexual**

It is used here to differentiate between the groups of people who identify as “transgendered”. Transsexual people invariably seek surgery as opposed to transgenderist people. These two groups share gender dysphoria as a commonality in a way probably not shared by transvestites.

These are people whose physical sex doesn’t match their gender as perceived by them and who feel beyond doubt that they need to change their physical characteristics. They tend to actively seek gender reassignment surgery (GRS), having been recognised as being gender dysphoric. Most transsexual people will meet all the requirements to be suitable for surgery, although not all will be suitable candidates. Sometimes medical reasons or fear of surgery can prevent reassignment from taking place.

● **Transition**

This is a term used to describe the sequence of events leading up to the change from the birth gender to the other gender (as perceived by the person to be their real gender).

● **Transgenderist**

This is a term used to describe a person who chooses to live in the role of the other gender, without the aid of surgery. A transgenderist does not normally intend to undergo major surgery, which can be for many reasons. They usually take hormone treatment and may have enhancement surgery. However, this is still a permanent transition and the person will not want to change back to their birth gender once they have transitioned.

● **Real Life Test (RLT)**

Once a person with gender dysphoria is diagnosed, they must go through an extensive medical process. This begins with psychiatric consultation with two different psychiatrists, a legal name change and living in the new gender for a minimum of two years. This is called the Real Life Test (RLT).

During this time, the change must be permanent and there is a requirement to be in paid or voluntary employment or training (or something similar) for at least one year of that time. Hormone treatment can start any time between three months and five years after the second psychiatric assessment.

● **Sexuality**

One of the most common misconceptions about gender dysphoric people is that they are gay, lesbian or bisexual. Sexuality is separate and unrelated to gender dysphoria. The sexuality of gender dysphoric people is "determined" in exactly the same way as for anyone else in society and is not related to gender. Many post-op transsexual people go on to have heterosexual relationships while others join the lesbian, gay or bisexual communities.

● **Presenting gender**

There is often a question of how a transgender person should be addressed. The rule is that the accepted gender of the person is their presenting gender. Once someone states their intention to live in their new gender and begins to do so, this is the gender that they now are. This is regardless of surgery status and, as already stated, not all transgender people will undergo gender reassignment surgery.

Once someone has undergone gender reassignment surgery, they no longer identify as their previous gender and are legally able to change their birth certificate to reflect this change. (See Gender Recognition Act 2004 in section 3).

● **Hormone treatment**

As already stated, hormone treatment is not prescribed until the psychiatrists are confident about the person's condition of gender dysphoria. This can range between three months and five years after the second assessment and is also reliant on name change and other changes.

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. These changes can 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.

3. Legislation

Sex Discrimination Act (Gender Reassignment) Regulations 1999

The Sex Discrimination Act 1975 makes it unlawful to discriminate on the grounds of sex in employment, education, provision of housing, goods, facilities and services. The Gender Reassignment Regulations extend the Act to cover those intending to undergo, currently undergoing or having already undergone gender reassignment in relation to discrimination in employment and vocational training.

The Act covers a broad range of workers including contract workers and applies regardless of length of service or number of hours worked.

Discrimination is defined in terms of comparative treatment of the transsexual person and that of other persons for whom gender reassignment grounds do not exist.

Coverage includes recruitment, promotion, training, transfer, access to employment related benefits including pay and pensions, selection for redundancy and entitles the individual to a working environment free from harassment on the grounds of gender reassignment.

Sickness absence allowed to a person undergoing gender reassignment should not be compared with absence which is due to sickness or injury of other persons for whom gender reassignment grounds do not exist.

A claim can therefore be brought against an employer, or an individual, for any unlawful discrimination including harassment. Further, the employee is protected by the regulations throughout the process of gender reassignment, from the moment they first indicate that they are gender dysphoric.

Gender Recognition Act 2004

The Gender Recognition Act 2004 (GRA 2004) provides for the legal recognition of the transsexual person in their acquired gender and their opportunity to acquire a new "birth" certificate for their new gender. This is called a Gender Recognition Certificate (GRC) and this will replace the originating birth certificate in all official documentation.

This also creates an offence of unauthorised disclosure in Clause 22 of the Act. 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 Gender Recognition Certificate (GRC) as this is "protected information". For example, should someone with access to the employee's personal file disclose the fact that the person was born a different gender, then an offence may have been committed as well as a major breach of confidentiality.

The holder of a GRC is not obliged to inform their employer that they have one, but if they choose to do so this information on their gender history must be clearly established as "protected information". Such information cannot be shared by that person with colleagues, unless in compliance with one of the sections in Clause 22.

It is not possible to hold a GRC until two years "post transition" and even then valid reasons exist for some transsexual people not to apply for legal recognition in their acquired gender. They may be married, for example, and not intending to divorce. In order to obtain a gender recognition certificate any pre-existing marriage must first be annulled. This may cause some problems and may be the main cause of failure to register.

