

# Supporting Trans Staff in the Workplace Guidance



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## Contents

1.0	Introduction.....	4
2.0	Purpose.....	4
3.0	Scope.....	4
4.0	Definition of Terms .....	5
5.0	Roles & Responsibilities .....	7
6.0	Staff Going Through Transition.....	7
7.0	Recruitment and Selection.....	12
8.0	Dissemination and Implementation of Guidance .....	13
9.0	Internal Monitoring Arrangements .....	<b>Error! Bookmark not defined.</b>
10.0	Equality Impact Assessment .....	13
11.0	Appendices .....	14

## 1.0 Introduction

NHS Ayrshire & Arran is committed to leading and promoting equality and diversity, equal opportunities and supporting human rights in terms of the provision of health services for the community it serves and in its practice as an exemplar employer.

NHS Ayrshire & Arran recognises that trans people are entitled to fair and equal access to all NHS services. A person's gender status will not exclude them from the high standards of employment expected from NHS Ayrshire & Arran. This guidance sets out NHS Ayrshire & Arran's responsibilities as an employer of trans people.

As gender reassignment is a protected characteristic under the Equality Act 2010 we must ensure that people are not discriminated against or disadvantaged by service delivery or prejudice of NHS Ayrshire & Arran's staff, other service users or the public.

We also recognise that every person has a different experience of their gender and therefore it is not a case of "one size fits all". Each person will have different needs and as such, a person-centred approach will be taken.

For a member of staff who transitions in our workplace, any changes to working conditions or access to facilities should have a negotiated approach between the staff member and their manager.

This guidance therefore needs to be considered alongside other NHS Ayrshire & Arran policies such as [Preventing and Dealing with Bullying & Harassment](#), [Promoting Attendance and Wellbeing Policy](#), [Uniform and Laundering Policy](#)

This guidance has been adapted from the NHS Forth Valley Supporting Transgender Staff in the Workplace Protocol and Guidance which was developed with support from the Scottish Trans Alliance and input from the NHS Greater Glasgow and Clyde Inequalities Team.

### 1.1 A Shared Vision

NHS Ayrshire & Arran is committed to ensuring trans staff feel fully supported, safe and secure in the workplace in relation to their gender identity and gender expression. We will continue to work with trans people to ensure NHS Ayrshire & Arran is recognised as a leader in best practice across our systems.

## 2.0 Purpose

The purpose of this document is to provide guidance for managers and staff on what they need to do to support people transitioning at work.

## 3.0 Scope

NHS Ayrshire & Arran recognises:

- The broad spectrum of gender diversity within society and that traditional gender stereotypes are inadequate in reflecting the lives of staff and service users.

- That people have the right to access NHS medical gender reassignment provision and that such provision can be a vital life-saving treatment for trans people experiencing intense gender dysphoria.
- That people have the right to live with dignity and privacy in the gender with which they identify, and that there must be no exceptions to this when a trans person is an employee or using services and facilities.

This guidance applies to all NHS Ayrshire & Arran staff. Staff will be expected to comply with the guidance at all times and positively challenge colleagues and users of services who act in a manner that breaches the legal aspects of NHS Ayrshire & Arran's responsibilities.

A glossary of terms is available in **Appendix A** and the organisation's legal duties as health care employers are outlined in **Appendix B**.

### 3.1 Guidance Review

The NHS Ayrshire & Arran Supporting Trans Staff in the Workplace Guidance has been developed in collaboration with the organisation's Policy Development Group to ensure it fulfils its operational use as a tool for practice and as a source of guidance for the organisation. This guidance will be formally reviewed in three years or sooner subject to the outcome of the Gender Recognition Act consultation.

The guidance will evolve through testing against real situations and will grow in its utility through a process of feedback from the wider system. As such, all queries relating to this guidance should be directed to the HR Department on 01563 825954 or Equality and Diversity Adviser on 01563 826438.

## 4.0 Definition of Terms

### 4.1 What Does Trans Mean?

Trans is an umbrella term for people who, for whatever reason, feel their gender identity or gender expression differs from their sex assigned at birth.

When a child is born, the midwife or doctor declares it to be a boy (male) or a girl (female) through a belief that a person's gender status can be ascribed on the basis of the visual appearance of their external genitals. The early assumption made is that sex and gender are interchangeable and that everyone can be neatly divided into two, mutually exclusive gender categories – boy or girl.

However, sex and gender are more complex than just the visual appearance of external genitals at birth. Variance can therefore occur in any of three main ways – biological sex variance; gender identity variance; and gender expression variance.

A number of people may not identify with a binary (male/female) concept of gender and instead identify as having an androgynous non-binary gender, intersex or having no gender. Some of them may experience their gender identity as fluid and changeable. Where this is the case, discussions relating to provision of services must take place with this broader understanding of gender identity.

While the organisation is committed to understanding the context of trans issues within a social model of health, for the purposes of the Supporting Trans Staff in the Workplace Guidance, NHS Ayrshire & Arran understands the term trans and its legal protections to include anyone proposing to undergo, undergoing or having undergone any part of the process for the purpose of gender reassignment.

