

What is new in the Equal Treatment Benchbook?

Changes in the ETTB Chapter 12 December 2021

Previous text	New text
<p>It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns.</p>	<p>In the case of a trans person, it is a matter of common courtesy to use the personal pronoun and name that they prefer.</p>
	<p>There may be situations where the rights of a witness to refer to a trans person by pronouns matching their gender assigned at birth, or to otherwise reveal a person's trans status, clash with the trans person's right to privacy. It is important to identify such potential difficulties in advance, preferably at a case management stage. See paragraph 26 in the body of the chapter for relevant considerations</p>
<p>A person who has been issued with a full GRC is entitled to be recognised in the gender stated on their certificate for all legal purposes (section 9), and those whose birth was recorded in the UK, may use their GRC to obtain a new birth certificate. It does not affect their status as the mother or father of a child: in <i>R (McConnell and YY) v Registrar General</i> the Court of Appeal upheld a ruling by the President of the Family Division, Sir Andrew McFarlane, that a trans man who, following the grant of a GRC became pregnant and gave birth, should be recorded on the child's birth certificate as the mother, and not the father.</p>	<p>A person who has been issued with a full GRC is entitled to be recognised in the gender stated on their certificate for all legal purposes (section 9), and those whose birth was recorded in the UK, may use their GRC to obtain a new birth certificate. There are some limited exceptions. It does not affect their status as the mother or father of a child: in <i>R (McConnell and YY) v Registrar General</i> the Court of Appeal upheld a ruling by the President of the Family Division, Sir Andrew McFarlane, that a trans man who, following the grant of a GRC became pregnant and gave birth, should be recorded on the child's birth certificate as the mother, and not the father. The effect of the GRA does not impose recognition of the acquired gender in private non-legal contexts and it cannot rewrite history</p>
<p>It should go without saying that all people deserve to be treated fairly, and with respect for their private life and personal dignity, irrespective of their gender or gender history. It is important to be alive to the fact that the gender history of a person may be something which an opponent litigant may seek to use in order to place pressure on them, such as by deliberately pleading a gender history or former names when there is no legal necessity to do so, or for example pointedly referring to a 'trans' man as 'she' in public documents.</p>	<p>It should go without saying that all people deserve to be treated fairly, and with respect for their private life and personal dignity, irrespective of their gender or gender history. It is important to be alive to the possibility that the gender history of a person is something which an opponent litigant may seek to use in order to place pressure on them, such as by deliberately pleading a gender history or former names when there is no legal necessity to do so, or for example pointedly referring to a 'trans' man as 'she' in public documents.</p>
	<p>In a survey² in early 2021 of 697 trans adults, 99% of those surveyed said they had experienced transphobia on social media. 70% felt that transphobia in social and other media had</p>

	<p>impacted their mental health, and even higher percentages felt it had impacted the way they were treated by their family, work colleagues and friends.</p>
	<p>In R (on the application of C) v Secretary of State for Work and Pensions,⁷ Baroness Hale begins her judgment with an account of the traumas faced by trans people and the importance to them of being acknowledged in their acquired gender:</p> <p>“We lead women's lives: we have no choice”. Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debateable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self. Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender. Genuine equality between the sexes is still a work in progress. But that does not mean that such women or men have not felt entirely confident that they are indeed a woman or a man. Gender dysphoria is something completely different – the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted.’</p>

