



Response by Trans* Jersey to the States of Jersey Social Security Department white paper on Law to protect against Sex Discrimination

Scope of response

To discuss two of the characteristics being considered by the consultation – sex and gender reassignment – that are of most concern to trans* islanders.

To suggest ways in which the law might be drafted to protect a more diverse, but equally discriminated against, population.

Introduction

The white paper assumes that gender and sex are interchangeable. For most people that may be the case but it is not the case for trans* people. Using a binary model of sex as a protected characteristic by which to assess discrimination presents problems. These are outlined in this response.

There are a number of misconceptions about what it means to be trans* and, unfortunately, the States of Jersey's consultation document falls into some common traps. Why these misconceptions are unhelpful is discussed in this response.

The States of Jersey has looked to the UK Equality Act for guidance on how to shape its anti-discrimination legislation. However, as the recent manifesto presented to the UK government by a number of UK charities that work with the trans* community demonstrates, there are problems with this legislation (and the Gender Recognition Act) that need to be corrected.

Jersey has an opportunity to bring in model legislation that advances the current position of trans* people within British law. Trans* Jersey offers a solution to the problems it sees as arising from the proposals put forward in the white paper in order that Jersey can implement legislation that encompasses the broad spectrum of human gender identity.

Executive summary

Trans* Jersey is asking for the States of Jersey's law to protect against sex discrimination to include two things:

1. The definition of "sex" as a protected characteristic expanded to include persons of a non-binary gender;
2. The removal of any exemption that permits businesses to discriminate on the grounds of gender reassignment. There is no requirement to have any exemptions for transgender individuals, other than those provided for the characteristic of "sex". Trans employees should be subject only to the same exemptions for genuine occupational requirements as natal born men, women and those persons of a non-binary gender.



Terms in use

Androgynous: the gender expression of a person who has both masculine and feminine characteristics.

Binary and non-binary: when referring to gender, binary means categorising human beings as either male or female, man or woman, masculine or feminine. Non-binary means allowing for more than two sexes/genders.

Bigender: a person who tends to flexibly shift between the gender behaviour typically associated with men and women depending on context.

Cis or cisgender: (pronounced siss-gender) a person whose gender conforms to their birth sex, i.e. a male who identifies as a man or a female who identifies as a woman.

Gender dysphoria: the medical term for the feeling that a trans* person has that their biological sex is not aligned with their gender identity.

Genderqueer: (acceptable terminology) anyone with a gender identity that is non-binary, i.e. not man or woman. Genderqueer people may identify as one or more of the following: having an overlap of, or indefinite lines between, gender identity and sexual and romantic orientation; two or more genders (bigender, trigender, pangender); without a gender (nongendered, genderless, agender, neutrois); moving between genders or with a fluctuating gender identity (genderfluid); third gender or other-gendered. It also includes those who do not place a name to their gender.

Passing: the act of successfully being accepted by society as the gender that you wish to present.

Stealth: the condition whereby a trans* individual passes so completely that they elect not to reveal they are trans*.

Trans*: this has replaced trans in recent years. It has been adopted by the trans* community to encompass more groups than just transsexual and transgender individuals. Trans* encompasses anyone who is genderqueer, i.e. androgynous, bigender, genderless, genderfluid and some intersex people. Trans now specifically refers to transgender or transsexual persons only, i.e. those who have undergone a transition.

Transgender: this has almost completely replaced transsexual as the term for someone who is transitioning from one gender to another. This is because of the acknowledgement that there is currently no way to alter a person's chromosomal sex. However, the usage is debated within the trans* community. Transgender should always be used as an adjective and not a noun.

Transition: the process that a transgender person undertakes to move from being accepted as one gender to being accepted as the gender they recognise. It usually includes hormone therapy to make physical changes to the body but may or may not involve surgical procedures.

Transman: a transgender person born female but living as a man. Synonymous with the term FtM (female to male).

Transwoman: a transgender person born male but living as a woman. Synonymous with the term MtF (male to female).