Under the Equality Act 2010, it states that a trans person no longer has to be under medical supervision or have a gender recognition certificate to prove that they have the protected characteristic of gender reassignment. For example, a trans person who simply starts using different pronouns for example 'she, he, and they' is protected by the Equality Act regardless of whether or not they wish to take any hormones or have any surgeries. They must be treated in accordance with their self-declared gender identity.

Further terms can be found in **Appendix A**.

Trans people may experience some or all of the following examples of discriminatory practice:

- People refusing to associate with or ignoring them because of their trans status
- Not being addressed, or thought of, as belonging to their gender or not having their new name used
- Having their personal life and relations probed into
- Having malicious gossip spread about them
- Having confidential information relating to their trans status released without their approval
- Not being allowed to use sanitary facilities that are appropriate to the gender in which they live
- Being treated less favourably than others in regard to sickness or other absences
- Being refused access to services, facilities or premises due to prejudice from staff or other service users
- Being verbally abused or physically assaulted because of their trans status.

#### **4.2 Genuine Occupational Requirement (GOQ)**

The Equality Act 2010 provides limited exemptions for GOQ positions to restrict access to members of a particular gender. These exemptions can only be applied in order to achieve a legitimate operational need. All efforts should be made to enable trans employees to work in positions, including those covered by General Occupational Qualifications, consistent with the gender with which they identify.

Where a person has a gender recognition certificate they must be regarded as being that gender for the purposes of GOQ positions. As the gender history of an employee is a matter of strictest confidentiality, this information should never be shared with service users.

Where an employee undergoing gender reassignment currently works in a GOQ position restricted to the gender they were assigned at birth, every effort will be taken

to work collaboratively with them to either adapt the duties of the post to enable them to continue working in it or to redeploy them to a suitable alternative post.

## 5.0 Roles and Responsibilities

All NHS Ayrshire & Arran staff have a responsibility to ensure they treat trans people in a dignified, non-discriminatory way in the workplace. Section 6 of this guidance provides more detail of the responsibilities of individuals in the context of their role.

## 6.0 Staff Going Through Transition

This guidance applies to all staff detailing how a trans person should be treated in a dignified, non-discriminatory way in the workplace. Its aims are to support the organisation in its delivery of inclusive services and ensure that it does not breach the Equality Act 2010. All trans staff have legal rights that are set out in **Appendix B** of the guidance.

Staff will:

- Work together to create an open, fair and just culture where everyone is valued and respected.
- Ensure trans people will be treated in their self-identified gender at all times. This means, a trans person no longer has to be under medical supervision or have a gender recognition certificate to prove that they have the protected characteristic of gender reassignment. For example, a trans person who simply starts using different pronouns for example 'she, he, and they' is protected by the Equality Act regardless of whether or not they wish to take any hormones or have any surgeries. They must be treated in accordance with their self-declared gender identity.
- Work to maintain a safe and supported workplace by challenging discrimination against a trans person, whether the discrimination stems from staff, service users or the public.

NHS Ayrshire & Arran will:

- Ensure trans staff are treated as being of the gender in which they are living irrespective of whether they have undergone any hormonal or surgical treatment or have a Gender Recognition Certificate. It is unacceptable for colleagues and managers to refuse to recognise, for any period of time, a member of staff as belonging to the gender in which they are currently living.
- Ensure that trans staff have the right to equal treatment and protection from discrimination and harassment as outlined in the organisation's values.
- Ensure trans staff can work in an environment without fear of prejudice, discrimination or harassment from staff, other service users or the public.
- Ensure that suitable arrangements such as toilets, showers and changing facilities are available for trans staff and in the event of any new builds they work towards gender neutral facilities.
- Provide staff with guidance on the rights of trans staff and the legal context for this.

- Support their staff to challenge discrimination from other staff, service users or the public.
- Continue to develop their trans awareness via Lesbian, Gay, Bi-sexual and Transgender (LGBT) e-learning available to staff as part of their Knowledge and Skills Framework (KSF) Core 6 Equality and Diversity competency requirements. Managers and staff not under KSF should also complete same.
- Provide information to trans staff regarding their rights to equality of employment opportunities, recruitment and development.
- Ensure that staff who intend to undergo, are undergoing, or have undergone gender reassignment are fully supported through their transition taking cognisance of any workplace adjustments that may be required.
- Prepare an agreed statement in the event of any adverse media enquiries, when required.

To ensure practice is principled, evidence-based and sensitive, NHS Ayrshire & Arran has used learning from a number of specialist agencies including Stonewall Scotland, Scottish Trans Alliance and LGBT Youth Scotland.

Transitioning is a personal process (rather than a medical process), which involves a person expressing their gender in any way that differs from the gender they were assigned at birth. This may include undergoing medical procedures, or may involve dressing in a different way.

When a member of staff considers embarking on transitioning, the initial point of contact may vary according to the nature of the workplace and preference of the individual, but could be: colleague, manager, human resource manager, equality and diversity adviser, occupational health staff, trade union representative or any other appropriate member of staff. All must maintain confidentiality except as agreed otherwise by the individual.

