

EMPLOYMENT DISCRIMINATION AND TRANSSEXUAL PEOPLE

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Gender Dysphoria is a recognised medical condition. Those who experience the condition do not feel, on the inside, to be of the gender that their bodies are perceived to be. Many of them experience such intense and prolonged discomfort that, in adulthood, they undergo a process of gender role transition in which they express their innate gender identities and, usually, obtain medical treatment to modify their bodies accordingly. Those who experience this degree of Gender Dysphoria may be regarded as having the condition termed Transsexualism.

During the period 1996-99, the legal responsibility of employers to protect transsexual employees against sex discrimination in the workplace was clearly established by several test cases and new government regulations. In late 2000, a survey of transsexual employees showed that many were still subjected to:

- > verbal abuse and even physical violence perpetrated by other employees, as well as by customers, clients or suppliers
- > discrimination in:
 - recruitment
 - promotion
 - remuneration
 - benefits and
 - other factors

The majority of their employers were failing to:

- > include gender in their anti-discrimination policies
- > provide their colleagues with information, support and/or training on gender identity
- > inform those colleagues that discrimination against the transsexual person would not be tolerated

Many of their employers were still not providing them with access to toilet facilities appropriate to their new gender roles.

The great majority of respondents did **not** feel that, aside from any difficulties created for them by other people at work, their transition had, at the time or currently, made them less able to do their jobs.

Many of the transsexual employees who had recently commenced transition had been forced to leave their jobs either by their employers or because of the resultant conditions at work.

These findings have major implications for policy makers. Although the law is now robust, employers' practice in the workplace remains highly imperfect. Whilst there is a need for more

rigorous enforcement of the law, that factor alone would be insufficient to achieve the changes in attitudes that trans people encounter daily at work, among their fellow workers as well as customers, clients and suppliers. Employers should be persuaded to educate all the people that the trans person encounters at work.

The need for action is mounting. The data gathered in the 2000 survey shows a sharp increase in the number of people commencing transition. The rapidly rising numbers of cases being referred to the Gender Identity Clinic at Charing Cross Hospital and of applications for membership of two major voluntary support organisations, The Gender Trust and FTM Network, confirm the upward trend.

Formalising Employment Protection for Transsexual People

The applicant claims that in 1990-92 some colleagues, including management, attempted holding [her] to see what was under [her] skirt, feeling [her] breasts. She attempted unsuccessfully to take a case of sexual harassment to the Employment Tribunal on Sex Discrimination, but was allegedly told that she has no case as she is legally considered a man. The applicant was dismissed from her job on grounds of ill health, the real reason allegedly having been that she is a transsexual.ⁱ

In 1999, the Sex Discrimination (Gender Reassignment) Regulations came into force, amending the Sex Discrimination Act 1975 (SDA). The amended SDA is intended to prevent discrimination against transsexual people, because of their gender reassignment, both in pay and treatment in employment and vocational training. The SDA is now intended to formalise the 1996 decision of the European Court of Justice (ECJ) in P v S and Cornwall County Councilⁱⁱ (P v S), and which had been affirmed in 1997 by the Employment Appeal Tribunal in Chessington World of Adventures v Reedⁱⁱⁱ.

Prior to 1996, employment law appeared to offer little, if any, protection to transsexual people from discrimination based upon their transsexual status. The Sex Discrimination Act (SDA) 1975 was understood to provide protection between the sexes, the comparator, for determining unequal treatment, to a woman was a man and visa versa. As such the comparator to a (male to female) transsexual woman was deemed to be a (female to male) transsexual man. As such an employer would simply claim in defence to any apparently unfair treatment that he would have treated a transsexual person from the 'opposite' sex group in an identically bad way. Referred to as the 'equality of misery' rules, as such the SDA was of no benefit to transsexual people and in effect was often used to justify the poor treatment they received.

In the decision of the ECJ in P v S, the court clearly stated that:

In view of the objective pursued by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment.^{iv}

P v S concerned a male to female transsexual woman, P, who worked as a senior manager in a Cornwall Education Establishment. On informing her employers that she was undergoing gender reassignment, and wished to come to work as a woman, she was given notice of the termination of her contract. She was not allowed to return to work during the period of her 'transition', that was when she was living full time as a woman but before she had undergone surgical genital reassignment, and her period of employment ultimately terminated without her returning to work. P brought an action before an Employment Tribunal claiming that she had suffered discrimination on the grounds of sex. Both S and Cornwall County Council claimed that, on the contrary, she had been dismissed due to redundancy.

