



THE STATE DECIDES WHO I AM

LACK OF LEGAL GENDER RECOGNITION FOR TRANSGENDER PEOPLE IN EUROPE

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INTRODUCTION

“Legal gender recognition is important as it is a validation of who I am. When you are born you get your birth certificate and when you die you get your death certificate. People take that for granted. It follows you all through life. Nobody thinks about it. But if I go into a social welfare office and someone wants to make my life difficult [because I don’t have documents reflecting my gender identity], I have no legal rights to rely on... Legal gender recognition also validates you within the rest of the population. If you are seen to be legally recognized then you have more legitimacy within the wider community, within the non-transgender community, and that’s important.”

Louise, a transgender woman living in Dublin, Ireland

For transgender people, official identity documents reflecting their gender identity are vitally important for the enjoyment of their human rights. They are not only crucial when travelling but also for everyday life; depending on the specific country, individuals may be asked to produce an official document when they enrol in school, apply for a job, access a public library or open a bank account.

In 1992, the European Court of Human Rights (ECHR) first recognized that a state's refusal to allow transgender people to change the gender markers on their official documents was a violation of the European Convention on Human Rights.¹ More than 20 years later, however, many transgender people in Europe continue to struggle to have their gender legally recognized.

Many states made the change in one's legal gender contingent on the fulfillment of invasive requirements, which violate the human rights of transgender people, through procedures that usually take years. In these instances, transgender people can obtain legal gender recognition only if they are diagnosed with a mental disorder, agree to undergo medical procedures such as hormone treatments and surgeries, are single or of age. Some other countries simply do not allow for a change in one's legal gender.

In many countries, even those with a reputation for championing equality and human rights such as Belgium, Denmark and Norway, as well as about 20 other countries in Europe², transgender people have to undergo surgeries to remove their reproductive organs, resulting in irreversible sterilization. If they decide not to undergo such surgeries, they must continue to bear documents indicating the gender on the basis of the sex they were assigned at birth – even if that contradicts their appearance and identity.

In fact, transgender people face an invidious situation in which they have to choose some human rights at the expense of others. Enjoying all of their human rights is not an option available to them. The choices are stark. Obtain documents reflecting their gender, which would ensure their right to private life, or refuse to divorce their partners? Being acknowledged by the state and enjoying equal recognition before the law, or preserving their reproductive rights by refusing to undergo sterilization? Forcing such choices on transgender people is contrary to the states' obligations to ensure that everyone can enjoy human rights without discrimination, including on grounds of gender identity and expression.

Transgender people should be able to obtain legal gender recognition through quick, accessible and transparent procedures and in accordance with their own perceptions of gender identity. States must ensure that transgender people can obtain documents reflecting their gender identity without being required to satisfy criteria that in themselves violate their

¹ European Court of Human Rights, Case of B. v France, no. 13343/87, 1992.

² According to the Transgender Europe's Trans Rights Map Index published in May 2013, 24 countries in Europe required transgender people to be sterilized in order to obtain legal recognition of their gender. On 17 December 2013, the Dutch Senate (Eerste Kamer der Staten-Generaal) adopted a bill that had already been adopted by the House of Representatives (Tweede Kamer der Staten-Generaal). The law proposal amends Article 28 of the Civil Code which, since 1985, allows transgender people to obtain legal gender recognition provided that they have adapted their bodies' appearance through hormone treatments and surgeries insofar as it was possible and safe and that they are permanently and irreversibly infertile. The new law will enter into force on 1 July 2014. It provides the possibility for transgender people who are aged 16 and above to obtain legal gender recognition by introducing a declaration to the civil registry supported by an expert's certificate. EK 33. 351, article I/B https://www.eerstekamer.nl/wetsvoorstel/33351_wijziging_vermelding_van, in Dutch, accessed 2 January 2014. In June 2013, Croatia adopted the Law on Amendments on the Law on State Registers (No.71 -05-03/1-13-2). According to Article 9A, medical evidence from treating physicians or other health facilities is needed for the purposes of legal gender recognition. The Ministry of Health is charged with developing guidelines on the legal gender recognition procedure that should also specify what medical evidence is needed (Article 36). In January 2014, such guidelines had not been developed yet. According to Article 37, previous guidelines adopted in 2008 remain in force (26/08).

human rights. For that purpose, legal gender recognition should not be made contingent on psychiatric diagnosis, medical treatments, single status or blanket age requirements.



Demonstration for gender legal recognition outside Leinster House in Dublin October, 2012 © Sasko Lazarov /Photocall

A. WHAT ARE GENDER IDENTITY AND EXPRESSION?

"It is so difficult to live a life where you feel a constant discrepancy between what you are and how others perceive you." Hélène,
Paris, France

In all societies, gender norms determine what is deemed "appropriate" behavior for men and women, which may include dress, speech and mannerisms. These gender norms are not homogenous across societies; they differ from place to place and across time. But individuals who transgress these boundaries – whose behavior lies outside of the accepted gender norms – often face stigma and discrimination, harassment, and sometimes even violence and murder.

In most countries, individuals have a legal gender that corresponds to the sex they were assigned at birth. This appears on multiple official documents (including birth certificates, identity cards and passports) and determines how they are perceived throughout their lives. Those whose gender identity differs from the sex they were assigned at birth or those who wish to express their identity in ways that are considered at odds with gender norms must choose between suppressing their own sense of self, or publicly transgressing gender boundaries and bearing all the potential negative consequences.

People generally do not experience and perceive their gender identities according to one standardized pattern. Transgender people, whose innate sense of their own gender differs from the sex they were assigned at birth, also experience and express their gender identity according to a variety of patterns. Their perceptions of gender identity may also evolve over time. Some transgender people identify themselves as fully male or female; others perceive their gender identity in a continuum between the two. According to a survey undertaken in Belgium, only 55 per cent of those transgender people who were assigned the male sex at birth identified themselves as either fully or mainly female. Similarly, only 60 per cent of those transgender people who were assigned the female sex perceived themselves as either fully or mainly male. The rest identified as neither male nor female, both male and female, or "other".³

While some transgender people are willing to undergo all available health treatments, including surgeries aimed at modifying their bodies according to their gender identity, others prefer to access only some procedures, and in some cases, treatments are not sought at all.

Throughout the research for this report, Amnesty International spoke to transgender people whose gender identities greatly vary. Joshua was assigned the female sex at birth but perceives himself as a man: *"I've seen myself as a male since I was four. I did not even know I was born female until my cousin peed in front of me and I could see the difference in our bodies. My gender identity was firmly established at that point and has not changed over time."*⁴

³ Joz Motmans, Being transgender in Belgium. Mapping social and legal situation of transgender people, 2010, p. 100, http://igvm-iefh.belgium.be/fr/binaries/34%20-%20Transgender_ENG_tcm337-99783.pdf, accessed 6 December 2013.

⁴ Interview with Joshua, Copenhagen, 22 October 2013.

Bjørk was assigned the male sex at birth: *"It's a bit tricky when it comes to my gender identity. Intellectually I think a third gender would fit me the best. I don't think I belong to either the male or the female gender. It's the same with my sexual orientation. I consider myself as bisexual. I haven't been happy with my male body since the age of four. My family was transphobic and homophobic. I wanted to come out as a trans person but I always thought about the reactions of those who surrounded me."*⁵

N. was assigned the male sex and sees herself as a woman: *"I am a woman with a trans background. I perceive myself as a woman who has a little bit of a different history than other women usually do. When I was a child, I wondered about my anatomy. I felt puzzled. When I was with boys, I felt like I was in a foreign country. I learned to speak the language but I felt I was not originally from there. I was 26 when I fully realized that I was transgender."*⁶

Luca was assigned the female sex: *"I don't perceive myself at either one end or the other of the spectrum; I wander somewhere between, or outside. The society and our culture always place people in two categories, so one needs to negotiate [how to position oneself] in different situations. I am a masculine trans. The way I perceived my gender identity has always been the same but the way I describe it has changed over time."*⁷

Runar Randi Beate is a man who often wears female clothes and makeup. *"I'm a heterosexual man, and I'm quite pleased with that. The feminine side is a part of me and it has to get out in order for me to feel I am a complete human being. I have to live out that part as well, to a greater or lesser extent. It comes and goes. It depends. The dressing style on the other hand has changed; it is now more fashion-oriented and classy"*.⁸



Runar Beate from Norway, a man who sometimes needs to express his feminine side © Amnesty International

⁵ Interview with Bjørk, Copenhagen, 23 October 2013.

⁶ Interview with N, Helsinki, 16 July 2013.

⁷ Interview with Luca, Helsinki, 5 July 2013.

⁸ Interview with Runar, Oslo, 23 June 2013.

Hélène was assigned the male sex at birth: “*I am a transsexual. I know that it may make people uncomfortable and that there are not many people who define themselves as transsexuals. I want to undergo genital reassignment surgery, which is important for me in order to live as a woman. I couldn't do that with male genital organs. I have felt I am a female since the age of four or five but it took me many years to come out... I was 48.*”⁹

B. HOW MANY TRANSGENDER PEOPLE LIVE IN EUROPE?

The exact number of transgender people living in Europe is unknown. Social scientists have developed various estimates on the prevalence of transgender people in the general population that stir lively debates, especially because they reach very divergent conclusions.

In the past, estimations were primarily based on the number of people who had undergone genital reassignment surgeries or were undergoing hormone treatment, using data sourced from health professionals. Other estimations were based on the number of people who obtained legal gender recognition. According to some of these estimates, there may be around 30,000 transgender people in the European Union.¹⁰

However, those estimates fail to take into account all transgender people who do not undergo reassignment surgeries or other health treatments. More recent estimates have been based not only on health related data but also, in some instances, on gender identity related questions undertaken in the context of survey research. Such surveys suggest there could be as many as 1.5 million people in the EU who do not fully identify with the sex they were assigned at birth.¹¹

C. DISCRIMINATION AGAINST TRANSGENDER PEOPLE BECAUSE OF THEIR GENDER IDENTITY

Whether at school or in the workplace, transgender people are often discriminated against

⁹ Interview with Hélène (pseudonym), Paris, 28 June 2013.

¹⁰ According to Eurostat, there were 505 million people living in the EU's 28 member states as of 1 January 2013. There were 104,8 women per 100 men. Several studies on the prevalence of transsexualism have been carried out since the 1960s. Such studies however only refer to transsexual people, who constitute just a portion of transsexuals people. According to these estimations, the highest prevalence is 1:11.900 for male-to-female transsexuals and 1:30.400 for female-to-male transgender. For a review of these estimations, see Femke Olyslager and Lynn Conway, “On the calculation of the prevalence of transsexualism”, 2007, <http://ai.eecs.umich.edu/people/conway/TS/Prevalence/Reports/Prevalence%20of%20Transsexualism.pdf>, accessed 9 December 2013. These are also the highest estimates indicated by the World Professional Association for Transgender Health (WPATH) in Standards of care for the health of transsexual, transgender, and gender non-conforming people, Version 7, p7, http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf

¹¹ Gates indicated in 2011 that 0.3 per cent (1:333) of the US adult population may identify as transgender. If applied to an EU population of about 505 million, that prevalence rate means that there may be approximately 1.5 million transgender people in the EU. Gary J. Gates, How many people are Lesbian, Gay, Bisexual and Transgender? 2011, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>;

Reed indicated that the prevalence of transgender people who seek health treatments might be 0.02 per cent (20:100,000) in the UK. However, 0.6 per cent (600:100,000) of the population may experience some gender variance irrespective of whether health treatment is sought or not. Reed et al., Gender variance in the UK: prevalence, incidence, growth and geographical distribution, 2009, <http://www.gires.org.uk/assets/Medpro-Assets/GenderVarianceUK-report.pdf>;

Femke Olyslager and Lynn Conway, On the calculation of the prevalence of transsexualism, 2007, indicated that the lower bound prevalence is 0.2 per cent (1:500) or higher, <http://ai.eecs.umich.edu/people/conway/TS/Prevalence/Reports/Prevalence%20of%20Transsexualism.pdf> (all sources accessed on 5 December 2013).

because of widespread prejudices and gender-based stereotypes stemming from standardized notions of masculinity and femininity.

Such discrimination occurs irrespective of whether or not transgender people bear documents that reflect their gender identity. However, the lack of such documents can further expose transgender people to discrimination whenever they have to produce a document with gender markers that do not correspond to their gender identity and expression. Such involuntary “outings” are a major concern in countries where transgender people cannot access legal gender recognition or where burdensome and lengthy procedures make it difficult to do so.

In a European Union Agency for Fundamental Rights (FRA) survey of lesbian, gay, bisexual and transgender people in Europe (hereafter referred to as FRA LGBT survey), 29 per cent of the transgender respondents said they had been discriminated against in the workplace or while looking for jobs in the year ahead of the survey.¹² Thirty-five per cent of them said they had experienced violence or the threat of violence during the five years ahead of the survey. Fifty per cent of those who had experienced violence or the threat of violence in the 12 months ahead of the survey, perceived they had been victimized because of their gender identity.¹³ In recent years, dozens of transgender people have been killed in Europe – at least 84 since January 2008, with the highest numbers in Turkey (34) and Italy (26).¹⁴

Although few states in Europe collect disaggregated data on hate crime perpetrated on grounds of gender identity, existing statistics raise concern. For example, more than 300 hate crimes were perpetrated against transgender people in England and Wales in the United Kingdom in less than a year between 2011 and 2012.¹⁵ In some instances, public authorities, including the police, harass transgender people. For example, in 2012 dozens of transgender women in Greece were arrested and forced to undergo HIV tests. The arrests were made on the basis of a regulation that had been introduced in May of that year, then suspended in June 2013 and subsequently reintroduced in July.

12 European Union Agency for Fundamental Rights, European Union lesbian, gay, bisexual and transgender survey, results at a glance, 2013, pp. 21-22, http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf, accessed 5 December 2013.

13 European Union Agency for Fundamental Rights, European Union lesbian, gay, bisexual and transgender survey, results at a glance, 2013, pp. 21-22, http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf, accessed 5 December 2013.

14 Trans-Murder Monitoring Project, Transgender Europe, last data update 21 November 2013 http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results.htm#tdor-2013, accessed 5 December 2013.

15 The police recorded more than 43,000 hate crimes between April 2011 and March 2012. Hate crimes against transgender people include any criminal offence that is perceived, by the victim or any other person, to be motivated by a hostility or prejudice against a person who is transgender, or perceived to be transgender, <https://www.gov.uk/government/publications/hate-crimes-england-and-wales-2011-to-2012-2/hate-crimes-england-and-wales-2011-to-2012>, accessed 5 December 2013. For individual cases of transphobic hate crimes and information on legislative gaps in Europe, see *Because of who I am: homophobia, transphobia and hate crimes in Europe* (Index: EUR 01/014/2013).

In May 2013, the police in the city of Thessaloniki arbitrarily stopped a number of transgender women for identity checks and then arrested them for several hours.¹⁶

ANNA: DISCRIMINATED AGAINST AT SCHOOL

Anna, a 26 year old transgender woman interviewed by Amnesty International, experienced discrimination and violence in an evening school for secondary education in Athens, Greece. School authorities refused her permission to express her gender identity. She told Amnesty International: "I went to the headmaster's office in order to enrol and he asked me if I was there to enrol my brother. I answered no and I told him my name was Anna. His colleague interrupted us and told him my name was Panagiotis [Anna's legal male name]. The headmaster told me that he had been informed about my situation and that he wouldn't accept any gay or trans in his school. He said I had to cut my hair, stop wearing make-up, wear men's clothes and generally act as a male. He tried to alter my identity and suppress my rights... I was frightened and I accepted those conditions for a month... the worst month of my life. Other pupils made fun of me but when I told the headmaster they were behaving like that because I was a trans person he replied that I was not trans because I hadn't changed my gender. He said I was a gay man who wanted to show off in female clothes."¹⁷ Anna was eventually allowed to wear clothes that expressed her gender identity. Nevertheless, other pupils continued to harass and threatened her with violence and she felt school authorities did not take effective action to put an end to the situation.¹⁸ In June 2012, Anna was victim of a serious attack when a pupil and his friend poured gasoline on her and attempted to set her on fire just outside the school premises. Amnesty International was also informed by Anna's lawyer that while a police car arrived at the scene of the incident, the attack was not subsequently investigated.¹⁹

Despite the intervention of the Greek Ombudsperson, Anna continued to face hostile and transphobic behaviour by the school administration after she registered to the upper secondary school in September 2013. Anna also reported being subjected to verbal abuse and harassment by other pupils because of her gender identity. In January 2014 Anna told Amnesty International that she felt forced to leave school because of the harassment she had experienced.

¹⁶ Greece must withdraw the provision on forced HIV testing and end harassment against transgender women, (Index; EUR 25/012/2013), <http://www.amnesty.org/en/library/asset/EUR25/012/2013/en/2d74d0f9-f321-4b55-a55f-44346ed3780c/eur250122013en.pdf>

¹⁷ Interview with Anna, 28 March 2013.

¹⁸ In a letter to the Minister of Education and Religious Affairs dated 5 April 2013, Amnesty International raised concerns about the discrimination Anna experienced at school. The letter sought further information on the measures taken by school authorities and other educational competent authorities to protect Anna from threats of violence and put an end to the discrimination she was experiencing. The Ministry replied on 10 July 2013 stating that the competent authority dealing with the official complaint Anna filed against the headmaster concluded that he handled a complicated situation in the best way possible.

¹⁹ Interview with Elektra Koutra, Anna's lawyer, 15 January 2014.

L. CAVALIERO: SEXUALLY HARASSED BY HIS UNIVERSITY PROFESSOR

L. Cavaliero is legally a female but he identifies more as a male. He has a gender queer appearance and he is not undergoing any health treatment to physically transition to the male gender. He was harassed and assaulted by a university professor in Berlin. He told Amnesty International: *“When I started his course, I presented myself as a trans person to everyone and I said I preferred the masculine pronoun. Sometimes he made fun of me, for example by referring to me as ‘this woman who wants to be a man’. At some point the other students started reacting because they were shocked by his behaviour, but he didn’t stop. I went to his office to discuss the topic for the exam. He referred to me with the female pronoun, so once again I said I preferred the masculine one. He told me I was the first trans person he had ever met and that he had a lot of questions... At some point he asked me if I had male or female genitals... and he tried to grab in between my legs. I told him he was not allowed to do that... He came towards me and then he started touching me. I was against the wall. I screamed and then ran away.”*²⁰

LOUISE: DISCRIMINATED AGAINST IN THE WORKPLACE

Louise is a transgender woman living in Dublin, who used to work in the transport industry. In late 2006, she informed her employer that she intended to start her physical transition to her female gender. She was ready to resign as she thought that her transition would be problematic in that particular working environment. However, her managers appeared to be supportive and encouraged her to stay. Having decided to stay, she accessed hormone therapy, changed her legal name in March 2007 and started working as “Louise”. Problems arose almost immediately. At the end of March, her managers told her she had to “go back to the male mode” for client meetings and she was banned from using the female toilets. Louise did not accept this position. *“I struggled to get to this point and I’m not moving back”* she told Amnesty International. Her manager started outing her in public; for example, he referred to her by her previous male name in front of clients. In early April, the manager said that the company had bought new premises and asked Louise to work from home for a month because, as he put it, “there is an atmosphere in the office”. Louise worked from home from 24 April to the end of July. She repeatedly asked to return to the office but was told there was no room. However, Louise knew her desk was free up until the beginning of July. In the middle of July, the manager told her she was not productive enough and suggested she looked for another job. She found another job in July 2007 but it fell through after a couple of weeks.²¹

²⁰ Interview with L. Cavaliero, Berlin, 7 November 2012.

²¹ Louise took her case to the Equality Tribunal, the body responsible for dealing with cases of discrimination. The Tribunal found that she was discriminated against on grounds of gender and disability, and that the request made by the employer to work from home was discriminatory. In July 2007, Louise asked to be reinstated in her previous job but her employer offered another position with unsociable hours and low pay instead, which she refused. The Equality Tribunal considered this treatment as discriminatory. See Decision No. DEC-S2011-066, *Hannon v First Direct Logistics Limited*, 29 March 2011.

D. AIMS AND METHODOLOGY

This report illustrates the human rights violations experienced by transgender people stemming from the requirements imposed on them to obtain legal recognition of their gender. In highlighting these requirements, including psychiatric diagnosis, medical procedures and divorce, it underscores the plight of transgender people forced to choose which rights to give up in order to enjoy others. The report shows the consequences of the current lengthy legal gender recognition procedures on the rights of transgender people, in particular the rights to recognition before the law, privacy and health, and to be free from discrimination and from inhuman and degrading treatment. This report does not focus specifically on the human rights violations experienced by intersex people (see 1.5).

Chapter 1 introduces some common problematic aspects of procedures on legal gender recognition in Europe and the human rights violations they entail. A summary of the applicable international standards is included in Appendix I.

Chapter 2 provides an overview of existing legal gender recognition procedures in seven European countries: Belgium, Denmark, Finland, France, Germany, Ireland and Norway. It includes also succinct information on the current civil and criminal laws protecting against discrimination and hate crimes on grounds of gender identity. Individual case studies illustrate the impact of the current legal gender recognition procedures on the lives of transgender people in Denmark, Finland, France, Ireland and Norway.

Chapter 3 draws conclusions and identifies both general and country specific recommendations.

The countries covered in this report were identified on the basis of two main criteria: a) the presence of compulsory requirements for legal gender recognition that violate the human rights of transgender people; and, b) the presence of opportunities for amending current laws, policies and practices, and a context to which Amnesty International could bring an added value to achieving such change.

The information included in this report was collected by desk research undertaken from August 2012 to December 2013, and from research undertaken by Amnesty International sections in Belgium, Denmark, Finland and Norway and a number of field-research missions. These include short 3-day missions to Finland (November 2012) and Germany (November 2012), and longer 6-day missions to Norway (June 2013), France (July 2013) and Ireland (October 2013). Information was also collected in the context of Amnesty International's participation in international conferences and seminars and in the framework of Amnesty International's ongoing work on homophobic and transphobic hate crimes. In-depth research was undertaken in Denmark, Finland, France, Ireland and Norway, where individual case studies have been researched and meetings held and contacts maintained with authorities. Research undertaken in Belgium and Germany was more limited in scope and aimed primarily at reviewing the main laws and practices applicable to legal gender recognition.

In the context of the research for this report Amnesty International interviewed about 70 transgender individuals, 15 health and legal experts and representatives of more than 25 transgender organizations in the countries covered. Interviews with transgender individuals

were undertaken in English, Danish, Finnish, French and Norwegian, without interpretation. Most of them were transcribed and translated into English when applicable. The quotes from the interviews reported here were lightly edited for brevity and clarity only. Interviewees are identified in accordance with their informed consent, sought by Amnesty International researchers in each interview. In referring to interviewees the report always uses their preferred description of their gender identity and their preferred pronoun.

Amnesty International acknowledges the crucial support of Transgender Europe and the European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) in the context of this research.

E. TERMINOLOGY

Cisgender people are individuals whose gender expression and/or gender identity accords with conventional expectations based on the physical sex they were assigned at birth. In broad terms, “cisgender” is the opposite of “transgender”.

Gender Identity is a very personal and subjective matter. It refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.

Gender expression refers to the means by which individuals express their gender identity. This may or may not include dress, make-up, speech, mannerisms and surgical or hormonal treatment.

Gender marker is a gendered designator that appears on an official document such as a passport or an identity card. It may be an explicit designation such as “male” or “female”, a gendered title such like Mr or Ms, a professional title, a gendered pronoun, or a numerical code which uses particular numbers for men and for women (for example, odd numbers and even numbers).

Gender queer refers to gender identities other than “man” and “woman”, falling thus outside of the gender binary.

Gender reassignment treatment refers to a range of medical or non-medical treatments that a transgender person may wish to undergo. Treatments may include hormone therapy, sex or gender reassignment surgery including facial surgery, chest surgery, genital or gonad surgery, and can include sterilization. In some states, certain forms of gender reassignment treatment may be compulsory for legal gender recognition. Not all transgender people feel a need to undergo gender reassignment treatment.

Genital reassignment surgeries refer to operations aimed at modifying genital characteristics to accord with a person’s gender identity. In some countries these surgeries result in irreversible sterilization as they entail the removal of reproductive organs.

Intersex individuals possess genital, chromosomal or hormonal characteristics that do not correspond to the given standard for the “male” or “female” categories of the sexual or reproductive anatomy. Intersexuality may take different forms and cover a wide range of conditions.

Sexual Orientation refers to each person’s capacity for profound emotional, affectionate and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

Transgender, or trans, people are individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth. A transgender woman is a woman who was assigned the “male” sex at birth but has a female gender identity; a transgender man is a man who was assigned the “female” sex at birth but has a male gender identity. Not all transgender individuals identify as male or female; “transgender” is a term that includes members of third genders, as well as individuals who identify as more than one gender or no gender at all. Transgender individuals may or may not choose to undergo some, or all, possible forms of gender reassignment treatment.

Transsexual individuals have a gender expression and/or gender identity that differs from conventional expectations based on the physical sex they were assigned at birth and who wish to undergo, are in the process of undergoing or have undergone, gender reassignment treatment. Transsexualism is included in the WHO International Statistical Classification of Diseases and Related Health Problems (ICD-10th version) as a mental and behavioural disorder (See Appendix II).

Transvestite (cross-dresser) describes a person who regularly, but not constantly, wears clothes mostly associated with a gender other than the gender they were assigned at birth.

1. LEGAL GENDER RECOGNITION AND HUMAN RIGHTS

“Legal gender recognition is important because, once and for all, I wouldn’t have to battle with people [for anything] I have a right [to], like social welfare. Having a legal gender recognition certificate would make these issues easier, instead of fighting every corner, which is what I’ve had to do. I want to be recognised as who I bloody well am. It’s ridiculous that the state doesn’t recognize me as who I am.”

Victoria, a transgender woman living in Dublin

Internationally protected human rights are applicable to gender identity as acknowledged by the Yogyakarta Principles, which crystallize the current status of human rights law in relation to gender identity and sexual orientation. Developed in 2006 by lawyers, scholars, NGO activists and other experts, these Principles have been referred to by several international and regional organizations, governments and other authorities in the context of human rights treaties’ monitoring activities or when developing policies on equality and non-discrimination.²²

²² Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

http://www.yogyakartaprinciples.org/principles_en.htm (accessed 15 January 2014). For examples of the impact of the Principles and the references made to them by international organizations and governments, see: Ettlbrick, P.L., Trabucco Zerán, A., The impact of the Yogyakarta Principles on International Human Rights Law Developments, 2010, http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf, accessed 15 January 2014

“All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.”