The successful support and management of an employee's transition at work depends crucially on taking account of the individual's views on how to proceed.

## 6.1 Role of the Manager

Managers are responsible for:

- Ensuring that all staff are aware of the Supporting Trans Staff in the Workplace Guidance and undertake any relevant training.
- Promoting equal opportunities in practice and preventing discrimination.
- Challenging staff who discriminate and ensuring that the relevant organisational policies and procedures are followed such as Preventing and Dealing with Bullying and Harassment [Management of Employee Conduct Policy](#).
- Supporting their staff to challenge discrimination from other staff, service users or the public.
- Agreeing a plan with a staff member who is proposing to transition to ensure that they are supported throughout the process.
- Ensuring that a trans person is addressed and treated as the gender they identify with.

Initially, managers (and any other member of staff acting as a point of contact) should ensure they are familiar with this policy and any other resources or systems in place in order to support the individual fully.

Through discussion with the employee a NHS Ayrshire & Arran main point of contact will be agreed. A meeting will be arranged with the nominated person to have a more detailed discussion and support the employee in the process of transitioning at work.

## 6.2 First Meeting

The employee may be anxious at the first meeting so it is important to spend time building trust and rapport.

If an employee is transitioning it is good practice for the manager to consult with them sensitively about their needs in the workplace and whether there are any reasonable and practical steps that can be taken to help the employee as they undergo their transition.

Where appropriate the individual concerned should be provided with an agreed member of the Human Resource Team or Equality and Diversity Adviser to provide guidance and advice to the member of staff and their manager. They may also wish to bring a support person such as a friend or trade union representative with them to the first meeting.

It may help to support discussion to use **Appendix C** as a guide to work with the staff member as a joint action plan for managing the transition at work. This, along with any other notes of the meeting, must be kept strictly confidential in a secure location.

Consideration should be given to:

- The anticipated point or phase of change of name, personal details and social gender.
- Date of changing their gender presentation at work. It is important to allow the employee to be in control of the timetable for this and to be flexible in the case that the employee decides that the experience is too difficult, and wishes to delay any part of it.
- A procedure for adhering to any change in dress code/uniform.
- Agreeing the point at which an individual will commence using single sex facilities such as toilets, changing rooms and showers in their affirmed gender.
- Transition whilst in employment/placement should be discussed with the staff member to inform any actions of when and how colleagues should be informed. Agreement should be reached in conjunction with the staff member of who performs the task
- Consider whether any training in gender identity issues is needed for the wider team.
- Discuss whether the employee's job role has a genuine occupational requirement to be a particular gender (see **Section 4.2**).

- Provide opportunity to raise any potential concerns about remaining in the current role. It is not appropriate to redeploy someone who wishes to transition just because you think it is in their best interests.
- Time off required for medical treatment and other related re-assignment appointments when known should be discussed in line with the organisation policies (see **Section 6.5**).
- Ensure the amendments that will need to be made to records and systems including ID badge, email address and payroll, are put in place.
- Staff that are professionally registered such as Nursing and Midwifery Council and General Medical Council are advised to contact their professional bodies to find out whether there are any specific requirements in terms of name changes. Where the organisation has to keep evidence of professional status or qualifications, it should be discussed with the member of staff how this information will be retained so as not to compromise or breach disclosure of protected information.

All staff records should be kept in accordance with our information governance and data protection legislation. Any information relating to an individual's transition should be destroyed unless there is an essential reason for keeping it. If such reasons can be evidenced, the documents should be secured to restrict access to authorised personnel and must not be passed to any third party without the specific consent of the member of staff. Advice can be sought from the information governance team. See **Appendix D**.

### **6.3 Informing and Supporting Colleagues**

NHS Ayrshire & Arran **must not** inform colleagues, clients or the public that an employee is intending to undergo or is undergoing or has undergone gender reassignment without the employee's **explicit written consent**.

Such disclosure may result in a criminal offence if the person concerned has a Gender Recognition Certificate (GRC) and it is done without the explicit consent of the individual concerned.

It is never appropriate to inform colleagues, service providers, service user or the public that an employee has in the past undergone gender transition. This is a private matter since being trans will have no bearing on that person's ability to do their job.

With regard to the change of name, all staff must refer to the trans person by their preferred name and use pronouns appropriate to their affirmed gender.

General information about trans issues is available on the equality and diversity pages of Athena for all staff. This section also provides specific information to help people to understand the needs of the person transitioning as well as information for staff with regards to support available.

Any additional issues or areas of concern or requiring further clarity can be discussed with the Equality and Diversity Adviser or identified point of contact. Each team is different and support either as a team or on a one-to-one basis should be met on a needs led basis further to discussion with the staff member concerned.

#### **6.4 Staff in Public Facing Roles**

A member of staff's gender transition may be unavoidably visible to the public. There is no general need or obligation to inform colleagues, clients or the public that a person is transitioning however, such information may be considered appropriate where the relationship with that individual was established prior to their transition and is to continue. In the event this is required, written consent from the staff member who is transitioning must be obtained.

