

# **The Gender Recognition (Disclosure of Information) (England and Wales) Order 2021 – Equalities Statement**

## **Equality Duties**

This document records the analysis undertaken by the Department to enable Ministers to fulfil the requirement placed on them by the Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010. The PSED requires the Minister to have due regard to the need to the following aims:

1. Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
2. Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
3. Foster good relations between persons who share a relevant characteristic and persons who do not share it.

The protected characteristics are race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment and pregnancy and maternity.

## **Summary of policy proposal**

The Gender Recognition (Disclosure of Information) (England and Wales) Order 2021 is a statutory instrument that makes a minor modification to the Gender Recognition Act 2004 in response to operational difficulties faced by Her Majesty's Prison and Probation Service (HMPPS) in their work with offenders.

The Gender Recognition Act enables people to change their legal gender by obtaining a Gender Recognition Certificate (GRC), which is in effect a replacement birth certificate entitling the holder to be treated in line with their acquired gender. Section 22 of the Act creates a criminal offence of disclosing protected information acquired in an official capacity. 'Protected information' is information about the legal gender of a person with a GRC before it became their acquired gender, or about a person's application for a GRC. In effect, this offence prevents officials from disclosing information about the gender history of a person with a GRC. There are exemptions to the offence, such as where disclosure is to prevent or investigate crime, or where the subject of the information agrees to the disclosure. The Act gives the Secretary of State the power to create further exemptions.

The purpose of this instrument is to create a further exemption to enable the disclosure of protected information, where appropriate, in the prison context. To achieve this aim, the instrument will state that the offence of disclosing protected information acquired in an official capacity is not committed where disclosure is required for the purposes of offender management. Examples of where disclosure might be required for offender management purposes are:

- to safeguard the prisoner who is the subject of the protected information;
- to safeguard other prisoners;
- to ensure the safe and effective operation of the prison;
- to make effective decisions regarding the above purposes;
- to develop and analyse policies concerning these matters.

## **Evidence and Analysis**

This legislation will only apply to offenders with Gender Recognition Certificates (GRC). Obtaining a GRC requires that you have lived in your acquired gender for at least two years and intend to do so for the rest of your life. Therefore, the offenders who will be directly affected by this instrument will all share the protected characteristic of gender reassignment. In the 'PSED Aims' section below we consider the impact of this instrument on people with the protected characteristic of gender reassignment. To fully understand the impact on this group, we conducted informal consultation (via focus groups and structured meetings) around the introduction of this instrument with operational and strategic HMPPS staff (including Pride in Prisons and Probation, the HMPPS LGBT+ staff network) and groups who work directly with and advocate for the rights of transgender offenders.

There is little data about the other protected characteristics of people with GRCs, either amongst those in prison or in society generally. This is due to the legal protections offered by the GRC process. HMPPS are looking at ways of improving the quality of data gathered about this cohort in future but it is not yet available. Data on some of the characteristics of people in the general population who apply for and are granted GRCs is published in the UK Government's Tribunal Statistics Quarterly, but these were not deemed relevant due to the significant demographic differences of offenders.

We consulted with the Government Equalities Office on the detail of this change to ensure that we had understood all of the possible equalities impacts.

## **Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act**

### Direct discrimination

We consider that this instrument is not directly discriminatory within the meaning of the Equality Act. While this policy may lead to prisoners with the protected characteristic of gender reassignment being treated differently in some instances, they will not be treated less favourably than other prisoners because they will continue to be supported through existing processes and mechanisms set out in the existing policy framework 'The Care and Management of Individuals who are Transgender'. This policy framework has been separately assessed in relation to PSED and does not amount to less favourable treatment.

### Indirect discrimination

There is no evidence to suggest that any protected characteristic will be over or under-represented in those affected by this instrument compared to the general prison population.

The exception to this is of course prisoners with the protected characteristic of gender reassignment. This instrument is not applied to people who do not share this characteristic and therefore indirect discrimination towards people with the protected characteristic of gender reassignment is not applicable under the definition in the Equality Act 2010. Even if the instrument could be seen to particularly disadvantage people with certain protected characteristics, we believe it is a proportionate means of achieving our legitimate aim of protecting people with the protected characteristic of gender reassignment.

#### Discrimination arising from disability and duty to make reasonable adjustments

We do not consider there to be a risk of discrimination arising from disability in relation to this instrument. We recognise that it remains important to ensure that we continue to make reasonable adjustments for offenders with disabilities; we have existing policies in place to do this.

#### Harassment and victimisation

We do not consider there to be a risk of harassment or victimisation as a result of these proposals.

### **Positive duties**

#### Advance equality of opportunity

Consideration has been given to how this proposal will impact on the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. As explained above, this amendment is designed to ensure that all prisoners are managed according to the same principles, regardless of whether they share a protected characteristic or not. Some evidence suggests that transgender prisoners are a particularly vulnerable cohort.<sup>1</sup> This instrument will ensure that they are properly safeguarded, and so will improve outcomes for those with the protected characteristic of gender reassignment.

#### Fostering good relations

The proposal is unlikely to foster good relations between persons who share a relevant protected characteristic and persons who do not share it but will not have any negative impact on this aim.

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### **Monitoring**

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<sup>1</sup> Bashford, J; Hasan, S; Marriott, C and Patel, K (2017) Inside Gender Identity: A report on meeting the health and social care needs of transgender people in the criminal justice system. Bradford: Community Innovations Enterprise

We will require staff using the exemption created by this instrument to record their reasons for doing so. This will allow us to monitor for any unforeseen consequences of this instrument and scrutinise the justification for disclosing sensitive information about a prisoner in particular cases.