1. Background to sex and gender

- a. It is important to define what is meant by sex and gender. Many people use these terms interchangeably but when dealing with trans* people they have specific meanings that help to understand the condition of being trans*.
- b. Sex is biological (male or female). There is currently no way to change a person's sex. Surgery can change the external look of a person's genitalia but it cannot give them fully-functioning sexual organs or alter their chromosomes. This is why the term sex-change has fallen from usage and transsexual is becoming less popular.
- c. Gender is psychological (man or woman). This is defined by the person and explains the gender they feel themselves to be. A transgender person will often say that they have always felt like a man or a woman, even though their biological sex is not aligned to that gender. This is the definition of being transgender (literally, crossing genders).
- d. Gender expression is an external presentation of sex and/or gender (masculine or feminine). This is defined by society and explains the gender that someone appears to others to be. A person's gender and gender expression may, therefore, not be aligned. Transgender individuals experience this most acutely when they are in the initial stages of transition and are starting to pass as their chosen gender.
- e. Most people will be male-man-masculine/female-woman-feminine. A transgender person is typically female-man-masculine/male-woman-feminine.
- f. The above explanation assumes that sex, gender and gender expression are binary. However, there are many people who do not feel wholly of one sex and gender or present as wholly one gender expression. It is therefore more helpful to think of the three elements that make up a person's gender identity as a spectrum.
- g. Figure 1 (below) uses some famous faces to examine their gender identity. Marilyn Monroe (A) and George W Bush (H) have been selected as polar opposites on the feminine-masculine scale. There is no doubt in the mind of the onlooker that their gender expression, gender and sex are aligned.
- h. Moving in from them on the scale are Sharon Cohen (B) and Ian Harvie (G). Sharon is a glamorous, curvaceous brunette who won Eurovision in 1998. There is no doubt that she is a very feminine woman, but she was born male. Ian is a bearded, stand-up comedian who grew up in a rural mountain town in Maine. He is a masculine man, but he was born female. They are both transgender.
- i. Next on the scale are singers George O'Dowd (C) and kd Lang (F). When both singers first appeared on the music scene the fact that their gender expression was at odds with their gender and sex caused confusion for the public at large. However, just because society is confused, it doesn't mean that they are! They may be genderqueer (you would have to ask them to be sure) but they are not transgender. As far as the public is aware, they both identify as homosexual, which, by definition, means George is a man who loves men and k.d. is a woman who loves women. They both happen to be homosexual but, as someone like the heterosexual Grayson Perry proves, this is not necessarily the case when you queer gender expression and gender/sex.

- j. Finally, converging in the centre are Sue Perkins (D) and David Beckham (E). Sitting centrally on the scale indicates a level of androgyny in a person's gender expression. There is no doubt about Sue and David's gender or sex, unlike that of George and kd. However, David's light voice, attention to his grooming, and soft features are, arguably, more feminine characteristics. Sue's career, style of dress, and forthright views are, arguably, more masculine characteristics. It's a grey area, but that's why gender identity should be seen as a spectrum and not as a binary choice.