<p>It should be possible to recognise a person's gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate. See 'Acceptable terminology' within this chapter regarding the use of someone's birth name.</p>	<p>It should be possible to work on the basis of a person's chosen gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate. This is not only a matter of courtesy. In many cases, revealing someone's trans identity publicly can have serious adverse consequences on their life. However, there are some situations where revealing someone's trans identity is unavoidable because of the nature of the case. We discuss this further below. See 'Acceptable terminology' within this chapter regarding the use of someone's birth name.</p>
	<p>26. There may be situations where the rights of a witness to refer to a trans person by pronouns matching their gender assigned at birth, or to otherwise reveal a person's trans status, clash with the trans person's right to privacy. It is important to identify such potential difficulties in advance, preferably at a case management stage, but otherwise at the outset of the hearing. A decision would then have to be made regarding how to proceed, bearing in mind factors such as:</p> <ul style="list-style-type: none"> • Whether the trans person's trans identity is already a matter of public knowledge. • Whether the trans person has a GRC and if section 22 applies. • The impact on the trans individual in terms of their willingness to participate in legal proceedings if their trans status is at risk of being revealed. • The impact on the trans person in their own life if their trans status is revealed and potentially becomes public. • The effect on the willingness of trans people to use the courts if they perceive a risk of their trans identity being revealed when it is not relevant or necessary. • Why the witness is unwilling or unable to give evidence in a way which maintains the trans person's privacy. For example, a victim of domestic abuse or sexual violence at the hands of a trans person may understandably describe the alleged perpetrator and use pronouns consistent with their gender assigned at birth because that is in accordance with the victim's experience and perception of the events. Artificial steps such as requiring a victim to modify his/her language to disguise this risks interfering with his/her ability to give

	<p>evidence of a traumatic event.⁸</p> <ul style="list-style-type: none"> • Whether it is appropriate to make a form of restricted reporting order. <p>There will be occasions when, after these and any other relevant factors have been considered, the interests of justice require that a witness or party may refer to the trans person using their former pronouns or name.</p>
<p>It is inappropriate to enquire about someone's medical history, including their anatomical status, unless it is legally relevant to the case at hand. If it becomes relevant, the issue should be handled with utmost sensitivity and respect for the person's private life. Again, a private hearing might be directed.</p>	<p>It is inappropriate to enquire about someone's medical history, including their anatomical status, unless it is legally relevant to the case at hand. If it becomes relevant, the issue should be handled with sensitivity and respect for the person's private life. Again, a private hearing might be directed.</p>
<p>Fundamental principles of equality and acceptance of diversity demand that no prejudice or difference in treatment is accorded to a person due to their appearance, including their manner of dress. Any person's gender expression and choice of clothing should be respected unless there is an affront to public decency or a clear intention to insult the judicial process. This applies equally to transgender and cisgender people.</p>	<p>Fundamental principles of equality and acceptance of diversity demand that no prejudice or difference in treatment is accorded to a person due to their appearance, including their manner of dress. Any person's gender expression and choice of clothing should be respected unless there is an affront to public decency or a clear intention to insult the judicial process. This applies equally to all people, whether or not.</p>
<p>Although the application for a GRC involves a fee, fee waivers are available for many applicants.</p>	<p>The fee for obtaining a GRC is now a nominal one of £5.</p>
<p>Terminology is rapidly changing in this area, and where it is necessary to refer to someone's transgender identity at all, they should always be consulted about their preferred terminology</p>	<p>Terminology is rapidly changing in this area, and where it is necessary to refer to someone's transgender identity at all, they should be consulted about their preferred terminology</p>
<p>The term 'cisgender' or 'cis' is sometimes used to describe people whose gender identity corresponds to the sex assigned to them at birth. Here again, the terminology may or may not be appropriate depending on how the person who is the object of the description wishes to be referred to, especially if it is a term they have not encountered or have not had explained to them. 'Cisgender' has its origin in the Latin prefix 'cis' which means 'on this side of' and the term is drawn from the common usage of cis- and trans- in stereochemistry to refer to otherwise identical chemicals, ie isomers, which have mirror image structures (with components on one side rather than the other but chemically the same). Thus, where the term is acceptable, a cis-</p>	<p>The term 'cisgender' or 'cis' is sometimes used to describe people whose gender identity corresponds to the sex assigned to them at birth. Here again, the terminology may or may not be appropriate depending on how the person who is the object of the description wishes to be referred to, especially if it is a term they have not encountered or have not had explained to them. Some people feel strongly that they do not wish to be described as 'cisgender' or 'cis'. 'Cisgender' has its origin in the Latin prefix 'cis' which means 'on this side of' and the term is drawn from the common usage of cis- and trans- in stereochemistry to refer to otherwise identical chemicals, ie isomers, which have mirror image structures (with components on one side rather than the other but chemically the same). Thus, where the term is acceptable, a cis- woman would be someone whose self-identified gender is on the</p>

