

Issue Paper

# HUMAN RIGHTS AND GENDER IDENTITY



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



# **HUMAN RIGHTS AND GENDER IDENTITY**

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## Introduction

Gender identity is one of the most fundamental aspects of life. The sex of a person is usually assigned at birth and becomes a social and legal fact from there on. However, a relatively small number of people experience problems with being a member of the sex recorded at birth. This can also be so for intersex persons whose bodies incorporate both or certain aspects of both male and female physiology, and at times their genital anatomy. For others, problems arise because their innate perception of themselves is not in conformity with the sex assigned to them at birth. These persons are referred to as ‘transgender’ or ‘transsexual’ persons, and the current paper relates to this group of people.

The human rights situation of transgender persons has long been ignored and neglected, although the problems they face are serious and often specific to this group alone. Transgender people experience a high degree of discrimination, intolerance and outright violence. Their basic human rights are violated, including the right to life, the right to physical integrity and the right to health.

Although the number of transgender persons is small, it should be pointed out that the transgender community is very diverse. It includes pre-operative and post-operative transsexual persons, but also persons who do not choose to undergo or do not have access to operations. They may identify as female-to-male (FTM) or male-to-female (MTF) transgender persons, and may or may not have undergone surgery or hormonal therapy. The community also includes

cross-dressers, transvestites and other people who do not fit the narrow categories of ‘male’ or ‘female’. Many legal frameworks only seem to refer to transsexual persons, leaving out a decisive part of the community.

In order to understand the concept of gender identity, it is important to distinguish between the notions of ‘sex’ and ‘gender’. While ‘sex’ primarily refers to the biological difference between women and men, ‘gender’ also includes the social aspect of the difference between genders in addition to the biological element.

The notion of ‘gender identity’ offers the opportunity to understand that the sex assigned to an infant at birth might not correspond with the innate gender identity the child develops when he or she grows up. 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, and includes the personal sense of the body and other expressions of gender (i.e. ‘gender expression’) such as dress, speech and mannerisms.<sup>1</sup> Most people legally defined as man or woman will correspondingly have a male or female gender identity. Transgender persons, however, do not develop that corresponding gender identity and may wish to change their legal, social, and physical status – or parts thereof - to correspond with their gender identity. Modification of bodily appearance or function by dress, medical, surgical or other means is often part of the personal experience of gender by transgender people.

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1. Definition as used in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, available at [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

Both the notion of gender identity and the forms of gender expression used in everyday life are important elements for understanding the human rights problems faced by transgender persons. Some legal frameworks in Council of Europe member states, unfortunately, categorise gender identity under ‘sexual orientation’, which is not accurate since gender identity and sexual orientation are two different concepts. Sexual orientation should be understood as each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender (heterosexuality, homosexuality and bisexuality).<sup>2</sup> In addition, many international and national medical classifications impose the diagnosis of mental disorder on transgender persons. Such a diagnosis may become an obstacle to the full enjoyment of human rights by transgender people especially when it is applied in a way to restrict the legal capacity or choice for medical treatment.

The challenge of protecting the human rights of everyone is to apply a consistent human rights approach and not to exclude any group of people. It is clear that many transgender persons do not fully enjoy their fundamental rights both at the level of legal guarantees and that of everyday life. Therefore, there is a need to take a closer look at their situation. This Issue Paper is intended to continue the debate on transgender human rights issues and make the problems encountered by transgender people known more widely.<sup>3</sup> The paper outlines the international human rights framework that should be applied

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2. Ibid

3. See also the Commissioner’s Viewpoint “Discrimination against transgender persons must no longer be tolerated” published on 5 January 2009.

to protect the rights of transgender persons. In the following section, it describes the key human rights concerns regarding transgender persons, including discrimination, intolerance and violence experienced by them. The paper concludes with examples of good practice and a set of recommendations to member states of the Council of Europe.

One obstacle in the drafting of this paper was the lack of data, research and reports on the theme. The limited information available often refers to countries that are member states of the European Union. The lack of data on other countries demonstrates the need for further research and information gathering. The Office of the Commissioner for Human Rights has therefore launched a comparative study on the situation concerning homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in all Council of Europe member states, including those countries which are not members of the European Union. Nevertheless, the currently available research already points at a bleak situation and calls for urgent measures to be taken to address the concerns identified.