Each situation is different and the ways in which informing people should be delivered on a needs led basis. Examples of a range of statements which can be used dependant on circumstances are reflected in **Appendix E**. These, however, can only be used when written consent has been obtained from the individual concerned.

Some staff may elect to move to another role during transition, however, they cannot be required to do so. Similarly, the way someone looks and the negative reactions this might be expected to elicit from certain members of the public must not be a barrier to people undertaking a public facing role.

#### **6.5 Time off for appointments**

Time off required for medical treatment may vary considerably in accordance with the medical needs of individuals concerned and when known should be incorporated into the action plan. The provides Guidance on time off for other appointments can be found in:

- [Supporting Work Life Balance Policy](#), page 13
- [Special Leave Policy](#)
- [Promoting Attendance and Wellbeing Policy](#)

#### **6.6 Use of Toilets, Showers and Changing Facilities**

The use of changing/showering facilities and toilets will be part of the discussion process with the member of staff transitioning to their affirmed gender with a view to agreeing the point at which the use of facilities should change from one gender to another.

Should there be any objections to this by other staff; the objections will be dealt with by a manager in a sensitive and understanding way while not denying the trans staff member access to facilities appropriate to their lived gender. It would not be acceptable to expect an individual undergoing transition to use facilities designated for use by the gender they were assigned at birth. It is not good practice to allocate specific facilities for the individual who is transitioning.

Trans staff must not be asked, expected or required to use accessible facilities allocated for people with disabilities (unless they have a disability which requires this). Where a trans staff member freely prefers to use accessible gender neutral facilities then this should be permitted.

## **6.7 Uniform and Dress Code**

NHS Ayrshire & Arran has a [Uniform and Laundering Policy](#) which is appropriate to the area and sphere of work undertaken and is compatible with safe moving and handling, and infection control practice.

NHS Ayrshire & Arran fully supports a trans staff member with regard to the clothing they feel best represents their gender identity.

## **7.0 Recruitment and Selection**

### **7.1 Recruitment**

It is intended that there be no barriers to a person who identifies as trans or people with trans histories from applying for employment within NHS Ayrshire & Arran.

All those involved in the recruitment and selection process should be made aware of their responsibilities to select fairly and without prejudice.

### **7.2 Confidentiality within the recruitment and selection process**

Applicants do not have to disclose their trans status during the recruitment and selection process including at interview, or as any condition of employment.

If applicants choose to disclose their status this must not be used as a reason for not offering the person employment with the organisation and also non-disclosure or subsequent disclosure are not grounds for dismissal.

### **7.3 Protection of Vulnerable Groups (Scotland) Act 2007**

Specific guidance for trans people completing a Disclosure form is available for information on the Disclosure Scotland website. Disclosure Scotland operates an application process for trans people to assist in ensuring discretion is afforded to such individuals who do not wish the gender assigned at birth (and names) to be disclosed to the person or organisation requesting the Disclosure. Any questions on this process should be directed towards Disclosure Scotland Helpline on 0870 609 6006 (Please ask to speak in confidence with the Operations Manager).

Existing staff may also seek advice from their named HR Manager who can also assist with this process.

## **8.0 Dissemination and Implementation of the Guidance**

The HR Director, Director of Nursing (Executive lead for Equality and Person Centred Care), and the Equality and Diversity Adviser are responsible for the implementation of this guidance.

- To be submitted to Area Partnership Forum for approval
- Following approval, the guidance plus the Equality Impact Assessment will be added to the NHS Ayrshire & Arran document library accessible through the Intranet site.
- A clear communication will be sent to all managers and staff publicising its existence.
- Trans e-learning package will be available for all staff within Learn Pro system and Supporting Trans Staff in the Workplace Guidance will be identified within same.

## Managers

Every manager employed by NHS Ayrshire & Arran is responsible for promoting equal opportunities in practice and, where applicable, for preventing patient and staff discrimination.

Line managers are responsible for:

- ensuring that all staff are aware of this guidance and undertake any relevant training
- challenging staff who discriminate and ensuring that the relevant procedures are followed in accordance with organisation policies
- supporting their staff to challenge discrimination from service users or the public
- agreeing a plan with a staff member who is proposing to transition to ensure that they are supported throughout the process
- ensuring that a trans person is addressed and treated as the gender they identify with

## Role of Individual Staff

All staff have a personal responsibility to support the equal and fair treatment of colleagues to ensure people are treated consistently in a non-discriminatory manner.

All staff members are responsible for:

- complying with the Supporting Trans Staff in the Workplace Guidance
- challenging/reporting discriminatory practice or language

## 9.0 Internal Monitoring Arrangements

The Equality and Diversity Adviser will monitor the number of adverse events related to trans reported on the electronic risk management system (Datix).

The Equality and Diversity Adviser will monitor the number of staff who have completed equality and diversity training.

## 10.0 Equality Impact Assessment

NHS Ayrshire & Arran wholeheartedly supports the principle of equal opportunities to access service provision as outlined by the Scotland Act which supports Equalities and Human Rights legislation. It understands that the key to this is recognising and valuing difference.