The Employment Tribunal found that whilst there was a case for redundancy, the true reason for dismissal was the objection to P's intention to undergo gender reassignment. At this stage the Employment Tribunal found that English law provides no protection to transsexual people, it long being understood that under the Sex Discrimination Act all that an employer needed to show was that they would have treated a transsexual person of either (naturally recorded) sex in the same manner^v. However, the ECJ approached the question differently. It was asked not whether P would have been dismissed if she had in fact been a female to male transsexual man, but rather would she have been dismissed if she had remained a man. Holding that she would not have been the ECJ could see no reason for not upholding that there had been discrimination by reason of sex.

The ECJ's Advocate-General Tesaro pointed out, in his opinion to the ECJ, that for the purposes of the Equal Treatment Directive, sex is important as a social convention. Discrimination is frequently to do with the social roles of women rather than their physical characteristics. Similarly, discrimination suffered by transsexual people is linked to moral judgments, which have nothing to do with their abilities in the sphere of employment^{vi}. As the Court has a duty to ensure that the general principles of Community Law are upheld, and as these include a respect for certain fundamental rights, one of which is the elimination of discrimination based on sex as expressed in the directive, then the directive must be held to cover changes from one sex to another as much as it covers whether a person is discriminated against because they are a man or woman^{vii}.

The decision was a historic decision for transsexual people. It meant that throughout Europe it would be unlawful, as regards any aspect of employment or vocational training with the state or any emanation of the state, to discriminate against a transsexual person on the grounds that they are going to undergo, are undergoing or have undergone gender reassignment. It was the first piece of case law to come into existence, anywhere in the world, which prevents discrimination because a person is transsexual (Whittle 1995). Further the scope of the decision was very broad. Not only did it effect all employers who were emanations of the state, through the principle of direct effect^{viii}, but also, potentially all other employers through the principle that national courts are required to interpret national law, and in particular the provisions of a national law specifically introduced to implement [the] directive^{ix} to achieve the results referred to in the European Directives.

So, it has been successfully argued that the 1975 Sex Discrimination Act (SDA) must be construed so as to apply to transsexual people ensuring protection whoever the employer. In

Chessington World of Adventures v Reed^x it was also found that there is no requirement for a male/female comparator^{xi} and

therefore the Sex Discrimination Act can be interpreted consistently with the purpose of the Directive as interpreted in P v S

As such, it is potentially the case that transsexual people are not only protected from discrimination in the sphere of employment and vocational training, but also in those other areas not covered by the Equal Treatment Directive but which the Sex Discrimination Act covers. That would extend protection to the provision of goods, services, housing and of areas of education so effectively making illegal virtually all discrimination based upon a person's transsexualism^{xii}.

If it is the case that if the Sex Discrimination Act can be interpreted by the national courts in line with the Directive and the decision in P v S then it affords protection as the enabling legislation of the Equal Treatment Directive. As such, the protection effectively came into existence from the date of the Equal Treatment Directive. Potentially therefore transsexual people who were discriminated against prior to the decision in P v S could make a claim, within the appropriate time limit, from the date of the ECJ decision rather than the date of the discrimination. Such a claim has been allowed in the case of Marshall v Director of Public Prosecutions^{xiii}.

The decision in P v S is quite clear in that transsexual people are afforded workplace protection if they are "intending to undergo, undergoing or have undergone gender reassignment". If the interpretation of the Equal Treatment Directive from P v S and the amending regulations of the SDA are understood by employers, then we could expect to see a significant improvement in the employment prospects for transsexual people throughout Europe.

A society in which everyone is treated equally is beyond price (MacPherson 1998)

After the report of the Lawrence Inquiry into institutional racism, the focus on discriminatory practices within public institutions was once again brought to the fore. Regrettably, one of the consequences of the Lawrence Inquiry has been that discrimination has almost solely been referred to as an issue of race or ethnicity, as resources are limited and priorities have to be made. However, McPherson provided a clear definition:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people (Macpherson 1999: 6.34).

The above can be broadly adapted and interpreted as relating to many groups within our society, not least of all transsexual people. The question is, after the decision in P v S and the amendments to the SDA in 1999, can it still be said to relate to the experiences of transsexual people in their workplaces.

In 1992 (Whittle 1995), and again in 2000, surveys were carried out amongst transsexual people who were both pre and post 'transition' (from one gender role to the other) and pre and post-surgical reassignment^{xiv}. The 1992 survey had indicated a very sorry state of affairs with transsexual people having a high unemployment rate, losing their jobs or being forced to leave them, or taking lower paid positions consequent upon them commencing living in their new

gender role. The 2000 survey intended to evaluate what effect there had been on the employment circumstances of transsexual people, whether the decision in P v S had made any impact, and in particular whether the 1999 Regulations had made any significant difference to the working lives of transsexual people. The data, as will be seen, indicates some improvement but the workplace is still a poor social environment for transsexual people.