## International Human Rights Law

In principle, international human rights instruments protect everybody without discrimination. Despite the fact that gender identity as a discrimination ground, along with sexual orientation, is often not explicitly mentioned in international human rights treaties, these treaties do apply to all persons through their open-ended discrimination clauses. As for the UN Covenant on Economic, Social and Cultural Rights, this was recently confirmed by the UN Committee on Economic, Social and Cultural Rights which stated that “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 work place”.<sup>4</sup> The European Court of Human Rights (ECtHR) has applied the European Convention on Human Rights in significant judgments ruling that states should provide transgender persons the possibility to undergo surgery leading to full gender reassignment and that this surgery should be covered by insurance plans as “medically necessary” treatment.<sup>5</sup> The Court has also ruled that states should recognise the change of sex in identity documents.<sup>6</sup>

Other instruments, such as the EU Directives implementing the principle of equal treatment between men and women in the access to and supply of goods and services, have closed lists of discrimination grounds and do not include gender

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4. UN Committee on Economic, Social and Cultural Rights, General Comment No 20 on Non-Discrimination.

5. ECtHR, *van Kück v. Germany*, judgment of 12 June 2003.

6. ECtHR, *B. v. France*, judgment of 25 March 1992 and *Christine Goodwin v. U.K.*, judgment of 11 July 2002.

identity specifically.<sup>7</sup> However, the European Court of Justice (ECJ) has explicitly ruled that “discrimination arising (...) from the gender reassignment of the person” is considered as discrimination on the ground of sex in the watershed case *P v S and Cornwall County Council*. This has been confirmed and extended in later case law of the ECJ.<sup>8</sup>

As the specific wording of the ECJ judgment shows, ‘sex discrimination’ is, however, restricted to transgender persons ‘intending to undergo, undergoing or having undergone gender reassignment’ whose sex change should be legally recognised by states as a result of rulings by the European Court of Human Rights.<sup>9</sup> ‘Sex discrimination’ does not cover non-operative transgender people. The latter group may not undergo gender reassignment because of their free choice, their health needs, or the denial of access to any treatment, which is common in many Council of Europe member states.<sup>10</sup>

A recent report of the European Union Agency for Fundamental Rights (FRA) states in this regard: “there is no reason not to extend the protection from discrimination beyond these

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7. Sex discrimination has for long been included in relevant European Community legislation. Since 1957, the EEC Treaty has contained a provision prohibiting unequal pay for men and women, which has been revised in the Treaty of Amsterdam. From 1975, the EU has issued several directives on sex discrimination

8. ECJ, Case C-13/94, *P. v. S. and Cornwall City Council* judgment of 30 April 1996, ECR [1996] I-2143, ECJ, Case C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, judgment of 7 January 2004, ECJ, Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, judgment of 27.4.2006. See for an explanation of the progressive nature of the Judgements, European Union Agency for Fundamental Rights, *Homophobia and Discrimination on the grounds of sexual orientation in the EU Member States*, Part I Legal Analysis, p.124.

9. ECtHR, *B. v. France* judgment of 25 March 1992 (Series A no. 232-C) (distinguishing the *Rees* and *Cossey* judgments); *Sheffield and Horsham v. the United Kingdom* judgment of 30 July 1998; *Christine Goodwin v. the United Kingdom*, Appl. no. 28957/95, judgment of 11 July 2002; *Grant v. the United Kingdom*, Appl. no. 32570/03, judgment of 23 May 2006.

10. It is assessed that only 10% of all transgender persons actually choose, have access to or to are able to undergo gender reassignment surgery.

persons, to cover ‘cross dressers, and transvestites, people who live permanently in the gender ‘opposite’ to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently’.<sup>11</sup> In order to overcome this limitation in coverage of all transgender persons, there is an opportunity to include ‘gender identity’ explicitly as a discrimination ground in future EU Directives through the review of the EU Gender Directives in 2010.<sup>12</sup>

The recognition of gender identity as one of the universally protected discrimination grounds has also been voiced by the UN High Commissioner for Human Rights: “Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights”.<sup>13</sup>

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11. European Union Agency for Fundamental Rights, *Homophobia and Discrimination on the grounds of sexual orientation in the EU Member States*, Part I Legal Analysis, p.126.

12. See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p.37; 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 (recast), OJ L 204 of 26.7.2006, p. 23 (Recast Gender Directive).

13. Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT human rights, Montreal 26 July 2006, available at [www.unhcr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument](http://www.unhcr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument).

