

Transition of a Teacher in School

Summary of the Law and Good Practice



The Equality Act 2010 (EA) specifically protects trans people, as well as eight other groups. Trans people are described as intending to undergo, undergoing or having undergone a process (or a part of a process) to change their social role and gender expression. This means they may use a new name and pronouns, and dress differently. Some may have medical treatment, but they don't have to, in order to be protected. Non-binary people, whose identifications fall outside the 'man' or 'woman' and who may undertake 'a part of process', e.g. change of name and pronouns, should be entitled to the same level of protection as other trans people who make a longer journey, to the opposite end of the gender spectrum. The term trans will be used on this document to include non-binary people. Those perceived to be trans, or associated with a trans person, such as a partner, are also protected from discrimination.

The law in this area may continue to evolve, so it is important that schools provide ongoing support for trans people, by making sure that fair and respectful treatment is the basis of their equality and diversity policies. Existing and new policies must be reviewed to be sure that they comply with what the Equality Act says about the protection of trans people. Schools should run events that celebrate diversity, and they should include it in the curriculum.

Schools are in the public sector and are therefore required to conform to the Public Sector Equality Duty. No matter how a school is constituted, good governance means having due regard for the needs of people who may be disadvantaged because they have a protected characteristic. The EA requires schools to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the EA.
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Direct discrimination occurs when a person is treated less well, because they have a protected characteristic, than a person who does not have that characteristic. This applies also when a person is discriminated against because they are believed to be trans – even if they are not. Those associated with trans people, such as partners, spouses, other family members or carers are also protected against discrimination.



John told his Principal that, after the Christmas break, he would be returning to work as Jenny and he needed to plan, with the school, how to move forward. Just at the end of term, John was told that his performance had been poor that year and, as the school was reducing its staffing levels, he would be made redundant. During the Christmas break, following her transition, Jenny took legal advice, and sought the support of her Union. This resulted in her successfully challenging the school on the grounds of discrimination.

Indirect discrimination occurs when a rule that is neutral as it applies to most people, creates a disadvantage for a person with a protected characteristic. New and old policies and procedures should be considered in light of the needs of trans people, and should be designed or amended to cater for their particular circumstances.

Harassment means any unwanted behaviour that violates a person's dignity or creates a hostile environment.

Chris and the other teachers were in the staff room during a break. Chris heard his colleagues making jokes about 'trannies'. Chris's mother had transitioned some years earlier and was now known as Andy. Chris wanted to speak up and say how hurt he felt by the 'tranny' comments, but didn't feel able to. He knew that he would be unable to share this information with his colleagues and he continued to keep it secret.

This behaviour creates a hostile environment.

Victimisation occurs when someone is treated badly as a direct result of having complained, either themselves, or someone else has complained on their behalf, about discriminatory treatment under the Equality Act.

The Human Rights Act 1988 (HRA) provides additional protection against unnecessary intrusion by State into private and family life, and correspondence. It includes personal dignity and autonomy and the interaction a person has with others, both in private and in public, and respect for confidential information, particularly regarding the storage and sharing of such information

Under **The Data Protection 1998 (DPA)** data relating to the protected characteristic of gender reassignment are regarded as 'sensitive information'.

The Gender Recognition Act 2004 (GRA) enables a person to have the gender status, for all purposes, which aligns with their gender identity rather than their birth assigned sex. A Gender Recognition Certificate can only be obtained after two years in the 'new' role.

Recommended Development of a Memorandum of Understanding

The Memorandum between the school and the person undergoing transition, is a confidential document. It does not represent a binding and unchangeable arrangement, but rather a commitment by the school to engage with, and support, the teacher at all stages. There should be agreement on where copies should be kept and who should have access. Hard copies should be in double sealed envelopes with the name(s) of the person(s) who are allowed to open them, clearly marked. The document should not be accessible to unauthorised personnel; it should be in a locked drawer or file. Any information held in computer files must be password protected as part of the overall data protection. Employers need to adapt their own systems to ensure that an unauthorised person cannot stumble on this document, or any other document that would give away a person's gender history.

The implementation of the Memorandum should be reviewed at least every three months, but should also be reassessed at each significant stage of the process, and at any time that the employee asks for this to be done. Early discussions should aim to foresee likely problem areas, and take steps to avoid these, rather than deal with them after they have arisen. Nothing should be done without seeking the consent and insights of the individual first.

This includes deciding who will be present at the initial meetings. This may be the Head Teacher or Deputy, or some other designated person, and possibly a Union official, if desired. The trans teacher may wish to keep the numbers of people involved to a minimum. The trans member of staff and the Head or Deputy Head should sign this document once it is agreed.



All participants in the meetings must keep these discussions in complete confidence.

