



Press For Change

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Dear Heather,

COMMENTS ON GENDER EQUALITY DUTY DRAFT CODE OF PRACTICE

Many thanks for contacting me recently and inviting further comments from Press for Change on the draft code of practice. I have consulted with the Vice Presidents of Press for Change and other key campaigners in arriving at our views on this draft and I have attached below our analysis and commentary.

These comments are limited to those aspects which affect transsexual and transgendered people. They are in addition to the comments made during preparation by Claire McNab in her capacity as a member of the advisory panel.

We trust that you will find these comments helpful and informative in understanding how trans people might better fit within this framework. We look forward to hearing further from you and would be happy to clarify any points raised.

Yours sincerely,

Angela Clayton MBE
Press for Change

Introduction to Pfc's Comments

Press for Change welcome the extent to which trans people are included within this draft code of practice and the evident effort made in attempting to accommodate our needs. However, in relation to trans people, the guide is very limited. It provides no examples of the types of discrimination trans people face, nor any examples of good practice relating to trans people and their employment or access to other services. It should ensure that trans people are included, even as examples of ordinary men and women, and that they are features as both transsexual women, transsexual men and more generally transgender people of either or both genders.

Specific points within the document are discussed below.

Paras. 1.20 - 1.24: Application To Transsexual People

Directive 2004/113/EC which will extend protection to goods and services for transsexual people has to be implemented nationally by December 2007. Generally it has been assumed that Directives do not have direct effect until such time as the date of implementation has passed. However, in the recent judgment in *Mangold v Helm* which related to age discrimination, the European Court of Justice ruled that Directives have direct effect from the date of their publication in the official European Journal¹. National Courts must therefore set aside provisions of existing law which would not comply with the principles of the Directive even though the implementation date has not been reached.

Consequently PFC suggests that since EC Directives have vertical direct effect against "emanations of the state" – public authorities in the context of this document – that the paragraphs identified below and other parts of the document need to be considerably strengthened to reflect the legal position since the Mangold decision.

At Para. 1.23 you state that there is no legal requirement under the gender duty for public authorities to promote equality between trans people and non-trans people. This is a very negative perspective likely to enhance current poor responses to trans people's right to dignity, in particular. While strictly within the specific wording of UK legislation, this is not the case within EC law. Repeated rulings by the ECJ have clearly indicated that discrimination on the basis of transsexualism is discrimination on the grounds of sex.² Further it is clear that since the *Mangold v Helm* decision that there is a common law duty to ensure that trans people have equal access to goods, services and facilities as well as workplace protection. PFC would argue that the gender duty does in fact apply to transsexual people, at least to the extent of those areas which fall within the areas covered by EC Directives and other EC legislation relating to gender.

This should be clarified within the text of the proposed guidance. Without clarification, the guide will not be future proofed, and as cases proceed through the courts then it is likely that regular amendments will need to be made.

At Para. 1.22 you identify some trans people who would not have protection under present legislation relating to gender reassignment. You identify those people who perhaps transition

¹ *Mangold v Helm*, ECJ Case C-144/04, Judgment of 22 Nov. 2005.

² *P v S and Cornwall County Council*, ECJ Case C-13/94; *KB v NHS Pensions Agency*, ECJ Case C-117/01, Judgment of 7 Jan 2004; *Richards v SoS for Work and Pensions*, ECJ Case C-423/04, Judgment of 27 April 2006.

“to live as a member of the opposite sex without intending to undergo medical gender reassignment”. It should be noted that many such people despite not seeking medical assistance would, by the very act of transition, indicate such an intention. The legal requirement for protection is not “medical gender reassignment” but “gender reassignment” which is defined as a process under medical supervision. There is no requirement, e.g. for legal recognition, to undergo any medical treatment provided one is supervised or intends to be so supervised by a medic. In many instances the lack of medical involvement will reflect problems accessing health services rather than any lack of intent.

If you wish to clarify those trans people who would not have protection you need to indicate that it is those people who cross dress or live in the opposite gender role for temporary periods of time and who have no intention of seeking any form of medically guided reassignment or of living permanently in the opposite gender role to whom this applies.

Paras. 2.4 – 2.12: Meeting The Duty

We would suggest that at Para. 2.5 you adopt the same approach as in Para. 2.6 by adding the phrase “including transsexual men and women” as you do in the later paragraph. This would add consistency and emphasise that transsexual people are also covered by “men and women”.

The question of proportionality raised in Para. 2.5 is also of some concern to transsexual people. While it might be argued that due to our small size we might cost very little, there will be cases where our small population is used as justifying taking no action on the basis that the outcome is not proportionate to the costs. For example, a simple change trans people might wish to see is an end to the practice of many public sector employers of asking for all former names on an open job application form. The costs of changing a form might easily be argued as disproportionate in cost for so few affected people.

PFC asks that it is indicated that proportionality is intended to be used as ‘a shield’ and not ‘a sword’. In simple terms, it can be a reason for recklessly failing to do, or doing, something, but it is not a reason for deliberately ignoring trans people or doing something to exclude trans people.

