

Transgender inclusion

Charities are looking to the law for clarity on how to be inclusive and respectful of all their beneficiaries. Single sex charities and those whose beneficiaries, members or service users are young people often have queries about transgender inclusion.

In the first of a series of articles on transgender inclusion and the law, **Mindy Jhittay** explains some of the legal terminology and answers the most frequent questions our clients ask.



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Mindy is a dispute resolution lawyer and advises charities on contentious matters relating to their transgender inclusion policies.

FIND OUT MORE

If you have any queries about transgender inclusion in your charity, whether legal or practical, please contact Mindy Jhittay on m.jhittay@bateswells.co.uk or 020 7551 7853.

Stonewall and Mermaids are specialist charities which provide support for transgender people and practical resources on transgender inclusion.

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What is gender identity?

Gender identity is a person's innate sense of their own gender, whether man/boy, woman/girl or something else. Many of us never stop to think about this because our gender identity matches our biological sex. For example, I am a woman and I am female. This means that I am 'cis-gender'.

For transgender (or 'trans') people, the gender they were assigned at birth does not match their gender identity. For example, a transgender man/boy is biologically female and was therefore assigned 'girl' at birth.

Gender identity is different to gender, a social construct under which people are expected to behave in a masculine or feminine way according to their biological sex.

Who is transgender in law?

Under section 7(1) Equality Act 2010 (the Equality Act), a person has the protected characteristic of 'gender reassignment' if the person:

- is proposing to undergo;
- is undergoing; or
- has undergone

a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

This is a wide definition. It means that there is protection under the Equality Act for a person who is aligning the outward expression of their gender with their gender identity. Medical supervision is not required and they may simply live permanently as the opposite sex, without hormonal or surgical therapy. This is sometimes referred to as 'self-identification'.

Can a transgender woman join a women-only charity?

The starting point is that it is unlawful to discriminate against someone on the basis of their sex (or any other protected

characteristic) – so a charity's services should be open to all. However, the Equality Act includes provisions permitting the restriction of services or membership to individuals who share a protected characteristic, such as sex.

This means that a charity can restrict its membership to women only, and refuse an application from a man who wishes to join. It is not clear whether these provisions can be read widely to include transgender women, who are biologically male. If they are, and a charity does allow a transgender woman to join, it may find it more difficult to reject applications from other biological males. But if the charity interprets the legislation more narrowly, and doesn't allow transgender women to join, it could face claims of discrimination from them.

Can transgender men and non-binary people join a women-only charity?

A transgender man is biologically female. This means that he falls within the single sex exception in the Equality Act and can join even though he is a man. The same applies to a non-binary person who is biologically female.

A non-binary person who is biologically male would not be included, unless they are part way through a process which might result in them identifying as a woman (as per the definition in the Equality Act discussed above).

Are there any other steps that charities can take?

Yes. Under Section 193(a) of the Equality Act, charities are permitted to restrict the provision of benefits to persons who share a protected characteristic if (among other things) the person acts in pursuance of a charitable instrument that governs the charity.

You may wish to review your constitution and consider whether you need to amend it to clarify the extent to which transgender and non-binary people can join or benefit from your charity.