Issues, which may be considered by the individual and the Head Teacher (and any others present at the meetings) include:

- 1) The change of name, personal details and social gender. (see Name change - privacy and confidentiality);
- 2) Record keeping of sensitive information (see Storage of protected information);
- 3) How the individual wishes to inform other teachers, governors, students and parents. (see Informing Others)

- 4) The expected timescale of the medical and surgical procedures and the time off required for medical treatment (see Time off for Medical Treatment);
- 5) Use of toilets and changing facilities (see Use of single-sex facilities);
- 6) Dealing with any specific objections to trans people on the grounds of religion or belief. (see religion or belief);
- 7) Agreeing any dress code requirements. Flexibility and compromise, may be required for those who cannot meet the school's code. (see Dress Code);
- 8) What the implications are for pensions and insurance (see Insurance matters; Pensions and retirement);
- 9) The role of Occupational Health
- 10) a contingency plan for dealing with media enquiries (see 3, Step 6)
- Where DBS checks are required, following a change of name, a special procedure may be accessed;¹

1) Name and Title change - Privacy and confidentiality

The school and the trans person must agree about how and when the name-change is to occur. A person can change their name without any legal process, and may do so, informally, immediately that the role is changed. However, most schools like to be provided with a Statutory Declaration (made before a solicitor or in a Magistrates Court) or a Deed Poll document, and possibly a doctor's letter. Driving Licences and Passports can be easily changed with a doctor's letter. Documents provide proof that a person means to keep the new name permanently. The school should not insist on people providing more than a simple signed statement by the person saying that they are changing from the old name and title, to the new one. Where there is agreement that a formal document will be provided, there may be a small cost which should be paid by the school. The changes to the individual's records are managed under the Data Protection Act 1998. This Act has rules that make sure that previous names, titles and pronouns, which appear in old documents, cannot be seen except by the small number of people who are authorised to see them.²

¹ sensitive@dbs.gsi.gov.uk and <http://www.equalityhumanrights.com/advice-and-guidance/information-for-employers/guidance-on-recruiting-and-supporting-trans-people/roles-that-require-police-checks/the-crb-solution/>

² It is unfortunate that at the time of writing – June 2015, the gender marker used on the DfE intranet, does not permit the male marker (1) to be changed to the female marker (2), or vice versa

The school should immediately update a trans person's records so that they only show their current name and title. Organisations such as HMRC, DWP and several banks and universities have recently updated their data systems to allow people to use the gender neutral title, Mx, because they recognise that many people do not identify as just men or women, but have a range of identities that are not one or the other, but may be in between, or both.



In some cases it may be necessary to keep records relating to the sex that was registered on the individual's birth certificate, for instance, for insurance purposes.

A person who deliberately breaches another person's privacy, could lose their job.

2) Storage of protected information

Hard copies of any old documents that cannot be altered, or replaced, must be stored securely in sealed envelopes, marked strictly confidential, and kept separately from the files of other staff, rather than in a filing cabinet. The name(s) of those who are allowed to open these envelopes must be clearly written on the outer one. All IT records of the individual's personal life and medical history must be secured in line with the Data Protection Act, including password-protection. Any named person who needs to access this private information, must still ask



permission of the individual concerned, unless there is an emergency situation and the individual is unable to give permission. The aim of these precautions is to prevent a member of staff accidentally coming across this sensitive information in the office.

Trans people may choose to disclose that they have changed their gender role and status in some circumstances, for example, answering an equal opportunities questionnaire, or asking for support from a line manager. Again, strict confidentiality should be observed.

Breaches of confidentiality will be treated in the same manner as disclosure of the highly personal details of any other employee protected under the Data Protection Act 1998. This information is 'sensitive', and should be "kept for no longer than is absolutely necessary'. Failure to protect sensitive data is against the law. In the case of a person having a GRC, a person obtaining protected information as part of their job – therefore, in an 'official capacity' – could be committing a criminal offence if they shared this information with anyone else, unless this is authorised by the trans individual concerned.



Informing Others

The Head Teacher and any others involved in the MoU discussions should agree with the teacher how best to inform teaching and other staff, governors, parents and students, about the trans person's plan to transition.

This information cannot be kept secret once a person changes their gender role in the school, so careful planning must be done in the run-up to that happening. It may not be necessary to inform the entire school; much depends on the size of the school, and the role of the person concerned within the school.

The wishes of the individual are most important. In some circumstances the trans person may wish to disclose these matters personally to their colleagues and students.

It must also be recognised that some non-binary people will make changes that must be accommodated by the school, but do not necessarily involve the complete transition of social gender role. In every case, the changes, and any need to impart these to others, must be dealt with according to the individual's wishes.

The following example is a real case but the school is not identified because that risks unwanted publicity and inadvertent 'outing' of the person concerned.