1992 Survey Results on Aspects of Employment of Transsexual People.

The 1992 survey indicated that 35% of the respondent transsexual people now living in their new gender role were unemployed. This was an astonishing figure, even in view of the then high rates of unemployment, and supported the view that even though transsexuals may be happy in their new role^{xv}, they are likely to face severe financial hardships^{xvi} and social isolation.

The 1992 survey also asked respondents to classify their job, both before and after transition, and it assessed their change in employment status and earning capacity due to gender role change. A large number of the 122 respondents who completed this question had been in professional jobs before undergoing reassignment, 63 (51.6%) were in professional and managerial roles, whereas only 7 (5.7%) were in unskilled work. Of the 53 who were unemployed at the time, 40 were male to female (mtf) transsexual women, of whom 28 (70%) were pre-operative; 13 were female to male (ftm) transsexual men, of which 9 (69%) were pre-operative. Looking at the numbers who became unemployed, all groups had suffered a similar level of job loss, even those in very high earning posts, whom one might expect would have the abilities to safeguard their positions. Another feature of the 'downward' trend in the post-transition status of the respondents was that many who had been in high profile jobs, took jobs below their abilities in order to stay in work, and undoubtedly received less money.

Legislation and case law at the time of the survey afforded little protection in work from the vagaries of employers and other employees alike. Worldwide, many transsexual people still suffer, both financially and socially, because of the inadequate protection the law affords them. The survey supported the notion that though it may be psychologically beneficial for the transsexual person to change gender role, it could be disastrous in terms of personal finances and career prospects. This must be, partly, because the law on employment as it relates to transsexual people was at that time, and in many parts of the world is still, a somewhat nebulous area, which provides very uncertain protection to them in their jobs.

2000 Survey Results on Aspects of Employment of Transsexual People

1. Demographics

The 2000 survey had 208 respondents of which 71.5% were mtf transsexual women, and 28.5% were ftm transsexual men. This is a ratio of 2.5 : 1, which is a considerably higher ratio of ftm transsexual men than in a recent survey as part of a needs assessment in Scotland, where the figures are 3.8: 1 (Wilson et al, 1999). This difference may well be due to our survey being distributed amongst the self-help support groups of which the FTM Network is particularly strong because it is free to its members rather than being a fee based organisation.

Of the 208 respondents, all but 7 had transitioned to living full time in their appropriate gender role and 31% of these had done so since the decision at the European Court of Justice in the case of P v S and Cornwall County Council (Table 1).

Table 1: Date of transition	Numbers	%	Average number per year
after Jan 1999	40	19.4 %	
1997-1998	45	21.8 %	22.5
1992 - 1996	65	31.6 %	11
1987-1991	26	12.6 %	8.5
1977- 1986	12	5.8 %	1
before 1977	11	5.3 %	

Table 1 further indicates that there has been an exponential growth in the numbers of people undergoing transition. This corresponds with the rising number of cases being referred to the Gender Identity Clinic at Charing Cross Hospital and applying for membership of The Gender Trust and the FTM Network, two national support organisations especially for trans people. Many factors might affect this, e.g. far more people may be seeking treatment, or the numbers being accepted for treatment may have risen due to less rigid clinical criteria. However, what is clear is that if there are problems for transsexual people in any system, whether it is owing to clinical, social, administrative or employment practices, then those problems are likely to become exacerbated as numbers continue to rise.

Similar figures were obtained as the 1992 survey in that at the time of their transition over 100 of the respondents worked in senior managerial positions (64% of valid responses). This raises a question: is it that, predominately, the bright, articulate and able transsexual people undergo gender role transition, rather than those less well equipped?

The answer to this is unknown, but it may well be the case that being bright, articulate and able is an essential requirement to surviving the social stigma that still surrounds transsexualism and gives the best chance of being able to continue earning a living. It might be that only these people will fill in a survey form, or that only these people join support groups, which were the main source of the survey group. Both are potentially valid explanations. However, it will be seen that, as the results of the survey unfold, despite being a 'senior position' group of people, the levels of discrimination suffered, or felt, are still very high. If these people are discriminated against, then it bodes very badly for those transsexual people who are further down the pecking order in the workplace.