Principle 1, Yogyakarta Principles

Central to the respect for the human rights of transgender people is the recognition of gender identity as a prohibited ground of discrimination. This is highlighted by the United Nations Committee on Economic, Social and Cultural Rights (CESCR): “Gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”²³ The United Nations Committee on the Elimination of Discrimination against Women has stated: “The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.”²⁴ Gender expression should equally be considered as a protected ground, included in open-ended lists of grounds of discrimination in human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR, Articles 2 and 26) or the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Article 14).

States can pursue legitimate aims by collecting, recording and keeping demographic information on the population, provided they put in place safeguards to ensure confidentiality and respect for the right to privacy. This can and often does include collecting information on gender. Recording information on gender is for example important for public health purposes or for designing, implementing and evaluating policies for combating discrimination on grounds of gender and gender-based violence.

Consequently, many forms of official documents issued to individuals, such as passports, ID cards and driving licences, include a gender marker. This may be explicit, such as a field labelled “sex” marked with an M or F signifying “male” or “female” respectively,²⁵ or implicit, like a unique identifying number that includes an even digit for “male” and an odd digit for “female”.

Transgender people who have not been issued official documents reflecting their gender identity have to constantly disclose information on their gender identity, even when they prefer it to remain confidential. As a result they may be questioned about their identities and are at risk of being suspected of fraud, harassed, discriminated against or even physically attacked.

23 UN CESCR, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights, 2009, para32.

24 UN CEDAW, General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2010, para18.

25 There are countries that sometimes issue documents with other markers. For example, Australia, Denmark and New Zealand issue passports with an X gender marker and India issues passports with an E, while Nepal issues ID cards with gender markers for “male”, “female” and “other”.

States must ensure that transgender people can obtain legal recognition of their gender – including issuing all documents with correct gender markers and changing the gender-related information kept in state-run registries – through a quick, accessible and transparent procedure in accordance with the individual’s own sense of their gender identity, while preserving their right to privacy.

OFFICIAL DOCUMENTS, DISCRIMINATION AND EU LAW

As shown by the many cases included in this report, transgender people who do not have documents reflecting their gender identity and expression can be discriminated against in areas such as employment, education and access to goods and services. Procedures aimed at allowing transgender people to obtain legal recognition of their gender are therefore essential to ensure that they are not discriminated against.

EU anti-discrimination law does not explicitly prohibit discrimination on grounds of gender identity and expression. However, the Charter of Fundamental Rights of the European Union prohibits discrimination on an open-ended list of grounds (Article 21). Gender identity and expression are not protected grounds in EU Directives aimed at combating discrimination on grounds of sex, including Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. However, the European Court of Justice found in several cases (see Appendix I) that that discrimination against people who intend to undergo, are undergoing or have undergone “gender reassignment” may amount to sex discrimination. Such protection is narrower than what would be provided on grounds of gender identity. Gender identity cannot in fact be construed as referring exclusively to “gender reassignment” and protection under EU law should be extended to cover the full range of gender identity and expression.

1.1 THE RIGHTS TO PRIVATE LIFE AND TO RECOGNITION BEFORE THE LAW

Transgender individuals whose official documents do not reflect their gender identity, name or gender expression must disclose they are transgender every time they produce these documents. In many countries, this is almost a daily occurrence. In situations where official documents are required to obtain goods or services – for example, in finding employment, enrolling in education, obtaining housing, or claiming welfare benefits – transgender individuals are forced to give up aspects of their right to private life in order to obtain them.

A 20-year-old transgender man in Finland said: *“I still have a female name and identity number, and I have had problems with my ID. For instance, almost every time I try to collect a parcel from the post office, they question whether the passport is mine. Also, the travel card has my identity number on it and when I try to get on a bus, the driver often claims it is not my card as it says female.”*²⁶

²⁶ This person expressed the wish to remain anonymous.

It is vital that states allow transgender people to change their gender markers and their name on all documents, in order to protect their right to private life. Those states that have not put in place a procedure to ensure legal gender recognition of transgender people, including Ireland, or those where legislative gaps make it impossible for transgender people to obtain documents reflecting their gender identity, including Lithuania,²⁷ violate their right to private life. This right is protected by international and regional human rights standards including the International Covenant on Civil and Political Rights (ICCPR, Article 17) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Article 8). The European Court of Human Rights has found states to be in breach of Article 8 of the ECHR in several instances where transgender individuals were not allowed to obtain legal recognition of their gender.

The impossibility to obtain documents that reflect gender identity and expression may also constitute a violation of the transgender individuals' right to recognition before the law, which is protected under international human rights law, including by the ICCPR (Article 16) and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, Article 15).²⁸

The rights to private life and to recognition before the law may also be violated by states where procedures on legal gender recognition exist but are overly lengthy and/or contain mandatory criteria to be fulfilled that in effect exclude some groups of transgender people. Such exclusion could occur, for example, when the procedures require medical treatments, including surgeries, that some transgender people cannot undergo because of health related problems, and where access to these procedures is contingent on the individual receiving a specific psychiatric diagnosis.

1.2 THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH AND TO BE FREE FROM CRUEL, INHUMAN AND DEGRADING TREATMENT

In recent years, some positive changes have occurred in a few European countries including the Netherlands, Portugal, Spain and Sweden. Legislative reforms enacted in these countries have abolished some of the problematic requirements imposed on transgender individuals to

27 In Lithuania, Article 2.27, para1 of the Civil Code adopted in 2001, provides that an unmarried adult of full age has the right to "change the designation of sex" if it is medically possible. Article 2.27, para .2, states that the conditions and the procedure for "changing the designation of sex", shall be prescribed by law. As such a law was never adopted, transgender people in Lithuania cannot obtain legal recognition of their gender. Civil Code available in English here: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=245495, accessed 2 January 2013. In 2007, the European Court of Human Rights found in *L. v Lithuania* that this gap amounted to a violation of the applicant's right to private and family life (Article 8). The applicant, a transgender man, had undergone some gender reassignment surgeries but could not undergo genital reassignment surgery, as it was not available in Lithuania. As a result, the applicant could not change his personal code, mentioned on his birth certificate and passport, which indicated that he was legally a female (the code started with the digit 4 for female; males are assigned the digit 3).

28 Yogyakarta Principles on the applications of human rights Law in relation to sexual orientation and gender identity, Principle 3. The Human Rights Committee, tasked to monitor the implementation of the ICCPR, found in several instances that the state's failure to issue birth certificates or to keep civil registries amounted to a violation of Article 16 and led to the violation of other rights included access to social services or education. See for example: Concluding Observations on Albania, CCPR/CO/82/ALB (HRC, 2004), para. 17, Concluding Observations on Bosnia and Herzegovina, CCPR/C/BIH/CO/1 (HRC, 2006), para. 2, Concluding Observations on the Democratic Republic of Congo, CCPR/C/COD/CO/3 (HRC, 2006), para 25.

obtain legal gender recognition, including sterilization.²⁹ Moreover, in 2011, the German Constitutional Court found that the irreversible surgery and the sterilization requirements foreseen by domestic legislation on legal gender recognition were unconstitutional.³⁰ In 2009 the Austrian Constitutional Court found that genital surgeries should not have been a prerequisite to allow transgender people to change their names.³¹

However, legal gender recognition procedures in the majority of European countries require the individual to fulfil a strict set of criteria. In many cases, these requirements violate the human rights of transgender individuals, including the rights to the highest attainable standard of health and to be free from cruel, inhuman or degrading treatment. Transgender individuals are thus forced to choose between these rights and the rights to private life and recognition before the law outlined above.

In many countries, transgender individuals cannot obtain legal gender recognition unless they undergo psychiatric assessment and receive a **psychiatric diagnosis**. The World Health Organization (WHO) currently categorizes “gender identity disorders” under “mental and behavioral disorders”³² in its International Classification of Diseases (ICD-10th version, adopted on 17 May 1990). In addition, the fifth version of the Diagnostic and Statistical Manual of Mental Health Disorders (DSM-V) of the American Psychiatric Association (APA), adopted in 2013, includes “gender dysphoria” in the list of mental disorders.³³

²⁹ In Spain, a new law (3/2007 of 15 March) was adopted in 2007 that requires psychiatric diagnosis and medical treatments, and excludes minors from its scope, but it does not require genital reassignment surgery and sterilization, <http://www.boe.es/boe/dias/2007/03/16/pdfs/A11251-11253.pdf>, in Spanish, accessed 2 January 2013. In Portugal a new law (7/2011 of 15 March) was adopted in 2011 that requires psychiatric diagnosis and excludes minors from its scope, but it does not include other compulsory medical requirements, <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>, in Portuguese, accessed 2 January 2013. In Sweden, a new law on legal gender recognition, which entered into force on 1 July 2013 (SFS 2013: 405), requires transgender people to have lived in accordance with their gender identity “since a long time” and excludes minors from its scope, but it abolished the sterilization requirement included in the previous legislation adopted in 1972, <http://rkrattsdob.gov.se/SFSdoc/13/130405.PDF>, in Swedish, accessed 2 January 2013. For legislative changes in Netherlands see note 2.

³⁰ See chapter 2.6.2.3.

³¹ Verfassungsgerichtshof/B1973/08, judgment of 3 December 2009. In 2006 the Constitutional Court had annulled an internal order issued by the Ministry of Interior in 2006 (Transsexuellen Erlass) according to which transgender people could have changed their name only after having complied with several medical requirements and having changed their sex in the Register of Births, which was possible only for transgender people who were not married. Verfassungsgerichtshof/B947/05, judgment of 21 June 2006.

³² ICD-10, Chapter V, Mental and Behavioural Disorders, F64 Gender Identity Disorders. Gender Identity Disorders include: transsexualism (F64.0), dual-role transvestism (F64.1), gender identity disorders of the childhood (F64.2), other gender identity disorders (F64.8), gender identity disorder, unspecified (F64.9), <http://apps.who.int/classifications/icd10/browse/2010/en#/F60-F69>, accessed 4 December 2013. The American Psychiatric Association (APA) removed “homosexuality” from its Diagnostic and Statistical Manual of Mental Health Disorders (DSM) in 1973. It took almost 20 more years for the World Health Organization (WHO) to depathologize “homosexuality”, which it deleted from the International Classification of Diseases (ICD) on 17 May 1990. For further details, see appendix II.

³³ According to the DSM-IV, “For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual’s expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present

The psychiatric diagnosis is very often based on these categories. In some countries, including Denmark, Finland and Norway, access to medical treatments necessary to obtain legal gender recognition, including surgeries, is made contingent on the specific and narrowly defined diagnosis of transsexualism (F64.0, See Appendix II). Transgender people who are diagnosed with other “gender identity disorders” included in the ICD-10th version, cannot access such treatments and are eventually excluded from the possibility of obtaining legal recognition of their gender, unless if they access treatments privately or abroad.

In countries where legal gender recognition is contingent on obtaining such a diagnosis, individuals who wish their gender identity to be reflected on official documents must submit to a notion that their transgender status – the fact that their gender identity does not accord with the gender they were assigned at birth – is a mental disease. Most of the transgender people Amnesty International spoke to for this report expressed the view that psychological counselling would be helpful before and during the transitioning phase. However, the psychiatric diagnosis is a practice many transgender people find demeaning as well as unnecessary for the purposes of obtaining legal gender recognition. In some states, including Denmark, France and Germany, transgender people have to undergo psychiatric diagnosis even if they simply want to change their name.

Ely, a trans man living in Belgium, said: “*Of course, trans people have the right to see a psychiatrist if they want too... What is wrong is the [idea that] you need a psychiatric opinion to be who you want to be.*”³⁴

In 2010, the World Professional Association for Transgender Health (WPATH), in urging the worldwide depathologization of gender non-conformity, stated: “The expression of gender characteristics, including identities, that are not stereotypically associated with one’s assigned sex at birth is a common and culturally diverse human phenomenon [that] should not be judged as inherently pathological or negative.”³⁵

In fact, the reality of the psychiatric diagnosis requirement is that medical professionals are making decisions on identity features that are personal and do not manifest themselves in a uniform and consolidated pattern. Transgender people who spoke to Amnesty International generally felt the diagnosis was based on gender stereotypes. Charlie, a transgender man living in Denmark, said: “*You have to try to convince [the mental health professionals] that your transgender identity is not a whim. They kept asking whether I was sure that I was not a lesbian and whether I had tried to do this or that to live as a woman. They were mainly*

and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.”

<http://www.psych.org/practice/dsm/dsm5>, accessed 4 December 2013. For further information, see the APA factsheet on “gender dysphoria”.

<http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf>, accessed 20 December 2013.

34 Interview with Ely, 18 December 2013.

35 WPATH, World Professional Association for Transgender Health, Board of Directors, 2010, WPATH De-Pathologisation Statement,

<http://tgmentalhealth.com/2010/05/26/wpath-releases-de-psychopathologisation-statement-on-gender-variance/>

WPATH, Standards of Care (SOC) for the Health of Transsexual, Transgender, and Gender Non-conforming People, 7th Version, p. 4,

http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf

interested in what I liked in bed. They asked me how often I masturbated, if I wanted to be the dominant partner in bed. You constantly feel you have to give the right answer... that you are under examination. When I said that I was sexually dominant, he [the mental health professional] said I could be a man because that was a typical masculine behaviour. His approach was very black or white.”³⁶

The United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) requires states to ensure that state policies and practices are not based on, or have the effect of reinforcing, gender stereotypes. According to Article 5a of the Convention, states should take measures to: “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

In several European countries, including Belgium, Denmark, France, Italy³⁷ and Norway, transgender people cannot obtain new documents reflecting their gender identity unless they undergo **genital reassignment surgeries**. Depending on the nature of the surgical procedure performed, these procedures could also have the effect of removing the individual's reproductive ability.

Although some transgender people would like to access certain health treatments with the aim of modifying their bodies, many others do not. For those who do, their choices in terms of the treatments they would like to access – whether hormone therapy, surgeries, genital reassignment surgeries, voice therapy, depilation and so on – greatly vary and depend on the personal feelings and perceptions shaping their gender identity. It is therefore problematic when a set course of medical treatment is required of all transgender people as a precondition to obtaining legal recognition of their gender.

Luca, a transgender man from Norway, told Amnesty International: “*I want my legal gender to be male but I still have the female one. I can in theory obtain recognition of my gender but only if I am sterilized. This is out of question for me and it is not going to happen. After I had been taking hormones for a year the doctor told me that the next step would involve removing my ovaries and uterus. I told him I did not want that kind of surgery. I feel like I am deprived of my rights [legal gender recognition] just because I choose to exercise some other rights [refuse medical treatments].”³⁸*

Requiring transgender people to undergo unnecessary medical treatments to obtain legal gender recognition violates their right to the highest attainable standard of health, which is

³⁶ Interview with Charlie (pseudonym), 4 November 2013.

³⁷ According to Italian legislation legal gender recognition is permitted only insofar as sexual characteristics have been adjusted through medico-surgical treatments that had been authorized in advance by the courts. Law of 14 April 1982, no. 164, Provisions concerning the rectification of sex attribution (Norme in materia di rettificazione di attribuzione di sesso), Article 3, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1982-04-14;164>, in Italian, accessed 3 January 2013.

³⁸ Interview with Luca, Oslo, 24 June 2013.

protected under international human rights law, including by the UN Covenant on Economic, Social and Cultural Rights (CESCR, Article 12). The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the CESCR, has stated: “The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”³⁹

The Yogyakarta Principles require that: “No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.”⁴⁰

In many cases, genital reassignment surgeries result in **sterilization** as they involve the removal of either the testes, for people who are transitioning towards the female gender, or the uterus and ovaries, for those who are transitioning towards the male gender. But this goes further in some countries, where legal gender recognition is dependent on a sterilization requirement. Whether explicitly prescribed by law such as in Belgium, Denmark and Finland, or stemming from established practices such as in Norway or France, the sterilization requirement violates the right of transgender people to be free from inhuman, cruel or degrading treatment, which is protected under several international human rights instruments including the ICCPR (Article 7) and the UN Convention against Torture and Inhuman, Cruel or Degrading Treatment or Punishment (Article 16). This requirement results also in the impossibility for transgender people to found a family and thus violates their right to private and family life (See chapter 1.2).

In 2013, the UN Special Rapporteur on torture and inhuman, cruel or degrading treatment or punishment stated: “In many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender. In Europe, 29 States require sterilization procedures to recognize the legal gender of transgender persons.” The Rapporteur called upon states to put an end to these practices.⁴¹

39 General Comment 14: the right to the highest attainable standards of health, 11 August 2000, para8.

40 Principle 18: protection against medical abuse

41 A/HRC/22/54, the Rapporteur recommends states put an end to involuntary sterilization stemming from genital reassignment surgeries transgender people have to undergo if they want to obtain legal recognition of their gender, 1 February 2013,

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

1.3 THE RIGHT TO MARRY AND TO FOUND A FAMILY AND THE RIGHT TO FAMILY LIFE

In countries such as Italy⁴² or Finland, legal gender recognition is contingent on **changes in marital status**. This requirement discriminates against transgender individuals who are married/in a civil partnership and wish to remain so, as they are bound to choose between their rights to marry and to found a family and to respect for private and family life, and their right to recognition before the law.

The single status requirement was included in the General Scheme of the Gender Recognition Bill 2013, published by the Irish government in July 2013 (see Chapter 2.4.3.1). Patricia is a transgender woman married to Susan and living in Cork, Ireland. She said: *“It’s not up to other people to evaluate my marriage, it should be my choice. The fact that other people, outside of our union, can decide that we should divorce, that our marriage should end or not... is a violation of our rights. We’re already married. I’m the same person I was when I got married. The only thing that’s changing is the gender marker on my birth certificate.”*⁴³

The right to marry and to found a family is protected under international and regional human rights laws including the International Covenant on Civil and Political Rights (ICCPR, Article 23) and the European Convention on Human Rights (ECHR, Article 12). The right to respect for private and family life is protected by the ICCPR (Article 17) and the ECHR (Article 8). The European Court of Human Rights has clarified that the notion of private and family life equally applies to same-sex couples, irrespective of the legal regime applicable to them under domestic jurisdiction.⁴⁴

Moreover, the single status requirement does not comply with the Yogyakarta Principles, which state: “No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”⁴⁵

Some states argue that requiring transgender people to be single if they wish to obtain legal recognition of their legal gender stems from the prohibition on civil marriages between same-sex individuals in their jurisdictions. However, this aim, which is discriminatory in itself, cannot justify restricting the family and marriage rights of transgender people. States should in fact ensure the enjoyment of all human rights, including the right to marry and to found of

⁴² Law 164/1982, Article 4. Legal gender recognition automatically entails the cessation of marriage.

⁴³ Interview with Susan and Patricia, Cork, Ireland, 24 October 2013.

⁴⁴ For example the Court found in the case *Schalk and Kopf v Austria* that the reference to “men and women” in the ECHR no longer means that “the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.” The court also stated: “[I]t is artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8.” See, *Schalk and Kopf v Austria*, Application no. 30141/04, para94.

⁴⁵ Yogyakarta Principles, “The application of international human rights law to sexual orientation and gender identity, Principle 3(d): the right to equal recognition before the law”, http://www.yogyakartaprinciples.org/principles_en.htm

family, without discrimination, including on grounds of sexual orientation and gender identity.

As the Commissioner for Human Rights of the Council of Europe has noted, courts in some states that do not recognise marriage between same-sex partners have nonetheless decided in favour of allowing marriages to continue when one partner has changed gender. Such rulings, the Commissioner notes, recognize that “protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages. This approach is to be welcomed as it ends forced divorce for married couples in which one of the partners is transgender”.⁴⁶

Because of the requirement of single status, people who are married or in a civil partnership and seek recognition of their preferred gender will face an invidious choice. They must either give up the legal protection acquired in their union, which is a violation of their right and the right of their partners and children to private and family life, or forego legal recognition of their preferred gender, a violation of their right to private life and to recognition before the law.

1.4 THE BEST INTEREST OF THE CHILD

In some countries, **age restrictions** on legal gender recognition are prescribed by law (Finland, Portugal, Spain, Sweden, and the Netherlands) or result from current practices (Belgium, Denmark). Absolute denial of legal gender recognition to individuals under a given age is not consistent with existing international standards regarding the rights of children. Legal gender recognition should be accessible to children on the basis of their best interest and taking into account their evolving capacities.

The UN Convention on the Rights of the Child (CRC) requires states to respect the right of children to be heard and to duly take into account their views. A key requirement of the CRC is that: “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁴⁷ The UN Committee on the Rights of the Child has highlighted that the identity of the child includes characteristics such as sexual orientation and gender identity, and that “[...] the right of the child to preserve his or her identity is guaranteed by the Convention (Article 8) and must be respected and taken into consideration in the assessment of the child’s best interests.”⁴⁸

This is closely linked to the right of children to express their views freely and to have those views taken into account in matters affecting them.⁴⁹ As the Committee on the Rights of the Child has noted: “Assessment of a child’s best interests must include respect for the child’s

⁴⁶ CommDH/IssuePaper(2009)2, Human Rights and Gender Identity, para. 3.2.2.

⁴⁷ Convention on the Rights of the Child, Article 3.1.

⁴⁸ Committee on the Rights of the Child, General Comment 14: The right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1), para. 55, 2013.

⁴⁹ Convention on the Rights of the Child, Article 12.1.

right to express his or her views freely and due weight given to said views in all matters affecting the child.”⁵⁰

The right of children to express their own views regarding what is in their best interests is especially important in relation to older children, in light of their evolving capacities. As the Committee on the Rights of the Child has emphasized that “...the child’s views must be given due weight, whenever the child is capable of forming her or his own views. In other words, as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them.”⁵¹

Transgender children and particularly adolescents who are unable to obtain legal recognition of their gender may face further discrimination and harassment, for instance at school where they cannot be enrolled in accordance with their gender identity. Andy, an 18-year-old transgender man living in Ireland, said: “*For me [legal gender recognition] is something to back me up... and make sure that teachers and the headmaster accept my gender and allow me to use the [male] bathroom.*”⁵²

1.5 INTERSEX PEOPLE

Intersex individuals possess genital, chromosomal or hormonal characteristics that do not correspond to the standard “male” or “female” categories of sexual or reproductive anatomy. There are several intersex conditions, which are all medically classified as “Disorders of Sex Development” (DSD),⁵³ a definition questioned by scholars and intersex activists because of its stigmatizing connotation.⁵⁴

A number of different human rights concerns arise for intersex people, many of which are outside the scope of this report. But in some cases there are intersections between legal gender recognition for transgender and intersex people.

In many European countries, registering births is a legal requirement for parents, who usually have a short time period after the birth in which to do so. Information on the sex of newborn children, which is established by health professionals, is required at the registration.

In cases where children are born with intersex conditions some countries extend the allowable

⁵⁰ Committee on the Rights of the Child, General Comment 14, para. 43, 2013.

⁵¹ Committee on the Rights of the Child, General Comment 12, para. 85, 2009.

⁵² Interview with Andy, Dublin, 24 October 2013.

⁵³ In 2006, a consortium composed of medical professionals, intersex individuals and parents of intersex children developed. Clinical Guidelines for the Management of Disorders of Sex Development in the Childhood: <http://www.accordalliance.org/dsdguidelines/clinical.pdf>

⁵⁴ Some have suggested that intersex conditions termed “Variations of Sex Development”, M. Diamond and M. Beh, Variations of sex developments instead of disorders of sex development, <http://www.hawaii.edu/PCSS/biblio/articles/2005to2009/2006-variations.html>

registration period, but in most European countries, children with intersex conditions⁵⁵ are registered as male or female. In the majority of European states no specific procedures exist to allow intersex people to obtain legal recognition of their gender in instances where the sex they were assigned at birth does not correspond to their gender identity.

In Germany, a new law, which came into force on 1 November 2013, requires that the information on sex in the population registry be omitted if a newborn child cannot be unambiguously assigned as either male or female.⁵⁶ This development sparked much debate, with intersex organizations raising the possibility that this provision may violate the privacy of intersex people and expose them to further discrimination.⁵⁷

In many countries, the process of assigning the gender of intersex babies at birth involves surgeries to make their bodies conform to standard notions of the male or the female sex. In most cases, these surgeries are cosmetic rather than medically necessary.⁵⁸ They may include the removal of gonads, which result in the sterilization of intersex people, and are often accompanied by hormone treatments. International and regional human rights bodies, including the United Nations Committee against Torture and the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment have criticized these medical procedures, which are not only unnecessary but also performed on children too young to give their consent.⁵⁹

55 Not all intersex conditions are diagnosed at birth.

56 Personal Status Law (Personenstandgesetz/PStG), §22.3.

57 See the opinion of the Organisation Intersex International (OII) Germany, <http://www.intersexualite.de/index.php/pm-mogelpackung-fur-inter-offener-geschlechtseintrag-keine-option/>, in German, accessed 12 December 2013.

58 For a review of these practices, including in Belgium, France and Germany, see D. C. Ghattas, "Human Rights between the sexes. A preliminary study on the life situations of inter* individuals", Heinrich Böll Foundation, 2013 http://www.boell.de/sites/default/files/endf_human_rights_between_the_sexes.pdf, accessed 12 December 2013.

59 CAT/C/DEU/CO/5, Committee against Torture, Concluding Observations on Germany, 12 December 2011, para. 20, http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/CAT/cat_state_report_germany_5_2009_cobs_2011_en.pdf; A/HRC/22/54, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, para.77, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf. Non-medically necessary surgeries performed on intersex children have also been recently criticized by the Council of Europe Parliamentary Assembly, Recommendation 2023 Children's right to physical integrity, 2013 <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=20176&lang=EN> (all accessed 12 December 2013).

2. LEGAL GENDER RECOGNITION IN EUROPEAN COUNTRIES

2.1 DENMARK

“Legal gender recognition is extremely important because people only get one life and they need to live it as who they feel they are.”

Joshua, a transgender man born in the United States of America and living in Denmark

Transgender people in Denmark cannot obtain legal recognition of their gender unless they get a psychiatric diagnosis and undergo psychiatric assessment and medical treatments including hormone treatment, surgeries and irreversible sterilization. This process lasts for years and all those transgender people who are not deemed to have fulfilled the criteria of the psychiatric diagnosis, or who do not want to, or for health reasons cannot, undergo all the necessary medical treatments are excluded from obtaining documents that reflect their gender. Psychiatric diagnosis is also a mandatory requirement for transgender people who wish to change their name.



Participants in the Copenhagen Pride 2012, © Søren Malmros

2.1.1 CURRENT LAWS AND PRACTICES

Personal data of Danish citizens and residents are stored in the Civil Registration System (CRS).⁶⁰ The data include information on the date of birth, the gender and the CPR (*det Centrale Personregister*), which is a unique 10-digit number. The CPR number includes a gender marker among other information, such as the date of birth. The last digit of the CPR is always odd for those individuals who were assigned the male sex at birth and even for those who were assigned the female sex. Personal Number Certificates (*personnummerbeviser*) are issued on the basis of the information registered in the CRS. The information included in the CPR number is needed to obtain other official documents, including passports, and to access a wide variety of goods and services such as health care, opening bank accounts, using public libraries or buying properties.

