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Gender Reassignment Policy



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1. INTRODUCTION

The Council is committed to ensuring that transsexual people are treated with respect and that it does not discriminate unlawfully. This commitment is an important aspect of its overall commitment to providing equal opportunities in employment.

This policy is intended to assist the Council to put this commitment into practice and to help the Council, transsexual people and other employees to deal with any practical issues that may arise. Compliance with this policy should also ensure that employees do not commit unlawful acts of discrimination.

Striving to ensure that the work environment is free of harassment and bullying and that everyone is treated with dignity and respect is an important aspect of ensuring equal opportunities in employment. The Council has a separate Equal Opportunities policy that deals with these issues.

2. TRANSSEXUALS AND GENDER REASSIGNMENT

Transsexual people are those who decide to adopt the opposite gender to that assigned at birth because they do not feel that their gender identity matches that assigned to them. Gender reassignment is the process of changing to the new gender identity. This may involve surgical treatment but some transsexual people will not undergo surgery for personal reasons, such as age, health or finance. The process of gender reassignment will normally involve a period of at least one year when the transsexual person must live and work in the gender to which he/she is reassigning (the 'real life test') and hormone treatment. If the person decides to undergo surgery, this will follow the real life test. Any person who proposes to undergo, is undergoing or has undergone a process (or part) for the purpose of reassigning their gender by changing physiological or other attributes of gender is protected against discrimination.

3. THE LAW

The Gender Recognition Act 2004 allows transsexual people who have undergone gender reassignment to apply for a gender recognition certificate as of April 2005. When a full gender recognition certificate has been issued, the person is considered in the eyes of the law to be of the acquired gender. There is no obligation on an individual to apply for a gender recognition certificate and there may be good personal reasons, such as an existing marriage, why someone has not applied for one. There are special laws protecting the privacy of someone who has a gender recognition certificate: a person may commit a criminal offence if he/she discloses information about the gender history of someone with a gender recognition certificate without that person's consent.

The Equality Act 2010 makes it unlawful to treat someone less favourably than other people because he/she intends to undergo, is undergoing or has undergone gender reassignment. The protection applies whether or not the individual has a gender recognition certificate and whether or not the person has sought medical treatment. Harassment or bullying on grounds of gender reassignment is unlawful discrimination.

There are some limited exceptions where it is lawful to prevent someone doing a job because of gender reassignment, for example where being a man or a woman is a genuine occupational requirement for the job, as set out in the Equality Act 2010, and the employer can show that it is reasonable to prevent the transsexual person from doing the job as a result. The exceptions apply only in rare cases. **The exceptions do not apply to someone with a gender recognition certificate.**

It is unlawful to victimise someone because he/she has alleged unlawful discrimination or supported someone to make a complaint or given evidence in relation to a complaint.

An employee who discriminates against another employee on grounds of gender reassignment may be held liable for unlawful discrimination and be required to pay compensation as well as, or instead of, the Council.

4. RECRUITMENT

A job applicant's gender identity status is irrelevant to the recruitment process, except in the rare circumstances where a genuine occupational requirement applies to the job. If the Council is relying on a genuine occupational requirement, it will make this clear in the recruitment material. The Council will not ask questions about gender identity status (unless as part of confidential equality monitoring) and job applicants are not required to volunteer information about it, unless a genuine occupational requirement makes this relevant. A job applicant with a gender recognition certificate is never required to disclose his/her gender history.

If during the recruitment process information is disclosed about a job applicant's gender history, for example because certain documents are in a previous name, the Council will keep the applicant's gender history confidential and will not take this into account in the selection process, unless a genuine occupational requirement makes this relevant. In accordance with its equal opportunities policy, the Council will assess candidates for employment objectively against the requirements that are necessary for the effective performance of the job.

If disclosure from the Criminal Records Bureau (CRB) is required as part of the recruitment process, applicants must disclose any previous names and/or gender to the CRB. Transsexual applicants may make use of the special application procedure established by the CRB so that their previous name is not disclosed to the Council.

5. EMPLOYMENT

It will not normally be necessary for the Council to be made aware of the gender history of an employee who has undergone gender reassignment. If it becomes aware of information relating to an employee's gender history, it will keep this information confidential. It will not disclose information about an employee's gender history to a third party without the employee's consent. Any records that the Council needs to keep that relate to an employee's previous gender, for example relevant qualifications in a previous name, will be kept confidential, with only specified staff having access to them. When the Council no longer needs to keep those records, it will destroy them.