Further analysis by job type indicates an 'employment' move has taken place amongst respondents. At the time of transition, just 45 (28%) of those employed worked in the public sector, which includes the civil service, local authority, education, health and social services work. This rose to 67 (42%) for current employment. The reason for this is unknown but we might speculate that it may be due to the difference in private and public sector equal opportunity policies and practices. There is a long history of the public sector being at the forefront of

improving equal opportunity policies in a variety of areas, including issues of ethnicity and race, disability and women's work. The involvement of a strong trade union movement in the public sector has meant the introduction, even before relevant legislation, of improved working practices. As such it may well be that the public sector provides a far better and more welcoming working environment to transsexual people, with far less emphasis being placed on 'looks' or prior medical history. Furthermore, the public sector is increasingly a struggling sector when seeking to recruit skilled and highly motivated workers, and so transsexual people are more likely to find a job there, as their skills will supersede other factors such as their gender reassignment history.

As can be seen from Tables 2 and 3, the majority (79%) of the respondents were working in some capacity at the time of their transition, and 72.5% were still working at the time of the survey.

Full time	138	66.7 %
part time	14	6.8 %
self employed	11	5.3 %
unemployed	19	9.2 %
sick/ disabled	8	3.9 %
retired	5	2.4 %
not seeking work	6	2.9 %

Full time	121	58.5 %
part time	13	6.3 %
self employed	16	7.7 %
unemployed	18	8.7 %
sick/ disabled	16	7.7 %
retired	13	6.3 %
not seeking work	3	1.4 %

Compared to the 1992 survey, unemployment rates, post transition, had decreased from 35% to apparently 8.7%, a figure much closer to the national average. However there is a significant rise in the numbers who are now claiming sickness or disability benefits, and those who have retired, all of which may be due to pressures put on them by the transition process in the workplace. Similarly there is a rise in the number who are now self-employed.

The great majority of respondents did **not** feel that, aside from any difficulties created for them by other people at work, their transition had, at the time (85%) or currently (87%), made them less able to do their jobs. For those who felt less able to do their jobs, the most frequently cited reasons were: less confidence, less strength and the need for time off for gender confirmation treatment. Hardly anyone felt that the effects of gender confirming medication were a contributory factor.

2. Workplace Issues

a - Job Retention

Compared to the 1992 survey, unemployment rates were greatly reduced. In 1992, 35% were unemployed. By 2000, this figure had reduced to 9%. However, including those who were economically inactive due to claiming sickness or disability benefits increases the total not working to 17%. I refer to sickness/disability as, for many transsexual people, the social stigma they face leads to their general practitioners' collaboration in supporting this route rather than risk their mental health by insisting upon them working in very stressful situations, or the regular 'signing on' that is required of the unemployed when insensitive job centre staff may publicly expose their transsexual status. The reduction in unemployment may be partly due to the overall reduction in unemployment rates, but at the same time, there has been a large increase of the overall numbers in the general population claiming long-term sickness benefits. However, in February 2002 national unemployment rates were 5.1% (ONS, 2002: 3), which is considerably less than that experienced by transsexual people.

A further question was how many respondents, still in employment, were now working for the same employer they had at the time of transition. 79 respondents (51% of 152 valid responses) reported a change in employer. As can be seen from Table 4, 49 of the 79 (62%) in other words, **2 in 3**, had changed jobs because their employer forced them to leave or the conditions were such that they had had to leave.

left voluntarily	23	29 %
left due to transition, unrelated to circumstances at work	7	9 %
employer forced leave after transition	26	33 %
left because of conditions due to transition	23	29 %

The figure of only 1 in 3 people changing their job with the real freedom of choice as to whether to go or stay is a terrible indictment of the problems faced by transsexual people in the workplace. However, in considering whether there had been the expected significant improvements following the 1996 decision in P v S at the ECJ and the enactment of the 1999 Regulations, the results are still unacceptable. Analysis by date of transition shows that:

- *Pre P v S*: 37 out of 99 respondents (37 %) claim that they were forced to leave their employment due to their employer or the conditions they face.
- *Post P v S / Pre 1999 Regulations*: 7 out of 21 respondents (33 %) claim they were forced to leave.
- *Post 1999 Regulations*: 5 out of 32 respondents (16 %) claim they were forced to leave.

The drop from 37 % to 16 % is significant, but it is still the case that more than **1 in 6** transsexual people have no real choice in whether they stay or leave their jobs, despite there being legislation supposedly affording them full protection from discrimination. The figures showed that the experience of mtf transsexual women and ftm transsexual men was equally bad, and so any question of whether people are more prejudiced against ‘men in dresses’ rather than visa-versa is not relevant. Most ftm transsexual men will profess to having ‘bent’ any dress code throughout their working life choosing to wear jeans and baggy shirts whenever possible, or the smart equivalent. It appears simply to be that as soon as a person states that they are undergoing gender reassignment their transsexual status is the sole source of prejudice. As transsexualism is recognised as a medical condition^{xvii} one must ask would co-workers and employers behave in a similar way to any other worker with a diagnosed medical condition.

b - Financial Effects

In light of the results of the 1992 survey that showed a ‘downward trend’ in salary levels after transition, the question was asked, “are you now having to do lower paid work as a result of your changed gender role?” 17 % of respondents indicated that that was the case. This is particularly likely to affect the financial security of those who have to fund parts of their gender reassignment treatment, which is becoming increasingly common as Health Authorities create more and more hurdles in order to ‘ration’ gender reassignment, as increasing numbers of applicants come forward.