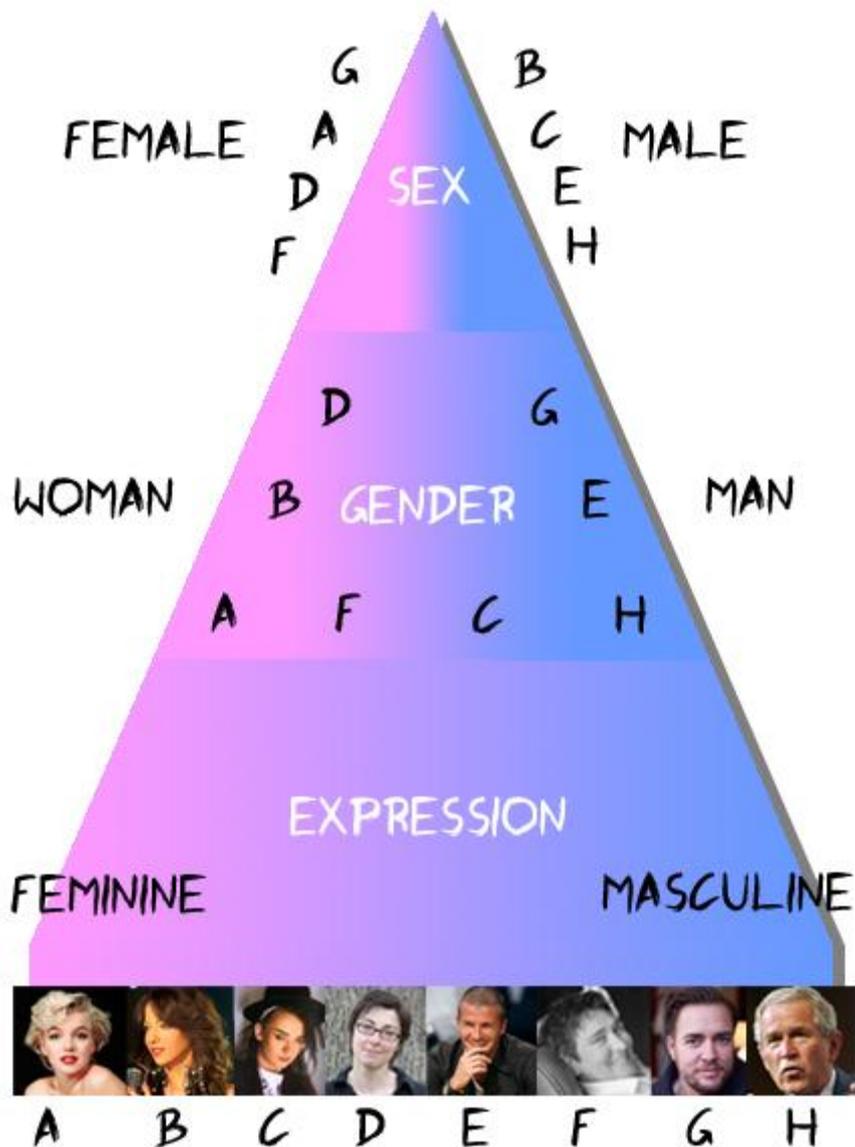


Figure 1. The Gender Pyramid

2. Background to non-binary genders

*“The Minster proposes that **sex** should be included as a protected characteristic under the Discrimination Law. This would make it unlawful to discriminate against either a **man** or a **woman** in relation to recruitment, promotion, treatment at work or any of the other circumstances in which discrimination is prohibited in relation to race.”*

- a. As discussed, this statement assumes that gender and sex are interchangeable. For most people that may be the case but it is not the case for trans* people.
- b. Using a binary definition of sex as the characteristic by which to assess discrimination excludes a significant population that cannot define their gender as man or woman. It is estimated that about 2-5% of any given population suffers from some degree of gender dysphoria. This equates to a population in Jersey of about 2,000 to 5,000 people who might consider themselves genderqueer.
- c. This presents a problem:
 - i. If a trans* person is bringing a discrimination case using sex as the protected characteristic is the case to be judged on their sex or their gender? The above quotation from the white paper mixes the two facets of a person.
 - ii. Where the individual concerned is someone who is intersex and has a disorder of sexual development (DSD), you may not be able to define their sex in binary terms.

Intersex explained

- d. Intersex conditions or DSDs are prenatal, i.e. they happen in the womb as the foetus develops. They are biological conditions that are often hard to detect at birth and can result in a person living for some years as the wrong gender. Being intersex is not the same as being transgender, although some intersex people may be trans* or decide to transition in the same way that a non-intersex person might.
- e. DSDs can be categorised as either:
 - i. Chromosomal – over 70 conditions including Klinefelter syndrome, Turner syndrome, XYY syndrome, triple X syndrome.
 - ii. Hormonal – includes congenital adrenal hyperplasia (CAH) and androgen-insensitivity syndrome (AIS). Congenital adrenal hyperplasia (CAH) affects 1 in 15,000 infants born. The genitalia shows some male and some female traits but the internal organs are consistent with the chromosomal sex. Androgen-insensitivity syndrome (AIS) affects 1 in 20,000 infants born. The genitalia is female and the internal organs are male.
- f. Hermaphroditism, where a person has fully formed ovaries and fully formed testes, is one of many DSDs and is very rare.
- g. Surgery can be carried out to correct the anomaly, if and when the condition is detected and should the patient desire it. After several high-profile cases of surgical intervention at birth making the wrong choice for the person concerned, surgery is no longer carried out on babies.

- h. If the States of Jersey wish to continue to use sex/gender as a basis for discrimination, they should reword the above to: *“make it unlawful to discriminate against either a man or a woman or a person whose sex or gender is self-reported as non-binary in relation to recruitment, promotion, treatment at work or any of the other circumstances in which discrimination is prohibited in relation to race.”*

Defining non-binary gender

- i. The reaction of those unwilling to admit that there are more than two genders is likely to include a concern that there is nothing to stop anyone identifying as a non-binary gender. Trans* Jersey would, therefore, suggest that an agreed upon methodology by which gender can be assessed for legal purposes should be included as a guide to the legislation, but not enshrined in the law. Due to the fact that gender is a spectrum, there will be a number of variants that will need to be considered. However, this is no different from race of which there are many variants with which the law copes.
- j. The methodology that Trans* Jersey suggests is to use the gender grid shown in figure 2 to provide Jersey’s government, lawmakers, lawyers, employers, employees, businesses, etc with a way of defining an individual’s gender identity.