The Ministry for Economic Affairs and the Interior is ultimately responsible for allocating new CPR numbers to transgender individuals, provided that the Danish Health and Medicines Authority (*Sundhedsstyrelsen*, hereafter the Health Authority), an entity under the Ministry of Health that sets up standards for the treatment of transgender people, certifies that the person's gender reassignment is completed.⁶¹

According to Danish law and practices, such a process is not over until the transgender person has undergone sterilization, which requires a long period of psychiatric diagnosis and supervision. Transgender people cannot obtain legal gender recognition until they undergo all the required phases.

Once genital reassignment surgeries and sterilization have been performed, the Health Authority authorizes the legal gender recognition and informs the Civil Registration System, which issues a new CPR number. At this stage, transgender people who had already changed their name can obtain new documents, including passport and driving licence, indicating their new legal gender.

Generally, names in Denmark should reflect the sex assigned at birth. Transgender people can obtain a name that corresponds to their gender identity before having completed the full process aimed at obtaining legal gender recognition, providing that the Sexology Clinic at the Copenhagen University Hospital (*Rigshospitalet*, hereafter the Sexology Clinic) considers them to be "transsexuals" or to be experiencing a similar condition.⁶² Similarly, transgender people who are diagnosed as "transsexual" but who have not yet completed the reassignment process with the Sexology Clinic, can obtain a passport where neither the male nor the female gender is indicated but where the gender case is filled with the letter X.⁶³ Bjørk, a

60 The CRS was put in place in 1968, mainly for the purpose of collecting taxes. See: Danish Act on the Civil Registration System, act no. 426 of 31 May 2000, <http://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50040.aspx>, accessed 2 December 2013.

61 Guidelines on Population Registration (Vejledning om folkeregistrering) no. 9273 of 14 June 2013, para. 2.1.3, <https://www.retsinformation.dk/Forms/R0710.aspx?id=152201#Bil2>, in Danish, accessed 2 December 2013.

62 Act on Names, § 13.2, http://www.familiestyrelsen.dk/fileadmin/user_upload/Engelsksproggede_filer/The_Danish_Act_on_Names.pdf, accessed 4 December 2013; Regulation on Names, No. 1324 of 27 November 2013.

63 Guidelines on Passports (Bekendtgørelse om pas m.v.) no. 1337 of 28 November 2013, §5, <https://www.retsinformation.dk/Forms/R0710.aspx?id=159226>, in

transgender woman, was told by the Clinic that she had to wait two years before getting a passport indicating a neutral gender. In the end, the Clinic did not support her request to have a gender-neutral passport, on the basis that she was not living as a woman full-time. According to Bjørk, this conclusion was based on one occasion when the Clinic tried to reach her on an old number that was not in use anymore and listened to the message on the answering machine that Bjørk had recorded by using her old male name. Bjørk filed a complaint with the Medico-Legal Council (*Retslægerådet*), which is tasked with providing advice to authorities on medical-related issues.⁶⁴ The complaint was rejected in March 2013.⁶⁵

2.1.2 MEDICAL REQUIREMENTS: THE PSYCHIATRIC DIAGNOSIS

The Sexology Clinic is the only facility in Denmark where transgender people can access the specific transgender health care officially required for legal recognition of their gender. The main rationale for this is the highly specialized nature of transgender health treatments, according to spokespersons for the Clinic and the Health Authority in interviews with Amnesty International.

The Clinic is also in charge of establishing the psychiatric diagnosis for transgender individuals, which is a prerequisite to access specific treatments, such as hormone treatment or surgeries. The team dealing with transgender individuals within the Clinic is composed of psychiatrists, psychologists and other doctors such as gynaecologists and plastic surgeons.

The Danish Classification of Diseases is based on the World Health Organization's International Classification of Diseases (ICD-10).⁶⁶ The psychiatric diagnosis of transgender identities undertaken by the Sexology Clinic is thus based on the ICD-10. The diagnosis is necessary to access the health treatments that are required to obtain legal gender recognition. According to the practices followed by the Sexology Clinic, only the diagnosis of "transsexualism" (ICD10, F64.0) paves the way to accessing hormone treatments, surgeries and eventually genital reassignment surgery and sterilization, which are compulsory requirements to obtain legal gender recognition.

The issue of psychiatric diagnosis is a contentious one. Many of the transgender people and organizations Amnesty International spoke to in Denmark and elsewhere vocally oppose the fact that transgender identities are treated as mental diseases that require a psychiatric diagnosis. On the other hand, the Health Authority told Amnesty International "*A transgender person does not have to be ill in order to be offered treatment by the Health Care System. However, thorough examination is a precondition for delivering treatment. The result of such examination constitutes the diagnosis, which is crucial to identify the most appropriate*

Danish, accessed 4 December 2013.

⁶⁴ Guidelines on Passports, §6.

⁶⁵ Interview with Bjørk, 23 October 2013.

⁶⁶ See Appendix II for more information on these categories.

treatment. Normally, it is dangerous and irresponsible to treat people without the diagnostic examination. Diagnoses are therefore a necessary medical tool".⁶⁷ Independent health professionals operating outside the Sexology Clinic told Amnesty International they think the current medical practices stem from the idea that transgender people are mentally ill and thus their experiences and feelings cannot be trusted. They said that "*being transgender is not a psychiatric disease, it's just a variation of normality and normality is a broad concept, with many nuances*".⁶⁸ According to representatives of the Sexology Clinic, the psychiatric diagnosis is not necessarily a stigmatizing practice. Anna Marie Giraldi, the Clinic Deputy Head, said "*I don't think that being transgender is a psychiatric disorder. However, the psychiatric diagnosis can help in identifying many factors and conditions that are problematic, including those who bear psychological consequences or need to be treated*".⁶⁹

Especially given the reservations of many transgender people regarding psychiatric diagnosis, it is important that it not be required for legal gender recognition, a process which is not medical in itself. Transgender people whom Amnesty International spoke to generally agree that medical supervision is necessary when accessing hormone treatment or surgeries. They would also be in favour of getting some psychological support; for some of them it proves indeed difficult to acknowledge their gender identity, especially in contexts where social pressure and stigma play an important role. However, many do not consider the Clinic's practices with regard to psychiatric diagnosis to be appropriate or supportive. Transgender people reported feeling ill at ease in sessions with mental health professionals at the Clinic.

Bjørk said, "*I went to the Clinic because I wanted to understand my feelings better. I didn't know whether I wanted the full gender change, but I did want some treatments to appear more feminine. I felt I had to prove myself to them; that the burden of the proof was on me. I had four sessions with the psychologist. She asked about my sexual relations. I told her I had some with men... and she insisted I was homosexual and that those were homosexual relations.... but that is not the way I perceived them... She said they could not help me because of [the 'homosexual relations']. That was my last visit to the Clinic.*"⁷⁰

Hanne, a psychologist who provides support to transgender people outside the Sexology Clinic also expressed some reservations on the diagnostic practices followed by the Clinic: "*It is not on the basis of sexuality that you can say whether a person is transgender or not because transgender people, as much as everyone else, live their sexuality in many different ways, it's not possible to make generalizations on that.*"⁷¹

Furthermore, psychiatric diagnosis contributes to making the procedure aimed at obtaining legal gender recognition lengthy. In the summer of 2013 the Clinic established a new practice and timetable for making a diagnosis – eight sessions with mental health

67 Interview with Dr. Marianne Jespersen, Danish Health Authority, 15 November 2013.

68 Interview with Hanne Pedersen, Michael Lützhøft Hansen and Peter Bagger, 15 November 2013.

69 Interview with Anna Marie Giraldi

70 *Ib.* 65

71 Interview with Hanne Pedersen, 15 November 2013.

professionals to be distributed in a period of eight weeks. If a diagnosis cannot be established in that timeframe, the guidelines stipulate further consultation for a period that should not exceed one year. Prior to these new rules, the Clinic had no specific guidelines on the timeframe for establishing the psychiatric diagnosis.

The waiting time to get the first appointment with the Clinic is currently around two months. After the first appointment, it takes another three months to start the diagnostic period. The number of sessions necessary to establish the psychiatric diagnosis varies on a case-by-case basis.

The diagnostic process followed by the Sexology Clinic also requires one session where relatives, preferably parents, are invited over and asked questions about the private and intimate life of the transgender person who is under scrutiny. This session seeks to assess whether the person's gender identity has been constant over time. Daniel, a transgender man told Amnesty International, "*I was not allowed to say anything during the session with my parents. They asked my mum a lot of questions about my birth, whether there were complications, if I played with boys or girls in the kindergarten, if I played with dolls, what clothes I wanted to wear and also about my intimate partners later on. My parents felt they were being interrogated and they were nervous they might say something wrong.*"

Transgender people who obtained another diagnosis, under the classification of "other gender identity disorders" (ICD10, F64.8) for example, do not have access to health treatments and ultimately are excluded from the possibility of seeking legal recognition of their gender, unless they undergo surgeries abroad and at their own expenses.

Pippin is a transgender man who was not diagnosed with "transsexualism" by the Sexology Clinic. He told Amnesty International, "*I went to the Clinic for a year and a half. The first year I had an appointment with a psychiatrist once a month. Then I had to undergo psychological tests and a discussion session with my parents. They concluded they could not offer me treatment because my gender identity was not certain and it was something I had come up with to bolster myself. They obviously think they know better who you are...you have to be declared mentally ill in order to be who you are.*"⁷²

Christina is a 48-year old trans woman. She told Amnesty International that she attended 32 sessions with mental health professionals at the Clinic for almost two and a half years. Eventually the Clinic rejected a diagnosis of "transsexualism". According to the written assessment Christina received from the Clinic, she was a transvestite and did not qualify for gender reassignment treatments.⁷³ As a consequence, she will not be able to obtain legal recognition of her gender.

2.1.3 HORMONE TREATMENTS AND SURGERIES

According to the Sexology Clinic, 120 transgender people were referred to the Clinic in 2011

⁷² Interview with Pippin, 24 October 2013.

⁷³ Interview with Christina (pseudonym), 13 December 2013.

and this number increased to 160 in 2012. There are no statistics on how many transgender people are diagnosed with “transsexualism” or any other gender identity related “disorder” each year. What is certain is that all those individuals who identify themselves as transgender and who would like to seek legal recognition of their gender but are not diagnosed with “transsexualism” by the Clinic will not be able to obtain new documents reflecting their gender because they do not have access to the health treatments that are compulsory for the purpose of obtaining legal gender recognition.

Transgender individuals who are diagnosed with “transsexualism” are referred to hormone treatment straight after the diagnosis. After one year of hormone treatment, under which transgender people are closely supervised, a final decision is taken by the Clinic on whether a full reassignment operation, involving sterilization, should be performed.

Some transgender people do not want to follow the process put in place by the Sexology Clinic and decide to access health treatment from other health professionals. According to some of these health professionals, in interviews with Amnesty International, more transgender people access health care through them than through the Sexology Clinic.⁷⁴

Niels, a 40-year old transgender man, refused to follow the process with the Sexology Clinic, opting instead to access hormone treatments via health professionals in the private sector and to undergo reassignment surgeries abroad, which are not state-funded. He told Amnesty International, *“[The Sexology Clinic] should not be able to exercise power over my life; the choice should not be in their hands... They think we are all mentally ill. If we feel bad before treatment, it's not because we have a disorder... [It is because] living in the wrong body is difficult.”* Niels, who used to suffer from severe depression before initiating his transition, explained why hormone treatment is important for him. *“I felt better immediately after taking my first dose of testosterone... For some transgender people hormone treatment is critical to their mental well-being, and it should be accessible just on the basis of informed consent.”*⁷⁵

Michael is a gynaecologist who provides health care to transgender people independent of the Clinic. He explained why: *“We take them because they do not have anywhere else to go and we know they are desperate. Being transgender is not a psychiatric disease, but often transgender people have psychological problems because for years they have experienced a situation in which they felt something was wrong... The most important thing is that they understand exactly what each health treatment entails. Their informed consent should be the only key element to be taken into account in access to specific health care.”*⁷⁶

The Health Authority, acting as the supervisor of the health system, instructed these health professionals to hand in all the medical files of the transgender people that they were treating as there were concerns about transgender health care being provided outside the system established by the Sexology Clinic. This caused a lot of anxiety among those transgender people, including Niels, who access hormone treatment via these health professionals. The

⁷⁴ Ib. 68

⁷⁵ Interview with Niels, 21 October 2013.

⁷⁶ Ib. 68

Health Authority decided eventually to allow them to continue treating the transgender individuals who were already under their supervision but reached the conclusion that they must not treat any new patients.

2.1.4 STERILIZATION

Danish legislation lays out the instances in which sterilization, a process entailing the surgical removal of the sexual and reproductive organs (ovaries, uterus, penis and testes), is allowed. According to the 2010 Health Act, a person can be sterilized in order to “change sex” if the sex assigned at birth causes considerable mental suffering or social deterioration. Only individuals who are 21 years or older can be sterilized. In practice, this excludes all transgender people who are under 21 from legal gender recognition.⁷⁷

Further administrative guidelines spell out the procedure. Requests for sterilization in relation to a “sex change” should be submitted to the Health Authority, which is the body tasked by the Ministry of Interior and Health to authorize such requests.⁷⁸

In practice, sterilization is carried out in conjunction with genital reassignment surgeries. One of the requirements of the Health Authority to authorize sterilization, besides the diagnosis of “transsexualism”, is an “observation period” of at least two years under the Sexology Clinic.⁷⁹ This means that transgender people who are treated by health professionals or structures in the private sector cannot be sterilized and are unable to seek legal recognition of their gender, unless they undergo reassignment surgeries abroad.⁸⁰

Gender reassignment surgeries performed abroad can be recognised in Denmark for the purposes of legal gender recognition only insofar as several conditions are fulfilled. In particular, transgender women who were born as male have to undergo castration (removal of testes and the penis) and vaginoplasty. Transgender men who were born female must have

⁷⁷ Individuals whose sex drive may lead to the perpetration of crimes may equally be sterilized. In any case, sterilization has to be authorized by the Ministry of Interior and Health. Danish law refers to “Kastration” as covering irreversible sterilization of both women and men. In this report, “Kastration” is translated as “sterilization” because it is not a gender-neutral term in English and refers only to the removal of testicles. Health Act (Sundhedsloven), no. 913 of 13 July 2010, §115, sub-sections 1 and 2, <https://www.retsinformation.dk/Forms/R0710.aspx?id=130455>, in Danish, accessed 4 December 2013.

⁷⁸ Decree on Sterilization and Castration including for sex change (Bekendtgørelse om sterilisation og kastration, herunder med henblik på kønsskifte), no. 14 of 10 January 2006, §5, <https://www.retsinformation.dk/Forms/R0710.aspx?id=10133>, in Danish, accessed 4 December 2013.

⁷⁹ Guidelines on castration in relation to a sex change (Vejledning om kastration med henblik på kønsskifte), no. 10077 of 27 November 2006, §2 and §3, <https://www.retsinformation.dk/Forms/R0710.aspx?id=11017>, in Danish, accessed 4 December 2013.

⁸⁰ According to available statistics two transgender women and 11 transgender men were allowed to undergo sterilization in Denmark from 1 January 2012 to 23 September 2013. In the same period 12 transgender women and one transgender man had surgery abroad. <http://www.ft.dk/samling/20121/almindel/suu/spm/858/svar/1082361/index.htm>

their uterus and ovaries removed.⁸¹

2.1.5 CONSEQUENCES OF CURRENT LAW AND PRACTICES

Transgender people who do not obtain the specific diagnosis of “transsexualism” cannot seek legal gender recognition. They also cannot access any state-covered transgender health treatment in Denmark. The only option open to them is to undergo surgeries abroad and to seek legal gender recognition once back in Denmark. Those transgender people who do not want to undergo genital reassignment surgeries and sterilization cannot seek legal gender recognition at all. They cannot obtain legal documents matching their gender identity and may be subject to a wide range of experiences where their rights to privacy and to be free from discrimination are violated.

Joshua is a transgender man born in the United States. He moved to Denmark to reunite with his current wife, who is Danish. He has three children from a previous marriage in the US. Joshua is caught in a legal limbo. While he is legally a man in the US and has a US passport, he is still a female in Denmark and has a CPR number that indicates the female gender. Danish authorities do not recognize his male gender because he has not undergone sterilization. This situation causes a great deal of stress for both Joshua and his wife. It also leads to social exclusion and discrimination.



Joshua said, “*I try to avoid people in Denmark, being stuck between two identities is a major obstacle for me. You don't want to go to your kids' school and out yourself all the time. I am still listed in the school system as their mum. The other kids in the school ask about it because they can see the [female] name [yet I have a male appearance]. It's very awkward for me and my kids.*”

Joshua Andreas Bryan © Private

⁸¹ Guidelines on castration, §4.

This situation creates problems in Joshua's everyday life. *"It's difficult when you go to the doctor and to the bank. I often take my wife with me to the doctor just in case they call up the wrong name [Joshua's former female name]... If you don't have your gender identity legally recognized, you always have to explain; 'I used to be so and so but now I am so and so'. You have to out yourself all the time and sometimes it makes you feel afraid; [I am yet] to get my driving licence in Denmark due to that fear... and I used to love driving in America."*

Joshua explained why he does not want to undergo the existing process to obtain legal gender recognition in Denmark. Apart from objecting to the sterilization requirement, he does not think the practices of the Sexology Clinic are appropriate and more fundamentally he does not think that transgender identities should be considered as mental diseases. *"Sterilization is a major surgery and seems unnecessary when no one can really see what's inside me. The idea that trans people should not have kids is an insult to my three kids because I wouldn't have them if I'd grown up here and followed the rules [about legal gender recognition]... The mental diagnosis is completely demeaning and gives you a big dose of low self-esteem. I went to the Sexology Clinic three times. I hated their questions. They were overly fascinated by the fact that I have three kids and that I used to be married to a guy. They focused only on my sexual life and asked questions like, 'Did it excite you having sex with Mark [Joshua's former husband]?' Finally I had enough and I left."*

The lack of legal gender recognition can further expose transgender people to discrimination and hate crimes, which remain widespread in Denmark. According to the FRA-LGBT survey, 44 per cent of the transgender individuals surveyed in Denmark felt they had been discriminated against or harassed during the 12 months prior to the survey. Twenty-one per cent of those surveyed felt discriminated against by health professionals and educational staff and 25 per cent perceived having been discriminated against at work. Danish civil law does not provide explicit protection against discrimination on grounds of gender identity.⁸²

The same FRA-LGBT survey found that 34 per cent of the transgender individuals surveyed experienced physical violence or were threatened with violence in the five years prior to the survey and 44 per cent thought the last incident of violence they had experienced was motivated by their gender identity. The transphobic motive behind the perpetration of a hate crime can be investigated, prosecuted and taken into account in the sentencing phase.⁸³

⁸² Discrimination on the ground of gender is prohibited in employment and other areas of life by the (Consolidated) Act on Equality between Women and Men (No.1527, 2004), Act on Equal Pay for Women and Men (No.906, 2006), Equal Treatment Act (No. 734, 2006) and Consolidated Act of equal treatment for men and women in occupational social security schemes (No. 134 No. 1998). Discrimination on the ground of sexual orientation is prohibited only in the area of employment in the Act on the Prohibition of Discrimination in the Labour market No. 1349, 2008. See: <http://www.ligebehandlingsnaevnet.dk/artikler/default.aspx?page=1166>, in Danish, accessed 16 December 2013.

⁸³ The Danish Criminal Code includes a provision according to which the punishment can be enhanced if a crime is perpetrated on the grounds of ethnic origin, religion or belief, sexual orientation or other grounds, Criminal Code (Straffelove) no. 1028 of 22 August 2013, §81.6, <https://www.retsinformation.dk/Forms/R0710.aspx?id=152827>, in Danish, accessed 4 December 2013. In October 2013 the Copenhagen City Court applied the existing

2.1.6 OPPORTUNITIES FOR CHANGING LAWS AND PRACTICES

Denmark violates the rights of transgender people to the highest attainable standard of health and to be free from inhuman, cruel and degrading treatments by requiring them to undergo unnecessary medical treatments such as surgeries and sterilization in order to obtain legal recognition of their gender. The extensive length of time required for transgender people to complete the process to obtain documents that reflect their gender identity, and the exclusion from that process of transgender people who are not diagnosed with “transsexualism” violates their rights to private and family life and to recognition before the law. Psychiatric diagnosis is stigmatizing and should not be a precondition for accessing health treatments and legal gender recognition. According to many of the transgender people Amnesty International interviewed, the psychiatric assessment is often undertaken on the basis of gender stereotypes, which Danish authorities should counteract.

The Health Authority informed Amnesty International that a working group chaired by the Minister of Justice is assessing the current laws and practices on legal gender recognition and is tasked to develop recommendations.

According to a November 2012 statement, the Health Authority is reviewing practices on transgender health care, including consideration of making treatments accessible to minors. Recommendations by the working group on legal gender change as well as guidelines regarding future transgender health care were still to be published at time of completing this report.

provisions on hate crime when judging a man who had assaulted a transgender woman with a hammer, although gender identity is not an explicitly mentioned ground in hate crime legislation.

2.2 FINLAND

"I find it offensive to have [gender] markers on my documents and in registers that are not true. This puts me in a situation whereby I must constantly be prepared to answer questions. My name is Juudas, I feel like [a man] but my documents say F-female. One big thing about gender recognition is safety. But also the fact that I want to be who I truly am in the eyes of society."

Juudas, a 20 year-old transgender man living in Tampere and in the process of obtaining legal gender recognition

Transgender people in Finland have to undergo a cumbersome process in order to obtain legal recognition of their gender. They cannot change the gender markers on their documents unless they receive a psychiatric diagnosis and undergo psychiatric assessment, medical treatments including sterilization and a "real life test". The procedure can last for years and it excludes all transgender people who do not receive, or chose not to receive, a specific diagnosis and those who do not want to, or cannot for health reasons, undergo all the required medical treatments. Transgender people can rarely change their name to a differently gendered name unless they get a psychiatric diagnosis.

2.2.1. CURRENT POLICIES AND PRACTICES

In Finland, all the personal information relating to citizens and residents is registered in the Population Information System, an electronic database maintained by the Population Registration Centre.⁸⁴ This information includes the gender and personal identity code. The latter refers to the sex assigned at birth and its last digit is always even for females and odd for males. All personal documents, including passport and identity cards, are issued on the basis of the information stored in the Population Information System.

According to the Act on Legal Recognition of the Gender of Transsexuals⁸⁵ (hereafter the Trans Act), in force since 2002, the reference to the sex assigned at birth in the Population Information System can be changed only if the applicant presents a medical statement certifying that she or he wishes to belong permanently to the opposite gender, lives in that gender role and has been sterilized or is "for some other reason infertile". The Act also restricts the possibility to access legal gender recognition to individuals who are single and of age. However, the single status requirement is not applied if the spouse gives his or her consent to legal gender recognition. In this case an existing marriage is converted into a registered partnership and vice-versa.

Further details on the requirements for accessing legal gender recognition are spelled out in a Decree issued by the Ministry of Social Affairs and Health.⁸⁶ In particular, the Decree

⁸⁴ See, the Population Information Act (507/1993), <http://www.finlex.fi/fi/laki/ajantasa/2009/20090661>, in Finnish, accessed 7 November 2013.

⁸⁵ Act No. 563/2002, Section 1. The Act also requires the applicant to be either a Finnish citizen or a resident in Finland. Unofficial English translation: <http://www.finlex.fi/en/laki/kaannokset/2002/en20020563>, accessed 11 November 2012.

⁸⁶ Ministry of Social Affairs and Health Decree 1053/2002 on the organization of the examination and treatment aimed at changing gender, as well as on the medical statement for confirmation of the gender of a transsexual. Unofficial English translation: www.trasek.net/wp-

specifies that the medical statement required by the Trans Act for the purpose of legal gender recognition should verify that all the medical criteria are fulfilled. The Decree also provides a framework regulating access to transgender health care and psychiatric assessment.

Every transgender person seeking treatment should be referred to one or other of the multidisciplinary teams established at the Helsinki University Central Hospital and the Tampere University Central Hospital. According to the Ombudsman for Equality, general practitioners sometimes refer transgender people to mental health units in other hospitals, although this is against the rules outlined by the Decree. Both of the official teams are led by a psychiatrist and composed of experts in gynaecology, endocrinologists and, in the case of Helsinki, plastic surgery. Transgender individuals wishing to legally change their gender must obtain a statement from both the heads of the specialist teams in Helsinki and Tampere.

The Names Act is interpreted as if it prohibits bearing a name that does not correspond to one's legal gender.⁸⁷ As a consequence, transgender individuals can usually change their name only after receiving a psychiatrist diagnosis. The diagnosis may not be required in a few cases where applicants wish to change their name to one that is considered to be gender neutral. However, name change practices, including the interpretation of which names are gender neutral, greatly vary across the registration offices that are in charge of dealing with applications.

2.2.2. MEDICAL REQUIREMENTS: THE PSYCHIATRIC DIAGNOSIS

Psychiatric diagnosis is required to access specific transgender health care, including hormone treatment, which is in turn necessary to obtain legal gender recognition. The diagnostic period at the Trans Units of Helsinki and Tampere University Hospitals takes at least six months and can take up to 12 months depending on the individual situation and the availability of human resources. Many transgender individuals perceive the need to receive a psychiatrist diagnosis as stigmatizing.⁸⁸

N. is a 39-year-old women with a transgender past. She is married to a woman and has two children. She realized she was transgender at the age of 26, although she had always felt uncomfortable with the male gender she was brought up with. A general practitioner referred her to the multidisciplinary unit in Tampere in March 2012, and she was finally diagnosed with "transsexualism" in April 2013. She shared her frustration with this long process in an interview with Amnesty International. *"I spent over a year trying to convince other people that*

content/uploads/2011/03/TransDecree2003.pdf, accessed 11 November 2013.