<p>woman would be someone whose self-identified gender is on the same 'side' as her gender assigned by doctors at birth based on physical characteristics</p>	<p>same 'side' as her gender assigned by doctors at birth based on physical characteristics</p>
<p>'Deadnaming' is a term used where a trans person, in the course of transitioning or having transitioned, is called by their birth name, or when their birth name is otherwise referred to, instead of their chosen name. This is highly disrespectful and may well be inhibiting and possibly humiliating to a witness, since it amounts to a reference to what may be a sensitive part of their social or medical history. If done in public in court, it may also deprive them of the confidentiality protections of the Gender Recognition Act 2004 (by placing their gender reassignment in the public domain permanently).</p>	<p>'Deadnaming' is a term used where a trans person, in the course of transitioning or having transitioned, is called by their birth name, or when their birth name is otherwise referred to, instead of their chosen name. This may be considered highly disrespectful and may well be inhibiting and possibly humiliating to a witness, since it amounts to a reference to what may be a sensitive part of their social or medical history. If done in public in court, it may also deprive them of the confidentiality protections of the Gender Recognition Act 2004 (by placing their gender reassignment in the public domain permanently).</p>
	<p>'Gender-critical' is a phrase which, broadly speaking, refers to a belief that sex is immutable and binary, and that people cannot transition. Very often it is linked to concerns that allowing the definition of women to include trans women would make the concept of 'women' meaningless and undermine protection for vulnerable women and girls. There is also often concern about what is seen as potential encroachment into 'safe spaces'. Feelings can run very strongly on both sides of this debate. Clearly the ETBB takes no sides on this matter. The ETBB's concern is simply that judges have some understanding of the perspectives of the variety of litigants and witnesses who appear before them. Gender-critical beliefs (as long as they do not propose for example to destroy the rights of trans people) are protected beliefs even if they might offend or upset trans people (and others). However, holding a belief is different from behaviour. As explained in the well-publicised Forstater case, 'misgendering' a trans person on a particular occasion, gratuitously or otherwise, can amount to unlawful harassment in arenas covered by the Equality Act 2010. ³³</p>

Appendix

Gender reassignment

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see 'Overview' at the start of this appendix. Meaning of 'gender reassignment'
2. Under section 7 of the EqA, a person has the protected characteristic of 'gender reassignment' if the person is undergoing, proposing to undergo or has undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex.
3. There is no need for the person to be under medical supervision or to have a Gender Recognition Certificate.
4. The EqA calls a person who has the protected characteristic of gender reassignment, a 'transsexual person'. As explained in chapter 12, this term is now old-fashioned, limited in its meaning, and considered unacceptable **by many people**. Preferred terms are 'trans' or 'transgender' people. We use both of these terms in the Bench Book.

Gender reassignment discrimination

Direct discrimination

5. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct discrimination to treat a person less favourably because of gender reassignment.

For example, as a result of complaints from other customers, a health spa apologetically tells a trans woman that she will not be allowed to use the spa again.

Time off at work

6. It is discrimination to treat a worker's time off for gender reassignment less favourably than a routine sickness absence would have been treated. It is also discrimination unreasonably to treat it less favourably than absence for some other cause, eg paid or unpaid leave.

Indirect discrimination

7. The full definition of indirect discrimination is set out in the Equality Act Overview above. It is indirect gender reassignment discrimination unjustifiably to apply a provision, criterion or practice which puts those who have undergone, intend to undergo, or are undergoing gender reassignment at a particular disadvantage, and which puts or would put others undergoing gender reassignment etc at that disadvantage.

For example, a health authority decides not to fund breast implants. A person undergoing gender reassignment may consider this essential to make her look more feminine.