Table 6: Are you now doing lower paid work?		
No	121	83 %
Yes	24	17 %

c - The Trans Person’s ‘Management’ of their Transition in the Workplace and their Employer’s ‘Management’ of the issues.

The retention of a job and good relationships with co-workers are not just an employer’s responsibility, but also lie at the hand of the employee. In the survey, respondents were asked to whom they reported their intention to transition, and what notice they gave to their employers of their intention.

87% initially reported their intentions to an immediate boss (44%), senior manager (26%) or a senior member of personnel management (25%) {the figures come to more than 87% as some reported to a combination of these}, of whom 99% did it on a person to person basis (and in some cases in writing as well).

In 81% of all relevant cases (n=95), employers then did the right thing, reporting the transition to the worker's colleagues either supportively or objectively, and in 15% of cases both supportively and objectively. However, this leaves 1 in 5 employers reporting the employee’s intention to come to work in the new gender role in a negative way to their co-workers. This could not bode well for the future of the trans person's place in that employment. Nonetheless, this is one area where we see a significant improvement since the decision in P v S in that only 6% of those transitioning after 1996 reported that their employers informed their colleagues in a negative manner.

d - Use of Single Sex Facilities

The 'bathroom' question is one that immediately raises its ugly head when the question arises of individuals changing gender roles in the workplace. Single sex facilities are provided in workplaces for no legal reason, it would be legal to have unisex bathrooms, just as we have them in our own homes or as we facilitate for people with disabilities. For whatever reason; issues of privacy, safety, and difference in cleanliness standards, single sex bathrooms are here to stay on the basis of what is 'natural'. However, the question of what is 'natural' falls apart as soon as transsexual people are involved.

The survey asked respondents whether they had been allowed to use the toilet of the appropriate gender group when they initially transitioned in the workplace, and whether they were now able to do so. Only **50%** (n=76) had been allowed use of gender appropriate toilets at the time of their transition, and only 76% (n=102) were now able to use them. This means that 1 in 2 transsexual people are expected to commence their compulsory 'real life experience' dressed in their new gender role, but then to go into their former toilet facilities or to use the 'disabled' toilet. It also means that 1 in 4 individuals who had been transitioned for some time were still expected to not use the gender appropriate toilet. This is a terrible finding. When we think of the humiliation faced by such individuals, it is no surprise that we must come to the conclusion that the law in this area is very problematic. Even if we acknowledge that single-sex toilets are for ensuring privacy, it might well be argued that the person who would feel most vulnerable in such space is not other employees but the transsexual person themselves. For example, in a recent consultation with Marks and Spencer's over the single sex changing rooms and their use by a pre-operative transsexual woman, the question of the bodily integrity and privacy of other women arose. The current facilities did not afford privacy for any woman who used a stoma bag, or who had undergone any major surgery such as a mastectomy. A simple solution was devised; within all changing rooms, several curtained areas would be provided which all staff could use. Similarly at a post-office sorting office, the provision of working locks on toilets made everyone feel much more comfortable, the cost came to less than £20.

The question of toilets, in particular, as opposed to other single sex facilities is not touched upon in the SDA or the amending 1999 regulations. It could be concluded that all the law requires is equally nasty or plush facilities, without discrimination, for each gender group if separate facilities are provided. And although the requirement is that there must be no discrimination on the grounds of transition, it does not indicate whether or not that means pro-active acceptance in the new gender role^{xviii}. It is obvious from the results that in fact only a minority of employers interpret the law as requiring this.

f - Harassment in Workplace

Harassment in the workplace can take many forms, from the appalling treatment of the transsexual worker in Chessington World of Adventures v Reed^{xix} to minor events such as failure to fully integrate the worker. However, following Chessington World of Adventures v Reed harassment was held to be discrimination under the SDA. Respondents were asked whether at the time of their transition, their employer informed others that they would not tolerate discrimination related to gender reassignment. Only 33% (n=51) said their employers had taken this stance. The consequences of this failure can be clearly seen in the results relating to the levels of harassment experienced by transsexual workers.