⁸⁷ Formally, the Names Act only prohibits giving a child a name that does not correspond to the legal gender. Names Act 9.8.1985/694, Section 32b

⁸⁸ The diagnostic period refers to the period elapsing from the first meeting at one of the two Trans Units to the moment where the psychiatric diagnosis is established. In summer 2013, the Helsinki Trans Unit created a diagram of the entire process from referral through legal gender recognition. The process is explained to all transgender people referred to the Unit on their first appointment. It includes: i) the diagnostic period (minimum of six months); ii) "real life test" (minimum 12 months) in which the transgender person lives according to the preferred gender identity, a requirement of the Trans Act and its implementation Decree, and includes hormone treatment, possibly mastectomy, voice therapy, epilation, and possibly other treatments; iii) evaluation of the "real life test"; iv) second opinion from the other Trans Unit; v) legal gender recognition and genital surgery. Interview with Hanna Hintsala, Helsinki Unit, 5 November 2013

I am really a woman. It is a humiliating process, a breach of one's self-determination. I see that as absurd. No one else has to constantly convince others of who they are. It is derogatory and stigmatizing that the issue is treated as a psychiatric one; for instance, I had to explain to my employer that I did not have mental health issues.”⁸⁹

Furthermore, many trans individuals told Amnesty International that they felt they had to conform to stereotypical gender norms in order to be perceived as trans by health professionals during and after the diagnostic process. Juudas, a 20-year-old transgender man living in Tampere who is in the process of obtaining legal gender recognition, told Amnesty International: *“You suffer all the time from the normativity that surrounds the process. I started my process in Helsinki. I went there thinking I would finally get help and the suffering would end soon. I was new there and one of the first things they told me was that I have a ‘feminine hairstyle’. You are constantly being reviewed on the basis of how ‘girly’ or ‘manly’ you are. [That is how] these ‘qualified’ people, decide your gender.”⁹⁰*



Luca Tainio and Juudas Kannisto from Finland, © Amnesty International

⁸⁹ Interview with N., 16 July 2013.

⁹⁰ Interview with Juudas, 5 July 2013.

Members of the Trans Units told Amnesty International that they are very well informed about gender diversity and do not expect people to conform to stereotypical gender roles in order to obtain the needed diagnosis. However, pressure is imposed by the fact that the diagnosis of “transsexualism” (ICD-10, F64.0) is the only one that enables access health treatments and ultimately legal gender recognition. Trans people who do not identify according to the binary male-female divide are not diagnosed with “transsexualism” but with “other gender disorders”,⁹¹ which excludes them from accessing legal recognition of their gender.⁹² The Trans Act and its implementation Decree are interpreted as being applicable only to those transgender people who are diagnosed with “transsexualism”.

K. I. is a transgender person who is legally a female and identifies as gender queer. Amnesty International interviewed him when he was in the process of being diagnosed by the Helsinki University Central Hospital. He felt pressured to fit into the gender stereotyping inherent in the diagnostic system. *“You need to be careful that what you say fits the image they are looking for. I cannot say that I am gender queer, closer to the male end of the spectrum, because then they would diagnose me as gender queer and I wouldn’t be able to get the treatments I need. They don’t look at what treatment you need, they put you in a box and that box determines which treatments are allowed. There is no room for dialogue on experience and personal needs. Gender queer people are not legally recognised so... I have had to make my childhood experiences sound more stereotypical just in case, which is very distressing and creates uncertainty over your own identity and your perception of it. I get a feeling of not being in the right place, as I am not accepted as I am”.*⁹³

2.2.3 OTHER MEDICAL REQUIREMENTS: HORMONE TREATMENT AND STERILIZATION

Once the diagnosis of “transsexualism” is established, transgender individuals can access hormone treatment. This is usually part of a “real life test” in which they have to live according to their gender identity for the period of a year, as required by the Trans Act and its implementation Decree, to obtain legal gender recognition.⁹⁴

The sterilization requirement is one of the most problematic issues for many transgender people. A 21-year old gender queer person told Amnesty International, *“The sterilization requirement is a big question for me personally. I would like to have my gender legally*

91 F 64.8: other gender identity disorders; F 64.9: gender identity disorders, unspecified, of the International Classification of Diseases (ICD-10). See Annex II for more information on these categories.

92 Such diagnosis excludes trans people from accessing state funded genital surgery and in some cases other state funded treatments because the Decree 1053/2002 refers only to “transsexualism”. The treatments accessible to trans people who are not diagnosed with “transsexualism” depend on the practices followed by the Trans Units. In early 2013 the Helsinki Trans Unit decided mastectomies would no longer be accessible to trans people diagnosed with “other gender disorders”. Even if the diagnosis can be changed to “transsexualism” at a later stage, making treatments dependent on the specific diagnostic classification and not on one’s individual personal situation and wishes is problematic.

93 Interview with K. I., 18 July 2013.

94 Section 1.1 of the Trans Act and §6 of Decree 1053/2002.

recognized but I am not sure I can trick [the health professionals] in the examinations to believe that I would never want biological children.” Another young person said, “Above all, the sterilization requirement is the most heinous. I do not want to be forced to decide at the age of 24 whether I want to have biological children.”

The sterilization requirement implies that trans people may have to undergo medical treatments against their wishes and with the sole purpose of obtaining legal gender recognition. K. I. shared with Amnesty International how he felt coerced into undergoing hormonal treatments in order to obtain legal gender recognition:

“I think my body image fits even without hormonal treatment, but hormones are compulsory for me if I wish to have my male gender recognized. The legal gender is crucial in your everyday life; it is marked on your travel card, you need it when you see your doctor, when you apply for education. The thought of my identity number outing me in front of other people is distressing.”⁹⁵

Health professionals at both the Helsinki and the Tampere Hospitals told Amnesty International that the Trans Act’s sterilization requirement is in practice achieved via hormone treatment.⁹⁶

2.2.4 OTHER REQUIREMENTS: CHANGE IN MARITAL STATUS

The single status requirement established by the Trans Act does not in practice require that a person literally be single. However, provided that the partner or the spouse of the transgender person seeking legal gender recognition gives the consent, a civil partnership may be transformed into marriage and vice-versa. This has the effect of making legal gender recognition conditional on what marital status the applicant has.⁹⁷

Heli is a 49-year-old transgender woman. In 2006 she was diagnosed with “transsexualism” by the University Hospital of Helsinki, a diagnosis confirmed by the University Hospital of Tampere. She has undergone all the phases required by law to obtain legal gender recognition. However, she cannot change her gender because she is married and she does not want to convert her marriage into a civil partnership, as this would be contrary to her religious beliefs and a violation of her and her spouse’s right to private and family life. *“I would be satisfied to have, in addition of my name, a passport with gender markers that reflect my*

⁹⁵ Interview with K.I., 18 July 2013.

⁹⁶ Interview with Hanna Hintsala, Helsinki Unit, 5 November 2013 and Interview with Aino Mattila, Tampere Unit 22 October 2013. The two teams follow different practices in this respect; the Tampere team considers sterilization completed after six months of hormone treatment, while the Helsinki team requires 12-months of treatment

⁹⁷ Under Finnish law, marriage is exclusive to different sex partners (Section 1.1, Marriage Act, 234/1929) and civil partnerships are restricted to same sex partners (Section 1, Act of Civil Partnerships, 950/2001). The rights protected by the two regimes differ, in particular with regard to adoption and parental rights. For instance, civil partners cannot jointly adopt children; one of the partners has to adopt as a single-person and the other partner can subsequently adopt the child through second-parent adoption. Moreover, if one of the partners gives birth to a child, the other partner is not automatically considered as the other legal parent unless the child is adopted through second-parent adoption.

gender. I currently do not fulfil the expectations created by my passport, for instance at airport security checks. I only wish my identity number did not out me. In my view, this number should correspond with my name that I have changed. Gendered identity-numbers lead to many unpleasant situations. For example once a ticket inspector claimed I was travelling with someone else's ticket or that I had taken my spouse's ticket by mistake [as the ticket showed the gendered identification number]"

Heli considered the requirement to convert her marriage into a civil partnership as the most problematic one. She told Amnesty International: *"The biggest issue is them requiring changes in my personal life, in things that have to do with my privacy, to treat a medical condition. I am surprised they don't require a ban on owning land, which would make as little sense [as the single status requirement]. The justification is that morals, everyone else's rights and everything else would collapse. However, I did not change, I was not reborn as a woman and I am not remarrying my spouse. We have been married since 1996 and in that marriage, a child was born. If I can live with this, the society should be able to, as well. It is not a question of lying to anyone. ... I wonder what is the protection the society needs in these situations."*⁹⁸

2.2.5 CONSEQUENCES OF CURRENT LAW AND PRACTICES

The personal identity code is mentioned on both official as well as less official documents like diplomas or library cards. The code is also required to apply for pensions and other benefits, for the payment of wages, salaries and fees, and for bank transactions. It is, therefore, crucial for transgender people that this number corresponds to their actual gender. The current process to obtain legal recognition can take years from the moment where transgender people are referred to specialized health institutions. Several transgender individuals interviewed by Amnesty International shared their negative experiences resulting from the divergence between their gender identity and the legal gender.

A 20-year-old transgender man said, *"Officially I still have a female name and identity number, and I have had problems with my ID. For instance, practically every time I try to collect a parcel from the post office, I am questioned as to whether the passport is mine. The travel card has my identity number on it and when I try to get on a bus, the driver often claims it is not my card as it says 'female'."*

A 30-year-old transgender man told Amnesty International: *"I started my midwife studies in 2010, when I was already taking hormones but my legal gender was not recognized. I had, for example, a conversation with my tutor teacher, in which he wanted to discuss my 'sexuality' as he could "see it from my identity number". I was confused about what he meant and why he would say something like that. My sexuality was not visible in the identity number although my legal gender was. I felt really uncomfortable having the conversation and afterwards I tried to get a new tutor but no one listened to me."*

⁹⁸ Interview with Heli Hämäläinen, 12 June 2013. She brought her case before the European Court of Human Rights in 2009 (Application 37359/09). On 13 November 2012, the Court found no violation of Article 8 in conjunction with article 14. See, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114486#%7B%22itemid%22:%7B%22001-114486%22%7D%7D>, accessed 8 November 2013. The case was referred to the Grand Chamber of the European Court of Human Rights in April 2013 at the request of the applicant and on the basis of Article 43 of the ECHR. The Grand Chamber held a hearing on 16 October 2013.

A 20-year-old masculine gender queer stated: *“Showing my passport or other ID is always very humiliating. In all situations where my legal gender comes up people stare for a really long time. I do not want to be a woman looking like a man.”*

A 37 year-old masculine gender queer said: *“I was discriminated against when I applied for a job and mentioned that I was starting hormonal treatment. We were already about to sign the contract but when I told them about the upcoming treatment, they said it would be too weird. It was a public nursery. I should have filed a complaint but I felt it would have been too difficult.”*

The lack of legal recognition of their gender can fuel discrimination and hate crimes against transgender people, which remain widespread in Finland. According to the FRA-LGBT survey, 48 per cent of the transgender individuals surveyed and living in Finland had been discriminated against in the 12 months ahead of the study.⁹⁹

A recent study on the wellbeing of young Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people in Finland¹⁰⁰ found that many young transgender individuals face discrimination and harassment in school and other areas of life. Eighty per cent of the trans individuals interviewed had faced harassment, and generally, trans pupils are more likely to experience violence than their cisgender peers. Forty eight per cent of the trans pupils interviewed experienced physical violence (compared to 40 per cent of the cisgender pupils interviewed); 79 per cent experienced psychological violence (compared to 67 per cent); and 21 per cent sexual violence (compared to 14 per cent). Sixty seven per cent of the trans pupils who experienced violence perceived it was motivated by their gender identity or expression.

The Ombudsman for Equality, tasked to monitor compliance with legislation on equality between women and men, collects annual statistics on reported cases of discrimination, including on grounds of gender identity.¹⁰¹ According to the Ombudsman’s Office,

99 Gender identity is not explicitly included in the list of protected grounds in Finnish anti-discrimination legislation. However, the Ombudsman for Gender Equality has clarified that gender identity is de-facto a protected ground in the Act on Equality between Women and Men (609/1986), <http://www.tasa-arvo.fi/en/publications/act2005>, accessed 7 November 2013. Anti-discrimination legislation is now being reviewed. The current draft of the Gender Equality Act explicitly mentions gender identity and gender expression as protected grounds of discrimination. The government was expected to make public its final proposal by September 2013 but the process was delayed. At the time of writing (December 2013), the final draft of the governmental Bill had not yet been made public.

100 K. Alanko, How are young LGBTI people doing in Finland? Seta and the Finnish Youth Research 2013, <http://www.nuorisotutkimusseura.fi/how-are-young-lgbtqi-people-doing-in-finland-abstract>, English summary, accessed 15 November 2013. A study by the Ministry of the Interior shows that as many as 30 per cent of the LGBTI pupils interviewed had experienced violence or threats of violence. The survey does not provide disaggregated data by sexual orientation and gender identity. K. Huotari, S. Törmä and K. Tuokkola, Discrimination in Education and Leisure: Focus on Discrimination Experiences by Sexual and Gender Minorities, Ministry of Interior Publications November 2011.

101 Of 451 cases registered by the Ombudsman for Equality in 2012, 172 were related to discrimination. Ombudsman for Equality Annual Report 2012, p. 60, <http://epaper.edita.fi/valtioneuvosto/tasa-arvo2012en/#/60/zoomed>, accessed 7 November 2013. A spokesperson for the Ombudsman’s Office told Amnesty International that between 2010 and 2013 it received between five and 11 cases of discrimination on grounds of gender identity per year. Communication with the Office of the Ombudsman for Equality, 12 December 2013.

transgender people are particularly vulnerable to discrimination in the workplace or in access to the job market, although such cases are rarely brought to courts.¹⁰²

According to the FRA-LGBT survey, 40 per cent said they had experienced violence or were threatened with violence in the previous five years, and 26 per cent of them perceived the most serious attack experienced in the last year as motivated by their gender identity. Official police statistics on hate crime report only a few cases of transphobic hate crimes.¹⁰³ In 2011, for instance, the police registered three crimes motivated by the gender identity of the victim,¹⁰⁴ which stands in stark contrast with the prevalence of violence and threats of violence highlighted by the FRA LGBT survey.

2.2.6 OPPORTUNITIES FOR CHANGE

Psychiatric diagnosis is stigmatizing and should not be a precondition for accessing health treatments and legal gender recognition. Finland violates the rights of transgender people to attain the highest standard of health and to be free from inhuman, cruel and degrading treatments by requiring them to undergo non-necessary medical treatments such as sterilization in order to obtain legal gender recognition. The length of the process to obtain documents that reflect their gender identity, and the exclusion of all of those transgender people who are not diagnosed with “transsexualism” from this process, violate their rights to private and family life and to recognition before the law. The single status requirement, while not requiring transgender people to literally be single, violates their rights to private and family life and to marry and found a family. The blanket age restriction excluding minors from the possibility of obtaining legal gender recognition may violate the right of children to be heard taking into account their evolving capacities, and the duty under human rights law to take into account the best interests of children in all matters concerning them.

The reform of the Trans Act was not part of the governmental coalition agreement reached in June 2011. In the wake of criticism from civil society organizations,¹⁰⁵ human rights treaty bodies¹⁰⁶ and other human rights bodies,¹⁰⁷ the Minister of Social Affairs and Health, who

102 In 2011, a transgender woman successfully litigated a case of discrimination. The court found that the Finnish Financial Supervisory Authority (FIN-FSA), part of the Bank of Finland, had discriminated against her on grounds of gender identity in withdrawing her promotion as head of the marketing unit in the wake of her coming out as a transgender person. Helsinki District Court, Ruling No. 53071, 20 December 2011.

103 Gender Identity is not an explicitly protected ground against hate crime. However, the provisions applicable to hate crimes in the Criminal Code are in practice interpreted as providing protection against hate crimes perpetrated on grounds of gender identity.

104 Charges were not brought against the suspects in these cases. J. Niemi and I. Sahramäki: Hate Crimes Registered by the Police in 2011, Report by the Police Academy No. 104.

105 See, for example, an open letter to the Finnish government by 20 national youth, LGBTI and human rights organizations (26.10.2012), <http://www.seta.fi/uutiset.php?aid=17799&k=17166>, in Finnish, accessed 7 November 2013.

106 See: Concluding Observations in Review of Finland in the UN Human Rights Committee following the 6th periodic report (CCPR/C/FIN/CO/6).

107 The Council of Europe's Commissioner for Human Rights recommended the abolition of the single status and infertility requirements for the purpose of legal gender recognition. Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Finland from 11 to 13 June 2012, CommDH (2012)27, para108. See also, 'Recommendation 90.8, Universal Periodic Review, 2012.' Working Group report and views on the Recommendations by the Finnish government, <http://formin.finland.fi/Public/default.aspx?nodeid=44595&contentlan=1&culture=fi-FI>,

took up her functions in May 2013, established a working group tasked to propose a new draft law on legal gender recognition (hereafter Trans Act Working Group) by the end of September 2014.¹⁰⁸

Amnesty International met with the Trans Act Working Group on 19 November 2013 to discuss issues of concern in the current laws and practices on legal gender recognition. The Working Group gave the assurance that human rights experts would be heard in the process of drafting the law.

At a seminar organized by Amnesty International Finland on 20 November 2013, State Secretary, Ulla-Maija Rajakangas, highlighted that the possibility of obtaining legal gender recognition should not be dependent on a psychiatric diagnosis or any other medical criteria, including sterilization.

Representatives of both the Helsinki and Tampere trans units told Amnesty International they supported the removal of the sterilization and single status requirements from the law.¹⁰⁹

accessed 15 November 2013.

¹⁰⁸ The current government is a coalition of several different parties including the National Coalition Party, Social Democratic Party, Left Alliance, Swedish People's Party in Finland, Green League and Christian Democratic Party. The latter voiced opposition to reforming current legislation on legal gender recognition. See, governmental programme: <http://valtioneuvosto.fi/hallitus/hallitusohjelma/en.jsp>, in English, accessed 11 November 2013.

¹⁰⁹ *Ib.* 96

2.3 FRANCE

"I've always identified myself as a woman but it took many years before I started my transition. I was harassed [throughout my years] at school, and brutally beaten up when I was 15 years old because I was perceived as a feminine guy. After that, I thought I had to be manly. I became violent to protect myself but I was also afraid of my reactions. I occasionally wore female clothes in secret and I did not talk to anybody about my gender identity. I established an end date in my head; I would not turn 50 as a man. I would have committed suicide beforehand. It is so difficult to spend your entire life, continually at odds with what you actually are..."

Hélène, a transgender woman living in Paris

In France, there is no specific legislation that allows transgender people to change their gender or name on official documents. The practices followed by the courts that are responsible for dealing with requests pertaining to name and gender change (*Tribunaux de Grande Instance*) are not homogenous. However, they often require transgender people who wish to obtain legal recognition of their gender to receive a psychiatric diagnosis and undergo health treatments, including genital reassignment surgeries that result in irreversible sterilization. The procedure can take several years.¹¹⁰

2.3.1. CASE LAW

In France, all births must be communicated to a civil registry officer within three days.¹¹¹ A birth certificate is subsequently issued indicating personal data such as forename, surname and gender.¹¹²

In 1975, the Supreme Court (*Cour de Cassation*) ruled that transgender people could not change their legal gender based on the principle according to which individuals cannot exercise full control of their judicial personality.¹¹³ This principle (*indisponibilité de l'état des personnes*), aimed at guaranteeing public order, implies that it is only possible to change certain characteristics, like name or civil status, in specific instances prescribed by law. Until 1992, the Supreme Court interpreted this principle as excluding the possibility for transgender people to legally change their gender – although some lower courts had allowed transgender individuals to change forenames and gender on birth certificates before 1992.

In 1992, in the case of B, a male to female transgender person, the European Court of Human Rights found that the situation in which it was impossible for her to obtain legal

110 The National Advisory Commission on Human Rights mentions between 2 and 9 years in its opinion published in July 2013. Commission Nationale Consultative des Droits de L'Homme, Avis sur l'identité de genre et sur le changement de la mention de sexe à l'état civil.

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027778791&dateTexte=&categorieLien=id>, accessed 25 November 2013.

111 Articles 55 and 56 of the Civil Code.

112 Article 57 of the Civil Code.

113 Principe de l'indisponibilité de l'état des personnes. Cour de Cassation, Chambre Civile 1, 16 December 1975, 73-10.615

<http://legimobile.fr/fr/jp/c/civ/1ere/1975/12/16/73-10615>, accessed 21 November 2013.

recognition of her female gender amounted to a violation of her right to private life.¹¹⁴ As a consequence, the Supreme Court established that transgender people could obtain legal recognition of their gender should they satisfy four main requirements. These are: being diagnosed with “transsexualism”; undergoing medical and surgical treatments; losing the characteristics of their biological sex; and, having an appearance and social behaviour consistent with their gender identity.¹¹⁵ The Court also established the principle whereby lower courts could involve experts when assessing the fulfilment of these criteria.¹¹⁶ As a result, some courts have consistently required transgender people to undergo expert assessment, at the cost of the applicant. To that end, each court appoints a number of experts, specifically psychiatrists, endocrinologists and surgeons.

In 2010, a Circular from the Ministry of Justice clarified the requirements laid down by the Supreme Court, in 1992, relating to medical and surgical treatments, stating that they did not imply the necessity to undergo gender reassignment surgeries. Hormone treatments and other surgeries were deemed to be sufficient to certify the irreversibility of the transition process undertaken by transgender people seeking legal gender recognition. Moreover, the Circular highlighted that the expertise should be required only in cases where serious doubts arise with respect to the “transsexualism” of the applicant.¹¹⁷ In June 2012, the Supreme Court confirmed the decision of the Court of Appeal of Paris to deny legal gender recognition to a transgender woman who underwent genital reassignment surgery in Thailand and subsequently refused to undergo expert assessment, as requested by the Court.¹¹⁸

In two recent judgments, the Supreme Court clarified that psychiatric diagnosis and proofs of the irreversible nature of the transformation of the physical appearance were necessary for the purpose of obtaining legal gender recognition.¹¹⁹

2.3.2 CURRENT PRACTICES AND REQUIREMENTS

Psychiatric diagnosis is required to obtain legal gender recognition, and several appointments are usually needed. Amnesty International spoke to representatives of transgender organizations who said the process can take from a few months to a couple of years, as

114 European Court of Human Rights, case of B. v. France, application number 13343/87, judgment of 25 March 1992, <http://archive.equal-jus.eu/150>, accessed 21 November 2013.

115 Judgment of 11 December 1992, number 91-11.900, <http://www.acthe.fr/information/viewartrub.php?a=109>, accessed 21 November 2013.

116 Judgement of 11 December 1992, number 91-12.373, <http://www.acthe.fr/information/viewartrub.php?a=109>

117 Circular n. CIV/07/10 of 14 May 2010 relating to requests for legal gender recognition (Circulaire relative aux demandes de changement de sexe à l'état civil), http://syndromedebenjamin.free.fr/juridique/etatcivil/cec/circulaire_justice2010-05-14.htm, accessed 22 November 2013.

118 Judgment 10-26.947, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000025993720&fastReqId=163538581&fastPos=5>

119 Judgment 11-14.515, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027072698&fastReqId=246685681>; Judgment 12-11.949, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027072756&fastReqId=1034479834&fastPos=2>

practices greatly vary. According to 11 mental health experts surveyed by the French National Authority for Health, the diagnostic period involved several appointments and can take up to two years.¹²⁰ Many transgender people and organizations in France view the psychiatric diagnosis as stigmatizing, and consider it as often being undertaken on the basis of gender-based stereotypes.

Oscar, a transgender man living in Lille and running a trans support group, told Amnesty International, *"The first psychiatrist I visited told me that I liked feminine things too much and that I could not be a transgender man. The diagnosis is tough, especially at the beginning... [because] it is basically a process aimed at getting a paper certifying that you are insane... It is important to get support, perhaps psychological support, but it should not be a psychiatric procedure."*¹²¹

Access to specific transgender health care, including hormone treatments and surgeries, depends on the psychiatric diagnosis, which is thus necessary for obtaining legal gender recognition. As illustrated in the case law above, courts would almost certainly reject requests for legal gender recognition from transgender people whose "appearance has not been changed irreversibly", which in some cases is still interpreted as requiring genital reassignment surgery despite the (non-binding) 2010 Circular.

Accessing specific health treatments can take several months or years. The main medical teams dealing with transgender health care are based in Lyon, Paris, Marseille and Bordeaux. Each team operates on the basis of different practices. For instance, in Lyon, the psychiatric assessment is undertaken by two psychiatrists and a psychologist and usually takes six months. A medical commission formulates an opinion on which health treatments, including hormone treatments and surgeries, each person should access. The waiting time for the first appointment is three or four months and the waiting time for the genital reassignment surgery is between 12 and 15 months.¹²²

Hélène had her first appointment with a specialized medical team dealing with transgender issues in Lyon in January 2012. She had already been taking hormones since 2008 after having consulted a psychiatrist. She had to meet several times both the psychiatrist and the psychologist and an endocrinologist. The process took nine months. Her genital surgery is scheduled for March 2014.

Courts follow different practices with regard to legal gender recognition. Some still require genital reassignment surgeries. Others require an expert assessment, especially in cases when surgeries are undertaken abroad. There is no legal certainty across the country as to the

120 According to these health professionals, the diagnosis is often based on the ICM-10 or the DSM IV. See, Haute Autorité de Santé, Situation actuelle et perspectives d'évolution de la prise en charge du transsexualisme, 2009, p96. In 2010, "early gender identity disorders" were removed from the list of "psychiatric long term diseases" (Decree 2010-15 of 8 February 2010), but psychiatric diagnosis based on the ICM-10 or the DSM IV is still applied.

121 Interview with Oscar, 26 June 2013.

122 Inspection Générale des Affaires Sociales. Evaluation des conditions de prise en charge médicale et sociale des personnes trans et du transsexualisme. Décembre 2011, p. 84.

criteria applied by different courts. A number of transgender individuals and organizations told Amnesty International they considered the processes followed by the courts to be arbitrary.

Oscar told Amnesty International, *"It was relatively easy to obtain legal gender recognition in Lille a few years ago; it took between three and six months. Two years ago a new judge was appointed and it is now much harder; expertise is required so it takes longer."*

Elsa, a transgender woman living in Paris, told Amnesty International that she had not yet submitted a request to change her legal gender because the procedure is particularly burdensome and expensive in the capital. *"I should apply to the most efficient court, for instance the one in Dijon... it's horrible in Paris. They ask for an expert assessment, which is very expensive, takes at least two years to complete and is likely to assess whether genital surgery and sterilization have been undergone. I should establish my residence in Dijon and then go there when needed, cover the transport costs... and hope that the judge remains the same [otherwise the practice can change]. At the beginning I did not take all this elements into account, as I did not have all this information. It took some time to understand how the system works."¹²³*

Celine is a woman with a male past. *"It's difficult because you have to show to the Court that you are already living as a female. To that purpose, I changed my email address to one that corresponded to my female identity but on the other hand I was always a male on my identity card, which could have raised problems if my clients asked to see my identity card. It is difficult because they ask you to live in mid-water [i.e. proving you are living as a female but with male documents]. I wanted to be operated in Thailand and I hired a lawyer before my operation to deal with the legal gender recognition. The request was introduced to the Court straight after the operation. I was summoned in April 2012 and waited until July to have the judgment. That Court¹²⁴ did not require any expertise."*

Hélène, for instance, obtained legal gender recognition in October 2013 without having undergone the genital reassignment surgery as it was established by the expert assessment that hormone treatment had irreversible sterilizing effects.