The Equality Act 2010 introduced the concept of nine protected characteristics which are Age; Disability; Gender Reassignment; Marriage and Civil Partnership; Pregnancy and Maternity; Race; Religion and Belief; Sex and Sexual Orientation.

This policy ensures that individuals are treated in a fair and consistent manner, making reasonable adjustments where necessary in accordance with the Equality Act 2010.

This document has been impact assessed using the NHS Ayrshire & Arran Equality Impact Assessment Tool Kit.

## **11.0 Appendices**

Appendix A – Glossary of Terms

Appendix B - Legal Protection

Appendix C – Points to discuss or consider for supporting staff transitioning

Appendix D – Personal Data and Information

Appendix E – Brief for Front Facing Staff / Reception Staff

## Glossary of Terms

**Affirmed Gender** – The process of bringing the gender role and appearance into alignment with the gender identity, ‘affirms’ that identity. Thus the term ‘affirmed’ gender, is now becoming more common in describing the post-transition gender status.

**Biological sex** - A person’s biological sex includes all aspects of their sex-related biological structure: not only their external genitals but also their internal reproductive system, their chromosomes and their secondary sexual characteristics such as breasts, facial and body hair, voice, and body shape. Most people’s biological sex will be clearly and consistently female or male.

**Cross-dressing people** simply wear, either occasionally or more regularly, clothing associated with the opposite gender (as defined by socially accepted norms). Cross-dressing people are generally happy with the gender they were labelled at birth and do not want to permanently alter the physical characteristics of their bodies or change their legal gender. They may dress as the opposite gender for emotional satisfaction, erotic pleasure, or just because they feel more comfortable doing so.

**Gender dysphoria** is a recognised medical issue for which gender reassignment treatment is available on the National Health Service in Scotland. Gender Dysphoria is distress, unhappiness and discomfort experienced by someone about their biological sex not fully matching their gender identity.

**Gender expression** - An individual’s gender expression is how they present themselves through their external gender-related appearance (including clothing and hairstyle) and their behaviour (including hobbies/interests and mannerisms). A person may have masculine, feminine or androgynous aspects of their appearance or behaviour.

**Gender identity** - An individual’s gender identity is their internal self-perception of their own gender. A person may identify as a man, as a woman, or as having a ‘non-binary’ gender identity which is more complex or fluid. A person’s gender identity may not match up with their biological sex. A person’s understanding of their own gender identity usually develops during the early years of their childhood and often (but not always) becomes permanent by the time they go through puberty. Unlike someone’s physical body, a person’s gender identity is as invisible as their personality when they are born. A person’s gender identity remains hidden from others unless the person decides to articulate or express it in some way.

**Gender Recognition Certificate (GRC)** – The Gender Recognition Act 2004 sets out the process for individuals to apply for a GRC after living full-time in their acquired gender for at least 2 years. It is not necessary for someone to have undergone genital surgery or any other medical intervention other than a diagnosis of gender dysphoria to receive a full GRC. Once a full GRC is issued to a person, their legal sex/gender henceforth becomes for all purposes their affirmed gender – including for marriage and civil partnership purposes and for employment in posts where a Genuine Occupational Qualification to be a particular sex/gender applies

**Intersex** – A term used to describe a person who may have the biological attributes of both sexes or whose biological attributes do not fit with societal assumptions about what constitutes male or female. Intersex people may identify as male, female or non-binary.

**Non-binary** - People with non-binary gender identities find they do not feel comfortable thinking of themselves as simply either men or women. Instead they feel that their gender identity is more complicated to describe. Some may identify their gender as being a combination between a man and a woman, or alternatively as being neither. Like

transsexual people, non-binary people can experience gender dysphoria (sometimes as intensely as transsexual people do) and may undergo a process (or part of a process) of gender reassignment.

**Trans man** - Someone who was assigned female at birth but has a clear and constant gender identity as a man. He therefore experiences an intense need to undergo female to male (FTM) gender reassignment to live completely and permanently as a man.

**Trans woman** - Someone who was assigned male at birth but has a clear and constant gender identity as a woman. She therefore experiences an intense need to undergo male to female (MTF) gender reassignment to live completely and permanently as a woman.

**Trans people** - 'Umbrella' term to cover the many diverse ways in which people can find their personal experience of their gender and possible variations from the assumptions and expectations of the society they live in. The umbrella term trans people can therefore include transsexual people, cross-dressing people, people with non-binary gender identities and others.

**Transitioning** - Is an individualised process which varies in length, stages and complexity from person to person. In addition to social changes such as starting to use a new name and pronouns, it may (but does not have to) involve physical changes through hormone treatment and sometimes surgical procedures. Whether or not someone accesses hormone treatment or various surgeries is a private and personal decision and is not relevant to their right to have their gender identity respected.

**Transsexual people** consistently and strongly self-identify as a different gender from the gender they were assigned at birth based on their biological sex and therefore experience an intense need to transition from male to female (trans women) or from female to male (trans men). This may or may not involve hormone treatment or undergoing various surgical procedures.