At the time of transition, **38%** (n=58) experienced harassment, over **1 in 10** (13%) faced it on a daily basis and after the period of transition, even after, in many cases, a move of job, 25% still faced harassment. Far fewer were victims of frequent harassment with only 8% experiencing it once a month or more. However, only 34% of current employers take an open anti-harassment stance. Harassment was not just by fellow employees with 28 of 152 respondents experiencing it from customers, clients or suppliers, i.e. 18% of the transsexual workforce experience harassment from non-company people at the time of their transition. This reduced in frequency after the period of transition, at which time only 17 of 134 (12.5%) were harassed, usually less than once a month.

The harassment included a significant degree of abuse, both verbal and/or physical. At the time of transition, **6%** had suffered physical abuse; in other words, they were victims of criminal acts. After the period of transition, this again reduced, with no respondents reporting being victims of physical abuse at the time of the survey, but the level of verbal abuse was still at 23%. Of course, this may not be due to a change in employer attitudes, but rather that individuals have moved into public sector jobs. We can only conclude that employers are falling down on diversity and anti-harassment training within the workplace and in fact the results go on to show that if they deal with harassment at all, they deal with it slowly and ineffectively. Of the 58 who faced harassment by colleagues and/or managers, at the time of their transition, only 13 felt that it was dealt with quickly and effectively, 6 felt it was dealt with effectively but slowly, and a further 6 felt it was dealt with but slowly and ineffectively. This leaves 33 cases (57%) where the employer apparently did nothing.

Of the 33 who were still being harassed at the time of the survey, 10 felt that it was dealt with quickly and effectively, 6 felt it was dealt with effectively but slowly, and a further 2 felt it was dealt with but slowly and ineffectively. This leaves 15 cases (45%) where it was not dealt with at all.

Since the decision in P v S one would expect less harassment of people commencing transition. For the 70 respondents who had transitioned from 1997, this appears to be the case. Only 4 indicated they had experienced daily harassment at the time of their transition and, in total, only 18 (25%) had experienced any harassment at the time of their transition. Of this group, only 13 (18%) continued to experience harassment at the time of the survey with only 1 experiencing it daily and 7 experiencing it less than once a month. For those who had transitioned pre P v S, 50 % had experienced harassment, 40 % on a daily basis.

Actual harassment is not acceptable at all, and in many cases, it may well not just be a workplace offence but also be a criminal offence. Harassment is pernicious and can become part of the workplace culture and ethos if not tackled quickly and effectively. Many employers are clearly not addressing their potential vicarious liabilities in this area. At the time of the survey, 24 % of trans employees were still being harassed. If our society were aware that 24 % of any workforce is regularly experiencing unlawful harassment it would undoubtedly act to combat it.

g - Other Discrimination

The survey also showed clear discrimination in other areas; promotional discrimination was experienced by 1 in 10 respondents, remunerational discrimination by 1 in 12, other benefits

discrimination by 1 in 30, and 1 in 8 experienced discrimination in other matters. Only 51% (n=78) said they had experienced no discrimination at the time of their transition, and only 64% (n=87) said they had experienced no discrimination after the time of transition.

Discrimination did not just end at the current workplace. 111 of the 200 respondents had applied for work since the time of transition. Of those 111, 18% had applied for jobs over 50 times, and 37% over 10 times. Overall, on about half of the occasions that jobs were applied for, the interviewer had been told before or at the time of the transsexual person's status. Half of the respondents said that they felt they had been discriminated against in recruitment, on grounds of their gender role change, ranging from 20% on 1 or 2 occasions to 5% on 50 or more occasions.

Since 1997, the picture hardly improves. Of 35 who had transitioned after 1997 and who applied for jobs, 49% felt they had been discriminated against in recruitment. It is still clearly the case that obtaining a 'fair' hearing in recruitment is difficult for transsexual people, and the closer they are to the time of their transition, when they are more likely to be visibly trans, the more likely they are to suffer adverse discrimination.

Tackling Gender Identity based discrimination

Finally respondents were asked about their employer's policies in relation to gender identity based discrimination. At the time of transition only 22% (n=34) of employers included 'gender' within their equal opportunity policies. Respondents were asked whether their current employer included gender, of which 44% (n=59) did. This shows a great improvement, but it must be borne in mind that there had been a significant shift of transsexual people to public sector employment where such policies are far more likely to be in place.

As regards training which includes transsexual/transgender issues, only 20% of current employers provide an inclusive rolling training programme, though 23% did provide some relevant training at the time of an individual's transition to their new gender role. Overall this means that less than 1 in 4 of the workmates of transsexual people receive training whereby it is explicitly explained that any discrimination based upon a person's transsexualism is not permitted in their workplace.