In practice, genital reassignment surgeries, which are still considered by some courts as a precondition for legal gender recognition, amount to sterilization as they also entail the removal of reproductive organs. For example, female to male transgender people usually have to undergo a hysterectomy (removal of womb). Understandably, many transgender people consider this to be problematic. Oscar said *"Some trans people have already had children... Requiring them to be sterilized means that the state is telling them that they are sick and for that reason they should not reproduce."*

¹²³ Interview with Elsa (pseudonym), 15 November 2013.

¹²⁴ Céline did not consent to publication of information relating to her place of residence. Interview with Céline, 28 June 2013.

Sophie, a transgender woman living in Lyon, told Amnesty International, *“I changed my name but not my legal gender because I haven't undergone genital reassignment surgery and I am not sterilized. I would like to change my legal gender but I am not convinced about the need to undergo surgery and I want to wait until the moment when I feel sure about it. In practice, you cannot freeze your sperm if you are a male to female transgender who has to undertake genital reassignment surgery. Other people who undertake medical treatments resulting in sterilization have that option. The State decides who can and who cannot reproduce. I don't think that's acceptable.”*¹²⁵

Transgender individuals and organizations also regard the additional expert assessment required by courts as problematic. Oscar told Amnesty International, *“The psychiatrist expert to whom transgender people were referred to by the court used to receive them in her office in the psychiatric ward of the main hospital. That was very stigmatizing for transgender people. She used to ask questions about sexuality and sexual orientation. Transgender people who were homosexual usually avoided saying that because they had the impression of being stigmatized by the psychiatrist and were afraid not to obtain their legal gender recognition.... Psychiatrist experts have a lot of power; at the end of the day, they can decide whether your gender can be recognized or not.”*

Sun Hee (pseudonym), a transgender woman living in Paris, underwent genital reassignment surgeries in Thailand. She sought legal recognition of her gender in Paris. The court requested additional expertise, which she refused to obtain. As a result the court refused to legally recognize her female gender, a decision upheld by the Supreme Court.¹²⁶ Sun Hee introduced a complaint to the European Court of Human Rights and as of November 2013, is still waiting to receive information on whether the complaint is receivable.

According to the French Civil Code, it is possible to change the forename on the basis of a “legitimate interest.”¹²⁷ The practices followed by courts in relation to requests from transgender individuals to change their forenames vary widely as they are based on the specific interpretation of each court on whether a “legitimate interest” is at stake.

2.3.3 CONSEQUENCES OF THE CURRENT PRACTICES

As a result of current practices regulating legal gender recognition, transgender people have to wait years to obtain documents that reflect their gender identity. The divergence between their gender, appearance and documents leads to the violation of their right to privacy and in some instances to discrimination.

Elsa, a transgender woman whose legal gender is still male, told Amnesty International about the difficulties arising from the divergence between her appearance and her documents, especially when looking for employment. *“I used to apply for jobs with my female name. I knew I would have to tell my future employers that I was a transgender person at some point,*

¹²⁵ Interview with Sophie, 3 July 2013.

¹²⁶ Judgment 10-26.947,

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000025993720&fastReqId=163538581&fastPos=5>

¹²⁷ Article 60 of the Civil Code.

but I feared being judged. Even in interviews where the issue was not discussed I still felt pressured because I knew I would have to produce my identity card and my health insurance card [should I be offered the job]. The situation was particularly dire at the employment centre because they refused to use my female name since it wasn't on my identity card or my health insurance card. I had to explain everything from the beginning at each meeting with a different counsellor. When I applied for jobs via the employment centres' Internet website or when the employment centre sent my CV to potential employers, I had to use my male name. That exposed me to discrimination [because I have a female appearance]."

Elsa experienced problems in other areas of her life because of the discrepancy between her appearance and her documents. *"My bank, my phone company, the social security do not use my female name, so many letters I receive refer to me as a male. The postman refuses to deliver my registered letters because he does not believe I am the addressee. I don't want to go to the post office anymore to collect register mail; my partner does that for me. It is degrading. When I travel I try to have an androgynous look so that my appearance does not raise too many questions but I feel like a usurper. Voting is also degrading as they read out your name loudly and people stare at you."*

Hélène described her negative experience at a hospital where she was scheduled for an operation on her vocal chords. *"I was in the waiting room when the nurse called me, referring to me as 'Mister'... I went back [for a follow-up appointment] and the same person called me, again referring to me as 'Mister' in front of all the other patients in the waiting room. I asked her why she referred to me as a male, she said that that was the gender on my documents and she asked why I did not change my legal gender."*

Celine obtained legal recognition of her female gender in July 2012. However, she still experiences difficulties in changing her gender on some documents, including the family record book, which is a document issued by the municipality to married couples and unmarried couples with children. *"I have two children who were born in two different municipalities. One municipality has indicated on the family record book that my legal gender changed in respect of my son, the other refused to do the same in respect of my daughter; they told me that a child couldn't have two mothers. That is an absurd situation."*¹²⁸

The lack of legal gender recognition of their gender can fuel discrimination and hate crime against transgender people, which remain prevalent in France. According to the FRA-LGBT survey, 48 per cent of the transgender respondents in France said they had been discriminated against in the previous 12 months. Twenty-eight per cent of those respondents said they had experienced discrimination at work and 18 per cent said school or university personnel had discriminated against them. According to victims, half of the most serious episodes of violence perpetrated against transgender people were specifically motivated by

¹²⁸ The introduction of marriage equality for same sex couples should entail the amendment of current rules applicable to family book records (livret de famille). Decree of 11 July 2011, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024795921&dateTexte=&categorieLien=id>, accessed 22 November 2013.

their gender identity.

The body tasked to combating discrimination, formerly known as the High Authority to Combat Discrimination and to Promote Equality (HALDE), has dealt with some cases of discrimination against transgender people.¹²⁹ The Defender of Rights, the body that replaced the HALDE, has recently provided legal assistance to transgender individuals who suffered discrimination in the workplace.¹³⁰

The non-governmental organization, SOS Homophobie, recorded 1,860 cases of discrimination and violence against LGBT people in 2012, of which almost 80 (4 per cent) related to transgender people. Of the overall number of cases, about 122 (7 per cent), involved physical violence. Transgender individuals were victims in 7 per cent of the overall number of cases involving physical violence.¹³¹

France has recently amended its legislation on sexual harassment by introducing the ground of “sexual identity” in its domestic legislation.¹³² As a result, the notion of hate crime perpetrated on the ground of “sexual identity” was introduced into French Criminal law and discrimination based on “sexual identity” in the area of employment was forbidden.¹³³ However, such legal reform has not had the effect of protecting transgender individuals in areas outside employment.¹³⁴

Moreover, as highlighted by both Amnesty International and the Defender of Rights, the ground of “sexual identity” may be interpreted as providing only a partial protection against discrimination faced by transgender people on the ground of their gender identity.¹³⁵

129 See, for example: Deliberation 2008-190 of 15 September 2008 with regard to harassment and discrimination faced by a transgender person in the workplace, which resulted in her resignation. www.halde.fr/IMG/alexandrie/4050.PDF, accessed 21 November 2013.

130 In 2012 for instance, the Defender of Rights intervened in the legal proceedings relating to the harassment experienced by a transgender woman in the workplace. Her managers and co-workers called her names and would not allow her to wear clothes that reflected her gender; they referred to her by using her previous male name, although she had already obtained documents indicating her preferred female name. The Defender of Rights concluded that the employer harassed and discriminated against the woman on grounds of sex. See Decision MLD 2012-22, www.defenseurdesdroits.fr/sites/default/files/01-A.pdf, accessed 21 November 2013. The HALDE established in 2008 that discrimination perpetrated against transgender people on grounds of their gender identity amounted to discrimination on grounds of sex. See, decisions 2008-28 and 2008-29, <http://archive.equal-jus.eu/82>, accessed 21 November 2013.

131 See, SOS Homophobie, Rapport sur l'Homophobie 2013, <http://www.sos-homophobie.org/rapport-annuel-2013>, accessed 21 November 2013.

132 Loi 2012-954 du 6 août 2012 relative à l'harcèlement sexuel, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id>, accessed 21 November 2013.

133 Article 1132-1 of the French Labour Code.

134 Law 2012-954 does not amend law 2008-496 of 28 May 2008 concerning several dispositions aimed at aligning French civil law on discrimination to EU law. The EU law provides protection against discrimination in areas of life other than employment, including social protection, health, education and access to good and services.

135 In May 2013, a working group set up by the Defender of Rights concluded that integrating the ground of gender identity in French legislation aimed at combating

2.3.4 OPPORTUNITIES FOR CHANGING LAWS AND PRACTICES

Psychiatric diagnosis of transgender identities is stigmatizing for many transgender people in France. Many have highlighted that these diagnoses are often based on gender-based stereotypes. France has an obligation under human rights law to counteract such stereotypes and to ensure they are not reflected or enhanced in policies and practices. France violates the rights of transgender people to the highest attainable standard of health and to be free from inhuman, cruel and degrading treatment by requiring them to undergo unnecessary medical procedures, such as surgeries and sterilization, to obtain legal gender recognition. The extensive length of time required to complete the process to obtain legal gender recognition, and the de facto exclusion of those transgender people who do not want to, or cannot for health reasons, undergo the health procedures involved such as hormone treatments or surgeries, violate their rights to private and family life and to recognition before the law.

In October 2012, the government published a programme to combat discrimination on grounds of sexual orientation and gender identity, which includes a commitment to review the current framework on legal gender recognition.¹³⁶ In an advice sought by the Minister of Justice and Minister of Women's Rights, the National Advisory Commission on Human Rights recommended the adoption of a framework allowing transgender people to obtain legal recognition of their gender without the requirement of psychiatric diagnosis or specific health treatments such as hormone treatment or gender reassignment surgeries.¹³⁷ In a meeting with Amnesty International in July 2013, representatives of the Ministry for Women's Rights, expressed support for the Commission's advice, although they remained cautious with regard to the timeline for a governmental proposal on legal gender recognition.

In the context of the discussion on legislation promoting equality between women and men, members of the Parliament introduced some amendments on legal gender recognition and discrimination on grounds of gender identity¹³⁸, but they were all rejected as recommended by the government, which has expressed its intention to regulate the issue in 2014. Some of these

discrimination and hate crime would provide better protection for transgender people. The National Advisory Commission on Human Rights reached the same conclusion in its opinion on gender identity and legal gender recognition. Commission Nationale Consultative des Droits de L'Homme. Avis sur l'identité de genre et sur le changement de la mention de sexe à l'état civil. <http://www.cncdh.fr/fr/publications/avis-sur-lidentite-de-genre-et-sur-le-changement-de-la-mention-de-sexe-letat-civil>, accessed 21 November 2013. Amnesty International raised this concern in a submission to the French government in January 2013. Amnesty International, Submission to the French government on violence and discrimination on grounds of gender identity (Index: EUR 21/001/2013), <http://www.amnesty.org/fr/library/info/EUR21/001/2013/en>

136 Programme d'actions gouvernemental contre les violences et les discriminations commises à raison de l'orientation sexuelle ou de l'identité de genre, 31 October 2012, <http://www.gouvernement.fr/gouvernement/homophobie-et-discriminations-a-raison-de-l-identite-de-genre-un-programme-d-actions-go>, accessed 25 November 2013.

137 Commission Nationale Consultative des Droits de L'Homme, Avis sur l'identité de genre et sur le changement de la mention de sexe à l'état civil, paras. 21 and 22, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027778791&dateTexte=&categorieLien=id>, accessed 25 November 2013.

138 Amendments 80, 92, 130, 154 and 169, projet de loi pour l'égalité entre hommes et femmes, http://www.senat.fr/amendements/2012-2013/808/liste_depot.html, accessed 25 November 2013.

amendments were in line with the recommendations of the National Advisory Commission on Human Rights and aims at introducing a framework allowing transgender people to obtain legal gender recognition without requiring evidence of medical treatments.



An action undertaken by French trans activists on the International Day against Homophobia & Transphobia in Paris on 17 May 2013, © ACCEPTESST

2.4 IRELAND

“If I had the legal documentation to back up what I’m saying [about my gender] then people would have to take it seriously, and not just as a phase. For me [legal gender recognition] is something to back me up... and make sure that the teachers and the headmaster accept my gender and allow me to use the [male] bathroom...whereas without it, they wouldn’t know which bathroom to let me use and how to refer to me. So I didn’t even tell them because I just didn’t want to go into that; because I knew the teacher would mess up pronouns and everything and everyone would be looking at me.”

A, an 18-year-old transgender man living in the province of Munster in south-west Ireland

While the Gender Recognition Bill is in preparation, transgender people in Ireland cannot obtain legal recognition of their gender because of the current legislative gaps. Although they can change their name and apply for a passport reflecting their gender identity if they comply with certain conditions, they cannot obtain a birth certificate or certain other documents in line with their gender identity.

2.4.1. CASE LAW AND PRACTICES

In Ireland, all births, marriages or civil partnerships, and deaths are recorded and stored at the General Registry Office, which issues birth certificates to the parents of the newborn child. This certificate is an important document, which is needed, for example, to enrol in school or to obtain a passport. According to the Civil Registration Act 2004, the birth of a child should be registered within three months. The sex of the child has to be registered on the basis of the “best knowledge and belief” of the parents, guardians or any other qualified informants. The sex assigned at birth is indicated on the birth certificate.¹³⁹

In some instances, the information on the birth certificate can be amended, for example, to correct a factual error or alter a forename. The request to amend the birth certificate should come from either the person concerned or the Registrar General¹⁴⁰ or when the forename is altered or a new forename is added.¹⁴¹ However, pending the enactment of new legislation, transgender people cannot change the sex they were assigned at birth indicated on their birth certificates.

¹³⁹ Civil Registration Act 2004, Section 19. For a definition of “qualified informant” see Section 19.6. <http://www.irishstatutebook.ie/2004/en/act/pub/0003/>, accessed 24 January 2014.

¹⁴⁰ Sections 63 and 64, Civil Registration Act 2004.

¹⁴¹ Section 25, Civil Registration Act 2004.

DR. LYDIA FOY'S LEGAL CASE

In 1993, Dr. Lydia Foy, legally male, asked the Registrar General to amend the gender on her birth certificate.¹⁴² Her request was turned down. In a written communication dated 11 February 1997, the Assistant Registrar General communicated to Dr. Foy that her birth certificate could not be amended as “it is a record of a particular event, which occurred on a particular day... [and] is not, nor did the law intend it to be, a personal record which is to be constantly updated to take account of every significant change in the life history of the subject”. According to this communication, the genital characteristics of the child at birth have to be used to identify the sex. Dr. Foy took her case before the High Court. In July 2002, the Court found that the Registrar General’s refusal to amend Dr. Foy’s birth certificate was in line with both statutory and common law provisions and did not violate her human rights.¹⁴³

Two days later, the European Court of Human Rights issued its decision in *Goodwin v. United Kingdom*, finding that the United Kingdom had breached the European Convention of Human Rights by preventing Ms. Goodwin, who had undergone genital reassignment surgery, from obtaining legal recognition of her female gender. Dr. Foy, therefore, appealed against the Irish High Court’s decision.¹⁴⁴ In 2007 the High Court found that the impossibility for Dr. Foy to obtain an amended birth certificate in order to reflect her female identity was incompatible with the European Convention of Human Rights and in particular with articles 8 (right to family and private life) and 12 (right to marry).¹⁴⁵ The Irish government appealed against this decision in the Supreme Court, but eventually withdrew it in 2010, conceding that Irish law was in breach of the European Convention on Human Rights. The government committed to enacting legislation to address that breach. In January 2013, Dr. Foy launched a new proceeding with the aim of enforcing the 2007 judgment in her favour.¹⁴⁶

Transgender people can easily change their name by deed poll, which is a signed declaration that binds the signatory to a particular course of action from the date of signing. The only documents needed are the birth certificate and a photo ID, such as the passport or the driving licence. In Ireland, there are no specific rules on names and a person is allowed to bear a name that is not gender neutral and that does not correspond with the legal gender.

Since 2008, transgender people can also obtain a passport that reflects their preferred name

142 At that time the Civil Registration Act 2004 was not in force. The registration of births was regulated by the Births and Deaths Registration Act 1863, which also required the registration of the sex of the child.

143 In particular, the High Court relied on *Corbett v Corbett* [1970] 2 W.L.R. 1306, according to which the sex for the purpose of marriage should be determined on the basis of the congruence between genital, chromosomal and gonad tests. According to the judge, such criteria have been adopted for many other purposes including for the determination of the sex of children at birth. *Foy v. An-t-Ard Chlaraitheoir, Ireland and the Attorney General*, 1997 No. 131 JR.

144 The Supreme Court referred the case back to the High Court taking into account the European Court of Human Rights’ judgment in *Goodwin v United Kingdom*, the introduction of the European Convention on Human Rights Act 2003 and the Civil Registration Act 2004.

145 A declaration of incompatibility with the European Convention of Human Rights was made by the High Court on the basis of Section 5 of the European Convention on Human Rights Act 2003. *Foy v An-t-Ard Chlaraitheoir and Others*, [2007], IEHC 470.

146 Meeting with the Free Legal Advice Centre, FLAC, 23 October 2013.

and gender identity, although they have to comply with some requirements. The Passports Act 2008 requires medical evidence that the applicant is undergoing, or has undergone, treatments and procedures aimed at altering the “sexual characteristics and the physical appearance to those of the new sex.”¹⁴⁷ According to the Passport Office, situated within the Department of Foreign Affairs and Trade, transgender people can in practice obtain a passport reflecting their gender identity and their preferred name if they produce medical evidence that the gender has changed and that they are using their preferred name, for instance following a name change via deed poll. Medical Evidence normally constitutes a letter from a psychologist and an endocrinologist. The Office clarified that, in addition to providing medical evidence, transgender people can obtain a passport indicating their preferred name if they can prove they are currently using that name. Most of the time, in practice, this is demonstrated by showing that the name was changed by deed poll.¹⁴⁸ However, transgender individuals and civil society organizations told Amnesty International that the processes through which transgender people receive new passports greatly vary and the medical evidence required is not always consistent.¹⁴⁹

The current rules do not allow transgender people who have not completed the diagnostic process or have not accessed hormonal treatment to obtain passports that reflect their gender identity. Neither the Health Services Executive (HSE), the body providing health and social care services in Ireland, nor the Irish College of Psychiatrists have adopted specific policies or standards of care with regard to the psychiatric diagnosis applicable to transgender identities and access to specific treatments such as hormonal treatment. Therefore, it may take a long time for transgender people to access these treatments and thus to abide by the conditions set out by the Passport Act 2008.

2.4.2 CONSEQUENCES OF LEGISLATIVE GAPS AND CURRENT PRACTICES

Several years after the High Court judgment in the Foy case, transgender people still cannot change their birth certificate. Such a situation has a detrimental impact on the enjoyment of their right to private life as birth certificates are required for several purposes in Ireland, including enrolment in schools and accessing social services.

Sinead is a 44-year-old woman. She transitioned 15 years ago and underwent genital reassignment surgery in Belgium. However, her birth certificate still indicates that she is a male. She told Amnesty International, “*The birth certificate issue is killing me. When I was 20 I bought four Waterford crystal champagne glasses to toast the day I got a new birth certificate. 24 years later, I’m still waiting.*” She shared her experiences with the council authorities. “*I needed to get on the council housing list and that required showing my birth certificate.*”

¹⁴⁷ Passports Act 2008, Section 11, gender reassignment.

¹⁴⁸ Email Communication with the Director of the Passport Office, 14 November 2013.

¹⁴⁹ Meeting with TENI, 21 October 2011; meeting with Gay and Lesbian Equality Network (GLEN), 22 October 2013

I had to explain that I was transgender to someone whom I barely knew. I couldn't bear to look at the certificate. It went against every fibre of my being.”¹⁵⁰

Martin, a trans man living in Cork, has changed his name via deed poll and got a passport reflecting his male gender identity. However, his birth certificate still indicates the former female name and the female sex he was assigned at birth. He told Amnesty International that he had to produce his birth certificate to access rent supplement [a welfare payment aimed at funding part of the rent in private accommodation]: *“The form required my first name as it appears on my birth cert, in addition to my present full name. My birth-assigned sex was exposed in doing so. I felt that was an unnecessary disclosure for accessing some basic support. What meaningful use is the Passports Act 2008 to me, an Irish transgender citizen, if some purposes still require my current birth certificate in spite of my passport? Gender Recognition would alleviate this issue”.*¹⁵¹

A, the 18-year old transgender man, told Amnesty International that he did not want to open a bank account because he would need to produce his passport, which reflects the female sex he was assigned at birth and cannot be easily changed because of the existing legislation. He told Amnesty International about his experience at the Dublin airport while he was travelling to Spain with his classmates. *“I was with 40 people who, [apart from one of my friends], didn't know I was transgender. Not even my teachers knew. A security officer pulled me aside and started asking questions. Because by then I had my hair cut short and everything and I was obviously wearing guys' clothes. So they were all like, 'Is this a forged passport? Is this who you really are? Why does it say female?' So I had to explain that I was transgender and that I hadn't changed my passport yet because that wasn't possible. And then my teacher came over and he asked me what was the problem and I just had to make up something... I said the security officer made a mistake.”¹⁵²*

Andy, another young transgender man had a similar experience at the Dublin airport. *“I was going to Frankfurt recently and in the airport I got pulled aside when I was checking in. They didn't believe that it was my passport. They just didn't think it was me... maybe it was because I passed as male or whatever... I also had my female name on the boarding card and Andy on my travel document [the receipt he got from the travel agency had to be presented to get the boarding pass].”¹⁵³*

Transgender people also told Amnesty International of the difficulties in accessing tertiary education in instances where they had already changed their name but their secondary

¹⁵⁰ Interview with Sinead (pseudonym), Dublin, 21 October 2013.

¹⁵¹ Interview with Martin, Cork, Ireland, 24 October 2013.

¹⁵² Interview with A, Dublin, 22 October 2013.

¹⁵³ Interview with Andy, Dublin, 24 October 2013.

education diploma (leaving certificate) indicated their old name.¹⁵⁴ Furthermore, gender markers are also electronically encoded in the public services card, which is necessary to access some services including the collection of welfare payments.¹⁵⁵ The Department for Social Protection told Amnesty International that transgender individuals can ask to change the gender markers associated with the public services card if they produce “medical evidence from a registered practitioner that the individual has undergone, or is undergoing, treatments or procedures or both to alter their sexual characteristics and physical appearances to that of their new sex. A passport in the preferred gender is not necessary”.¹⁵⁶

Darrin is a transgender man who changed his name via deed pool. He shared with Amnesty International the problems stemming from the delay in reissuing a social services card bearing his new male name. “*I have a social security card and it used to have my old name on it. It took about two years to get a new one issued with my new name on it. [In that period] when I went to the post office to pick up my money [welfare payments] I was asked in front of everyone in the post office, well whose card have you stolen? [The problem was that] when they scanned [my information] my new name, ‘Darrin’, would come up on their computer, but it was a very female name on the card. So I would have to explain in a post office what my situation is.*”¹⁵⁷

The lack of legal recognition of their gender can fuel discrimination and hate crime against transgender people, which remain widespread in Ireland. According to the FRA-LGBT survey, 58 per cent of the transgender individuals surveyed and living in Ireland had been discriminated against in the 12 months ahead of the study. Forty-two per cent of the transgender individuals surveyed said they had experienced violence or were threatened with violence in the previous five years. Sixty-two per cent of them perceived that the last episode of violence or threat of violence was motivated by their gender identity.

In a 2012 survey on mental health and wellbeing, 78 per cent of the transgender individuals surveyed in Ireland said that they had thought about or attempted suicide more often before transitioning, suggesting that coming out as transgender or the medical transition may bring substantial relief. The survey highlights an extremely high level of vulnerability to self-harm and suicide among transgender people.¹⁵⁸

154 Meeting with TENI, Dublin, 21 October 2013.

155 The Irish government started issuing new public services cards in 2012. They are supposed to progressively substitute old public services cards as well as other cards needed to access some goods and services including the social services cards.

156 Meeting with representatives of the Department of Social Protection, Dublin, 25 October 2013. Email communication between Amnesty International Ireland and the Department, 8 January 2014.

157 Interview with Darrin, Cork, Ireland, 24 October 2013.

158 Also, forty-four per cent of those surveyed said they experienced self-harm. Ireland’s trans mental health and well-being survey. Self-harm and

The Employment Equality Act 1998 and the Equal Status Act 2000 prohibit discrimination on nine grounds including gender in employment and areas such as access to goods and services, health and education. The gender ground in the equality laws has been interpreted as providing protection against discrimination on grounds of gender identity. The Department of Social Protection in cooperation with the Department of Justice and Equality¹⁵⁹ is considering whether to explicitly introduce the ground of gender identity into Irish equality law in the context of the Bill on Legal gender recognition 2013. This may have a positive impact in raising awareness on discrimination against transgender people and in facilitating the reporting of discrimination.

The 1989 Prohibition of Incitement to Hatred Act forbids actions, broadcasting, and possession and distribution of materials that “are likely to stir up hatred” on grounds of race, religion, nationality or sexual orientation.¹⁶⁰ However, there is no specific legislation in Ireland to ensure that any alleged hate motive associated with a crime is thoroughly investigated and taken into account in the prosecution of suspects. Statistics on hate crime are collected by the police and published by the Central Office for Statistics (CSO). Disaggregated data are available on a number of grounds including race, ethnicity, sexual orientation and citizenship but not on gender or gender identity.¹⁶¹



Transgender Equality Network Ireland (TENI) participates at Dublin Pride Dublin 2012, ©Alison McDonnell

suicide. TENI, http://www.teni.ie/suicide_in_trans_communities___new_data_from_the_mental_health__well_being_survey, accessed 27 October 2013.

159 Meetings with representatives of the Department of Social Protection and the Department of Justice and Equality, 25 October 2013.

160 Prohibition of Incitement to Hatred Act, Articles 2, 3, 4, <http://www.irishstatutebook.ie/1989/en/act/pub/0019/print.html#sec4>, accessed 28 October 2013.

161 According to the official statistics provided by Ireland to the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), the police registered 162 hate crimes in 2011, of which 136 were committed on the ground of race. OSCE/ODHIR, Hate Crime in the OSCE region: incidents and responses. Annual Report 2011. According to the Equality Authority several problems persist with regard to the registration of hate crime by the police. See Séamus Taylor, Responding to racist incidents and racist crimes in Ireland, an issue paper for the Equality Authority, September 2010.

