

Gender Identity Issues in the Asylum Claim

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Introduction

The experiences of discrimination and persecution for transgender people are often distinct, and in addition to those they may experience due to other characteristics. For example, a transgender man may be perceived to be lesbian even after gender reassignment if his 'new' gender is not acknowledged. A transgender woman may be vulnerable as a woman and as a transgender person. This instruction should therefore be read in conjunction with the Asylum Instructions (AIs) on [Sexual orientation in the asylum claim](#) and [Gender Issues in the asylum claim](#) as well as [Considering the Protection \(asylum\) Claim and Assessing Credibility](#) ; [Considering Human Rights Claims](#), [Conducting the Asylum Interview](#), and [Internal Relocation](#).

It should be noted that in addition to the UK's obligations under the 1951 Refugee Convention and the European Convention on Human Rights (ECHR), and the minimum standards for protection set by the EU Qualification Directive, the Equalities Act 2010 places a positive duty public bodies to eliminate discrimination.

As with anyone who lives by a name other than their birth name, a transgender applicant should be given respect and referred to by their chosen name. If in any doubt, an applicant should be asked which personal pronoun and salutation he or she would like used.

This instruction gives guidance on:

- How to approach consideration of asylum claims made on the basis of gender identity.
- The additional considerations decision-makers should have in mind when assessing claims for asylum that could include issues to do with gender identity.
- How to take gender identity issues into account when looking at the persecution experienced and whether there has been a failure of state protection.
- How to objectively consider future fear within the legal, political and social context of the country of origin.

Application of this Instruction in Respect of Children and those with Children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Staff must not apply the actions set out in this instruction either to children with gender identity issues or to transgender parents, guardians or carers with children without having due regard to Section 55. The UK Border Agency instruction 'Every Child Matters; Change for Children' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive.
- The child's interests being made a primary consideration. This means it is considered first, although it is possible for other considerations to outweigh them.

- No discrimination of any kind.
- Asylum applications are dealt with in a timely fashion.
- Identification of those that might be at risk from harm.

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Glossary

Below is a brief glossary setting out some of the terms used in this instruction. It is important to recognise the individual nature and perceptions of the transgender applicant, and decision makers should not label or stereotype transgender persons. The term transgender is a western one which does not have universal agreement and which may be used variously. People in different cultures may use different terms to self-identify as having socially adopted a gender different to that assigned at birth and some communities may not emphasise a social identity or particular community affiliation based on variance in gender identity.

Given the variety of terms that may be used, it will always be necessary for the decision maker to establish how the applicant perceives him or her self and how his or her behaviour or characteristics are perceived by the society which s/he is from.

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms.

A transgender (or trans) person is someone who lives, or desires to live, in the gender opposite to the one assigned at birth. This Western term may include, but is not limited to, transsexual, cross-dressing and gender variant people. Transgender people may identify as men or women, as third gender or non-gendered persons.

A transsexual person, as defined by the Equalities Act, is a person who is proposing to undergo, is undergoing or has undergone a process to change their sex i.e. gender reassignment. It is, however, important to note that for asylum purposes gender identity issues may be broader which is why this document refers to transgender persons.

A transgender man is a person who is born female and transitions to become male (FTM).

A transgender woman is a person who is born male and transitions to become female (MTF).

Transition (or Gender reassignment) refers to the process of changing gender, that is, what a person does to alter their gender or sex.

Transphobia consists of actions or expressions which injure, threaten, humiliate or otherwise distress transgender persons in direct relation to their (real or perceived) transgender status, where these actions are motivated by prejudice or fail to show due diligence in regard to the safety and wellbeing of transgender people.

A '**refugee**' is a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulation 2006.

The **Convention** is a reference to the **1951 Refugee Convention**.

Gender Identity and Persecution

An applicant may claim asylum when he or she fears persecution on account of his or her actual or perceived gender identity which does not, or is deemed not to, conform to prevailing political, social or cultural norms in his or her country of origin.

Claims relating to gender identity are most likely to be considered under the Convention ground of membership of a particular social group, but may also be linked to other grounds, such as political opinion and religion, depending on the circumstances.

The European Council Directive (2004/83/EC) of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (the Qualification Directive) contains definitions of certain terms within the Convention, including the forms persecution may take. The Directive was transposed into UK law through the Refugee or Person in need of International Protection (Qualification) Regulations 2006 and changes to the immigration rules, and has applied to all protection based claims since 9 October 2006.

Transgender men and women may have distinct experiences of persecution. This may relate to being perceived as challenging prevailing cultural conceptions of gender and relationships. It may also relate to attempts to force 'normative' gender behaviour onto the individual.