Nonetheless, in respect of either situation, it is good practice and in keeping with the letter of the law to regard all those who have transitioned gender identity as if a GRC is held, from the point of social (or presenting) gender change onwards.

Civil Partnership

Since December 2005 the Civil Partnership Act 2004 enables same sex couples across the UK to have their relationships legally recognised. Any couple registering a civil partnership will have the same rights as a married couple in terms of workplace benefits, tax, social security and inheritance tax.

- ***Who can register?***

Two people of the same sex, aged 16 or over, who are not already married or in a legal partnership and not closely related.

- ***How does this relate to transgender people?***

Not all transgender people will undergo gender reassignment surgery or legally change their gender. This will enable them to have a relationship with a partner of the same or other gender (as it relates to the gender they now assume) and legally register that relationship for full benefits.

Where a transsexual person does register their new gender, having undergone gender reassignment surgery, they will also be able to register a civil partnership in a same sex relationship.

4. What does that mean for CPS in employment, prosecutions and community engagement?

Employment issues

● *Recruitment*

Any application for work may be made in the assumed gender of the transgender person. There is no requirement for them to disclose details of this to a recruitment panel or line manager. However, where a job offer is made and security checks carried out, any previous names will need to be disclosed.

This information should be provided directly to Human Resources staff carrying out the checks. It would potentially be an offence and a breach of confidentiality if this information is disclosed. The other potential area where a person's previous gender is likely to be disclosed is through pension rights and contributions. Again, this must not be shared beyond the appropriate staff.

As already stated, a person holding a gender reassignment certificate (GRC) is not obliged to disclose this.

Transition at work

● *The pre-transition period*

A member of staff who has made the decision to transition will need to have a named contact to talk to in confidence. This would normally be someone within the HR function who will be able to support the employee throughout the transition process. Additional support may be provided through the EDU where appropriate.

A member of staff may, of course, choose anyone they are comfortable

with to talk about their decision. This will require sensitive and careful handling, working closely with HR and/or the EDU.

The HR or other chosen 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.

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

Key issues to consider are:

- Identifying a named confidential contact for the employee
- Identifying what support may be needed and when
- The potential timescale for different stages of the transition
- Advising on sick pay and other leave for any absences during the transition
- How the employee wants to inform others who need to know
- Discussing support and information needed for themselves and others
- Implementing any support agreed for both the individual and others who need it
- Agreeing the date from which the real life test will take effect and how this will be shared with colleagues
- Considering whether an alternative working arrangement would be preferred, such as moving office for example
- Clarifying how HR will provide appropriate support to the individual and other staff in a sensitive way

● **The post-transition period**

- At the point when real life experience begins, HR will need to ensure that all personal records are changed. Contact details will also need to be changed.
- The employee must be allowed to use the toilets and facilities for their new gender. They should not be directed to the accessible toilets.
- Managers, colleagues, staff and contacts will need to address the person in their assumed gender and by their new name. This will need to be negotiated and agreed with the individual member of staff. 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. There are organisations that are able to provide advice and support on this issue (see Contacts in section 6).

● **Records and confidentiality**

Any records of a transgender individual which may disclose a previous gender must not be contained openly within a personal file. As previously discussed, some records may need to make reference to birth gender such as pensions, insurance, security vetting and any medical records. Access to this information must be restricted to only those who absolutely need to know. This “need to know” group is very small and limited to, for example, the relevant HR and pensions’ staff and the medical officer.

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

Once a person has transitioned they are no longer transgender and now live in their acquired gender.

Recognising and managing possible issues raised during the transition process

● *Hormone treatment*

There may be many side effects as a result of hormone treatment. It takes an average of about three months before any appreciable changes begin to be noticed. Body fat levels change and there can be a lot of pain and discomfort. Emotions can become a real roller-coaster ride and people can become very easily upset. Any change in hormone treatment, including coming off treatment, must be done gradually or else it may result in severe depression.

It is important to be aware of this possibility and to take this into account in effectively managing the transition process in the workplace. Advice can be sought from the individual concerned and others supporting the transition process.

● *Real Life Test (RLT)*

In order to be considered for surgery, the person must live in their new gender role for two years. This includes a legal name change.

This can be difficult with an existing member of staff, who starts coming to work with a new name and different gender. 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). This must be done sensitively and in conjunction with the individual member of staff with consideration for their privacy.

● ***Surgery***

Not all transgender people undergo surgery, either as a choice or because it is not advised on medical or other grounds. Some people may take only the hormone treatment, however this does not mean they do not assume their new gender and name change.

Most surgeries related to gender reassignment are major and as such may require long periods of absence and/or convalescence.

It is essential that this is managed sensitively, appropriately and in accordance with the sickness absence policy. Advice must be sought from HR and those supporting the individual.