2.4.3 OPPORTUNITIES FOR CHANGING LAWS AND PRACTICE

The current lack of legislation to allow transgender people to obtain birth certificates that reflect their gender violates their rights to private and family life and to recognition before the law. Current laws and practices that require transgender people to undergo medically unnecessary treatments for the purposes of acquiring a gender appropriate passport violate their rights to the highest attainable standard of health.

In the aftermath of the High Court's judgement in the Dr. Foy case, and in the face of growing criticism from human rights treaty bodies and other international human rights bodies, the Minister for Social Protection established a Gender Recognition Advisory Group (GRAG) in May 2010. The GRAG was tasked to advise the Minister on the legal framework required for legal gender recognition.

The GRAG published a report in June 2011 outlining recommendations on the qualification criteria to access legal gender recognition. However, it failed to separate the issue of legal gender recognition with psychiatric diagnosis and specific transgender health-care treatments. Furthermore, it required medical evidence in the form of either a statement from a practitioner attesting that the person had undergone gender reassignment surgery or received a formal psychiatric diagnosis accompanied by treatments undergone or in progress such as hormone therapy or minor surgeries. Moreover, the GRAG recommended applicants be asked to provide independent evidence of a two-year period in which they had lived "fulltime in the preferred gender". It also advocated banning minors and persons who are married or in a civil partnership from being able to obtain legal gender recognition.¹⁶²

Following the publication of the GRAG report, the Department for Social Protection engaged in an informal consultation with civil society organizations and health professionals with the aim of drafting a bill. The Minister, Joan Burton, reiterated on several occasions that she intended to introduce legislation allowing transgender individuals to obtain legal gender recognition in Ireland.¹⁶³ However, no specific timeline was established for that process. In a letter to the Council of Europe Commissioner for Human Rights, dated 3 December 2012,¹⁶⁴ the Minister said that the government had sought the opinion of the Attorney General on the marital status and civil partnership status requirements suggested by the GRAG.

¹⁶² Gender Recognition Advisory Group Report to Joan Burton, T.D., Minister for Social Protection, 15 June 2011, <http://www.welfare.ie/en/Pages/Report-of-the-Gender-Recognition-Advisory-Group.aspx>, accessed 31 October 2013.

¹⁶³ See, for example: Minister Burton's statement at the 4th European Transgender Council held in Dublin in September 2012, <http://www.thejournal.ie/joan-burton-gender-587902-Sep2012/>, and press release of the Equality Authority: <http://www.equality.ie/en/Press-Office/Protection-of-Transgender-People-%E2%80%93-Equality-Authority-welcomes-Minister%E2%80%99s-statement.html>, accessed 31 October 2013.

¹⁶⁴ http://www.tgeu.org/sites/default/files/2012_12_03_Reply_Minister_Burton.pdf, accessed 12 November 2012.

2.4.4 THE GENERAL SCHEME OF THE GENDER RECOGNITION BILL 2013

The Department for Social Protection eventually published the General Scheme of the Gender Recognition Bill 2013 in July 2013.¹⁶⁵ Overall, the Scheme conforms to international human rights standards more than the GRAG recommendations. For instance, the Scheme does not explicitly require transgender people to receive a psychiatric diagnosis and undergo surgeries or to have lived in their preferred gender for a specific number of years, before obtaining legal gender recognition.¹⁶⁶

However, the Scheme is problematic insofar as it still requires a statement by a “primary treating physician” confirming that the person seeking legal gender recognition is transitioning, or has transitioned, to the preferred gender. Moreover, the Scheme restricts the possibility to obtain legal gender recognition to transgender people who are aged 18 years and above and who are neither married nor in a civil partnership.¹⁶⁷ These requirements, if included in the new law, may violate the rights of transgender people to the highest attainable standard of health and to private and family life. The age restriction will violate the state’s obligation to take account of the child’s freely expressed views regarding their own best interests, in light of their evolving capacities.

Physician statement

Crucially, , the criteria on which a physician will assess whether an individual “has transitioned or is transitioning” are unclear and may result in implying the need for a psychiatric diagnosis or specific health treatments such as hormone treatment or surgeries. The same formulation in the Passport Act is interpreted as requiring evidence of medical treatment in order to obtain a new passport. The Department of Social Protection told Amnesty International that the government is in favour of maintaining a system of validation according to which the statement can be delivered by an endocrinologist, a psychiatrist or a

165 <http://www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx>, accessed 1 November 2013.

166 Members of Parliament have tabled two other proposals in the Irish Parliament (Oireachtas) that do not require medical evidence or any other cumbersome requirement, such as single status or age of majority, as a condition to access legal gender recognition. On 23 May 2013, Deputy Aengus Ó Snodaigh introduced the Gender Recognition Bill 2013 in the Lower Chamber of the Irish Parliament (Dáil Éireann), <http://www.oireachtas.ie/documents/bills28/bills/2013/5613/b5613d.pdf>, accessed 14 November 2013. Senator Katherine Zappone introduced the Legal Recognition of Gender Bill 2013 in the Senate (Seanad Éireann) on 2 July 2013. <http://www.oireachtas.ie/documents/bills28/bills/2013/7513/b7513s.pdf>, accessed 13 November 2013.

167 Many civil society organizations in Ireland have expressed concerns on these three issues. See the transcripts of the hearings before the Joint Parliamentary Committee on Education and Social Protection. Hearings held on 23 October 2013, <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/EDJ2013102300001?opendocument>; Hearings held on 24 October 2013: <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/EDJ2013102400003?opendocument#B00100>, accessed 1 November 2013. See also, Amnesty International Submission to the Department of Social Protection on the General Scheme of the Legal gender recognition Bill 2013, <http://www.amnesty.ie/sites/default/files/AI%20submission%20to%20DSP%2018Oct2013.pdf>. The Irish Human Rights Commission raised concerns on these three aspects. Observations on the General Scheme for the Gender Recognition Bill, November 2013, http://www.ihrac.ie/download/pdf/ihrac_observations_on_the_general_scheme_of_gender_recognition_bill_november_2013.pdf, accessed 15 January 2013.

paediatrician. The Department is of the opinion that such a system is necessary to protect all those people who have mental health problems and who may wrongly perceive themselves as transgender.¹⁶⁸ The College of Psychiatrists of Ireland told Amnesty International that although they favour a system of validation by professionals to access specific transgender health treatments, they do not have a position on whether such a system should also be applied to transgender people who wish to obtain legal gender recognition.¹⁶⁹

Age restrictions

The inclusion of a the blanket age restriction included in the Scheme has been explained as arising from the need to protect children, who are more likely to change their mind with regard to gender identity. The GRAG report indicated that certain mental health professionals supported that view. However, the College of Psychiatrists of Ireland told Amnesty International that it does not have a formal position on whether children should be entitled to legally change their gender. The Department of Social Protection told Amnesty International that the government strongly supports this age requirement. Civil society organizations in Ireland strongly criticized this age restriction, especially in the light of provisions in Irish law according to which adolescents aged between 16 and 18 can consent to medical, surgical and dental treatments as if they were of full age and without the consent of their parents or guardian.¹⁷⁰ The Ombudsman for Children also criticized the age restriction highlighting that, if implemented, it would fail to improve the situation of transgender children and adolescents, who in many cases already experience isolation and discrimination.¹⁷¹ She recommended that parents be allowed to apply for a gender recognition certificate for children younger than 16 years while adolescents aged between 16 and 18 should be able to apply on their own.¹⁷²

Amnesty International spoke to teenagers and young people who explained why legal gender recognition is important for underage youth, especially in light of the difficulties often experienced in secondary school. Dan is a young transgender man who experienced problems with his family and at school because of his gender identity. He said, "*If the gender recognition bill does not include people under 18, school authorities [could say] you're actually not allowed to be trans until you're 18. They can twist it to suit their own means.*" Dan told Amnesty International that school authorities understood his situation when he

168 Meeting with the Department of Social Protection, 25 October 2013.

169 Meeting with the College of Psychiatrists of Ireland, 24 October 2013.

170 Non-fatal Offences against the Person Act, 1997, Section 23.1: "The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his or her person, shall be as effective as it would be if he or she were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his or her parent or guardian." <http://www.irishstatutebook.ie/1997/en/act/pub/0026/sec0023.html#sec23>, accessed 1 November 2013.

171 Advice of the Ombudsman for Children on the Scheme for the Legal gender recognition Bill 2013. October 2013. http://www.oco.ie/assets/files/publications/advice_to_government/Updated%20advice/OCOAdviceonGenderRecognitionBill2013.pdf, accessed 1 November 2013.

172 Meeting with the office of the Ombudsman for Children, 23 October 2013.

presented a certificate from his psychologist explaining that he was transgender, but there was a mixed response from them. For instance, they allowed him to wear a tracksuit bottom (as opposed to the usual boy's trousers) and registered him with his male name but they did not allow him to use the male toilets. When he came out to his classmates, the religion teacher changed his name to Daniel on the registry roll but when the year head found out, it was changed back to his legal female one.

Dan also experienced situations in which his privacy was violated. *"We had a free class with a teacher I don't usually have. I was sitting at the first desk right in front of her and she was reading out some names. She called out my birth name and I raised my hand and she looked at me really sceptically. She called out the name louder and I put my hand up again and she told me to show her my journal – I had to show her my journal to prove my name to her, which is ridiculous because if they just let me use the other name it would save problems."*¹⁷³ Dan could change his name on the registry only after having changed it via deed poll, and although he is now allowed to wear boy's trousers, he has not been allowed to use the male toilets.

Sarah is a mother of three children. Her middle child, Kelly was born male but she has asserted her identification as female since the age of four. Kelly was very unhappy and repeatedly expressed suicidal thoughts. Sarah was shocked and decided to consult a psychiatrist, after which she decided to allow Kelly to express her gender identity. Kelly still has a legal male name and gender. She is enrolled in school as a male as the school registry has to include the legal name and gender. Sarah also had to produce Kelly's birth certificate when enrolling her in primary school. She was once stopped and questioned at the Singapore airport because Kelly's appearance did not correspond with the gender indicated on her documents. *"Immigration officials laughed at us. One even called a colleague over for a look. It was humiliating and very upsetting for Kelly. The immigration official asked me, 'Why do you let him wear his hair long and dress like that?' We also came across [negative] reactions in Abu Dhabi, Malaysia and Australia but the officials were more polite."*

For Sarah is it vital that legal gender recognition and transgender health treatments are accessible to minors. *"I just want to keep this child alive. I have a happy child now, why end up... on a psychiatric ward? Why end up with a dead child? I found out about a 10-year-old in the UK who killed himself because he wanted to be a girl. That's what I'm trying to avoid... It's important that she gets documents that reflect her gender. What if she is learning to drive? What if she goes on holiday with her friends and she is 16 and she is asked for her ID? Or what if it's a policeman in a foreign country who wants ID? If the legislation is in place...it means that you are not setting [transgender people] up for a hard life, for discrimination, misunderstanding or prejudices... I have heard the argument – that by changing your name, you are tricking people; that it's like identity fraud or that anybody who is really a man could pretend he is a woman and commit insurance fraud or anything. That's criminal activity and there are already legal procedures to protect us against all that."*¹⁷⁴

173 Interview with Dan, Dublin, 24 October 2013.

174 Interview with Sarah (pseudonym), 21 October 2013.

Single status

The Scheme explicitly excludes those who are married or in civil partnership. The Department for Social Protection told Amnesty International that this restriction is aimed at avoiding a situation in which a marriage between two persons of different sex becomes a same-sex marriage as a result of the legal gender recognition of one of the spouses. Similarly, the situation in which two persons of different sex become bound by a civil partnership as a result of a legal gender recognition should be avoided, as civil partnerships in Ireland are accessible only to same-sex partners.¹⁷⁵ The government is of the view that the Irish Constitution forbids same-sex marriages, even though there is no such explicit prohibition in the Constitution.¹⁷⁶ The government bases this conclusion on domestic case law¹⁷⁷ and the opinion of the Attorney General on this issue.¹⁷⁸ According to the Department for Social Protection, this issue may be solved as a consequence of a positive outcome of the referendum on marriage equality, which the government has said will be held in 2015.¹⁷⁹

Patricia (Trish) is a 53-year-old transgender woman who is still legally a male. She is married to Susan. They have two children who are in their 20s. For Patricia, legal gender recognition is the final step of a long and difficult process through which she became aware of her gender identity. However, they strongly oppose the idea of divorcing, should the single status requirement be included in Irish legislation on legal gender recognition. Patricia told Amnesty International, "*After all those years of pain... the final stage, the final step, to be recognized in the eyes of the law will be denied, unless we divorce. At the end of the day all you want is to be recognized for who you are, and that will be denied.*"

¹⁷⁵ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

¹⁷⁶ Article 41.2 of the Irish Constitution reads, "The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

¹⁷⁷ See the High Court's judgment in *Zappone and Gilligan v. Revenue Commissioner*, [2006] IEHC 404. Section 2.2.e of the Civil Registration Act 2004 explicitly considers an impediment to marriage where the partners are of the same sex.

¹⁷⁸ This opinion is confidential and is unpublished.

¹⁷⁹ A process is underway to revise the Irish Constitution. In July 2012, the parliament established the Constitutional Convention, a participatory forum involving members of the public and parliament with a mandate to develop recommendations in specific areas, including marriage equality. In July 2013, the Convention recommended that the government change the Constitution to enact marriage equality. Third Report of the Constitutional Convention, Amending the Constitution to provide for same-sex marriage, July 2013. According to Article 46 of the Constitution, every amendment should be submitted to referendum.

<https://www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ec2e211-a5a0-005056a32ee4>, accessed 1 November 2013. On 5 November 2013 the government formally accepted this recommendation and committed to holding a referendum on the matter in 2015.

Susan does not view Trish's transition and the single status requirement as a valid reason for divorce. *"Trish has become who she is within the marriage, later in her, in our life. I'm still married to the person I married; Trish is still the genuine, honest, decent person she always was. I don't see any reason for me to divorce and I want that to be my choice if I do. I don't want it to be the government's choice, or somebody who doesn't know me or know Trish."*

Patricia added, *"Everybody would agree that forced marriage is a terrible violation of someone's rights, but in order for me to express myself in the gender I feel I should be, we're being forced to divorce. So, the government will say, 'no you have a choice, you can either divorce and change your gender or you can stay married but you won't be able to change your birth certificate... your gender won't be recognized'."*¹⁸⁰

In Ireland, a divorce can only be obtained after the spouses have lived apart for at least four out of the five years ahead of the request and only when there is no reasonable prospect of reconciliation. Dissolution of civil partnerships can be obtained only after the partners have lived apart for at least two out of the three years prior to the request. The single status rule, if established under Irish law, will substantially delay, if not make it impossible, for transgender people who are married or in a civil partnership to obtain legal recognition of their gender.

Following the debate held in October 2013, the Joint Parliamentary Committee on Education and Social Protection recommended to the government not to include the single status requirement and to lower the age requirement to 16 in the Bill. Furthermore, the Committee suggested the government reconsidering the Scheme's wording relating to the "evidence of transition" required to obtain legal gender recognition.

According to the legislative programme published by the Irish government in January 2014 and referring to spring and summer 2014, it is not possible to indicate when the Bill is published.

¹⁸⁰ Interview with Susan and Patricia, Cork, Ireland, 24 October 2013.

2.5. NORWAY

Transgender people in Norway can obtain legal recognition of their gender on the basis of an administrative practice established in the 1970s. This practice places health professionals at the centre of the decision-making process and requires compulsory treatments including gender reassignment surgeries and removal of reproductive organs, which result in irreversible sterilization.

Transgender people can change their name relatively easily; the process requires the notification of the request to the Norwegian Tax Administration in the Ministry of Finance, which authorizes the change.¹⁸¹ However, the name change is not followed by a title change, until, and if, all the medical requirements to obtain legal gender recognition are satisfied.

2.5.1 CURRENT LAWS AND PRACTICES

In Norway, personal data are stored in the national population register, which is administered by the Norwegian Tax Administration in the Ministry of Finance.¹⁸² Norwegian citizens and residents are assigned an 11-digit national identification number,¹⁸³ which contains the date of birth and the sex assigned at birth.¹⁸⁴ According to the regulation implementing the Norwegian national population register, the national identification number can be changed if the gender (*kjønnstatus*) changes.¹⁸⁵

All the official documents in Norway are issued on the basis of the information in the National Population Register, including the gender marker contained in the national identification number. The gender change is not legally recognized until the gender marker in the national identification number is amended accordingly.

Although, the regulations currently in place mention the possibility of changing the national identification number, there is no specific law regulating this change. According to a practice established in the mid-1970s, the Norwegian Tax Administration can only change the national identification number of transgender people, and more specifically the number referring to the sex they were assigned at birth, when it receives a green light from the Oslo University Hospital *Rikshospitalet* (OUS). According to this practice, the OUS signs off on

¹⁸¹ Law on Personal Names, §11, <http://lovdata.no/dokument/NL/lov/2002-06-07-19>, in Norwegian, accessed 16 December 2013.

¹⁸² Act on Population Registration, §1, <http://lovdata.no/dokument/NL/lov/1970-01-16-1>, in Norwegian, accessed 27 November 2013. Population registers were set up in 1967 by local authorities. The implementation of a central population register began in 1963.

¹⁸³ This national identification number is assigned to every child born to a Norwegian national when the birth is registered, and to foreigners who move to Norway and stay for more than six months. Newborn babies have to be registered in the local register of the municipality where the birth occurred within a week of the birth by the attendant midwife or physician or within a month by the mother, if she gave birth on her own.

¹⁸⁴ Example of an identification number: 21 09 79 345 73. The first six digits indicate the date of birth, the last two digits are automatically calculated by computer. The three digits in between constitute the serial number; in this case 5 is an odd number, which indicates that the person's gender is male.

¹⁸⁵ Regulation on the Population Registration, §2.2, <http://lovdata.no/dokument/SF/forskrift/2007-11-09-1268?q=folkeregister>, in Norwegian, accessed 27 November 2013.

requests from transgender individuals to change their personal identification number only when a “real sex conversion” can be certified. This requires transgender people to fulfill a whole set of medical requirements including the surgical removal of reproductive organs.

The OUS is the only institution in Norway where transgender people can access health treatments, including genital reassignment surgeries, and it makes key decisions in the three crucial areas: fulfillment of the diagnostic criteria; provision of health treatments; and determination of whether the criteria for obtaining legal gender recognition have been achieved.

2.5.2 MEDICAL REQUIREMENTS: THE PSYCHIATRIC DIAGNOSIS

A multidisciplinary specialized unit on transsexualism (hereafter Trans Unit) has been established within the Oslo University Hospital (*Rikshospitalet*) since the 1970s.¹⁸⁶ The psychiatrists of Trans Unit are in charge of diagnosing transgender individuals, who are referred to them by general practitioners, psychologists or psychiatrists. The psychiatric diagnosis is based on the relevant categories of “gender identity disorders” included in the International Classification of Disease (ICD-10). Access to specific transgender health care in Norway is made possible only in instances where a diagnosis of “transsexualism” is established (F64.0 or F64.2 of the ICD-10).¹⁸⁷ Those who are given other diagnoses (F64.8 or F64.9 of the ICD-10, for instance) or those who are not diagnosed with any “gender identity disorder” cannot access state-funded health treatments such as reassignment surgeries, and are ultimately excluded from the possibility of seeking legal gender recognition. That is why the diagnosis is crucial for many transgender people who seek legal gender recognition.

¹⁸⁶ In 1974, a specific working group was established. In 1979, the national service for treating transsexualism (nasjonal behandlingstjeneste for transseksualism) was set up.

¹⁸⁷ See Appendix II for more information on these categories.



Luca Daln Espeth, a young transgender man from Norway, © Amnesty International

Luca is a young transgender man who was referred to the Trans Unit in 2010 and who is still legally a female. *“The F64.0 diagnosis is my card of triumph because [it means] they cannot force me to undergo any treatment, but on the other hand they cannot forbid me accessing any if I so wish. My first appointment at the University Hospital was in May 2011 and I had to go back eight times in the following 11 months... It was funny because they tried to discourage me... I was told that the treatment would leave me disabled forever... and that I was not really depressed. The focus was on how bad the gender reassignment treatment was and how people deal with that afterwards. They told me they did not think the treatment would improve my life. That is horrible... I don’t even know when I got the diagnosis because they did not officially communicate it... I understood that I got the diagnosis in May 2011 from another doctor at the hospital.”*¹⁸⁸

Esben Esther Pirelli Benestad is a transgender sexologist and one of the first persons in Norway who came out as transgender. Esben Esther supports those transgender individuals whom the Trans Unit has not diagnosed with “transsexualism” and are thereafter denied the possibility of accessing specific health care. Hir¹⁸⁹ told Amnesty International: *“If you are not diagnosed as a transsexual by the National Hospital, you have no rights whatsoever, and you don’t have a chance of a second opinion... [T]hey accept as transsexuals only those who followed a specific path, who considered themselves transsexuals, from a very early age. If you are depressed or have another mental health concern, they will not diagnose you as a transsexual... but many trans people are [depressed] because they are not feeling [comfortable] with their own body.”*¹⁹⁰

¹⁸⁸ Interview with Luca, Oslo, 24 June 2013.

¹⁸⁹ This is the gender-neutral pronoun Esben Esther would like to be referred by.

¹⁹⁰ Meeting with Esben Eshter Pirelli Benestad, 22 June 2013.

Other organizations, including the Harry Benjamin Resource Centre (HBRS), which provides specific support to people who perceive themselves as transsexuals, pointed out that the lack of a second opinion for transgender individuals who, in the views of the Trans Unit, do not fulfill the diagnostic requirements is problematic. The HRBS told Amnesty International that those who are deemed not suitable to be diagnosed could in principle complain to health authorities, but in practice this is not an effective mechanism.¹⁹¹

In discussions with Amnesty International, other transgender individuals and support groups voiced criticisms based on their experiences with the Trans Unit. Marion Arntzen, who has been providing support to transgender individuals for a number of years, told Amnesty International: *“I’ve been accompanying several trans women to their appointments with the gender reassignment ward at the National Hospital. They are met with little understanding or compassion and perceived as dressing as women for fun. I went with a trans woman, Marianne, to her appointments at the National Hospital. She was beautifully dressed and wore make-up. However, the doctors in the gender reassignment ward called her with the male name.”*¹⁹² She said that transgender people are aware that a specific diagnosis is necessary to access health care and to obtain legal gender recognition but often have negative experiences of the Trans Unit.

According to transgender organizations, the Trans Unit applies exclusive criteria when establishing who can be diagnosed with “transsexualism”. Age is one of those criteria. Elderly people tend to be excluded and according to Esben Esther the average age of transgender people treated by the Trans Unit is lower than the average in other countries. Statistics of the Directorate of Health, an agency under the responsibility of the Ministry of Health and Care Services, show that half of the patients referred annually to the OUS are aged below 18.¹⁹³

2.5.3 OTHER MEDICAL REQUIREMENTS: HORMONE TREATMENT AND SURGERIES

Official statistics on access to health care for transgender people is lacking in Norway. According to the Harry Benjamin Resource Centre (HBRS), the number of referrals to the Trans Unit increased since 2010 and currently amounts to 200 individuals per year. The HBRS emphasized that only half of all the patients referred to the Oslo University Hospital are diagnosed with “transsexualism”. According to the Centre the explanation for such a low ratio is that general practitioners and/or psychologists refer individuals to the OUS based on very superficial assessments.¹⁹⁴

According to the Health Directorate, 120 transgender individuals are referred each year to the Oslo University Hospitals. Only half of the 60 persons who are over 18 are diagnosed with “transsexualism”.¹⁹⁵ It implies that the other adults who do not get the diagnosis will not be

¹⁹¹ Meeting with the Harry Benjamin Resource Centre, 24 June 2013.

¹⁹² Meeting with Marion Arntzen, Head of the Resource Centre for Trans People (Stensveens venner), 23 June 2013.

¹⁹³ Directorate of Health, Review of the treatment of transsexual and transgender people, 1 October 2012.

¹⁹⁴ *Ib.* 191

¹⁹⁵ *Ib.* 193

able to access any state-funded health care. Although they can access hormone treatment from their general practitioner, they will not be able to obtain legal gender recognition unless they undergo genital reassignment surgery abroad, at their own expense.

Jannicke is a 58-year-old transgender woman. After having concealed her gender identity for many years, she decided to start living as a woman in 1999 when she divorced her partner with whom she had three children. She started hormone treatment in 2001 and she was referred to the OUS Trans Unit in 2007. She was not diagnosed with “transsexualism” but with “other gender identity disorders” (F64.8 in the ICD10) in 2008, after nine consultations with the Trans Unit. It was not until 2009 that she received a letter from the Trans Unit confirming the diagnosis. The Trans Unit clarified that she could have sought treatment abroad but that she could not have accessed state-funded transgender health care in Norway. She was able to contact a surgeon in Thailand where she underwent genital reassignment surgery in 2011. She told Amnesty International: *“The Hospital [the Trans Unit] tells transgender patients that there is just one kind of approach, which is full gender confirming treatment and sterilization. But sometimes partial treatment is sufficient: for example breast removal or breast implants [depending on the specific case] could be enough and fully satisfactory. However, no such options are offered. They do not take the best interests of the patients into account. During my first appointment, [the staff at the Trans Unit] quickly drew conclusions on the sort of treatment they could offer me. The only option seemed to be castration... I did not feel welcomed or that I was being taken seriously as a transsexual woman... they were always referring to my age, as if I was too old to get treatment [and] I found their final report degrading and offensive... They never referred to me by using the female pronoun although they have always seen me dressed as a woman.”*

After undergoing surgery in Thailand, which cost some 90,000 Norwegian Krone (about 10,500 Euros), Jannicke wrote a letter to the Norwegian Tax Administration, seeking legal recognition of her female gender. She was told that she had to contact the OUS beforehand as they had to certify that the surgery she had undergone in Thailand was the appropriate one for the purposes of legal gender recognition. She got an appointment with the OUS Trans Unit in June 2012, and she finally obtained legal recognition of her female gender in July 2012.

Jannicke had changed her name in 2008 and received a new passport with a new picture and her new name. However, the passport entry indicating the sex she was assigned at birth was not changed until she finally obtained legal recognition of her gender, a process that began when she started hormone treatment in 2002 and took more than 10 years to complete.

According to the current practices, transgender people who are diagnosed with “transsexualism” can access hormone treatment, surgeries and finally genital reassignment surgeries. Access to surgeries, such as breast reduction or enlargement surgery, is made possible only after two years of hormone treatment. Genital reassignment surgery is accessible 6-12 months after those surgeries. Those who are diagnosed with “transsexualism” but are unwilling to undertake genital reassignment surgery resulting in sterilization cannot obtain legal gender recognition, which is the ultimate OUS requirement to allow the national identification number to be changed.