Claims made by people on the basis of their gender identity may reveal exposure to physical and sexual violence and cumulative denial of human rights. Examples include:

- Threat of execution.
- Forced sterilization.
- Forced castration.
- 'Corrective' rape.
- Domestic violence.
- 'Honour based violence'.
- Forced sex-working.

Other forms of physical and psychological harm that may constitute persecution include:

- Harassment.
- Threats of harm.
- Vilification.
- Intimidation.
- Psychological violence.

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Discrimination

Hostility or the threat of violence towards transgender individuals need not necessarily be the defining feature of persecution. A discriminatory measure, in itself or cumulatively with others, may amount to persecution (see [Considering the Protection \(asylum\) claim and assessing credibility A1](#)). For example, it may, depending on the facts of the case, amount to persecution if the discrimination has sufficiently serious consequences for the person concerned such as:

- Serious legal, cultural or social restrictions on rights to earn a livelihood.
- Serious legal, cultural or social restrictions on rights to private and family life.
- Serious legal, cultural, or social restrictions on rights to freedom of opinion, expression, association or assembly.
- Restrictions on political enfranchisement.
- Restrictions on the choice to practise or not practise a religion.
- Restrictions on access to public places.
- Restrictions on access to normally available educational, legal, welfare and health provision, including gender affirming treatment.

Transgender men, women and children may also be subject to discriminatory treatment that is enforced through law or through the imposition of social or religious customs that restrict their opportunities, rights and exploration of gender variance. This can include:

- Family and personal laws.
- Gendered dress codes.
- Discriminatory medical processes.
- Exclusion from education and employment.

Problems with accessing health care and/or an increased risk of exposure to harm may occur especially where the gender identity of a transgender man or woman is not legally recognised.

Child protection problems may arise in families where, for example, there is hostility to the child's expressed gender identity.

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Non-state Agents of Persecution and the Failure of State Protection

Persecution can be perpetrated by the state. However, acts of violence and serious discrimination committed by the local populace, within a specific community, within the family, or by individuals, are also persecutory if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer sufficient protection.

Protection is generally considered effective when the state takes reasonable steps to prevent the persecution or suffering of serious harm, and the applicant has access to such protection.

Decision makers should make a case specific research request to the Country of Information (COI) Service, clearly identifying the subject matter as Transgender issues. In addition decision makers should refer to objective country of origin information provided by the COI Service, in particular any information on transgender issues given within the COI Service country reports and the sections on LGBT, refer to Country Guidance cases (principally found in the country Operational Guidance Notes), and take into account the relevant sections on actors of persecution and the sufficiency of state protection in the [AI Considering the protection \(asylum\) claim and assessing credibility](#).

For reasons of gender identity men, women and children may be subject to abuse resulting from social customs or conventions because there is no effective means of legal recourse to prevent, investigate or punish such acts. Such failure of state protection may include, but is not limited to:

- Lack of police response to pleas for assistance.
- Reluctance, refusal or failure to investigate, prosecute or punish individuals.
- Encouragement or toleration of particular social, religious or customary laws, practices and behavioural norms or an unwillingness or inability to take action against them. For instance, a state may not allow gender reassignment but nevertheless condone or tolerate societal or familial violence against transgender people.

It is not always reasonable or possible for a transgender claimant to alert the authorities to his or her need for protection. This may be because protection may not be forthcoming or, where there are criminal sanctions for transgender practices, because the claimant is regarded as an offender rather than a victim. Transgender persons may be hesitant to come forward with complaints due to a distrust of authorities and/or previous abuse by authorities.

The ways in which particular laws, social policies or practices (including traditions and cultural practices) are implemented may constitute or involve a failure of protection. Thus, for example,

- A law, policy or practice may have a "legitimate" goal, e.g. the maintenance of law and order out of respect for genuine religious or social sensitivities, but be administered through persecutory means.

- The penalty for non-compliance with the law or policy may be disproportionately severe against certain persons/groups.
- A law, policy or practice may not be enforced in practice and therefore fail to deter or prevent the banned behaviour.

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Internal Relocation

In accordance with Paragraph 339O of the Immigration Rules, if there is a part of the country of origin to which the applicant can relocate where they would not have a well-founded fear of persecution or real risk of suffering serious harm, and where it is reasonable to expect them to stay, then the application for asylum should be rejected.

The Supreme Court in HJ (Iran) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location:

“There is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay.” (para 21)

Likewise, it is not reasonable to expect a transgender man or woman to conceal his or her gender identity in order to survive in a place of relocation.