		Gender			Gender Expression		
		Man	Trans*	Woman	Masculine	Andro-gynous	Feminine
Sex	Male	MM	MT	MF	M	A	F
	Intersex	IM	IT	IF	M	A	F
	Female	FM	FT	FF	M	A	F
Gender Expression	Masculine	M	M	M			
	Andro-gynous	A	A	A			
	Feminine	F	F	F			

Figure 2. The Gender Grid

- k. Around 90% of the population will define their gender identity using the grid as MMM or FFF (M (sex), M (gender) and M (gender expression) or F (sex), F (gender) and F (gender expression)), but for the other 10% this provides a means by which they can explain in a court of law why and how their gender is non-binary.
- l. A transwoman might categorise her gender as MFF, MTF, MFA, MTA or FFF (if in possession of a gender recognition certificate). A transman might categorise his gender as FMM, FTM, FMA, FTA or MMM (if in possession of a gender recognition certificate).
- m. The concern with opening up the legislation like this will be that *anyone can claim they have a non-binary gender identity*. However, this is not the case. Don't forget that only one element, gender, is decided by the individual. Sex is a matter of public record (birth certificate) and gender expression is decided by society based on an individual's presentation.
- n. Someone claiming to be trans* in a discrimination case would need to demonstrate that they present regularly either as the opposite gender to their birth sex or as androgynous. Their presentation would be a matter for independent witnesses to confirm. This would not require gender care specialists as anyone within a society can provide an opinion on whether someone passes, under the rules of that society, as a man, woman or androgynous.

X markers

- o. One of the aims of trans* organisations working in the UK is to allow the "X" marker to be used on passports and birth certificates to denote a person of non-binary gender. Similar legislation has been passed in Argentina, India, Pakistan, Nepal, Germany, New Zealand and Australia. The "X" marker is included in the International Civil Aviation Organisation (ICAO) standard for passports, to which Britain adheres. However, British policy when issuing passports is to disallow "X" as an option. Applicants must select "M" or "F".
- p. The calls for Britain to amend its policy regarding "X" markers are growing and are likely to succeed as other countries amend their legislation. When Britain includes the "X" marker, Jersey will more than likely follow suit. By including non-binary gender now in its sex discrimination legislation, Jersey will be ahead of the UK in its inclusion of all sexes/genders and will not have to amend the legislation when the "X" marker is brought in.
- q. Furthermore, as a tourist destination, Jersey needs to be aware of what is happening in the outside world. As other countries change their laws to include the "X" marker and those citizens visit Jersey, Jersey needs to have legislation in place that protects tourists with a non-binary gender from discrimination by hoteliers, shops, bars and restaurants.

3. Background to gender reassignment

- a. Estimates of the incidence of transgenderism vary but the NHS has estimated that 1 in 4,000 people in the UK is or has been receiving treatment for gender dysphoria. This figure will rise if you include people who come under the trans*umbrella but have not sought medical help to transition. This means that Jersey could have a trans* population of 25 people or more, so we recognise that it is not a large number of people affected by this legislation.
- b. At present, the States of Jersey has looked to the UK Equality Act for guidance on how to shape its anti-discrimination legislation. However, as the recent manifesto presented to the UK government by a number of UK charities that work with the trans* community demonstrates, there are problems with this legislation (and the Gender Recognition Act) that need to be corrected. Jersey therefore has an opportunity to bring in model legislation that advances the current position of trans* people within law.

Misconceptions

- c. There are a number of misconceptions about what it means to be trans*. These misconceptions are placed on the trans* community by cisgender individuals who, although do not intend harm by their actions, struggle to understand the condition of being trans*.
- d. Trans* rights are at a similar stage in their development as black rights were in the 1960s. Today, it is unthinkable that a white person would speak for the black community or presume to understand what being black means to a person. However, cisgender individuals currently assume these prerogatives in relation to trans* individuals. There is much more education to be done but the good news is that it is happening and, due to the universal acceptance of human rights for all groups, is likely to happen much faster than black rights or gay rights happened.
- e. Unfortunately, the States of Jersey's consultation document falls into some common traps.