2.5.4 THE STERILIZATION REQUIREMENT

For the purpose of changing a national identification number, the Oslo University Hospital must certify to the Norwegian Tax Administration that a “real sex conversion” occurred in cases where genital reassignment surgeries have been performed. These surgeries entail the removal of reproductive organs resulting in irreversible sterilization. Orchidectomy (removal of testes) is practiced routinely in genital reassignment surgeries of male-to-female transgender persons and oophorectomy (removal of ovaries) in the context of genital reassignment surgeries of female-to-male transgender persons.¹⁹⁶

According to Norwegian law, patients should consent to any health care treatment given to them. Information on each specific health treatment is necessary in order for the patient's consent to be valid.¹⁹⁷ Individuals who are aged 25 and above can undergo sterilization provided they consent to it.¹⁹⁸

Existing research shows that transgender people often do not receive specific information that sterilization is an outcome of genital reassignment surgeries and do not explicitly consent to it.¹⁹⁹

Luca opposes the principle of undergoing genital surgery as it is currently practiced: *“I want my legal gender to be male but I still have the female one. I can in theory obtain recognition of my gender but only if I am sterilized. This is out of question for me and it is not going to happen.”* He also raised concerns about the fact that health treatments for transgender people, including surgeries, are not tailored to individual needs and are often inadequate: *“The treatment is presented as a package solution by the Hospital without consideration for individual wishes. The normative principle for medical staff is that after having taken hormones for a while, you undergo surgeries. They take for granted that you want to go for the whole package of surgeries and they do not ask you questions about that. In June 2013 I got a referral for a gynecological appointment from the Hospital. I did not ask for it. I went to this appointment in October and the doctor told me that the next step would involve removing my ovaries and uterus. I told him I did not want that kind of surgery and that I would have let them know if I changed my mind.*

196 The Unit Chief Surgeon of the Department for Plastic and Reconstructive Surgery of the OUS confirmed this in an email communication with Anniken Sørli. See Anniken Sørli, *The right to gender identity as a human right*, Annex 3, p163, <http://www.jus.uio.no/lor/forskning/omrader/kvinnerett/publikasjoner/skriftserien/dokumenter/nr-90-anniken-sorlie.pdf>, in Norwegian, accessed 16 December 2013.

197 Patient Rights Act, No. 63 of 2 July 1999, §4-1, <http://www.ub.uio.no/ujur/ulovdata/lov-19990702-063-eng.pdf>, accessed 13 December 2013.

198 Sterilization Act, § 2, <http://lovdata.no/dokument/NL/lov/1977-06-03-57?q=steriliseringssloven>, in Norwegian, accessed 28 November 2013.

199 Anniken Sørli, *The right to gender identity as a human right*, attachment 1, p. 154. According to the survey, 56 per cent of the transgender people who had undergone genital reassignment surgery did not receive specific information about the sterilization procedure. Twenty-seven individuals out of 33 did not give explicit written consent for the sterilization procedure.

I feel like I am deprived of my rights [legal gender recognition] just because I choose to exercise some other rights [refuse medical treatments].”

Moreover, according to current practices, transgender people who undergo genital surgeries resulting in irreversible sterilization are not given the possibility by the Trans Unit to preserve gametes before undergoing such treatment, although domestic legislation explicitly allows for the general possibility to store sperm and also permits the storage of unfertilized oocytes and ovarian tissue in instances where women undergo treatments impairing their fertility.²⁰⁰

2.5.5 CONSEQUENCES OF CURRENT PRACTICES

It can take 10 years or more²⁰¹ for transgender people to fulfill all the criteria to comply with the notion of “real sex conversion”, and thus to qualify for legal gender recognition. All those transgender people who do not fulfill the criteria because they are not diagnosed with “transsexualism” or refuse to undergo surgeries are not able to obtain legal gender recognition.

Current practices result in transgender people not having documents that reflect their gender identity, which can expose them to discrimination, harassment or violence. Recent research undertaken by the Centre for Equality, a Norwegian foundation, highlights how little awareness on gender identity there is among health and education professionals, stigma and discrimination experienced by transgender individuals who come out and problems with regard to accessing health care.

Until January 2014, only those transgender individuals who had undergone a full gender reassignment process with the OUS were protected against discrimination on the gender ground.²⁰² New anti-discrimination legislation, which entered into force in January 2014, explicitly provides protection against discrimination on grounds of gender identity and gender expression.²⁰³ However, it is unclear whether this new legislation will have any impact on current problematic practices with regard to legal gender recognition.²⁰⁴

200 Act of 5 December 2003 No. 100 relating to the application of biotechnology in human medicine, §2-11 and 2-17, <http://www.ub.uio.no/ujur/ulovdata/lov-20031205-100-eng.pdf>, accessed 13 December 2013.

201 Janneke van der Ros, Transgendered citizenship in the Norwegian welfare state: the non-recognition of diversities, or gender equality for all kinds of gender? <http://www.ecpg-barcelona.com/sites/default/files/Transgendered%20citizenship%20in%20the%20Norwegian%20welfare%20state%20Barcelona%20jvdr.pdf>, accessed 7 January 2014. See also: letter from the Ministry for Health and Care Services to the Directorate of Health, 13 September 2013.

202 Gender Equality Act (likestillingsloven), adopted in 1978 and revised in 2013, <http://lovdata.no/dokument/NL/lov/2013-06-21-59>, in Norwegian, accessed 13 December 2013.

203 Law on prohibition against discrimination on the basis of sexual orientation, gender identity and gender expression (diskriminering loven om seksuell orientering), <http://lovdata.no/dokument/NL/lov/2013-06-21-58>, accessed 13 December 2013.

204 In the past, the Equality and Anti-Discrimination Ombudsperson received a complaint about the discriminatory nature of the current practices from a transgender person who wanted to obtain legal gender recognition without undergoing surgeries. The Ombudsperson found that this case was beyond the remit of her competences under the previous Gender Equality Act, Case 13/289. Meeting with the Equality and Anti-discrimination Ombudsperson,

Representatives of the Ministry for Children, Equality and Social Inclusion told Amnesty International that these issues were not discussed at all in the context of the political debate that led to the adoption of the law.²⁰⁵

2.5.6 OPPORTUNITIES FOR CHANGING LAWS AND PRACTICES

Norway violates the rights of transgender people to attain the highest standard of health and to be free from inhuman, cruel and degrading treatments by requiring them to undergo unnecessary medical treatments, including the removal of their reproductive organs, in order to obtain legal recognition of their gender. The lengthy procedure to obtain legal gender recognition and the fact that transgender people who are not diagnosed with “transsexualism” cannot receive legal recognition of their gender unless they undergo treatments abroad and at their own expense, violate their rights to private and family life and to recognition before the law.

There is broad agreement among transgender organizations and other civil society organizations that the current practices on legal gender recognition have to be reformed. In particular, there is a wide consensus that undergoing surgeries resulting in sterilization should not be a precondition to obtain legal gender recognition, irrespective of whether or not some transgender people may seek those surgeries.

Policymakers are engaged in discussions on reforming the current framework applicable to legal gender recognition. The Ministry for Health and Care Services has tasked the Directorate of Health with putting forward proposals on access to health care and legal gender recognition for transgender individuals.

On 1 October 2012, the Directorate of Health published a review of the treatment of transsexual and transgender people. In this context, it recommended the establishment of a mechanism for transgender individuals to get a second opinion if the OUS does not consider they have fulfilled the diagnostic criteria. Although the Directorate of Health recommended clarifying the interpretation given to the concept of “real sex conversion”, it highlighted that sterilization was part of the medical treatment applicable to “patients diagnosed with transsexualism”. On this basis, the Directorate emphasized that the safeguards included in the Sterilization Act do not apply to transgender individuals, as the material scope of the Act does not cover instances where sterilization is considered a treatment or an intervention allowed by other laws.²⁰⁶ Transgender organizations and other civil society organizations, including Amnesty International, criticized these conclusions.

The Ministry of Health and Care Services has recently tasked the Directorate of Health to set up a multidisciplinary expert group to review the practices on legal gender recognition, focusing on the sterilization requirement, and to develop recommendations within one year from its appointment. The Directorate of Health is also charged with establishing a complaint

24 June 2013.

205 Meeting with the Ministry for Children, Equality and Social Inclusion, 21 June 2013.

206 Sterilization Act, §1.

mechanism to which transgender people who are denied health services from the OUS can apply.²⁰⁷ The Directorate of Health has established an expert group, composed of health professionals, legal experts and representative of transgender organizations. The group is tasked to develop recommendations on legal gender recognition and access to health care for transgender people by 31 January 2015.



Demonstration against sterilisation in Norway. The banner reads “Stop forced sterilisation”, March 2012, © Kristine Bue /Skeiv Ungdom

²⁰⁷ Letter from the Ministry for Health and Care Services to the Directorate of Health, 13 September 2013.

2.6 OTHER COUNTRIES

2.6.1 BELGIUM

“When you are transgender, you have to justify yourself and explain everything, all the time. Some trans activists may want to do that, and it’s their right, but other trans people prefer to preserve their privacy, and that’s their right also... The problem is that the society always expects you to be cisgender and straight. The law on legal gender recognition is very important... and has to be amended. All its transphobic aspects have to be dropped to allow trans people to be who they want to be, without asking them to get a psychiatric diagnosis or to be sterilized, for instance... otherwise the law itself gives people, the society, an excuse for being transphobic too.”

Ely, a transgender person living in Brussels

Transgender people in Belgium cannot change their legal gender and thus obtain documents that reflect their gender identity, unless they undergo a lengthy procedure that can take three years or more. It entails mandatory psychiatric diagnosis and compliance with a whole set of medical requirements including hormone treatment, a “real life test”, genital reassignment surgeries and sterilization. In fact, according to current legislation, transgender people cannot obtain legal gender recognition unless they are rendered incapable of reproduction. Psychiatric diagnosis and hormone treatment are also, according to current laws and practices, mandatory requirements transgender people must fulfil if they want to change their first name.

2.6.1.1 CURRENT LAW AND PRACTICES

In Belgium every new birth of a child has to be registered at the municipal level within 15 days from the birth. Personal information of citizens and residents, including their legal gender, established on the basis of the sex assigned at birth, is recorded in population registers and on birth certificates.²⁰⁸ Official documents such as passports and identity cards are issued on the basis of this information and include the legal gender and gender markers associated with it.

According to Belgian law in force since 2007,²⁰⁹ the legal gender can be modified only in instances where there is an irreversible conviction to belong to the “opposite” gender and where medical treatments have been undertaken. This implies that medical evidence has to be produced when a request for legal gender recognition is submitted to the civil registrar. Such evidence must include two declarations, one from a psychiatrist and another from a surgeon, certifying that the person who requested legal gender recognition has the “intimate, constant and irreversible” conviction to belong to the “opposite” gender, has undergone gender reassignment surgeries and is incapable of reproduction. The current practices

²⁰⁸ Law on population registries, identity cards, cards of foreigners and residence documents (Loi relative aux registres de la population, aux cartes d’identité, aux cartes d’étranger et aux documents de séjour), 1991, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1991071931&table_name=loi, in French, accessed 20 December 2013.

²⁰⁹ Loi relative à la transsexualité, 10 May 2007, Article 2, §2, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2007051055, in French, accessed 11 December 2013.

followed by health professionals in Belgium imply that transgender people have to wait several years before obtaining legal gender recognition.

Transgender people can access health treatments in two hospitals, in Ghent and Liège, where multidisciplinary teams have been established. They can only undergo gender reassignment surgeries in Ghent. It takes an average of six months to establish the psychiatric diagnosis at the Ghent University Hospital (hereafter Ghent Gender Clinic), although this can vary on a case by case basis.²¹⁰ The diagnostic period typically involves usually six sessions with mental health professionals distributed on a monthly basis. According to çavaria, an LGBTI organization located in the Dutch-speaking part of Belgium, and Genres Pluriels, a trans organization based in Brussels, it may take up to one year to establish the psychiatric diagnosis at the Gent Gender Clinic.²¹¹

Hormone treatment is accessible after the diagnosis, although the waiting period can be as much as two months depending on the availability of the endocrinologist. Hormone treatment is also accessible to minors. According to current practices, a “real-life” experience is associated with hormone treatment. Transgender people are expected to start living in their preferred gender socially and professionally as soon as they start the treatment.²¹²

Genital reassignment surgeries are available for male-to-female transgender people one year after hormone treatment, and two years after for female-to-male transgender people. In the case of the latter, the waiting period is longer due to the limited availability of surgeons. Genital reassignment surgery is always practiced in a way that implies the removal of reproductive organs, which results in irreversible sterilization.²¹³ As a practice, genital reassignment surgeries are not available to minors.²¹⁴ Although minors can submit a request to obtain legal gender recognition to the civil registrar,²¹⁵ they cannot in practice obtain legal recognition before they come of age and undergo genital reassignment surgery.

Transgender people can change their name only insofar as they can produce two declarations,

210 Phone interview with a representative of the Ghent Gender Clinic, 17 December 2013.

211 Email communication with çavaria, 18 December 2013; Interview with Max Nissol of Genres Pluriels, 16 December 2013.

212 The hormone treatment usually entails two phases. During the first phase, the male hormones are inactivated for transgender women, and the female hormones are inactivated for transgender men. Nine months later substitution therapy is started, at which time trans women are given female hormones and trans men are given male hormones. The second phase starts only after an assessment of the “real-life experience”. See UZ Ghent, *Transsexualiteit, Info voor Patiënt*, 2009, p12, [http://www.uzgent.be/wps/wcm/connect/da71110048cd74279bd6bb1b2ddb3c83/UZ_A5_Transseks+\(herdruk\)v4.pdf?MOD=AJPERES](http://www.uzgent.be/wps/wcm/connect/da71110048cd74279bd6bb1b2ddb3c83/UZ_A5_Transseks+(herdruk)v4.pdf?MOD=AJPERES), in Dutch, accessed 20 December 2013.

213 Phone interview with a representative of the Ghent Gender Clinic, 17 December 2013.

214 Health practitioners in Belgium follow the recommendations of the WPATH according to which genital surgeries should not be carried out until patients reach the legal age of majority. WPATH *Standards of Care*, Version 7, p. 21, http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf

215 *Loi relative à la transsexualité*, 10 May 2013, Art. 2, “Le mineur transsexuel non émancipé qui fait une déclaration de sa conviction est assisté de sa mère, de son père ou de son représentant légal”.

one from a psychiatrist and another from an endocrinologist. These declarations must certify that the person in question has an “intimate, constant and irreversible” conviction to belong to the “opposite” gender, and has undergone or is undergoing hormone treatment.²¹⁶

2.6.1.2 CONSEQUENCES OF CURRENT PRACTICES AND DISCRIMINATION

Current laws and practices expose transgender people to a life of everyday situations in which they are forced to produce documents bearing a name and gender markers that do not correspond to their gender identity and expression. This can have the effect of increasing discrimination against them.



Eefje, a 25-year-old transgender woman from Belgium, © Eefje

Eefje is a 25-year-old transgender woman who is undergoing the gender reassignment procedure at the Ghent Gender Clinic. She is still legally a male and would be willing to access all the health treatments available at the Clinic, including genital reassignment surgery. Eefje shared with Amnesty International the negative experiences she faced

as a result of the mismatch between her legal gender and her gender identity and expression: *“I trained to become an assistant cook on a course managed by the VDAB [the public employment agency in Flanders]. At the end of the course, I had to complete a traineeship and the VDAB traineeship director told me I would have to apply using my legal name and gender. I felt obliged to do so because I wanted to successfully complete the course and find a job. That had a great psychological impact on me because during the course I was constantly given orders by using my male name. Once I completed the traineeship, the manager told me that I could have been employed but that other colleagues were against it because I was transgender. I was finally not employed officially because I did not satisfy educational requirements.”*

Ely told Amnesty International: *“You need your electronic identity card for many things... [and] you can’t use your preferred name if you haven’t changed it... The result is that you are confronted constantly with situations where you must use a name that you don’t want because it does not reflect your gender.”*

Some trans individuals do not want to comply with the requirements prescribed by the law on legal gender recognition. Max, who is accessing hormone treatment privately, but has

²¹⁶ Loi relative à la transsexualité, Article 9.

changed neither his name, nor his legal gender, stated; *"I refuse to be bound to a law that violates human rights. I would like to change my name but I don't want the state to interfere with my private life to the extent of asking me to see a psychiatrist just to change my name. That amounts to policing genders."*

Transgender people who do not have documents reflecting their gender identity can be exposed to discrimination, harassment or violence, which remain a serious problem in Belgium. According to the FRA-LGBT survey, 48 per cent of the transgender individuals surveyed in Belgium said they had been discriminated against or harassed the year ahead of the survey. Respondents cited acts of discrimination when looking for jobs (47 per cent), in the workplace (19 per cent) and by educational personnel (15 per cent). Moreover, 41 per cent said they had been targeted with violence or threats of violence in the five years before the survey. Of those who had been targeted, 46 per cent said that the last episode of violence that they had experienced in the year ahead of the study was motivated by their gender identity.

The current Belgian legislation on equality between women and men prohibits discrimination on grounds of sex in several areas including employment, access to goods and services, health and social security.²¹⁷ The law also protects against discrimination on grounds of sex change.²¹⁸

A new law introducing sex change in the Criminal Code as a ground on which a hate crime can be perpetrated entered into force in January 2013.²¹⁹ On 28 November 2013, the government proposed to extend the scope of the law on equality between women and men to include the grounds of gender identity and expression.²²⁰

2.6.1.3 OPPORTUNITIES FOR CHANGING LAWS AND PRACTICES

Belgium violates the rights of transgender people to the highest attainable standard of health and to be free from inhuman, cruel and degrading treatment by requiring them to undergo unnecessary medical treatments, including sterilization, in order to obtain legal recognition of their gender. The lengthy procedure required to obtain legal gender recognition and the fact that it is dependent on requirements that some trans people may not want to comply with violates their rights to private life and to recognition before the law. The current exclusion of minors from being able to obtain legal gender recognition because they cannot fulfil the medical requirements prescribed by the law is also at odds with international standards

217 Loi tendant à lutter contre la discrimination entre hommes et femmes, 10 May 2007, Art. 5, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2007051036&table_name=loi

218 Loi du 10 Mai 2007, Art. 4.2.

219 Loi modifiant l'article 405 quater du Code pénal et l'article 2 de la loi du 4 octobre 1867 sur les circonstances atténuantes, 14 January 2013, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013011406&table_name=loi, in French, accessed, 10 January 2014..

220 At the time of writing (January 2014), the text was not yet available. See, press release of the Belgian Minister of Interior and for Equal Opportunities, <http://www.milquet.belgium.be/fr/une-meilleure-protection-grâce-à-l'extension-de-la-loi-anti-discrimination-aux-critères-d'identité>

obliging states to take into account the best interests of the child in all matters concerning children's lives.

In January 2013, the Belgian government adopted a comprehensive roadmap to combat discrimination on grounds of sexual orientation and gender identity.²²¹ The roadmap includes a commitment to review the 2007 law on legal gender recognition. However, in December 2013, it was still unclear when the current government intends to present a proposal to amend the law.

2.6.2 GERMANY

Transgender people in Germany cannot change their name and obtain legal recognition of their gender unless they get a psychiatric diagnosis and undergo a "real-life experience" and an expert assessment ordered by the courts.

Discrimination and hate crime against transgender people remain widespread in Germany. According to the FRA-LGBT survey, as many as 54 per cent of the transgender individuals surveyed in Germany perceived they had been discriminated against in the year ahead the research. Thirty-two per cent of respondents said they had been discriminated against when looking for a job, and 24 per cent cited discrimination by school or university personnel. Fifty-two per cent said they had been targeted or threatened with physical or sexual violence during the five years prior to the survey, and 58 per cent believed that the last episode of violence or threat of violence against them was motivated by their gender identity.²²²

German anti-discrimination legislation, in force since 2006,²²³ provides for protection against discrimination on grounds of "sexual identity" (*sexuelle Identität*).²²⁴

221 Plan d'action interfédéral contre les violences homophobes et transphobes, 31 Janvier 2013, Chapter 2, Actions 1 and 4, http://igvm-iefh.belgium.be/fr/binaries/Plan%20d'Action%20Interfédéral%20Violences%20Homophobes%20Transphobes_tcm337-224389.pdf

222 Some German trans organizations collect cases of discrimination and violence. See, for example TransInterQueer, Daily Routine: Experiences of discrimination on the grounds of gender identity and gender expression in access to and supply of goods and services and employment in Germany, Case collection 2008-February 2011, <http://www.ilga-europe.org/content/download/19569/125868/version/1/file/Annex+2+-+Germany+-+Collection+of+cases+of+discrimination+against+trans+people+-+February+2011.pdf>, accessed 27 November 2013. According to the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights, Germany collects disaggregated data on hate crimes perpetrated on grounds of gender identity.

222 However, there is no specific legislation on hate crime in Germany. The hate motive can be taken into account in the sentence but this is at the discretion of individual judges, who base judgement on Article 46.2 of the German Criminal Code. Cases of hate crime perpetrated against transgender individuals as reported by Transgender Europe to the OSCE Office for Democratic Institutions and Human Rights (ODIHR), Hate crimes in the OSCE Region: incidents and responses, Annual Report, 2012, p. 81, <http://tandis.odhr.pl/hcr2012>, accessed 27 November 2013.

223 Allgemeines Gleichbehandlungsgesetz, §1, <http://www.gesetze-im-internet.de/agg/index.html>, in German, accessed 27 November 2013.

224 No legal definition of the protected ground is given. The non-binding Parliamentary explanatory report provides some guidance in this respect, stating that "sexual identity" should be construed as including all LGBTI people.

The German Equality body (*Antidiskriminierungsstelle des Bundes*), which deals with discrimination against transgender individuals, has on several occasions recommended changes to enhance legal protection against discrimination on grounds of gender identity and expression.²²⁵

2.6.2.1 CURRENT LAWS AND PRACTICES

In Germany, all information relating to a newborn child, including the sex, has to be registered in the birth registry within one week after the birth²²⁶ and is indicated on the birth certificate.²²⁷ The sex of a newborn child is assigned at birth by medical staff. According to recent amendments of the Personal Status Law, entered into force on 1 November 2013, the information on sex can be omitted in the birth registry if a newborn child cannot be unambiguously assigned as either male or female.²²⁸

Transgender individuals have been able to change their forename and obtain legal recognition of their gender since 1980, when the Law on the Changing of First Names and the Establishment of Sex Status in Special Cases²²⁹ (hereafter TSG) was introduced. This law allows transgender people to change their name (informally referred to as “minor solution”) or their legal gender (informally referred to as “major solution”).

Although the German Constitutional Court, in numerous judgments from 1982 until 2011, has struck down several problematic requirements originally laid down in the TSG, transgender people who wish to change their name and gender are still required to get a psychiatric diagnosis, based on the International Classification of Diseases (ICD-10),²³⁰ which Germany has adopted.²³¹ Experts appointed by courts must confirm the diagnosis

225 In 2010, the German Equality Body published an expert opinion on discrimination of transgender people in the workplace. It recommended a review of the procedures for transgender individuals to change their name and legal gender, in particular the psychiatric diagnosis and the expert assessments. An English summary of the expert opinion, “Discrimination against trans*persons, especially in the world of work”, can be accessed here: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/factsheet_engl_Benachteiligung_TransPersonen.html?nn=4194106, accessed 27 November 2013.

226 Personal Status Law (Personenstandgesetz/PStG), §21.

227 PStG, article 59.

228 PStG, §22.3, See Chapter 1.5

229 Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen – Transsexuellengesetz (TSG), <http://www.gesetze-im-internet.de/tsg/BJNR016540980.html>, in German, accessed 26 November 2013.

230 See Annex II.

231 Internationale statistische Klassifikation der Krankheiten und verwandter Gesundheitsprobleme, 10. Revision German Modification, Version 2013, F 64 Störungen der Geschlechtsidentität, <http://www.dimdi.de/static/de/klassi/icd-10-gm/kodesuche/onlinefassungen/htmlgm2013/block-f60-f69.htm>

when transgender people apply to obtain legal gender recognition or to change their name.

The requirements found to be unconstitutional by the Constitutional Court, including single status, sterilizations and medical treatments, are no longer applied but new legislation on legal gender recognition has still to be adopted. The relatively lengthy procedures required for transgender people to legally change their name and their gender result in the violation of their right to private life.

2.6.2.2 CHANGE OF NAME: THE MINOR SOLUTION

The “minor solution”²³² allows for transgender people to change their forename, provided the applicant can fulfil the following three main conditions:

- Provide sufficient proof that he/she feels to belong to the opposite gender;
- Demonstrate in a believable manner that he/she has had the compulsion to live according to his/her perceived gender for a minimum period of three years;
- Provide certification that the urge to live in the opposite gender is probably irreversible, based on his/her “transsexual imprinting or conditioning”, which is unlikely to change again.

District courts (*Amtsgericht*) hand down decisions on name change on the basis of the opinion of two court appointed experts who are tasked with assessing whether all requirements are fulfilled. The experts are usually selected from among mental health professionals and can be either psychologists or psychiatrists.

According to transgender organizations that Amnesty International spoke to, the courts and the experts sometimes require transgender people to have already lived for three years in their preferred gender when they apply for a name change, although the law refers only to the “compulsion” of living in the preferred gender and not an actual experience. Therefore, the TSG is in practice interpreted as requiring transgender people to undergo a “real life experience” (*Alltagstest*) before being allowed to change their name. Such interpretation partially stems from the standards of care applied by health professionals,²³³ as well as by insurance companies,²³⁴ which require a “real life test” as a precondition to access specific transgender health care. This alignment on standards between the health care sector and the courts is not surprising since the court experts are themselves health professionals.

Transgender organizations are very critical of the role played by experts. They believe that the

232 TSG, §1.

233 The German standards of transgender care require a one-year “real life test” before accessing hormone treatment and one year and a half “real life test” to access reassignment surgeries. Standards der Behandlung und Begutachtung von Transsexuellen, www.bernhard-breuer.de/download/StandardsTS.pdf, accessed 26 November 2013.