Conclusions

This is an initial analysis of the survey results, and much more could be done to glean further information. Nonetheless, it is clear from the results to date that harassment and other forms of discrimination in the workplace, from recruitment to promotion, is endemic when it comes to transsexual people. Some of the discrimination, especially the levels of harassment suffered at the hands of employers or employees is shocking. The ongoing failure of employers to tackle the problem, in the light of their legal obligations, means that more and more of them are likely to face the cost and ignominy of frequently successful legal action against them as transsexual people become more aware of their rights and lawyers become better educated on the law in this area. Is it really the case that transsexual people are such a dreadful addition to the workplace that these costs far outweigh the costs of ensuring fair, anti-discriminatory practices are pursued? We must not allow transsexual people are going to continue to experience social stigmatisation through non-acceptance as regular members of our workforces. Unless their cases are made

visible, they will always be able to be viewed as the ‘outsider’, a ‘freak’, ‘undesirable’ – just as black, Asian and disabled people were in the past.

Discrimination in the field of employment is probably the issue of greatest concern to trans people. A job, or lack of one, is of primary concern to most of us. Without a job our place and status in the community in which we live is tenuous. We are known by and through our job, the first thing we ask on meeting a new person is ‘... and what do you do?’. We gain access to social contacts through the workplace; the financial rewards of a job allow us to enjoy those social contacts to the full and afford the goods and services, which in their own turn provide more jobs for others. By having paid work, we are fully able to participate in our society.

A job is even more essential for the transsexual person because, for those seeking surgical reassignment, either a job or full-time college place, is still one of the requirements of the real-life experience as promoted through the Standards of Care for Gender Identity Disorders (HBIGDA 2001). It also provides the material resources that allow access to gender confirming medical treatments that are difficult or even impossible to fund from state run or private health insurance schemes^{xx}. Finally, the workplace provides a place in which transsexual people retain social contacts; social stigma is such that many transsexual people are cut off from friends, family and neighbours from the moment that they commence transition. The social contacts made in work may at first be problematic, but Christmas comes and with it the ‘ladies luncheon’. It is one thing to not to be happy working alongside a transsexual women, but it would be a cruelty beyond the bounds of most office politics not to invite her to the lunch. Such small events can smash huge walls, and before long she is accepted as ‘one of the girls’. However, for many transsexual people a job is often still an illusory prospect.

Legal work on transsexual people has tended to concentrate on ‘quality of life’ issues such as the transsexual’s right to birth certificate change, their right to marry and the medico-legal issues of treatment and surgery, but it has rarely concerned itself with employment rights or employment protection for this minority group^{xxi}. Yet employment law is also concerned with ‘quality of life’ questions. To many it seems senseless to require a transsexual person to obtain and keep work prior to surgical procedures, and for physicians then to follow through such procedures on the basis that life quality is being improved, unless they concurrently recognise that this outcome cannot solely be provided by the slice of a surgeon’s knife, nor a piece of paper acknowledging a name and status change. All such efforts become pointless if the transsexual person can then not obtain or maintain employment.

Statutory law alone cannot change attitudes as was seen with the Race Relations Act 1974, the Sex Discrimination Act 1975 and as will certainly be seen with the Disability Discrimination Act 2000. However, these two Acts do provide an educational impetus, with public sector employers in particular leading the way in setting in practice change and developing new workplace practices. These in turn lead to an increased visibility for the ‘discriminated’ group, and consequently they ‘become acceptable’ within society at large. Some private sector employers, particularly larger ones, have adopted new policies and practices. They do this for 2 reasons; firstly because they wish to be seen as leading fair employers for the purposes of merit based recruitment and retention, and secondly in order to increase or extend their customer / client base so improving profitability.

The results from this survey indicate an overall very poor response from employers to the matter of an individual's transition to a new gender role in the workplace. Many of the findings are shocking particularly in the areas of toilet use, harassment, and consequent unemployment rates. There has been some improvement since the decision in P v S and the regulations amending the SDA, but these are by no means sufficient. The reality is that transsexual people are not given an equal footing with other employees, and many of them face discrimination and harassment on a regular basis. The move into public sector employment gives a clear indication that those employers who have clear policies in this area are much more able to pursue the spirit rather than the mere letter of the law. Private sector employers could learn a lot from the public sector, however it must be recognised that policies in themselves are not enough, they must be translated into practice whereby:

