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Our Ref: IM-FOI-2022-0060
Date: 01 February 2022



FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

I refer to your recent request for information which has been handled in accordance with the Freedom of Information (Scotland) Act 2002.

For ease of reference, your request is replicated below together with the response.

In the article [Rape suspects can choose to self-identify as female](#) published on 17 April 2021 by *The Times*, Detective Superintendent Fil Capaldi is quoted as saying:

The sex/gender identification of individuals who come into contact with the police will be based on how they present or how they self- declare...

He goes on to talk about not requiring evidence or certification as proof of self-declared sex unless pertinent to the investigation. However, no further information is given on how identification is made based on how the individual 'presents'.

Under the Freedom of Information (Scotland) Act 2002, please provide the guidance, training, instructions, orders or other information given to officers for the purpose of identifying the sex of an individual "based on how they present".

The following notes in italics have been taken from Police Scotland's Diversity Booklet. It provides information on Gender Identity for Police Scotland officers. The booklet is dated from August 2013, it is considered outdated and is currently in the process of being updated.

GENDER

There is a common misconception that gender only concerns women's rights and discrimination against women. However, issues affecting men and Transgender people are equally important.

The terms transgender and trans people are both umbrella terms used for a diverse range of people who find their gender identity or gender expression differs from the sex they were assigned at birth, including: transsexual men and women; cross-dressing/transvestite people; intersex people and non-binary gender people.

Gender identity and sexual orientation are two separate aspects of a person's identity and transgender people can be lesbian, gay, bisexual or heterosexual. However, the discrimination and inequalities experienced by people due to their transgender status have some significant overlaps with those experienced by people due to their sexual orientation.

OFFICIAL

Therefore, the main equality organisations working within Scotland to provide good practice and guidance on transgender equality and diversity issues find it effective and useful to form a strategic alliance under the heading of 'LGBT' (Lesbian, Gay, Bisexual and Transgender). For this reason, transgender diversity will be examined under the LGBT section of this guidance.

TERMINOLOGY RELATING TO GENDER IDENTITY

A person's Gender Identity is their internal sense of where they exist in relation to being a man or a woman. A person's Gender Expression is their external gender-related clothing and behaviour (including their interests and mannerisms).

In Scotland, it is currently common to use the terms Transgender People or Trans People as 'umbrella' terms to cover the many diverse ways in which people can find their gender differs from society's assumptions and expectations of the sex they were assigned at birth. The various people who may identify with the term transgender include: transsexual women, transsexual men, intersex people, androgynous or non-binary gender people and cross-dressing people.

A person's Biological Sex includes all aspects of their gender-related biological structure: not only their genitals but also their internal reproductive system, their chromosomes and their secondary sexual characteristics such as breasts, facial and body hair, voice, and body shape. Most people's sex will be clearly and consistently female or male. However, a small but significant number of people have bodies which are not completely male or female. People born with these kinds of physical variations are often referred to as Intersex People and there are many different intersex conditions.

Transsexual People are people who consistently identify as the opposite gender from the gender labelled at birth based on their physical body. Depending on the range of options and information available to them during their life, transsexual people may try to cope in a variety of ways. Many will manage (some while still children, most as young adults and some much later in life) to find a way to transition (undergo gender reassignment) to live fully in the gender that they identify as.

Gender Dysphoria (which is also known as Transsexualism) is a recognised medical condition for which gender reassignment treatment is available on the National Health Service in Scotland. Gender Dysphoria is distress, unhappiness and discomfort experienced by someone about their physical body not fully matching their gender identity (that is, their internal sense of where they exist in relation to being a man or a woman). Transsexual people usually experience intense gender dysphoria which is significantly reduced by transitioning to live as the gender they identify as which may include taking hormones and having surgery to make their physical bodies match their gender identity and gender expression better. Other transgender people may also experience various degrees of Gender Dysphoria, especially when unable to fully express their gender identity.

A Female-to-Male [FTM] Transsexual Man [Trans Man] is someone who was labelled female at birth but has a male gender identity and therefore is currently seeking to transition, or has already transitioned, to live permanently as a man.

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A Male-to-Female [MTF] Transsexual Woman [Trans Woman] is someone who was labelled male at birth but has a female gender identity and therefore is currently seeking to transition, or has already transitioned, to live permanently as a woman.