In the event that internal relocation may be a possibility then the question to be asked is whether the applicant would face a well-founded fear of persecution in the place of relocation; whether there is a reasonable level of protection by the authorities, and if so, whether it is reasonable, i.e. not unduly harsh, to expect the individual to travel to and stay in that place. The practicalities for the individual concerned of moving to and settling in a different part of a country must be assessed in the light of the available information about the country concerned, such as the means of travel and communication, cultural traditions, religious beliefs and customs, ethnic or linguistic differences, health facilities, employment opportunities, supporting family or other ties, and the presence and ability of civil society (e.g. non-governmental organizations) to provide practical support.

In certain countries, financial, logistical, social, cultural and other factors may mean that a transgender person may face particular difficulties. This may be particularly the case for an individual perceived as being a transgender lesbian, especially in countries which place a high moral value on the biological sex and sexual orientation of the individual. Transgender men and women may also face a particular form of discrimination in the place of relocation and thus be unable to work or safely access healthcare, to the extent that they cannot survive in the place of relocation.

Decision makers should consider whether the applicant, if unaccompanied, would be able to safely access the proposed relocation area.

Decision makers should make a case specific research request to the COI Service, clearly identifying the subject matter as Transgender issues. In addition, decision makers should refer to objective country of origin information provided by the COI Service, in particular any information on transgender issues given within the COI Service country reports and the sections on LGBT, and refer to the Asylum Instruction on [Internal Relocation](#). But even where country information and guidance may suggest that relocation is possible, the personal circumstances of the individual should be explored at interview for a sound decision to be reached on the reasonableness of internal relocation. The onus is on the decision maker to demonstrate that internal relocation is not unduly harsh, having regard to the individual circumstances and country of origin information.

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Convention Grounds

Issues about gender identity may inform an assessment of whether one of the five Convention grounds applies. Decision-makers are reminded that an application does not have to be on one Convention ground only and that while the claimant is required to establish that she or he has a well-founded fear, she or he is not required to identify accurately the Convention reason for it. As with all other applications, someone who may not qualify for international protection under the Convention could nevertheless qualify for Humanitarian Protection (subsidiary protection) (see the AI on Humanitarian Protection).

Race

Whilst actual or attributed racial identity is not specific to transgender cases, gender identity may affect the form that persecution takes in race-related cases. For instance, a particular racial group may target transgender persons not conforming with moral codes within their group in order to assert the group's racial superiority or 'purity' i.e. by 'purging' the group of perceived 'impure' elements.

Religion

Religion may be relevant to gender identity asylum claims where, for example, the attitude of religious authorities towards transgender people is hostile, or where being transgender is seen as an affront to religious beliefs in a given society.

Nationality

Regulation 6(1)(c) of the Qualification Regulations states that:

“The concept of nationality shall not be confined to citizenship but shall include, for example, membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins, or its relationship with the population of another state.”

As a result the term 'nationality' may occasionally overlap with the term 'race'. Whilst actual or attributed national identity is not specific to transgender persons, it may operate in tandem with gender identity to explain why an individual fears persecution. For instance a transgender individual from a particular ethnic group may have a fear of persecution that does not exist for other transgender individuals in the country of origin.

Membership of a Particular Social Group (PSG)

Claims relating to gender identity are likely to fall under 'Particular Social Group'. A definition of what constitutes a particular social group is provided in Regulation 6 (i) (d) of the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006.

A group shall be considered to form a particular social group where, in particular:

- i) Members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- ii) That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

The Regulation sets out an approach to identifying the existence of a social group which is similar to the one taken by the UK courts, most significantly in the House of Lords judgement in the case of Shah and Islam [1999] UKHL 20 where it was found that women in Pakistan constituted a particular social group.

An absence of information on transgender issues in an OGN or COI should not be taken to mean that there are no issues for the transgender people in that country. If decision-makers are in doubt as to whether a person may be part of a PSG they should refer to the section on membership of a particular social group in the [Considering the protection \(asylum\) claim and assessing credibility AI](#) and/or discuss the case with a Senior Caseworker (SCW). If it is considered that the person is not within a PSG, the decision maker will explain why not.

Political Opinion

Regulation 6(1)(f) of the Qualification Regulations 2006 states that:

“The concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods, whether or not that opinion, thought or belief has been acted upon [by the applicant]”.

Holding political opinions different from those of the government is not in itself a ground for refugee status. However, in countries where transgender practices are viewed as contrary to the country’s policy, an applicant may apply for asylum based on a fear of persecution for acting in opposition to the political opinion. For full details see section on political opinion in the [Considering the protection \(asylum\) claim and assessing credibility AI](#)

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Interviewing and Assessment of Credibility

Each applicant will have been asked at screening to indicate a preference for a male or female interviewer, and it should normally be possible to comply with a request for a male or female interviewer or interpreter made in advance of an interview. Requests made on the day of an interview should be met as far as is operationally possible.