## Legal protection

The foundation of delivering services that are non-discriminatory must be compliance with the law. As a starting point on the journey to delivering fully inclusive and accessible services, NHS Ayrshire & Arran staff must be familiar with their legal responsibilities in relation to working with trans service users and trans staff. This section details the relevant legal considerations for practice.

### Equality Act 2010

Employment and goods, facilities and services equality law makes clear that gender reassignment direct discrimination, indirect discrimination and harassment are all unlawful. A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

It is important to recognise that this means someone has the protected characteristics of gender reassignment if they simply propose to change the gender of name and pronouns they use, even if they do not wish to change any aspect of their physical body.

People are also protected if they face discrimination due to being associated with a trans person (for example, if they are a friend or family member) and due to being incorrectly perceived to be trans when they are not actually a trans person.

### Legislative Definitions Of Unlawful Behaviour Relating To Gender Reassignment

**Direct discrimination** - Treating a person less favourably than another in comparable circumstances because of their gender identity.

**Associative discrimination** - is direct discrimination against someone because they are associated with another person with the protected characteristic of gender reassignment.

**Discrimination by perception** - is direct discrimination against someone because others think they have the protected characteristic of gender reassignment even if they do not.

**Indirect discrimination** - Putting in place a Protocol or practice that has a differential (positive or negative) impact on someone who has the protected characteristic of gender reassignment when this cannot be objectively justified.

**Harassment or bullying** - unwanted conduct which has the purpose or effect of violating someone's dignity, or which is hostile, degrading, humiliating or offensive to someone who has the protected characteristic of gender reassignment.

**Victimisation** - treating someone unfavourably because they have taken (or may be taking) action under the Equality Act or supporting someone who is doing so.

## **The Equality Act (2010) (Specific Duties) (Scotland) (2012)**

The Equality Act 2010 places a statutory duty on all public sector organisations, when carrying out their functions, to have due regard to the need: to eliminate unlawful discrimination and harassment; promote equality of opportunity and promote good relations between people who have the protected characteristic of gender reassignment and those who do not. The Act places a responsibility on statutory services to pro-actively promote non-discriminatory practice, moving the focus away from an historic reactive complaints-orientated approach. This means services must invest significant resource in ensuring functions (including promotion of services) are fit for purpose and meet the needs of diverse groups through an intensive process of planning, development and reflection/assessment.

## **Gender Recognition Act 2004**

This Act of Parliament gave legal recognition to some trans people following a permanent change of gender. It sets out the process for individuals to apply for a Gender Recognition Certificate (GRC) after living full-time in their acquired gender for at least 2 years. It is not necessary for someone to have undergone genital surgery or any other medical intervention other than a diagnosis of gender dysphoria to receive a full GRC.

Once a full GRC is issued to a person, their legal sex/gender henceforth becomes for all purposes their affirmed gender – including for marriage and civil partnership purposes and for employment in posts where a Genuine Occupational Qualification to be a particular sex/gender applies. People with a GRC can apply for a corrected birth certificate if their birth was registered in the UK. A person who has received a GRC is not required to show their GRC to others such as employers or service providers. It is not an identity document and will not be carried on the person.

It is very important to note that employers and service providers must change on first request by an individual, their name and gendered title (i.e. Mr, Miss, Ms) on all their employment, medical and other records, identity badges and future correspondence. All that the individual needs to state in their request is that they are starting a process of gender reassignment to live permanently in their affirmed gender.

They do not need to show a Gender Recognition Certificate in order to change over their day-to-day documentation or to use the toilet facilities of their affirmed gender. Indeed, as it is necessary to live fully in the affirmed gender for at least two years before applying for a Gender Recognition Certificate, a refusal by an employer or service provider to allow these changes at the start of an individual's gender reassignment process would unfairly prevent that individual from later being able to apply for a Gender Recognition Certificate and consequently would be discriminatory.

Section 22 of the Gender Recognition Act 2004 makes it a criminal offence, with a fine of up to £5000 on conviction, for any person to disclose information which they have acquired in an official capacity about an individual's application for a Gender Recognition Certificate, or about the gender history of a successful applicant. If a person has a Gender Recognition Certificate or it could be assumed they might have

a Gender Recognition Certificate (for example they are living permanently in their affirmed gender), then this cannot normally be disclosed further in a way which identifies the person involved without that person's express consent or, more exceptionally, a specific order by a court or tribunal.

Section 22(4) of the Gender Recognition Act 2004 states specific exempt circumstances where it is not an offence to disclose protected information about a person's application for a Gender Recognition Certificate, or about that person's gender history. The exempt situations of relevance to NHS Ayrshire & Arran are where:

- The information does not enable that person to be identified;
- That person has agreed to the disclosure of the information;
- The disclosure is in accordance with an order of a court or tribunal;
- The disclosure is for the purposes of preventing or investigating crime.