Transition or Gender Reassignment refers to the medically supervised process that a transsexual person goes through to live as the gender they identify as. The process of diagnosis and treatment can take anything from a matter of months to a period of years. The initial diagnosis is usually followed by hormone therapy, and during this process the individual will start to live and work full-time in their acquired gender and at this point their name and other records will be changed. A person may obtain full legal recognition and rights in their acquired gender without ever undergoing any surgical intervention. Some people may not undergo surgery for a number of reasons, including age, health or other factors (such as high complication rates in genital surgery for female-to-male trans men). Cross-dressing People (sometimes called Transvestite People although this is becoming an out-dated term) are people who dress, either occasionally or regularly, in clothes associated with the opposite gender, as defined by socially accepted norms.

Cross-dressing people are generally happy with their birth gender and do not necessarily want to permanently alter the physical characteristics of their bodies or change their legal gender. They may dress as the opposite gender for emotional satisfaction, or just because they feel more comfortable doing so.

Androgyne People (sometimes called Third-gender People, Bi-gender People, gender queer and Polygender People) are people who find they do not feel comfortable thinking of themselves as simply either men or women. Instead they feel that their gender identity is more complicated to describe. Some may identify their gender as being some form of combination between a man and a woman, or as being neither. Like transsexual people, they can experience Gender Dysphoria (sometimes as intensely as transsexual people do) and may sometimes partially transition socially and may take hormones or have surgery done.

Acquired Gender is the term used in the Gender Recognition Act 2004 to mean the gender role that a person has transitioned to live their life in. Therefore, the acquired gender of a male-to-female Trans Woman is female. The acquired gender of a Female-to-Male Trans Man is male.

TRANSGENDER SPECIFIC CONSIDERATIONS

When interacting with a transgender person, the following guidance should be considered:

- A transgender person may be heterosexual, lesbian, gay or bisexual. Their sexual orientation is determined in relation to their gender identity rather than their physical body. So, for example, a male-to-female transsexual (regardless of whether or not she has undergone any surgery) may identify as a straight woman if attracted to men, as a lesbian woman if attracted to women or as a bisexual woman if attracted to men and women;*
- You are likely to cause distress to transgender people if you make mistakes about the type of transgender identity they have. In particular, a transsexual person undergoing gender reassignment is likely to be upset if incorrectly referred to as a cross-dresser or transvestite person;*

OFFICIAL

- *So long as a person has their genitals covered, it is completely legal for them to wear clothing and accessories of any gender in public. If another person reacts in a homophobic/transphobic manner to a transgender person's appearance then it is not the transgender person's fault as they should not be forced to hide their identity out of fear. Going out in public partially or completely cross-dressed is no offence;*
- *A transgender person is not breaking any laws by using the opposite gender toilet facilities from the gender they were labelled at birth. Usually transgender people will use the toilet which corresponds with their gender presentation at that time. If a transgender person prefers to avoid selecting between the male and female toilets then they can use a unisex disabled toilet. However, a transgender person should not be forced to use a disabled toilet;*
- *Some transgender people may look androgynous or have obvious physical characteristics which mean that their transgender status might be noticeable to others. However, most of the time it is not possible to determine that someone is a transgender person from their appearance while clothed;*
- *You are likely to insult a transgender person and reduce their willingness to answer any questions if you ask them inappropriate questions about their physical body, gender history or transition (gender reassignment) process. Take great care only to ask questions that are essential for the investigation of a crime and phrase any questions as politely as possible;*

If the transgender person is a victim or witness rather than a suspect, then it is inappropriate in virtually all cases to ask them their previous name, what they used to look like or whether they have undergone any surgery. Even when someone is a suspect, it may be inappropriate to ask them such questions;

- *If you are speaking only briefly with someone and you are unsure whether the person would wish to be addressed as he or as she, then it is usually best just to avoid using any gendered terms than to risk insulting them by guessing wrong;*
- *When the interaction is long enough, ask the person their name to try to determine which pronoun to use. If it is not clear whether their name is a male or female name then it is acceptable to politely ask the person how they would like to be addressed;*
- *If you treat the person in accordance with their gender identity, they may be more co-operative.*

Privacy Rights provided by a Gender Recognition Certificate

The Gender Recognition Act 2004 provides transsexual people with full legal recognition of the gender they identify as. Once full gender recognition is granted the person's sex/gender becomes for all purposes their acquired gender. A person can make an application once they have been living as the gender they identify as full time for a period of two years. It is not necessary for an applicant to have undergone any surgery in order to obtain recognition.