When interviewing an applicant, before assessing the credibility of an account and before deciding whether there is a need for protection, decision-makers should have an awareness of the status and treatment of transgender individuals in the applicant's country of origin. This should be by making reference to the information provided by the COI Service, and other approved objective sources of information, on transgender people in particular and on lesbian, gay, bisexual and transgender people in general - it may be the case that if gay men are found to face persecution, then transgender persons may also be at risk, as a corresponding group which does not conform to an established gender role. This awareness should include, but not be limited to the hostility that such non-conformist groups might experience in the applicant's country of origin.

Generally speaking, self-identification will be the usual starting point as an indication of a person's gender identity and their expression of this. However applicants may not have felt able to disclose this at the screening interview and it will need to be explored in greater depth at interview.

A transgender applicant may have kept aspects and sometimes large parts of their lives secret, perhaps in response to societal pressure, explicit or implicit hostility and discrimination, criminal sanctions and/or feelings of shame, stigma and difference. For these reasons, as well as available terminology, a transgender asylum seeker may struggle to talk openly about his or her gender identity. An open, non-judgmental and reassuring environment will help to establish trust between the interviewer and the claimant, and should help the full disclosure of sensitive and personal information.

As with anyone who lives by a name other than their birth name, a transgender applicant should be given respect and referred to by their chosen name and gender identity. If in any doubt, an applicant should be asked at interview which personal pronoun he or she would like used.

The interview should explore what the applicant is claiming to be their current gender identity and establish the range of behaviour and activities of life that inform or affect the individual's gender identity, or how they are perceived. It will be important to establish the applicant's own terms of reference and description of their gender identity and how they have expressed it. Care must be taken to sensitively, but thoroughly, investigate relevant elements of the individual's history of gender variance. Despite the need to focus on establishing the individual's gender identity, decision makers are reminded that the asylum claim needs to be considered in the round and that all other material facts and merits of the case will also need to be addressed.

Establishing the material facts and assessing the credibility of the claim are essential and it is therefore important that an effective interview is conducted and relevant issues clarified with the applicant. (For further guidance see the [Considering the protection \(asylum\) claim and assessing credibility and Conducting the asylum interview](#) AIs).

The credibility of an individual's claim and the degree of risk on return should primarily be tested by a sensitive enquiry into the applicant's realisation and experience of gender identity. Altering one's birth sex is not a one-step process, but a complex process that occurs over a period of time. Transition may include some or all of the following personal, legal and medical adjustments: telling family, friends and colleagues; changing one's name and/ or sex on legal documents; dressing, behaving and/or living as a different sex; hormone therapy; and possibly surgery. Interviewing officers should ask open questions that allow applicants to describe the development of their identity and how this has affected their experiences both in their own country and in the UK.

Staff should be careful to avoid subjective judgements. Although an individual's appearance or demeanour may have a bearing on the persecution suffered in the country of origin, stereotypical ideas of gender, such as the presence or absence of a feminine voice, should not influence the assessment of credibility.

The fact that an applicant has, or has had, a conventional life and relationships (including marriage and/or parenthood) in the country of origin or in the country of asylum does not necessarily mean that s/he is not transgender - it may be that the individual was fearful of the implications of acting on his or her gender identity, and wary of doing so in the UK. The fact that a transgender applicant has not taken steps to physically demonstrate their change of gender should not be seen as evidence of a lack of credibility. Decision makers should encourage individuals to explain their previous actions in order to ensure that all evidence can be considered appropriately.

Correspondence should normally be prepared using the applicant's preferred salutation of the applicant. Officers should be aware of the provisions of the Data Protection Act 1998 which, even where a transgender person does not hold a Gender Recognition Certificate, prevent the disclosure and processing of sensitive personal information other than in the limited circumstances set out in that Act. Further information is contained in the [IDI on Disclosure of Information relating to asylum claims](#). The Gender Recognition Act 2004 further restricts the disclosure of information relating to a person's gender history, where they hold a Gender Recognition Certificate. Further information is contained in the [instruction on Gender recognition](#).

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Deciding the Claim

Having established the facts of the claim and come to a conclusion on which aspects are accepted, rejected or where it is appropriate to apply the benefit of the doubt, in accordance with paragraph 339L of the Rules, decision makers will then need to consider if there is a future risk of persecution, and if the criteria for Refugee Status, Humanitarian Protection or Discretionary Leave apply. (See [Considering the protection \(asylum\) claim and assessing credibility A1](#) for detailed guidance). Where an applicant is found not to be a transgender person he or she should be processed (for asylum support and enforcement purposes) in the sex they have been found to be.