The Council will not take account of an employee's gender identity status or history in making employment decisions except where necessary and permitted by law.

The gender history of an employee with a gender recognition certificate will never be relevant to employment decisions. **An employee with a gender recognition certificate will be treated in accordance with his/her acquired gender for all employment benefits including pensions and insurance.**

An employee who has undergone gender reassignment but does not have a gender recognition certificate may be required to disclose his/her gender history for insurance or pension purposes. This information will be passed only to those people who require it for these purposes and will be kept confidential.

The Council will make it clear in information about insurance whether the insurance providers require disclosure of gender history. A transsexual employee has an obligation to disclose necessary information to the insurance Council if the Council is not aware of the employee's gender history. If the Council is aware of the employee's gender history, the Council can supply the information to the insurance company with the employee's consent.

The Council will make it clear in information about the pension scheme what information is required and any implications that gender reassignment has on the pension scheme.

6. BULLYING AND HARASSMENT

The Council has a separate Dignity at Work policy concerning issues of bullying and harassment on any ground, and how complaints of this type will be dealt with. Disciplinary action will be taken against employees who bully or harass other employees.

7. DEALING WITH THE TRANSITION

The Council will be supportive of any employee who expresses an intention to undergo gender reassignment and will work with him/her to try to ensure as smooth a transition at work as possible.

The Council will appoint, in consultation with the employee, a manager to be the employee's principal point of contact. That manager will agree with the employee an action plan for managing the transition at work. Matters to be addressed may include the following.

The employees' job: Consideration will be given to whether the employee wishes to stay in the same job and location or, if possible, to move post and/or location. In the rare cases where a genuine occupational qualification applies to the post, a change of job may be required.

Time off: The employee may require time off for medical or other treatment. Time off for these purposes will be treated no less favourably than time off for illness or other medical appointments.

Change of social gender: Consideration will be given to:

- When the employee expects to change name and to start presenting at work in the new gender;
- How work colleagues and clients are to be informed of the change;
- Whether the employee wishes to inform colleagues and clients of the change or have someone from the Council do this;
- What information or training is to be given to managers and work colleagues;
- The point at which the employee will start to use any single-sex facilities, such as toilets, in his/her new gender

Dress codes: If there is a dress code applying to the job done by the employee consideration will be given to what, if any, flexibility may be required to accommodate the transition.

Records: Consideration will be given to changes to records and systems that may be needed. After gender reassignment has been completed, records relating to the transition will be destroyed. The Council will create a new personnel record to ensure confidentiality.

8. THE LEGAL POSITION

Leading statutory authority

Equality Act 2010

Human Rights Act 1998

Data Protection Act 1998

Gender Recognition Act 2004

Equal Treatment Directive 76/207/EC as amended by Directive 2002/73/EC

Equality Act 2010

The Equality Act 2010 protects individuals against discrimination because of a number of specified protected characteristics, one of which is gender reassignment.

Under the Equality Act 2010, a person who has the protected characteristic of gender reassignment is defined as someone who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning his/her sex by changing physiological or other attributes of sex. It is no longer necessary for the individual to be under medical supervision or surgery.

The Equality Act 2010 covers the following types of discrimination in relation to gender reassignment:

- **Direct discrimination** is where a person is treated less favourably than another because of the protected characteristic of gender reassignment. An example of direct gender reassignment discrimination would be refusing to employ a man because he is undergoing surgery to become a woman. There is a limited exception where it is lawful to prevent someone doing a job because of gender reassignment, for example where not being a transsexual person is an occupational requirement for the job, and the employer can demonstrate that it is a proportionate means of achieving a legitimate aim. This exception does not apply to someone with a gender recognition certificate.
- **Indirect discrimination** is where a provision, criterion or practice is applied that is discriminatory in relation to individuals who satisfy the definition of gender reassignment such that it would be to the detriment of people who share that protected characteristic compared with people who do not, and it cannot be shown to be a proportionate means of achieving a legitimate aim. For example, where a woman is undergoing surgery to become a man and the medication causes fatigue, but the employer introduces a new shift pattern that requires fewer days of work but longer shifts, it might be that the employee is unable to work longer hours. Consequently, the new shift pattern puts the employee at a substantial disadvantage. This will amount to discrimination unless an employer can objectively justify the new shift pattern.