This act defines any information relating to a transsexual person's gender recognition application as 'protected information'. It is a criminal offence (with a £5000 fine) for anyone

OFFICIAL

acquiring this protected information in an 'official capacity' to disclose it to a third party without the transsexual person's consent. There are only a very few exceptions, for example if the information is specifically required by the third party for the prevention or investigation of a crime.

The information is deemed to have been acquired in an 'official capacity' if it was acquired by someone in connection with their function:

- as a member of the civil service, a Police constable or the holder of any other public office or in connection with the functions of a local or public authority or of a voluntary organisation, or;*
- as an employer, or prospective employer, of the person to whom the information relates or as a person employed by such an employer or prospective employer, or;*
- in the course of, or otherwise in connection with, the conduct of business or the supply of professional services. SEARCHING TRANSGENDER PEOPLE As transgender people may have biological sex characteristics which differ from the gender they live in, there is potential for distress and embarrassment during searching. Sensible application of the following guidance should minimise the risk and protect all involved:*

If a search is begun without any knowledge that the person being searched is transgender and it only comes to light in the middle of the search then, unless the transgender person requests a different gender of searching Officer to take over the search, the search should simply be completed as usual by the original searching Officer;

- If a person is thought or known to be transgender prior to a search being carried out, then they should be asked what gender they identify as in order to ascertain which Officer should carry out the search;*
- A female-to-male trans man who still has female physical characteristics may identify strongly as a man but may also request to be searched by a female Officer. In such a case, the trans man should still be referred to using male pronouns and treated as a man in all other ways except in terms of the gender of Officer who searches him;*
- If a person is unwilling to make such an election, the Officer should try and determine the predominant gender in which he person lives their life. This is likely to be indicated by the name, title or gender on their main identity documentation such as their driver's license, bank cards, etc. If they appear for example to live predominantly as a woman, they should be treated as such;*
- Once it has been established which gender a transgender person is to be treated as during the search, the Officers conducting the search should be made aware that they are about to search a transgender person. This is the best way to ensure that the dignity of both the Officer and the transgender person is maintained as it reduces the risk of the Officer being surprised if the person has some physical characteristics not usually associated with that gender. The person should be informed of the reason for any such disclosure;*
- It may be necessary to share information about the person's gender identity with other custody care related organisations and other Police staff. Such disclosure should only be*

OFFICIAL

made for the purposes of the prevention of crime in relation to the transgender person which is relevant, legal, proportionate and fair. Refer to the section on the Gender Recognition Act 2004 above;

- *A transgender person should not have to share a cell or detention room with anyone else.*

You may also find the following links to the Police Scotland Care and Welfare of Persons in Custody Standard Operating Procedure which is publically available on the Police Scotland website and the Scottish Government Code of Practice for Stop and Search useful.

<https://www.scotland.police.uk/spa-media/0mfjn3pa/care-and-welfare-of-persons-in-police-custody-sop.pdf> [emplate \(scotland.police.uk\)](#)

<https://www.gov.scot/publications/code-practice-exercise-constables-power-stop-search-person-scotland/>

Should you require any further assistance please contact Information Management quoting the reference number given.

If you are dissatisfied with the way in which Police Scotland has dealt with your request, you are entitled, in the first instance, to request a review of our actions and decisions.

Your request must specify the matter which gives rise to your dissatisfaction and it must be submitted within 40 working days of receiving this response - either by email to foi@scotland.police.uk or by post to Information Management (Disclosure), Police Scotland, Clyde Gateway, 2 French Street, Dalmarnock, G40 4EH.

If you remain dissatisfied following the outcome of that review, you are thereafter entitled to apply to the Office of the Scottish Information Commissioner within six months for a decision. You can apply [online](#), by email to enquiries@itspublicknowledge.info or by post to Office of the Scottish Information Commissioner, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS.

Should you wish to appeal against the Office of the Scottish Information Commissioner's decision, there is an appeal to the Court of Session on a point of law only.

As part of our commitment to demonstrate openness and transparency in respect of the information we hold, an anonymised version of this response will be posted to the Police Scotland Freedom of Information [Disclosure Log](#) in seven days' time.