*"The Equality Act provides that a person has the protected characteristic of gender reassignment where he or she has proposed, started or completed a process to **change his or her sex**"*

- f. As already discussed, this is not possible. Medical science cannot yet provide a male with a functioning uterus or a female with functioning testes. Instead of sex, the word gender should be used.
- g. However, using the word *change* and gender can be offensive to some transgender people as it assumes that the person transitioning was never that gender in the first place. Many transgender individuals consider that they were their preferred gender from birth. A better phrase would be: *"where he or she has proposed, started or completed a process to transition from being accepted as one gender to being accepted as the gender they recognise."*

Surgery

*"What is **required** is that the individual has begun or completed a process of living as a person of the acquired gender. This usually, but not always, includes **surgery** and other forms of medical intervention."*

- h. Any requirement based on a transgender individual having surgery is going to fail. Surgery is not a prerequisite and usually comes some time after a person has started their transition. There are also a number of surgical procedures available to transgender individuals and someone undertaking a transition may have none, one, some or all of them. There is no single operation that defines that a person is 'properly' transgender.
- i. Cisgender people obsess about transgender surgery. It is not an obsession shared by the transgender community. Many transgender individuals do not have any surgery and it is the least of a transperson's concerns when they start their transition. Reasons for not having surgery include cost, time, the transperson is happy passing as they are, the risks involved and the sometimes unsatisfactory results.
- j. Cisgender individuals often feel it is acceptable to ask transgender people *if they have had the op*. This is as offensive as asking a cisgender person about their medical history. The surgery in the question also usually refers to genital surgery. In other words, this person is asking what the transgender person's genitalia looks like, which is as unacceptable as asking a cisgender person what their genitals look like.
- k. A more correct phrase to use in the white paper would therefore be: *this usually, but not always, includes medical intervention*.

Completion

*"Once a person has **completed** the process of gender reassignment they should, for all purposes, be accepted as being of their acquired gender."*

- l. The idea that there is a day on which a transgender person can say 'I am complete' is flawed. Transgender individuals know better than most that your gender identity is never complete. It is a lifelong process for both transgender and cisgender people.
- m. Again, this misconception probably stems from the idea that someone has only 'properly' completed transitioning if they have had surgery.
- n. A legally correct phrase would be: *"Once a person has **registered a gender recognition certificate with the Royal Court** they are, for all purposes, to be accepted as being of their acquired gender."*

Shared facilities and intimate services

*"It may be appropriate to provide for exceptions to deal with situations **during the period of transition involving privacy and intimate contact**, for example, the provision of **communal changing facilities or shared accommodation**."*

- o. Again, this suggests that there is a start and end date to transitioning.
- p. More disturbingly, it suggests that there are circumstances in which transgender people should be segregated. The trans* community give a resounding and absolute *no* to exceptions of this sort being enshrined in law.

- q. The concern about transgender people performing intimate services or using communal, but gender segregated, facilities speaks to another of the cisgender myths about transgender people that confuses gender with sexuality and demonstrates a lack of understanding about who transgender people are and what gender dysphoria is.
- r. The fear of cisgender people is that because someone has transitioned they are not to be trusted sexually. This is a common slur thrown by those with a phobia towards people who are different from them. Black men were also said to be rapacious and out of control sexually during the fight for civil rights. It is highly offensive to suggest that transgender people are sexual predators. There are no more sexual transgressors in the transgender population than in the population as a whole.
- s. Another myth that exists is that homosexuality is a stepping stone to being transgender. It is impossible to guess a trans* person's sexuality any more than you can guess a cis person's sexuality. A transwoman was not necessarily gay before her transition and a transman was not necessarily lesbian before his transition. After transition, a transgender person's sexuality may have changed from heterosexual to homosexual, or vice versa. However, this may not be the case. Many trans people find that one of the effects of taking hormones is to reverse their sexuality so that they feel attracted to the opposite of the sex they found attractive before transition.
- t. Suggesting that transgender people should be banned from performing intimate services or using communal facilities is a nonsense unless you are first going to ban lesbians from performing intimate services for women or using the ladies and, similarly, gay men from performing intimate services for men or using the gents.
- u. Cisgender women, particularly, seem to be concerned that they might be faced with a pre-op transwoman in changing facilities, which might cause them embarrassment or awkwardness. Firstly, it is highly unusual to see someone's genitals in public facilities. Most people, transgender people included, are discreet. Furthermore, the overpowering aim of transgender people is to pass as their preferred gender. They are, therefore, less likely to expose themselves than cisgender individuals.
- v. Policing this kind of segregation policy is notoriously difficult. You may know the history of a transgender employee who has come out to you but what of the intersex/transgender employee or intersex/transgender visitor to the building who has elected to be stealth? Unless you are going to check everyone's genitals who performs the service or uses the facility, you are actually enshrining discrimination within the law.
- w. Most importantly, this kind of segregation 'outs' the transgender individual to everyone who uses the service or the facility. This compromises the safety of the transgender person. **Transgender people are the most vulnerable in these situations not the other users of the facility.** Arizona's so-called 'bathroom bill' highlighted many of the arguments against segregating transgender people in these situations and made public the horrendous statistics associated with physical violence towards transwomen in particular.
- x. The treatment of transgender prisoners is an area of grave concern for trans* activists at the moment. When dealing with this issue and similar issues, such as admittance to hospital wards, Trans* Jersey advise the States of Jersey, rather than enshrining segregation in law, to issue guidelines to their employees that state that the transgender individual being processed should