- **Harassment** is where there is unwanted conduct, related to the protected characteristic of gender reassignment that has the purpose or effect of violating a person's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment. For example, an individual may be subjected to insulting and humiliating comments from her line manager because she is a woman living permanently as a man. That individual can bring a claim for harassment related to the protected characteristic of gender reassignment. In addition, if that individual's office colleague is also present when these comments are made, even though they are not directed at him or her, he or she may also bring a claim for harassment related to gender reassignment as the line manager is creating an offensive environment. It does not matter whether or not this effect was intended by the person responsible for the conduct.
- **Associative discrimination** is where an individual is discriminated against or harassed for association with another individual who falls under the definition of gender reassignment. For example, if an employer denies an employee a promotion because she is living with a partner who is undergoing surgery to become a woman that would amount to associative discrimination as gender reassignment is a protected characteristic. Similarly, if an employer harasses an employee because his sister is a woman living permanently as a man, that would be unlawful as associative harassment related to gender reassignment.
- **Perceptive discrimination** is where an individual is discriminated against or harassed based on a perception that he or she has a particular protected characteristic, whether or not he or she does, in fact, have that protected characteristic. For example, a line manager may believe that a male employee is undergoing gender reassignment, when in fact he is a transvestite (transvestites are not protected under the Act as there is no intention to live permanently as a woman). If the company does not allow him to make presentations to clients because his line manager thinks he may make clients uncomfortable, the employee has been discriminated against because of a perception of the protected characteristic of gender reassignment. Similarly, where colleagues ridicule and tease a female employee because they believe that she was once a man, this would be unlawful as perceptive harassment related to gender reassignment, even though she may always have been a woman.

The Gender Recognition Act 2004

The Gender Recognition Act 2004, allows transsexual people to gain legal recognition in their acquired gender by a process of registration. Once issued with a gender recognition certificate, a transsexual person is considered in the eyes of the law to be of his or her acquired gender from the date of issue. It may be a criminal offence to disclose information about a person's gender recognition process without his or her consent.

Consequences of legal recognition of a transsexual person's acquired gender include the ability to:

- acquire a substitute birth certificate including the acquired gender;
- marry in the new gender (or form a civil partnership with someone of the same gender under the Civil Partnership Act 2004).
- retire and receive a State Pension at the age appropriate to the acquired gender.

Exceptions

There are limited exceptions where the Equality Act 2010 permits discrimination against someone on the grounds of gender reassignment. These are:

- where being of a particular sex is a genuine occupational requirement for the job as set out in the Equality Act 2010 and the employer can show that it is reasonable to prevent the transsexual person from doing the job as a result;
- if the job involves conducting intimate searches pursuant to statutory powers, such as the Police and Criminal Evidence Act 1984; or
- if the job involves working in a private home where there would be close physical or social contact, or knowledge of the intimate details of a person's life, and the employer can show that people would reasonably object to the job holder being someone who was undergoing or had undergone gender reassignment.

There are also some temporary exceptions that apply to someone who intends to undergo gender reassignment or is undergoing gender reassignment but not to someone who has undergone gender reassignment. These temporary exceptions apply:

- where the employee needs to live on premises provided by the employer, reasonable objection could be taken on grounds of privacy and decency to sharing accommodation and facilities, and it is not reasonable to expect the employer either to equip the premises with suitable accommodation or to make alternative arrangements;
- where the employee provides vulnerable individuals with personal services promoting their welfare, or similar personal services, and in the reasonable view of the employer those services cannot be effectively provided by a person whilst that person is undergoing gender reassignment.

None of these exceptions apply to someone with a gender recognition certificate, who is to be treated as being of his or her acquired gender.

There is a special exception that may be relied on by organised religions where there are genuine reasons not to employ a transsexual person, whether or not that person has a gender recognition certificate.

The Human Rights Act 1998

The Human Rights Act 1998 may be relevant in interpreting other legislation in a way consistent with rights enshrined in the European Convention on Human Rights or in providing a freestanding right against a public body where Convention rights are infringed. Convention rights that may be of particular relevance are Article 8 (the right to respect for private and family life), Article 10 (freedom of expression) and Article 14 (the right not to be discriminated against in the enjoyment of other Convention rights).

Data Protection Act 1998

Information about transsexualism and gender reassignment will be 'sensitive data' for the purposes of the Data Protection Act 1998 and can be processed only for certain specified reasons set out in the Act.

9. ADVICE AND GUIDANCE

This document is only a general guide. If you wish for more detailed information about this or other Council policies in respect of Equality and Diversity, please contact the Equal & Diversity Manager or Adviser.