The Gender Recognition (Disclosure of Information) (Scotland) Order 2005 provides a limited exception permitting disclosure for medical purposes of the protected information about someone's gender recognition history ONLY where the following three criteria are ALL met:

- The disclosure is made to a health professional; and
- The disclosure is made for medical purposes; and
- The person making the disclosure reasonably believes that the subject has given consent to the disclosure or the subject cannot give such consent (for example, unconscious).

**Points to discuss or consider for Supporting Staff Transitioning.**

A Person Centred approach should be taken and all discussions/actions should be discussed and agreed on a 1:1 basis with the individual concerned.

Details	Date
<p><b>Main Contact</b></p> <p>Identify a single point of contact to support the individual, agree an action plan and coordinate arrangements between NHS Ayrshire &amp; Arran and member of staff. This would normally be a manager, equality lead, HR or senior member of the department, who would liaise with Human Resource Services, or the Occupational Health Service. It can also be someone from a similar professional body i.e. RCN, RCGP etc</p> <p>Consider if the role has any occupational requirements</p>	
<b>Time table</b>	
<ul style="list-style-type: none"> <li>• What is likely timetable for transition? e.g.</li> <li>• Dates for name change (Individual to identify preferred name)</li> <li>• Use of facilities (toilets, changing rooms)</li> <li>• Change of presentation e.g. from suit to a dress or change of uniform attire?</li> <li>• Change of records</li> </ul>	
<p><b>What identification needs to be changed?</b></p> <ul style="list-style-type: none"> <li>• e-mail address</li> <li>• web link</li> <li>• ID - Name badge</li> </ul>	
<p><b>What documents and records need to be changed?</b></p> <p>e.g.</p> <ul style="list-style-type: none"> <li>• NHS Ayrshire &amp; Arran records</li> <li>• Department records</li> <li>• Professional bodies</li> <li>• Trade Union membership</li> <li>• Payroll (and banking details)</li> <li>• Pension scheme</li> <li>• Web details</li> <li>• Committees and groups (at agreed time)</li> <li>• Does the employee have multiple posts within NHS?</li> </ul>	

Details	Date
<p><b>Transition Process</b></p> <ul style="list-style-type: none"> <li>• Is the individual taking any extended time off? Is this additional paid/unpaid leave?</li> <li>• Is time off needed for medical appointments (which may require to be taken during normal working hours)</li> <li>• How can ongoing medical and other re-assignment related appointments accommodated. Consider whether this can be accommodated by working flexi hours/or home working</li> <li>• Does the person need time off for medical reasons or appointments?</li> <li>• If an individual undergoes any surgery, recovery may take between one to twelve weeks.' Please refer to sickness absence policy</li> <li>• Does the employee's job role require to be reconsidered as a genuine occupational requirement to be a particular gender (See section 4.2)?</li> <li>• What arrangements have been put in place to support an individual's return to work? Occ Health may support phased return?</li> </ul>	
<p><b>Support for individual/communication</b></p> <ul style="list-style-type: none"> <li>• How will colleagues be informed? Can statement be agreed and who delivers it?</li> <li>• How and when will external contacts be informed?</li> <li>• Is there training needed?</li> <li>• Impact change may have on their work and adjustments that could be made.</li> </ul>	
<p><b>Discrimination</b></p> <ul style="list-style-type: none"> <li>• Are there clear guidelines and processes to deal with direct or indirect discrimination or harassment of trans people?</li> <li>• Are systems in place in to address any adverse publicity or reactions from service users etc to ensure the employee is supported?</li> </ul>	

## Personal Data and Information

### 1. Retention

Staff at all levels who could learn about an individual's Trans history in the course of their work need to be very clear about the handling of this information. This could apply to:

- The information that can be entered into Workforce files where other staff might have access
- Discussion about an individual's application form and applicant's job interview.
  - Please note: Supporting documents such as degree certificates and references may not use the applicant's correct name and gender.
- The contents of Occupational Health Reports
- Information that can be passed from one medical professional to another in the course of referral or when discussing a case
- Information stored in medical records where others could access that data.

Any such information must be treated with the utmost confidentiality and included only as "sensitive data" (Data Protection Act) in any records which must not be available to or accessible by anyone not specifically authorised or agreed with the specific employee to have access.

### 2. Proof of right to work in UK

A passport, national identity card or Home Office issued residence document are the relevant primary identification documents that Human Resource Managers should request in order to prove a person has the right to work in the UK. A birth certificate should only be requested if none of those documents are available. It is possible for a trans person who is a UK national to obtain a UK passport with their new gender identity at the start of their transition.

If a trans person does not have a UK passport in their current gender identity then their birth name and gender they were assigned at birth may be present on a document shown. In such cases the Human Resource Manager should explain that retaining a copy of the document on the employee's record is a legal requirement imposed by the UK Government. They should also explain that if the employee later gains a new document then Human Resources can replace the document kept on file. Confidentiality must be maintained.

### 3. Record Keeping

All records should be updated to reflect the new name, title and affirmed gender simply on receipt of a written request from the trans person. No formal evidence is required in support of the written request, although many trans people may choose to provide a statutory declaration or deed poll confirming their change of name. Records must be updated regardless of whether or not the trans person has any medical treatment or gender recognition certificate.