be asked which prison block, ward or dormitory they would prefer to be placed in and to accommodate those wishes. This should also include offering a gender neutral option to the transgender individual, where possible, but not enforcing its use.

4. Suggested solution

Taking all the above into consideration, Trans* Jersey suggests, when drafting the new legislation, that the law draftsmen use the following wording, copied from the UK Equality Act and amended:

Protected characteristic: sex

*"In relation to the protected characteristic of sex—
(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman or to a person whose sex or gender is self-reported as non-binary ;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."*

Protected characteristic: gender reassignment

"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 or gender by changing physiological or other attributes of sex or gender.

A reference to a transgender person is a reference to a person who has the protected characteristic of gender reassignment.

*In relation to the protected characteristic of gender reassignment—
(a) a reference to a person who has a particular protected characteristic is a reference to a transgender person;
(b) a reference to persons who share a protected characteristic is a reference to transgender persons."*

May 2014

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Vic Toole is a transman. He was born female, but lives now as a transman. He is an activist for equal human rights and blogs about LGBT rights and issues (vtdavy.com). He has two published novels, under his pen name V T Davy, and is working on a third. All have LGBT themes. In order to succeed at all three of the above he has had to become an expert in the subject of gender and sexuality.



Trans* Jersey

Trans* Jersey is a voluntary not-for-profit group formed: to provide support to transgender, transsexual, androgynous, genderqueer, bigender and intersex Jersey residents; to provide information to cisgender islanders, such as employers, healthcare professionals and teachers, who are dealing with individuals who are undergoing, or thinking about undergoing, gender transition; and, to work to ensure that the States of Jersey's legislation and government policies that directly affect the trans* community are appropriate and fit for purpose.

The transgender population in Jersey is very small. It is estimated that about 2-5% of any given population suffers from some degree of gender dysphoria and, of them, only 1 in 12,000 natal males and 1 in 34,000 natal females will transition, although these numbers are increasing. This equates to a population in Jersey of about 2,000 to 5,000 people who might consider themselves androgynous, genderqueer or bigender and only a handful of transgender people (i.e. those who have undergone, are undergoing, gender reassignment).

Anyone wishing to transition has to go to the UK for the specialist treatment required. Trans* Jersey seeks to bridge that gap by providing Jersey healthcare professionals with a resource they can use to assist their patients through transitioning and providing trans* islanders with information to manage their transition. Trans* Jersey provides information about the process of transitioning in Jersey, explanation of the law in Jersey as it relates to gender reassignment, resources detailing the medical processes transmen and transwomen can expect to go through in order to transition, links to organisations that can offer assistance with transitioning and facts about living as a trans* person in the island.

Because of the size of the population affected by trans* issues, there is very little support on the island for trans* individuals. Before Trans* Jersey existed, Jersey's trans* population had no means to come together to share ideas about measures that directly affected them. Now, as well as providing support for the community, Trans* Jersey is a way for individuals to get together online, through a blog, email and Twitter, to discuss issues that are important to them.

The UK is currently undertaking a review of its Equality Act and Gender Recognition Act in response to the Trans Manifesto presented by trans* organisations in the UK who have found a number of problems with the existing legislation. Trans* Jersey is working with GIRES and Consortium in the UK to ensure that Jersey does not repeat the mistakes made by the UK in its anti-discrimination legislation.