Your inclusion of the need to ensure suitable data is gathered in respect of trans people at Para 2.12 is appreciated, especially given recent discussions with other bodies who have consistently used the absence of data about trans people as the basis for taking no action.

Para. 2.13: Outcomes

PFC would wish to see an indicator relating to the need of public bodies to have engaged with trans community groups in formulating relevant policies.

We would also wish to see indicators in employment around the retention rate for transsexual employees after transition. In a survey published in 2001³ around 30% of all transsexual people reported that they felt forced out of their employment following transition.

³ Employment Discrimination and Transsexual People, Stephen Whittle, GIREs 2001

Paras. 2.27 – 2.31: Policy Development

Throughout this section no mention is made of transsexual people in policy development. At several stages earlier in the document there has already been mention of the need to consider transsexual men and women in this context. It would seem likely that trans people ought to be mentioned in these paragraphs.

In particular at Para. 2.28 one might need to consider the impact of policy on trans people as well as men and women in the limited sense. Similarly in 2.29 one might ask have they considered negative impacts on trans people. We would suggest that at Para. 2.31 “specific groups of men or women” includes trans people but should be explicitly stated.

Paras. 2.32 – 2.35: Service Design

As in the previous block there is no mention of trans people. While the duty in the context of services, subject to the comments above, is not presently seen as applying to transsexual people nonetheless we believe that some mention at this point would be appropriate given earlier discussion on service delivery in the early parts of the document.

In particular the mere consideration of transsexual people in considering delivery of a service could make a world of difference to the lives of transsexual people. One very recent example comes to mind of a transsexual woman well past transition who presented at her local A&E department, complete with Gender Recognition Certificate. The receptionist decided this meant she was a gay man – with the best of intentions – and wrote ‘male’ on her notes. Mr X was called to considerable titters from fellow patients; after initial review she was asked to go and sit among the people who had laughed at her.

Paras. 2.36 – 2.39: Single Sex Facilities

These are a nightmare for many transsexual people and some mention of the needs of transsexual people is essential here. For example in the provision of rape crisis services transsexual women can be vaginally raped but may not have a gender recognition certificate because they are married or in a civil partnership or have not yet had sufficient time to meet the criteria. On the basis of a single sex rape crisis centre transsexual women may be turned away. We do have at least one case pre-Gender Recognition Act of a woman vaginally raped being told to “find a man” to counsel her by a rape crisis centre. Similarly trans men, legally male, may never have had genital surgery and so could be vaginally raped.

In all cases where single sex facilities are contemplated which may be needed by transsexual people we would suggest that the needs of transsexual people must be considered in consultation with transsexual people rather than assuming our needs are understood. At the very least the policy must be based upon a reasonable attempt to identify the needs of transsexual people in such instances.

Paras. 2.42 – 2.45: Data Collection

Collection of data is a problem for transsexual people. Many transsexual people will wish to remain unknown to their employer and certainly their colleagues, especially if in former employment they have had difficulties in transition (see comment on 2.13). Equally, there are likely to be so few transsexual people even in the largest employer that statistics mean little at one point in time. Inevitably in employment then there is a need to develop practices flexibly as the need rises, the needs of someone about to transition are different from someone who transitioned thirty years earlier.

Good sources of guidance on information gathering for transsexual people are available from Press for Change and also from the TUC⁴ and unions in general.

Paras. 2.46 – 2.49: Recruitment and other work issues

It is particularly important that recruitment takes into account the privacy of transsexual people. Application forms and questioning should not force transsexual people to ‘out’ themselves or lie in an attempt to find employment. For many transsexual people finding employment can be very difficult.

Similar issues arise around the long term retention and promotion of transsexual staff. For many it was simply enough to remain in employment given that past practices normally resulted in instant dismissal on discovery that someone was transsexual. It remains the case that someone known as transsexual can rarely expect promotion. The need to monitor such practices is high if the conditions in employment for transsexual people are to improve.

Paras. 2.50 – 2.53: Flexible and Part Time Working

Transsexual people who are in the early stages of transition have particular problems due to accessing services needed within their transition. For example they may need to travel extended distances to access medical services (e.g. in Manchester the ‘local’ NHS gender identity clinic is in London). Outside the medical sphere they may also need to undergo treatments such as electrolysis for facial hair removal which is essential but cannot always be fitted in after work hours, especially if travel is needed.

General Comments

The attention to detail and the attempt to make a significant mention of transsexual people throughout the early part of the document is welcomed. However we note that there are few (three in all) mentions after section two. Having set out the principles in the first two sections we hoped that a similar level of mention would be maintained later in the document. For example in 3.32 the document talks about the impact on specific groups of men and women – it would be particularly easy to reinforce the earlier part of the document and mention transsexual people at this point and in similar instances throughout the code of practice.

⁴ Monitoring LGBT Workers, TUC: <http://www.tuc.org.uk/equality/tuc-9303-f0.cfm>