● ***How to address a transgender person***

Once someone has made the difficult decision and completed the assessment to undergo gender reassignment, they will begin the real life test. At this stage the person should be referred to by their new name and in accordance with their new gender. For example, they should now be able to use the toilets and other facilities available to their assumed gender.

● ***Needs of colleagues and others***

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 colleagues.

The organisation 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. Sometimes, it may be possible for briefing sessions to be provided to colleagues by

transgender consultants who undertake this role, who can provide information and answer questions.

The important thing is that the transition for the individual is managed appropriately and other staff are able to continue working positively with them.

● ***Discrimination in the workplace***

It is not acceptable to discriminate against someone at work or to treat them differently because they are transgender. It is essential to treat people fairly and uphold the Dignity at Work ethos.

This is enforced in the Sex Discrimination Act (Gender Reassignment) Regulations 1999 (see section 3). Harassment and bullying on these grounds are also outlawed in this legislation.

5. Working with Transgender Communities

● *Community Engagement Strategy*

The CPS has a Community Engagement Strategy which outlines our approach to working inclusively with all communities. Traditionally, transgender communities may not have been included in the groups we have engaged with. Sometimes other umbrella lesbian, gay, bisexual and transgender organisations have been included as representing the issues. We will need to check that these groups include transgender people in their representation or look for groups that do and include them in our engagement activities. Ideally we need to consider transgender specific engagement where appropriate.

● *Benefits of working with transgender communities*

The CPS provides a public service which needs to be available 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.

Communities who feel excluded from CPS engagement strategies 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.

Our experience of working with transgender communities and groups may be limited, in which case it is essential that we engage with transgender communities and groups to tap into their experiences. This will enable our prosecution and employment practice to be appropriate, sensitive and effective.

There are benefits for both the transgender communities and the CPS. For the communities, their understanding of the CPS will be increased

as both an employer and prosecution authority and their confidence increased in relation to supporting prosecution processes. For the CPS, the knowledge about transgender community issues will be raised and knowledge about handling of prosecution cases also increased. Community engagement will improve both the experience and perception of fairness and the appropriateness of services provided.

6. How the Prosecution Process may affect Transgender People

- **Legislative implications**

There are particular provisions in the CPS Guidance on Prosecuting Cases of Homophobic Crime on the prosecuting of transphobic attacks. As case law with regards to assaults on or by transsexual people is limited, any prosecutor who deals with a case in the following circumstances should report the matter to the Policy Directorate which has an interest in identifying the ways in which the courts are dealing with cases involving transsexuals.

There are particular offences where lawyers will need to consider the acquired gender of the victim. Some examples of this are as follows:

- ***Rape***

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

- ***Indecent assault***

The acquired gender should be used to determine the appropriate charge. Therefore, any indecent assault – such as the fondling of a

transsexual woman's breasts – should be regarded as indecent assault on a woman, contrary to S14 Sexual Offences Act 1953 or S3 Sexual Offences Act 2003.

- **Transgender people as victims**

Transgender people will be victims of crime in much the same way as any other people. The crime may relate specifically to being transgender (or being perceived to be) or it may relate to another crime, including being a victim of domestic violence. Sexuality is not determined by gender dysphoria and so transgender people may also be victims of other crimes such as homophobic crime.

Being transgender does not automatically impact on the ability to be a "credible witness" and the CPS must be particularly careful to avoid this assumption. Transgender victims and/or witnesses may also be eligible for special measures where they are vulnerable or intimidated. This can be in relation to the nature of the offence, for example hate crime, or it may be in relation to the nature of their evidence or safety etc.

- **Transgender people as defendants (recommendations re sentencing etc)**

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 name and gender. Wherever possible, these convictions should be referred to neutrally and with 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 under which they are charged without reference to the fact that the convictions were acquired under a different name.

Transgender people may be particularly vulnerable if serving custodial sentences. Transsexuals who are pre-op or are not undergoing surgery may be particularly vulnerable to sexual abuse for example. Transgender people who are taking hormones must be allowed to continue their treatment or else they will become increasingly visible and vulnerable. Even post-operative transsexual people can be vulnerable and it is usual for all transgender prisoners to be separated from other prisoners.

It is absolutely essential that all transgender people are allowed to continue their medication. This is not something that can or should be given up. Failure to provide adequate levels of medication may result in severe depression, emotional and mental problems and can lead to violent mood swings, attempted or actual suicide.

Given the increasing involvement of CPS lawyers in early charging, this gives prosecutors the opportunity to ensure that transsexuals are addressed in their assumed gender and treated according to presenting gender.

● **Role of CPS in wider CJS**

The CPS, as part of the wider CJS, has a role in trying to ensure fair and appropriate treatment of transgender people. It also provides an opportunity to quash some of the stereotypes commonly associated with transgender people.