Step 1:

The Head Teacher, with the agreement of the trans person, called a meeting of Heads of Year and Pastoral staff a few days before the end of term, and informed them that the person they knew as Brian Collins (name changed) would be returning at the start of the next term, as Brenda Collins. The Head said this is a matter for celebration. In order to overcome any knowledge gaps, training was due to be provide on the following day.

Step 2:

The pre-arranged team of three trainers (at least one of the team must be trans) from a specialist group, ran two workshops back to back for this group of teachers.

Step 3:

Immediately following this, the school was divided into three separate groups in different areas of the building. One trainer and a senior member of staff was allocated to each group. The staff member read an agreed announcement about the reasons for this meeting, explaining that Mr Collins would be returning as Miss Collins, The statement emphasised that this is a wonderful event, and should be celebrated by all.

Training was then delivered which enabled the students to understand why people identify differently, how to address them, the need for respect and an understanding of the legal requirements; what to say, and what not to say.

The member of staff concluded with a further message about equality, respect, zero tolerance for any disrespectful behaviour, in or out of school, and in social media.

Step 4:

Parents, and any children not in school, for instance on a school trip abroad, received simultaneous emails, giving the basic facts of Brenda Collins' transition, and the expectation that everyone would behave appropriately.

Step 5: follow-up letter was sent the same day to parents/guardians, along with an information leaflet.

Other models of imparting the information to colleagues, especially in very large schools, may include the trans person sending a letter or email as follows:

Dear Colleagues,

I am writing to you because I know that it wouldn't be possible to speak to you all individually. I wanted to tell you my news personally, rather than leaving you to hear it via someone else. There are going to be some big changes in my life that I would like to share with you.

I have been seeing a specialist doctor for a while, who confirms what I have recognised for many years. I identify as a woman, and I always have. Because I don't look like a woman, I have lived with a feeling of great discomfort, which I have tried to ignore, repress or overcome. This uncomfortable experience is called gender dysphoria. Most of you will have heard of people in my situation being described as transgender, or just trans.

I have reached the point where I cannot continue in my old gender role. I will return at the beginning of the new term as a woman. I am still the same person, and I shall continue to do the same job. In that respect nothing will change. My appearance and the way I dress will change, of course, and I will no longer be known as Brian, but as Brenda. Pronouns may take a while to get used to, but I am sure I can count on you all to refer to me as 'she'.

We have great values in our school: we celebrate diversity and I am confident that all of you will give me the support that I need through this rather difficult, but also exciting, phase of my life.

Please feel free to come and ask me about anything that you don't understand, or would like to know. I don't mind answering questions, and if you have uncertainties, I would much rather you spoke to me directly about them.

Regards

Brenda

N.b Although Brenda suggests that people should ask her questions, it must be made clear in any training provided, that some questions are unacceptable, for instance, you should not ask people intrusive questions about surgery, or other treatment.

Step 6: A Press statement was prepared to deal, if necessary, with media enquiries. The statement did not name the individual but stated the school's respect and support for all its staff and pupils, including those with protected characteristics, which were listed alphabetically.

4) Time off for medical treatment

Time off for treatments associated with gender reassignment is specifically protected under the Equality Act 2010, so that absences cannot be used against trans people when, for instance, considering promotion. Trans people may or may not be able to schedule time off for treatment, especially in the NHS.

The timing included in the memorandum can therefore only be a general guide initially. Consultations and hospital appointments may require full days away from work in addition to any time required for surgical procedures.

It is not necessary for people to have time off work in connection with hormone therapy. Chest surgeries will generally require shorter recovery times, than genital surgeries, but all of these will vary depending on the person, and the actual surgery carried out. These are not all the same, so the trans person should obtain an estimated time, from the surgical team. Genital surgeries are not scheduled until, at least, the end of the first year of treatment in any event, although chest reconstruction for trans men may be done at an early stage. Obviously, it makes sense to schedule these surgeries during school holidays, but if that is not possible, this must not be used against the individual. Flexibility should be allowed.

5) Use of single-sex facilities

Facilities such as toilets and changing rooms should be accessed according to the full-time presentation of the teacher in the new gender role. It is never appropriate to insist that a person who has transitioned, use only the toilets that are meant for disabled people, or unisex toilets, unless these are the only facilities available, or they are preferred by the trans person. If others do not wish to share the 'ladies' or 'gents' facilities with a trans person, then it is they, not the trans person, who must use alternative facilities.

Sufficient cubicles, designed for maximum privacy by having partitions and doors that extend from floor to ceiling, should be provided. Unisex toilets may be provided as an alternative for any person, whether trans or not, who does not wish to share with others. This may be especially important for some trans individuals (non-binary, genderqueer for instance), who do not identify





either as men or as women, and would be uncomfortable entering facilities designated: 'ladies' or 'gents'.