After two years living in their affirmed gender with all their records updated (except their birth certificate), trans people have the option of applying to the Gender Recognition Panel for a gender recognition certificate which can update the gender on the person's UK birth certificate and provides enhanced gender history privacy protections.

A trans member of staff is under no obligation to provide a gender recognition certificate to their employer; nor, should anyone be asked if they hold one; under any circumstances.

The Manager and appointed Human Resource (HR) Manager should advise on where records are maintained that need to be changed. Managers and Human Resource Managers should ensure that all documents, public references (such as telephone directories, web biographies etc) and employment details display only their name, title and gender.

Wherever possible, all records that could disclose previous gender history should be withdrawn and destroyed as soon as the person makes a written request for their name and gender to be updated on their employment records. Any copies needing to be kept for legal reasons (for example, proof of right to work in the UK) in the person's central HR file have to be treated as sensitive data under the Data Protection Act and not disclosed to anyone not specifically authorised to see them.

When documents have been seen and copies taken at the point of starting employment (such as birth certificate) then every effort will be made to replace those with equivalent documents in the new name and affirmed gender. The Data Protection Act limits the purposes for which information may be kept. When the information is no longer useful, it must be destroyed.

In some instances, it is necessary to retain records relating to the gender someone was assigned at birth, for example, for pension or insurance purposes prior to obtaining legal gender recognition. However, once a person has obtained a gender recognition certificate, these must be replaced with new details.

Access to records showing the change of name and any other details associated with the individuals trans status (such as records of absence for medical treatment) must be restricted to staff who need the information to do their work.

Such people could include those directly involved in the administration of a process, for example, Occupational Health Professional, or the person who authorises payments into a pension scheme. They do not include colleagues, line managers or third parties.

Breaches of confidentiality about a person's gender history and trans status must be treated in the same serious manner as disclosure of sensitive personal information (for example, medical details) of any other member of staff. In addition to being data protection violations, breaches of confidentiality can be gender reassignment discrimination or harassment under the Equality Act 2010.

It must also be recognised that such disclosure after the receipt of a gender recognition certificate is a strict liability of a criminal offence and will be subject to

internal investigation in line with [NHS Ayrshire & Arran's Management of Employee Conduct Policy](#). Information about exceptional circumstances where it is lawful to disclose someone's gender history can be found in **Appendix D**.

Trans staff may choose voluntarily to disclose information at a secondary level, e.g. answering a staff survey or asking for support from a line manager. Again, strict confidentiality must be observed as further disclosure must not be made without the express written permission of the individual. This means that such questionnaires must be assessed for impact beforehand to determine how such circumstances are going to be handled in confidence.

It is not an offence to disclose protected information if the person cannot be identified or if they give their consent. Such consent however must not be forced, and should be written confirmation of consent from the individual concerned.

#### **4. Work Permits**

Staff who are working in the NHS Ayrshire & Arran on a work permit or student visa are asked to comply with any work permit/visa regulations, which may relate specifically to name change or gender recorded on file in order that the work permit/visa continues to be valid.

#### **5. National Insurance**

Staff who change their name will need to inform the local Department of Work and Pensions. People will be referred to in their new pronouns by HM Revenue and Customs, but any gender-specific calculations relating to their pension, national insurance contributions or benefits will be based upon the gender assigned at birth unless and until they receive a gender recognition certificate.

**Brief For Front Facing Staff / Reception Staff**

**This guidance can only be used with the transitioning employee's permission.**

Where service users have not previously met face-to-face with the transitioning employee, there should not be any need to link the two names or provide any explanation.

**Patient**

Can I have an appointment with John Smith?

**Response**

You may not as yet be aware of a recent change within the Department/Directorate/Clinic but **John Smith** will now be known as **Mary Smith**. The first available appointment with **Mary Smith** will be.....

**Patient**

No I want to see someone else

**Response**

OK, I can offer you an appointment with someone else on.....

**Patient**

Are you telling me that **John Smith** is now a woman?

**Response**

**Yes, John Smith** will now be known as **Mary Smith**.

The department/Directorate/organisation/Clinic is very supportive of this change and we can reassure you that this change will not have an impact at all on the care that we deliver.

Would you like me to make you an appointment with **Mary Smith**? I can give you the first available appointment which will be.....or I can offer you an appointment with someone else on.....

**OR****Patient**

So has John Smith left?

**Response?**

No, **John Smith** will now be known as **Mary Smith** The Department/Directorate/Organisation/clinic is very supportive of this change and we can reassure you that this change will not have an impact at all on the care that we deliver.

Would you like me to make you an appointment with **Mary Smith**, I can give you the first available appointment which will be.....or I can offer you an appointment with someone else on.....

If the caller persists in making any requests/comments beyond those included above the following statement may also prove helpful.

"I am very sorry, I am sure you will understand I am not at liberty to discuss any details beyond what I have already shared as you will understand the organisation very much want to respect **Mary Smith's** confidentiality."

If the patient raises concerns or becomes abusive the caller should be referred to someone else more senior for further discussion".