It is not unlawful indirect discrimination if the employer/service provider etc can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

Victimisation

9. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about gender reassignment discrimination in some way. For example, an employee complains to management that his colleagues are making lewd comments about his proposed gender reassignment. His manager decides the situation is too difficult or 'sensitive' to manage and makes the employee redundant on some pretext.

Harassment

10. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to gender reassignment, which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

For example, a hotel receptionist repeatedly refers to a trans woman as 'sir' and 'he' whenever she uses reception, despite her objections. This creates a degrading, humiliating and offensive environment for her.

11. Unwanted conduct because of rejection of or submission to gender reassignment harassment is also unlawful.

Discrimination against trans workers who are not undergoing gender reassignment

12. There is a wide range of people who would describe themselves as trans or transgender, non-binary or gender fluid, but who have not undergone, and do not propose to undergo, gender reassignment in the sense of a permanent change from one social presentation of their gender to another. It is uncertain whether they would have the protected characteristic of 'gender reassignment' and therefore whether they would gain the protection under section 7, except perhaps on the basis that they were (wrongly) perceived as having undergone or proposing to undergo gender reassignment. The same might apply to people who cross-dress from time to time.

13. It is arguable, though untested, that individuals in these categories could also claim sex discrimination.

14. It is also possible that the concept of 'gender reassignment' in the Equality Act is not limited to where an individual undergoes reassignment from a single sex to its opposite. Again, this is untested in the appeal courts. However, an employment tribunal has said that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum, not necessarily ending up at the opposite sex.⁷

Intersex people are not explicitly protected by the Equality Act, but must not be discriminated against because of their sex or perceived sex.

Gender-critical belief

16. The relationship between the rights of trans people and those who hold gender critical beliefs has arisen for consideration in a few employment cases, most notably *Forstater v CGD Europe* and others.⁸

The following is a summary, but it is recommended to read the full case.

17. Ms Forstater brought an employment tribunal claim for belief discrimination under s10 of the Equality Act 2010. She alleged she had been discriminated against because of her beliefs which the tribunal summarised as 'gendercritical'. The EAT said 'the tribunal found that the core of her belief was that sex is biologically immutable: there were only two sexes, male and female. There was no possibility of any sex in between male and female; or that there was a person who was neither male nor female. It was impossible to change sex. Males were people with the type of body which, if all things were working, were able to produce male gametes (sperm). Females had the type of body which, if all things were

working, were able to produce female gametes (ova), and gestate a pregnancy. It was sex that was fundamentally important, rather than 'gender', 'gender identity' or 'gender expression'. She would not accept in any circumstances that a trans woman was in reality a woman or that a trans man was a man.'

18. Ms Forstater claimed that she had not been offered further consultancy work and her fellowship was not renewed by the respondents because she had expressed her beliefs on these issues in tweets which colleagues felt were transphobic.

19. The first question was whether her gender-critical belief was the type of philosophical belief which was protected by the Equality Act 2010. The employment tribunal had said it was not because, applying the established Grainger criteria, it was 'not worthy of respect in a democratic society'. The EAT overturned this finding on appeal. It said that beliefs which are offensive, shocking or even disturbing to others are not excluded. It is only beliefs akin to pursuing totalitarianism or advocating Nazism or espousing violence and hatred in the gravest of forms which should be capable of not being worthy of respect in a democratic society. Ms Forstater's belief might well have been considered offensive and abhorrent to some, but it was not a statement of a belief which sought to destroy the rights of a trans person. Ms Forstater believed that it was not 'incompatible to recognise that human beings cannot change sex, whilst also protecting the human rights of people who identify as transgender'.

20. An employment tribunal will now decide whether Ms Forstater was discriminated against because of that belief.

21. The EAT was at pains to state what its judgment did not mean: 'We take this opportunity to reiterate, once more, what this judgment does not mean:

a. This judgment does not mean that the EAT has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.

b. This judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment under the EqA. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.

c. This judgment does not mean that trans persons do not have the protections against discrimination and harassment conferred by the EqA. They do. Although the protected characteristic of gender reassignment under s 7, EqA would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct: see footnote 1.

d. This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would be liable (subject to any defence under s 109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.'