- harassment is clearly outlawed and appropriately punished
- equal opportunity and anti-harassment policies are developed which state clearly that gender identity is a protected category
- pro-active means are used to facilitate transition in the workplace, including the use of gender appropriate facilities, and re-deployment if preferred
- pro-active acknowledgement of the new gender role is provided
- gender reassignment is viewed as a medical matter like all other medical matters
- gender role changes are positively experienced by other employees as well as the transsexual person by:
 - supportive and objective reporting from all levels of management
 - facilitating medical needs, without prejudice
 - encouragement to the transsexual person to succeed, including obtaining promotion
 - appropriate diversity training for all levels of staff

Employers need to recognise that gender reassignment is irrelevant to an individual's ability to perform a job. They might even accept that a worker who has undergone a successful and supported gender role change may well be a far better worker than before transition. Only when they do so, will transsexual people have the opportunity to fully enjoy the fruits of the long and hard medical procedures they have undertaken. It will also ensure that employers are not walking a tightrope between the unwarranted (and often apparently condoned) prejudices of other employees on the one hand and the law on the other, which states quite clearly that transsexual people must not be discriminated against. It has been shown by the experiences of many other employers from the very large, such as Barclays Bank and Marks and Spencer, to the very small, such as a 5-person canoe making operation in the far north of Scotland, to be possible to welcome and integrate transsexual people fully in the workplace. Further, it is cost-effective, avoiding not just potential legal fees but also retraining and hiring costs, as well as creating a happy and accepting workforce.

END NOTES

1. Christine GOODWIN against the United Kingdom, (1995) European Commission on Human Rights, Application No. 28957/95
2. P v S and Cornwall County Council ECJ [1996] IRLR 347
3. ChessingtonWorld of Adventures Ltd v Reed, EAT [1997] IRLR 556
4. op cit at note 2
5. White v British Sugar Corporation [1977] IRLR 121
6. Advocate-General's Opinion in P v S and Cornwall County Council ECJ [1996] IRLR 347, para 20
7. ibid, para 14
8. Marshall v Southampton & SW Hants AHA Case 152/84 {1986} IRLR 140
9. Marleasing SA v La Comercial Internacional de Alimentacion SA, Case C-106/89 [1990] ECR I-4135, para 7
10. op cit at note 3
11. Webb v EMO Air Cargo (UK) Ltd (No 2) [1995] IRLR 645 HL
12. The Equal Opportunities Commission has handled several such cases, for example; 'AM' had been an amateur musician who played at Irish music sessions in the pubs of Manchester. In her mid 50s she commenced gender reassignment treatment. However, upon starting to live and dress in her new gender role, the managers of 2 pubs where she had played music for almost 25 years barred her from using the pubs. All of the cases to date have been settled out of court.
13. Marshall v Dame Barbara Mills and the Crown Prosecution Service (1998) IT
14. Surgical contributions to gender reassignment will often require several procedures, generally a penectomy and vaginoplasty for the male to female transsexual person, a bilateral mastectomy and hysterectomy for the female to male transsexual person. It is rare in the UK for female to male transsexual people to undergo phalloplasty to create a phallus because of the poor results available from current procedures. The survey undertaken required self-definition, as such respondents were enabled to classify themselves as pre- or post-operative transsexual people, with no specific surgical requirements being made.
15. Of the 157 potential respondents 146 provided valid responses to the questions concerning their personal sense of well being. Of these 143 strongly agreed or agreed with the statement "I am happy with my decision to seek a sex change". Only 1 respondent did not agree that they were happier since changing roles.
16. 44.5% of the respondents felt that they had suffered financially since changing over, but 54.8% felt that they had not either suffered or had gained financially.
17. A, D & G v North West Lancashire AHA (1999) CA
18. The question of pro-active acceptance is being raised in the Court of Appeal later this year in the case of A v Chief Constable of West Yorkshire Police Case No. 1802020/98 (1999) IT
19. op cit at note 3
20. Although Health Authorities and Primary Care Trusts are legally required to fund gender confirmation treatment, they frequently delay funding the necessary medical procedures by placing them in a low priority category. Private health insurers do not fund any of this treatment.
21. An exception is Pannick,D., (1983) Homosexuals, Transsexuals and the Sex Discrimination Act, Public Law: 279.

BIBLIOGRAPHY

- > MacPherson, W., (1999) Report on the Inquiry into the Stephen Lawrence Murder, London: Home Office
- > ONS (April 2002) Labour Statistics, London: ONS
- > Pannick,D., (1983) Homosexuals, Transsexuals and the Sex Discrimination Act, Public Law: 279
- > Whittle, S., (1995) Transsexuals and the Law, Ph.D thesis, Manchester Metropolitan University
- > Wilson, P., Sharp, C. and Carr, S., (1999) The Prevalence Of Gender Dysphoria In Scotland: A Primary Care Study, British Journal of General Practice, December, pp 991-992