234 The Association of Health Insurers developed a set of binding guidelines to assess state coverage of transgender health care. These guidelines suggest a period of 18 months of “real life test” before a transgender person can access any medical treatment including hormone therapy, Anlagen zur Begutachtungsanleitung Geschlechtsangleichende Maßnahmen bei Transsexualität (MDS), http://www.trans-ident.de/index.php?option=com_joomdoc&task=cat_view&gid=63&limit=50&limitstart=0&order=hits&dir=ASC&Itemid=5, accessed 26 November 2013.

criteria on which experts rely are not transparent,²³⁵ and note that transgender individuals often reported intrusive and unnecessary practices followed by experts, including physical examinations or queries about their sexuality. According to a study on living conditions of transgender people in the German state of North-Rhine Westphalia, a third of transgender men and a quarter of transgender women surveyed were physically examined by court-appointed experts who were psychiatrists and thus not qualified to perform gynaecological examinations. A fifth of transgender men and 15 per cent of transgender women found the physical examination degrading. Seventy-four, 33 and 37 per cent of transgender men and 41, 33 and 37 per cent of transgender women were respectively asked by experts about their sexual orientation, sexual practices and sexual fantasies.²³⁶

The “minor solution” enables transgender people to change their name but not the gender on their birth certificate. The Passport Act allows transgender individuals to obtain a passport reflecting their preferred gender, if they have already changed their name in accordance with the minor solution.²³⁷ However, the procedure to change the forename can be relatively lengthy, lasting anywhere between six months and two years and expensive with costs ranging between €500 and €2,000.²³⁸ Alternative identity cards indicating the preferred forename can be issued to transgender people who have not yet changed their name but who are already undergoing the psychiatric assessment.²³⁹

2.6.2.3 CHANGE OF LEGAL GENDER: THE MAJOR SOLUTION

The “major solution” allows for transgender individuals to obtain full legal recognition, which entails the amendments of the information on their gender included in the birth registry, on the birth certificate and on any other documents.²⁴⁰ To that purpose, the TSG requires transgender individuals to “feel the compulsion to belong to the opposite gender” for a minimum period of three years, and a “probably irreversible transsexual imprinting” that has

235 An opinion shared also by Annette Gildenring, a transgender psychiatrist at the WestküstenKlinikum in Heide who also serves as a court appointed expert in proceedings relating to name change and legal gender recognition. Amnesty International's researchers met her on 4 November 2012.

236 Wiebke Fuchs, Dr. Dan Christian Ghattas, Deborah Reinert, Charlotte Widmann. Studie zur Lebenssituationen von Transsexuellen in Nordrhein-Westfalen, pp. 84-85, in German, www.lsvd.de/fileadmin/pics/Dokumente/TSG/Studie_NRW.pdf, accessed 8 January 2013.

237 Passport Act (Passgesetz), Section 4, reads: “The indicated sex shall be the same as that entered in the official civil register. In derogation from the third sentence, a passport applicant whose forename(s) have been changed by court decision in accordance with Section 1 of the Act on Transsexuals shall be issued a passport in which the indicated sex differs from the one entered in the official register at birth.”

238 C. Balzer, A. Suess, Transrespect versus Transphobia Worldwide, TvT research project country results: Germany – Elaborated version, April 2010, available at <http://www.transrespect-transphobia.org/en/countries/germany-1/germany-2.htm>.

239 German identity cards do not mention the gender, Act on Identity Cards and Electronic Identification (Personalausweisgesetz), Section 5, http://www.gesetze-im-internet.de/englisch_pauswg/englisch_pauswg.html#p0041, accessed 26 November 2013. However, an identity card bearing a name and a picture that are not consistent with the appearance of the holder can be problematic. The German Society for Transidentity and Intersexuality (DGTI) issues alternative identity cards under an agreement with the Ministry of Interior. Further information (in German), http://www.dgti.org/index.php?option=com_content&view=article&id=10, accessed 26 November 2013.

240 TSG, §8.

to be certified by two court-appointed experts and confirmed by the decision of a court. As is the case with regard to the “minor solution”, courts and experts interpret the conditions laid down by the TSG for legal gender recognition as requiring transgender people to have already lived in their preferred gender for three years before seeking legal recognition of their gender.

Three further conditions were originally foreseen by the TSG to access the “major solution”: single status, incapacity to reproduce and having undergone surgery to change “external sexual characteristics so that the person’s appearance approaches that of the other gender”.

In 2008, the Federal Constitutional Court found that it was unconstitutional to require transgender people who sought legal gender recognition to divorce from their partners, without providing them with any alternative to continue their partnership in an equally secured form. The Court emphasized that forcing spouses to divorce went against the very structural characteristic of marriage, which is meant to be a long-lasting commitment deserving constitutional protection. The Court left it to legislators to decide on the solution to address the unconstitutional aspect of the single-status requirement enshrined in the TSG.²⁴¹

In 2011, the Court found that the irreversible surgery clause and the incapacity to reproduce were unconstitutional.²⁴² The Court highlighted that requiring transgender individuals to undergo genital surgeries that lead to infertility in order to provide evidence of the stability and irreversibility of the perceptions of themselves in the other gender, was unreasonable. However, the Court left open the possibility for legislators to establish what other criteria or evidence should be provided to that purpose.²⁴³

On 17 July 2009, following-up on the Constitutional Court’s judgment, the Federal Ministry of Justice declared in the Federal Gazette (*Bundesgesetzblatt*) that the section of the TSG establishing the non-marriage clause (§8.1.2) was deemed as not applicable until a new law could be entered into force.²⁴⁴

Following up on the 2011 judgment, the sections of the TSG laying down the requirements pertaining to the incapacity to reproduce and the obligation to undergo medical treatments (§8.1.3 and §8.1.4) were also deemed inapplicable.

241 Federal Constitutional Court, BVerfG 121, 175. 27.05.2008, Judgment on the non-marriage clause.

242 Federal Constitutional Court, BVerfG, 1 BvR 3295/07, 11.01.2011, http://www.bundesverfassungsgericht.de/entscheidungen/rs20110111_1bvr329507.html, accessed 26 November 2013. In a 2005 judgement, the Court had already found that “an operative intervention as a precondition for the change of gender is increasingly regarded as problematic or no longer tenable among experts.” BVerfG, 1 BvL 3/03, Judgment of 6 December 2005, http://www.bverfg.de/entscheidungen/lis20051206_1bvl000303.html, accessed 26 November 2013.

243 BVerfG, 1 BvR 3295/07 (11.01.2011), para63.

244 Bundesgesetzblatt Jahrgang 2009, Teil 1, Nr. 43, on 22 July 2009, p1978, Gesetz zur Aenderung des Transsexuellengesetzes (Transsexuellengesetz-Änderungsgesetz – TAG-ÄndG) from 17 July 2009, available at, http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger_BGBI&start=%2F%2F*%5B%40attr_id%3D%2F%2F%5D%5D&wc=1&skin=WC

As a result of the case law of the Constitutional Court, the conditions currently required to access the minor solution and the major solution are very similar.



Trans*genious Pride 2013 in Berlin, ©Richard Koehler

2.6.2.4 OPPORTUNITIES FOR CHANGING LAWS AND PRACTICES

Although the Constitutional Court has struck down some of the requirements for obtaining legal gender recognition that had resulted in the violations of human rights of transgender people – including the blanket age restriction, the single status the reassignment surgeries and sterilization – current practices remain problematic. In particular, the expert assessment required by the courts can lead to the violation of the right of transgender people to be free from degrading treatment. Moreover, the practice according to which a “real life test” is required for transgender people who wish to change their name and legal gender, violates their right to private and family life as it exposes them to situations in which they must constantly produce documents in their everyday life that are at odd with their appearances. Although surgeries are no longer required to obtain legal gender recognition, other medical treatments, including hormone treatment, may be required by the courts as a precondition to legal gender recognition. As in all the other countries, transgender people and organizations in Germany consider the requirement of a psychiatric diagnosis to obtain legal gender recognition to be degrading and stigmatizing.

The 2009 governmental coalition agreement between the conservatives (CDU-CSU) and the liberals (FDP) included a point concerning the revision of the TSG.²⁴⁵ Although several draft laws were introduced into the German Federal Parliament (*Bundestag*) by different political parties during the previous legislature, none of the proposals were adopted before the parliamentary elections held on 22 September 2013.²⁴⁶

Transgender and intersex organizations established a civil society-led working group in 2011, which drafted a position paper on the reform of the TSG. It included a call for the abolition of the court proceedings and in particular the requirement to undergo expert assessment in instances where transgender people seek legal change of their name and gender.²⁴⁷

The governmental coalition agreement between the conservatives (CDU, CSU) and the social democrats (SPD), signed on 27 November 2013, includes only a general reference to the situation of transgender and intersex people and no specific commitment to reforming the current law and practices.²⁴⁸

245 Koalitionsvertrag zwischen CDU, CSU und FDP. p108 <http://www.cdu.de/sites/default/files/media/dokumente/091026-koalitionsvertrag-cducsu-fdp.pdf>, in German, accessed 26 November 2013.

246 For instance, in 2010, the Bündnis 90/Die Grünen (The Greens), introduced a proposal for legal gender recognition to be obtained by simply submitting a declaration to the Civil Registry and without undergoing any diagnosis, treatment or expertise. See, Draft Law on the Change of Forenames and the Recognition of Gender Identity, <http://dip21.bundestag.de/dip21/btd/17/022/1702211.pdf>, accessed 2 November 2013.

247 The full proposal (in German) is accessible here: www.tsgreform.de, accessed 26 November 2013.

248 Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD, p.105

3. CONCLUSIONS AND RECOMMENDATIONS

This report highlights the variety of human rights violations experienced by transgender people when they wish to change their legal gender. Across Europe, even where laws and practices exist to allow transgender people to obtain documents reflecting their gender identity, these procedures are inadequate and, for transgender people, violate the rights to private and family life, to recognition before the law, to highest attainable standard of health and to be free from cruel, inhuman and degrading treatments without discrimination on grounds of gender identity and expression.

Regrettably, many of these laws and practices on legal gender recognition are still based on stereotypical norms of masculinity and femininity, which result in discrimination against transgender people. States must counteract all discriminatory practices stemming from gender-based stereotypes.

Amnesty International recommends:

TO ALL GOVERNMENTS

- Allow individuals to change their legal name and gender, including the gender markers on official documents issued by the state, through a quick, accessible, and transparent procedure and in accordance with the individual's sense of gender identity;
- Ensure that non-state institutions and bodies put in place quick, accessible and transparent procedures aimed at providing transgender people with documents, such as diplomas or other education certificates, that reflect their gender identity;
- Ensure that all information concerning changes of legal name and gender is kept confidential; such information should not generally be accessible to third parties without the explicit consent of the persons concerned;
- Remove gender identity from the classification of mental diseases and reclassify aspects relevant to the provision of health care in a non-stigmatizing health category;
- Abolish requirements to undergo psychiatric assessment and receive a diagnosis for obtaining legal gender recognition;
- Abolish any medical requirement, including surgeries and sterilization, in relation to legal gender recognition;
- Abolish any requirement of single status as a prerequisite to obtain legal gender recognition;

- Abolish blanket age restrictions to legal gender recognition procedures and ensure that legal recognition is accessible to minors, taking into account the child's freely expressed views regarding their own best interests, in light of their evolving capacities;
- Provide explicit legal protection against discrimination on grounds of gender identity and expression in all areas;
- Ensure that gender identity and expression are explicitly included as grounds for prosecution of hate crimes;
- Ensure that medical practices, especially the provision of medical care for transgender people, do not perpetuate stereotypical notions of masculinity and femininity. Ensure that health treatments are accessible to transgender people on the basis of their informed consent;
- Take steps to raise public awareness of transgender identities and the discrimination experienced by transgender people.

TO THE EUROPEAN UNION

- Ensure that protection against discrimination on grounds of gender identity and expression is provided to all transgender people irrespective of whether they have undertaken, wish to undertake or are undertaking gender reassignment, in line with international human rights standards according to which gender identity is a protected ground of discrimination. To this aim, gender identity and expression should be included as explicit grounds in all existing and future EU legislation on combating discrimination;
- In the context of the development of the new strategic guidelines in the area of freedom, security and justice, aimed at shaping the EU policies after 2014, the EU should ensure that transgender people can enjoy their rights to privacy and family life, to be free from ill and degrading treatment and to enjoy the highest attainable standards of health, particularly in the context of legal gender recognition procedures. The protection of these rights should be part of a comprehensive EU policy which addresses discrimination, violence and other human rights violations experienced by transgender people.

TO THE GOVERNMENT OF DENMARK

- Amend current laws and practices, in particular the Guidelines on Population Registration (no. 9273 of 14 June 2013), paragraph 2.1.3, and the Guidelines on Passports (no. 1337 of 28 November 2013), paragraph 5, with the aim of allowing transgender people to obtain a new CPR number on the basis of which documents reflecting their gender identity can be issued without the necessity to undergo psychiatric assessment and receive a psychiatric diagnosis or any other medical requirement and through a quick, transparent and accessible procedure;
- Amend the Health Act no. 913 of 13 July 2013 with the aim of abolishing the sterilization requirement for transgender people wishing to obtain legal recognition of their gender;

- Remove the requirement that transgender individuals receive a psychiatric diagnosis and undergo psychiatric assessment or medical treatment as a precondition for legal gender recognition. Remove transgender identities from the national classification of diseases and ensure that transgender people can access the health treatments they wish on the basis of their informed consent;
- Amend the Act on Names, paragraph 13.2, and the Regulation on Names (no. 1324 of 27 November 2013) with the aim of allowing transgender people to change their names without the necessity of undergoing psychiatric assessment and receiving a psychiatric diagnosis and through a quick, transparent and accessible procedure;

TO THE GOVERNMENT OF FINLAND

- Amend current laws and practices, in particular the Act on Legal Recognition of the Gender of Transsexuals (Trans Act, no. 563/2002) and the Decree 1053/2002 with the aim of allowing transgender people to obtain a new personal identity code on the basis of which official documents reflecting their gender identity can be issued through a quick, transparent and accessible procedure;
- Abolish the single status requirement, the sterilization requirement and the “real life test” laid out in the Trans Act and the Decree 1053/2002;
- Amend the Trans Act to ensure that minors can access legal gender recognition on the basis of their best interests and according to their evolving capacities;
- Remove the requirement that transgender individuals receive a psychiatric diagnosis and undergo psychiatric assessment or medical treatment as a precondition for legal gender recognition. Remove transgender identities from the national classification of diseases and ensure that transgender people can access the health treatments they wish on the basis of their informed consent;
- Allow transgender people to change their names without requiring them to undergo psychiatric assessment and receive a psychiatric diagnosis and through a quick, transparent and accessible procedure.

TO THE GOVERNMENT OF FRANCE

- Introduce a legislative proposal within the Parliament aimed at establishing a framework allowing transgender people to obtain legal recognition of their gender and to change their names through a quick, transparent and accessible procedure;
- Follow-up on the opinion of the National Advisory Commission on Human Rights by ensuring that the legislative proposal mentioned above does not make legal gender recognition dependent on any medical requirements such as psychiatric diagnosis, hormone treatment, surgeries or sterilization;

- Ensure that such a legislative proposal does not require transgender people to undergo any additional expert assessment as a condition to obtain legal recognition of their gender;

TO THE GOVERNMENT OF IRELAND

- Ensure that transgender people can obtain legal recognition of their gender without further delays and through a quick, transparent and accessible procedure;
- Ensure that the Gender Recognition Bill will not require transgender people to be single or to have undergone any specific health treatment to obtain legal gender recognition. Moreover, ensure that children will be given the possibility to obtain legal gender recognition taking into account their best interests and their evolving capacities;

TO THE GOVERNMENT OF NORWAY

- Amend current laws and practices by introducing a legislative proposal that sets out a framework allowing transgender people to obtain legal recognition of their gender through a quick, accessible and transparent procedure;
- Ensure that such proposal will abolish the sterilization requirement as well as any other medical requirement currently enforced in instances where transgender people seek legal gender recognition;
- Ensure that legal gender recognition is accessible to everyone without the need to undergo psychiatric assessment and to receive psychiatric diagnosis and that transgender identities are removed from the national classification of mental diseases. Ensure that transgender people can access the health treatments they wish on the basis of their informed consent;

TO THE GOVERNMENT OF BELGIUM

- Amend the current laws and practices, in particular the Law on Transsexuality of 10 May 2007, with the aim of allowing transgender people to obtain legal recognition of their gender and to change their names through a quick, transparent and accessible procedure;
- Abolish the sterilization and surgery requirements included in the Law on Transsexuality of 10 May 2007;
- Remove the requirement that transgender individuals receive psychiatric diagnosis and undergo psychiatric assessment as a precondition for legal gender recognition. Remove transgender identities from the national classification of diseases and ensure that transgender people can access the health treatments they wish on the basis of their informed consent;
- Ensure that legal gender recognition can be effectively accessed by minors on the basis of their best interests and by taking into account of their evolving capacities.

TO THE GOVERNMENT OF GERMANY

- Introducing a legislative proposal aimed at amending the Law on Transsexuality (TSG) adopted in 1980 as well as current practices with the aim of allowing transgender people to obtain legal recognition of their gender and to change their names through a quick, accessible and transparent procedure that do not require them to receive a psychiatric diagnosis and undergo expert assessments, a “real life test” or specific health treatments;
- Remove transgender identities from the national classification of diseases and ensure that transgender people can access health treatments on the basis of their informed consent.

APPENDIX I: HUMAN RIGHTS STANDARDS

In order to protect, promote and fulfill the human rights of transgender people, and in view of the obligation to comply with international and regional human rights standards, states should undertake the following actions:

DISCRIMINATION AND HATE CRIME	
Actions for governments	Human rights bases
<p>1. Provide explicit protection against discrimination on grounds of gender identity and expression in all areas of life</p> <p>2. Provide explicit protection against hate crimes perpetrated on grounds of gender identity and expression</p>	<p><i>Gender identity is a protected characteristic under human rights law. Gender expression should be considered as a protected characteristic under open-ended anti-discrimination provisions included in the major international and regional human rights instruments (ICCPR, Articles 2 and 26, ICESCR Article 2.2, CRC Article 2.1, ECHR Article 14 and Protocol 12)</i></p> <p>UN Committee for Economic, Social and Cultural Rights (CESCR), General Comment no. 20, para32</p> <p>UN Committee for the Elimination of All Forms of Discrimination against Women (CEDAW) General Recommendation no. 28²⁴⁹</p> <p>Report of the UN High Commissioner for Human Rights on discrimination on grounds of sexual orientation and gender identity, Recommendations a, b, e²⁵⁰</p> <p>European Court of Human Rights (ECtHR) judgment in P V v Spain (gender identity is</p>

249 CEDAW/C/GC/28, 16 December 2010, para18.

250 A/HRC/19/41, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-41_en.pdf

	<p>covered by art. 14 of the ECHR)²⁵¹</p> <p>Council of Europe Committee of Ministers, Recommendation CM/Rec (2010) 5, recommendations 1, 2, 3, Appendix I.A²⁵²</p> <p>EU Directive 2012/29, recitals 9, 17²⁵³</p> <p>European Court of Justice case law on discrimination on grounds of sex²⁵⁴</p>
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LEGAL GENDER RECOGNITION	
Actions for governments	Human rights bases
<p>3. Allow individuals to change their legal name and gender markers on all official documents issued by the state</p>	<p><i>Right to recognition before the law</i></p> <p>International Covenant on Civil and Political Rights (ICCPR), Article 16</p> <p>Convention on the Elimination of all Forms of Violence against Women (CEDAW), Article 15</p> <p>Yogyakarta Principle 6: the right to recognition before the law</p>

251 P.V. v Spain, judgment of 30/11/2010, para30,

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#f!%22dmdocnumber%22:%222877607%22,%22itemid%22:f!%22001-101943%22>, in French, accessed 10 December 2013.

252 <https://wcd.coe.int/ViewDoc.jsp?id=1606669>

253 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:01:EN:HTML>, accessed 10 December 2013.

254 The Court found in three cases that discrimination against transgender people who have undergone, are undergoing or intend to undergo gender reassignment might amount to discrimination on grounds of sex. CJEU, Case C-13/94 P. v S. and Cornwall County Council, 1996, ECR I-2143; CJEU, Case C-117/01 K.B. v National Health Service Pensions Agency and Secretary of State for Health, 2004, ECR I-541; CJEU, Case C-423/04 Sarah Margaret Richards v Secretary of State for Work and Pensions, 2006, ECR I-3585.

<p>4. Abolish any medical requirement in relation to legal gender recognition including surgeries and sterilization</p>	<p><i>Right to privacy/Right to the respect for private life</i></p> <p>ICCPR, Article 17</p> <p>ECHR, Article 8</p> <p>ECtHR case-law:</p> <p>B. v France, 25 March 1992</p> <p>Goodwin v UK, 11 July 2002</p> <p>I. v the United Kingdom, 11 July 2002</p> <p>Grant v the United Kingdom, 23 May 2006</p> <p>L. v Lithuania, 11 September 2007</p> <p>Yogyakarta Principle 6: the right to privacy</p> <p>Council of Europe Rec CM (2010) 5, para22</p> <p><i>Right to the highest attainable standard of health</i></p> <p>UN Covenant on Economic, Social and Cultural Rights (CESCR), Art. 12</p> <p>CESCR General Comment 14</p> <p><i>Right to be free from degrading treatment</i></p> <p>ICCPR, Article 7</p> <p>UN Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, paras78 and 88</p> <p>ECHR, Article 3</p> <p>Council of Europe Commissioner for Human Rights, Issue Paper on Human Rights and</p>
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<p>5. Abolish the single status as a prerequisite to obtain legal gender recognition</p>	<p>Gender Identity²⁵⁵</p> <p>Parliamentary Assembly of the Council of Europe, Resolution on forced sterilizations and castrations²⁵⁶</p> <p>Yogyakarta Principle 18: protection from medical abuse</p> <p>Yogyakarta Principle 10: the right to freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment</p> <p><i>Right to marry and to found a family</i></p> <p>ICCPR, Article 23</p> <p>ECHR, Article 12</p> <p><i>Right to private and family life</i></p> <p>ICCPR, Article 17</p> <p>ECHR, Article 8</p>
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255 Human Rights and Gender Identity, CommDH/Issue Paper (2009) 2, para3.2.1 https://wcd.coe.int/ViewDoc.jsp?id=1476365#P108_22710, accessed 9 December 2013.

256 Resolution 1945 (2013), 26 June 2013, Putting an end to coerced sterilizations and castrations, <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19984&Language=EN>, accessed 9 December 2013.

<p>6. Make legal gender recognition procedures accessible to minors as appropriate and by taking into account their best interests and their evolving capacities</p>	<p>Council of Europe Commissioner for Human Rights, Issue Paper Human Rights and Gender Identity, para3.2.2</p> <p>Yogyakarta Principle 6: the right to privacy</p> <p>Yogyakarta Principle 24: the right to found a family</p> <p>Convention on the Rights of the Child (CRC), Article 3.1: best interest of the child</p> <p>CRC Article 8: right of the child to preserve her identity</p> <p>CRC Article 12.1: right of the child to express her views</p> <p>UN Committee on the Rights of the Child (UNCRC), General Comment 12: the right of the child to be heard²⁵⁷</p> <p>UNCRC, General Comment 14: the right of the child to have his or her best interest taken as a primary consideration²⁵⁸</p>
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257 General Comment 12 (2009), para. 85 <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>, accessed 10 December 2013.

258 General Comment 14 (2013), para. 55, <http://www.amnesty.org/en/library/asset/EUR20/003/2013/en/52e09c17-3787-4723-9d4a-95bbe546d2cb/eur200032013en.pdf>, accessed 10 December 2013.

APPENDIX II: INTERNATIONAL CLASSIFICATION OF DISEASES, 10TH VERSION (ICD-10)

CHAPTER V MENTAL AND BEHAVIOURAL DISORDERS (F00-F99) DISORDERS OF ADULT PERSONALITY AND BEHAVIOR (F60-F69)

This block includes a variety of conditions and behaviour patterns of clinical significance which tend to be persistent and appear to be the expression of the individual's characteristic lifestyle and mode of relating to himself or herself and others. Some of these conditions and patterns of behaviour emerge early in the course of individual development, as a result of both constitutional factors and social experience, while others are acquired later in life. Specific personality disorders (F60.-), mixed and other personality disorders (F61.-), and enduring personality changes (F62.-) are deeply ingrained and enduring behaviour patterns, manifesting as inflexible responses to a broad range of personal and social situations. They represent extreme or significant deviations from the way in which the average individual in a given culture perceives, thinks, feels and, particularly, relates to others. Such behaviour patterns tend to be stable and to encompass multiple domains of behaviour and psychological functioning. They are frequently, but not always, associated with various degrees of subjective distress and problems of social performance.

GENDER IDENTITY DISORDERS F64.0 TRANSSEXUALISM

A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.

F64.1 DUAL-ROLE TRANSVESTISM

The wearing of clothes of the opposite sex for part of the individual's existence in order to enjoy the temporary experience of membership of the opposite sex, but without any desire for a more permanent sex change or associated surgical reassignment, and without sexual excitement accompanying the cross-dressing.

Gender identity disorder of adolescence or adulthood, non-transsexual type

Excl.:fetishistic transvestism (F65.1)

F64.2 GENDER IDENTITY DISORDER OF CHILDHOOD

A disorder, usually first manifest during early childhood (and always well before puberty), characterized by a persistent and intense distress about assigned sex, together with a desire to be (or insistence that one is) of the other sex. There is a persistent preoccupation with the dress and activities of the opposite sex and repudiation of the individual's own sex. The diagnosis requires a profound disturbance of the normal gender identity; mere tomboyishness in girls or girlish behaviour in boys is not sufficient. Gender identity disorders in individuals who have reached or are entering puberty should not be classified here but in F66.-.

Excl.:egodystonic sexual orientation (F66.1)

sexual maturation disorder (F66.0)

F64.8 OTHER GENDER IDENTITY DISORDERS

F64.9 GENDER IDENTITY DISORDER, UNSPECIFIED



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THE STATE DECIDES WHO I AM

LACK OF LEGAL GENDER RECOGNITION FOR TRANSGENDER PEOPLE IN EUROPE

For transgender people, official identity documents reflecting their gender identity are vitally important for the enjoyment of their human rights. They are not only crucial when travelling but also for everyday life, such as enrolling in school, applying for a job, accessing a public library or opening a bank account.

This report illustrates the human rights violations experienced by transgender people in Europe when seeking legal gender recognition, which is necessary to obtain documents reflecting their gender identity. Some countries simply do not allow for a change in one's legal gender. Many others have made the change in one's legal gender contingent on the fulfillment of invasive requirements, which violate the human rights of transgender people. In highlighting these requirements, including psychiatric diagnosis, medical procedures, such as surgeries and sterilization, and divorce, the report underscores the plight of transgender people who are forced to choose which rights to give up in order to enjoy others.

Amnesty International urges governments to ensure that transgender people can enjoy all their human rights irrespective of their gender identity and expression. States should allow transgender people to legally change their gender and their name through a quick, accessible, and transparent procedure without requirements that violate their human rights. Psychiatric diagnosis, medical treatments such as surgeries and sterilization, single status and arbitrary age restrictions should not be required to obtain legal gender recognition.

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