The decision-maker needs to assess objectively whether there are reasonable grounds for believing that the applicant, in his or her particular circumstances, would face persecution if returned to the country from which they seek refuge. It is important to consider fully any other relevant material such as medical or psychological reports as well as objective country information provided by the **Country of Origin Information Service**. The absence of objective information to corroborate a claimant's account should not necessarily be taken to mean that the claimed fact did not occur. Each case must be decided on its own merits.

There may be very little evidence on the ill-treatment of transgender men and women in the country of origin. Decision makers may wish to explore the following areas more fully with COI Service:

- The social and cultural norms of the country, including access to healthcare and employment, and how these might affect transgender people.
- The level of 'visibility' of transgender communities, including the presence of dedicated social, campaigning or support groups.
- The efficacy of protection against violence available to all citizens of the country of origin, including transgender people.
- The legal status of transgender men, women, children, third gender or on-gendered persons (as applicable), including the recognition of an altered gender; discriminatory measures; protection from discrimination and any anti-discriminatory measures.

Discretion

Great care should be taken in assessing the risk to an individual and the issue of 'discretion'. As noted by the UNHCR in its Guidance Note Relating to Refugee Claims Relating to Sexual Orientation and Gender Identity (21 November 2008):

“A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action. Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds.”

This is to be understood in the following terms: people cannot be required to behave discreetly. However, how they will behave on return is a question of fact to be investigated at the interview. Applications should therefore not be approached from the assumption that individuals could exercise discretion in order to avoid persecution.

The test established by the Supreme Court in the case of HJ and HT should be applied when assessing a claim based on fear of persecution because of the applicant's gender identity. If a transgender individual chooses to live discreetly because s/he wants to avoid embarrassment or distress to his or her family and friends s/he will not be deemed to have a well founded fear of persecution and will not qualify for asylum. This is because s/he has adopted a lifestyle to cope with social pressures and not because s/he fears persecution due to his or her gender identity. Conversely, an individual who chooses to live discreetly because s/he fears persecution if s/he were to live openly as a transgender man or woman may be granted asylum if that fear is considered to be well founded fear.

Each case must be determined in the light of its own facts and country of origin information. It is the task of the decision-maker to assess objectively whether there are reasonable grounds for believing that there would be a real risk of serious harm to the applicant, in his or her particular circumstances, if returned to the country from which s/he is seeking refuge.

Persecution

General hostility and transphobia may not amount to persecution but general discriminatory measures and the cumulative effects of harassment, threats and restrictions can constitute persecution. The interview should establish if it was a single event or a number of incidents that led to the applicant's fear of persecution.

It is reasonable to expect the individual to give a detailed account of any incidents of persecution and/or ill treatment they or others they know have experienced even if they are not aware of the exact legal or social position of transgender persons in their country of origin.

It is neither reasonable nor logical to argue that an awareness of the illegality of their actions should prevent the applicant from engaging in those actions. However, it is reasonable to expect the applicant to explain what they did in response to any ill treatment, persecution or discrimination.

Country of Origin Information

A climate of hostility to transgender persons can still exist in a particular country even where those acts are not specifically laid down as criminal in a penal code or legal statutes, or where laws do exist but are not enforced, or even where there is provision for gender reassignment surgery. A society which is intolerant of non-conformist behaviour in relation to gender and/or sexual activity is likely to be intolerant of transgender people. The absence of specific legislation on transgender men and women in particular may be an extension of their general marginalisation. The interview should establish if the threats came from state agents enforcing legislation or whether the persecution is a result of societal discrimination and general transphobia.

Sufficiency of Protection

This must be considered within the context of available objective country information. It may not always be possible to access protection from the state because of the general hostility that exists toward people who are transgender.

This area must be explored and due consideration given to the reasons as to why an applicant's fear of the authorities might prevent them approaching those authorities for protection. General transphobia within a society may contribute to the lack of state protection regardless of whether their gender expression and/or relationships are criminalised. It is reasonable to ask whether redress was sought and/or to explore any reason for not seeking protection.

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The Equality Act 2010 and Gender Reassignment

The Equality Act makes it unlawful to discriminate against or harass a person because of gender reassignment; and places a duty on public bodies to have due regard to the need to eliminate discrimination and harassment because of gender reassignment, to advance equality of opportunity between transsexual and non-transsexual people, and to foster good relations between transsexual and non-transsexual people. The Equality Act also prohibits direct discrimination and harassment where someone is wrongly perceived to be a transsexual person, and where someone is associated with a transsexual person.

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