Also, all other users of all facilities should have awareness training, and be properly prepared to welcome any trans person who is starting to use the appropriate facilities. If the school anticipates problems, it should undertake a formal risk assessment and institute whatever actions are deemed necessary

and institute whatever actions are deemed necessary to protect the trans person and enable them to use the facilities that are appropriate for their gender expression.

The question about whether or not a person has a Gender Recognition Certificate is irrelevant, and must never be asked. A person who is just transitioning cannot have such a document anyway, as a pre-requisite is that the person has lived continuously in the new role for at least two years.

6) Religion or belief

Sometimes, people who have particular religious beliefs, or cultural views about gender presentation, claim that their 'protected characteristic' of 'religion or belief' under the Equality Act allows them to refuse to work with, or share facilities with, a person who is trans. Employers, union representatives and other work colleagues do not always know how these conflicting rights and protections can be sorted out.

There is no hierarchy among protected characteristics; one protected characteristic is not more important than another. A person's religion or belief must, of course, be respected, but it must *not* be used to discriminate against another



person because of that person's protected characteristic. If a person who has made this objection cannot understand that, although they have a right to their views (no matter how objectionable these may be to others) they do not have the right to act on those views by discriminating against a person who has another protected characteristic. It is also not acceptable to move either the trans person, or the person making the complaint, to another work area, so that they do not have to work together. A person refusing to work with a trans person will ultimately have to be dismissed.

7) Dress and appearance code

It is good practice to allow enough flexibility in the dress code to accommodate the process of transition from one gender role to another. For example, when starting to live full-time as a woman, flexibility should be allowed over hair length and style, jewellery and make up. If a person is transitioning to the opposite gender role, then the code they should aim at will be the same as for others of

that sex. It is possible to accommodate a person who presents sometimes in one role, and sometimes in another although this is still quite unusual.

8) Insurance and Pensions

Trans people will need to disclose their gender history for insurance purposes. Some insurers automatically invalidate a policy if a major fact such as gender reassignment is not disclosed. Any policy that indicates a trans person's history must not be visible to others, and the person(s) who now have that information must keep it completely confidential.

Everyone born after April 1955 now receives state pension at 65. Women born on or before 5 April 1950 were entitled to a pension at 60. Those born between 1950 and 1955 can claim it at a point between 60 and 65. For state pension purposes, trans people can only be regarded as the sex recorded at birth until they have obtained a new birth certificate under the provisions of the Gender Recognition Act 2004. Otherwise, those born before April 1955 can only claim state pension in line with the sex on the original birth certificate - that is for trans women at age 65 and for trans men at 60. Under recent case law, a trans woman is entitled to receive a state pension from the age of 60 without a Gender Recognition Certificate if she reached that age before 4 April 2005 when the Gender Recognition Act came into force.

It is the responsibility of the employer to take steps to keep confidential the reason for an individual's apparently early or late retirement.

9) The Role of Occupational Health

If an occupational health, or similar service is available in a school, a person experiencing gender dysphoria should be offered the opportunity to be referred to that service for advice. The fitness for work issues may apply in cases, for instance, of a PE teacher who may temporarily be unable to participate in sport.

Generally speaking, trans people are not more at risk than their work colleagues. Physical changes may give rise to difficulties, for instance: trans women may lose upper body strength when having hormone treatment; trans men, prior to chest surgery, wear breast binders which restrict their movement and may cause back problems. Assessments should take account of these possible risk factors.

Following any surgery, advice may also be needed about any temporary adjustments to help those returning to work. Trans men may have chest reconstruction surgery before, or around the time of, role change. A complication for trans women is that facial hair removal is a very long process, and on each occasion (depending on the method used) they may have to have two days' beard growth prior to treatment.

There are no likely circumstances where the restriction of an Occupational Requirement would be relevant (i.e. that the work may be performed only by a person of one specific sex. Trans people with GRCs *must* be regarded as being of the post-transition gender status for the purposes of ORs, but others *may* be just as suitable who do not have GRCs. Common sense should prevail.

10) Contingency Plan for dealing with Media Intrusion

Those who answer incoming calls in a school must be more alert than usual to the possibility that the Press, in particular, will invite comment if the news of a teacher's transition has leaked out.

It is advised that a generic statement is prepared, that can be made public if necessary, stating that the school supports all members of its community especially those with any of the nine protected characteristics, that everyone is treated with respect and regard for their right, in law, not to have their privacy invaded.

A statement of this sort, once agreed by the parties involved, could be placed on the website, and inquisitive callers, could be referred to it. Sometimes media intrusion means door-stepping a person, in which case, the school may be able to assist by temporarily housing the person elsewhere.