UN Special Procedures and treaty bodies have also applied this approach in their work. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has highlighted several cases of killings of transgender persons and the Special Rapporteur on torture has reported serious abuses against transgender individuals in various country reports. The UN Committee against Torture has specifically addressed the issue of abuses against transgender activists. Moreover, the UN High Commissioner for Refugees has addressed problems transgender persons encounter when applying for asylum or being recognised as a refugee, for example on occasions where a transgender individual is asked by the authorities to produce identity documents and his or her physical appearance does not correspond to the sex indicated in the documents.<sup>14</sup>

The Parliamentary Assembly of the Council of Europe adopted a *Recommendation on the Condition of Transsexuals* in 1989.<sup>15</sup> Currently a report is under preparation within the Assembly's Committee on Legal Affairs and Human Rights which will cover, inter alia, discrimination based on gender identity. The Committee of Ministers of the Council of Europe has in several replies to questions from members of the Parliamentary Assembly recalled the principle of equal en-

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13. Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT human rights, Montreal 26 July 2006, available at [www.unhcr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument](http://www.unhcr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument).

14. UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, available at: <http://www.unhcr.org/refworld/docid/48abd5660.html>

15. Recommendation 1117 (1989) on the condition of transsexuals available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta89/errec1117.htm>

joyment of human rights regardless of any grounds such as gender identity. Furthermore, on 2 July 2008, the Committee of Ministers decided to step up action to combat discrimination on grounds of sexual orientation and gender identity. This resulted in the setting up of an intergovernmental Expert Group, which has been tasked to prepare a Recommendation for the 47 Council of Europe member states. The European Parliament issued a Resolution on Discrimination Against Transsexuals in 1989.<sup>16</sup> The Resolution calls on EU Member States to take steps for the protection of transsexual persons and to pass legislation to further this end. In more general Resolutions in 2006 and 2007, the situation of transgender persons has also been paid attention to by the European Parliament.<sup>17</sup>

In a large scale international effort to promote international standards on sexual orientation and gender identity, a group of distinguished experts in international human rights law published in 2007 the *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity*. While not adopted as an international standard, the principles are already cited by UN bodies, national courts, and many governments have made them a guiding tool for defining their policies in the

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16. European Parliament Resolution of 12 September 1989 on discrimination against transsexuals cf. Recommendation 1117 (1989) on the condition of transsexuals, available at [http://tsnews.at.infoseek.co.jp/european\\_parliament\\_resolution890912.htm](http://tsnews.at.infoseek.co.jp/european_parliament_resolution890912.htm)

17. European Parliament resolution on homophobia in Europe (2006), available at [www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2006-0018](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2006-0018); European Parliament resolution on homophobia in Europe (2007) available at [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0167+0+DOC+XML+V0/EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0167+0+DOC+XML+V0/EN)

matter. The Commissioner for Human Rights has endorsed the *Yogyakarta Principles* and considers them as an important tool for identifying the obligations of states to respect, protect and fulfill the human rights of all persons, regardless of their gender identity.<sup>18</sup>

Of particular relevance is Yogyakarta Principle number 3: “Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity”.

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18. Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, p. 11-12.

## **Specific human rights issues**

### **Gender identity as a discrimination ground in Council of Europe member states**

Discrimination based on gender identity is not explicitly covered in legal frameworks in a large majority of Council of Europe member states.<sup>19</sup> The European Union Agency for Fundamental Rights reports that 13 EU Member States treat discrimination on the ground of gender identity as a form of sex discrimination, 2 Member States consider it inaccurately as sexual orientation discrimination and in 11 Member States it is treated neither as sex discrimination nor as sexual orientation discrimination.<sup>20</sup> This results not only in a situation of legal uncertainty as to the precise protection of transgender persons from discrimination, but also in a much lower level of protection of transgender persons. For the other 20 Council of Europe member states this information is not yet researched systematically, though one may assume, based on reports received by the Commissioner, that gender identity is not explicitly defined as a discrimination ground in any of these countries.

The absence of explicit recognition of gender identity in non-discrimination legislation also has an impact on its inclusion in the work of equality bodies and National Human Rights Structures (NHRSSs). Only very few equality bodies and NHRSSs actually incorporate discrimination based on gender identity in their mandates or tasks. In addition, these

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19. Sweden prohibits discrimination on the ground of a person's 'transgender identity or expression' in the new Discrimination Act that entered into force on 1 January 2009.

20. European Union Agency for Fundamental Rights, *Homophobia and Discrimination on the grounds of sexual orientation in the EU Member States, Part I - Legal Analysis*, p. 20.

organisations often lack the knowledge and competence to deal with gender identity discrimination, and would therefore require training before embarking on this work.

## **Legal recognition of the preferred gender**

Article 8 of the European Convention states that “everyone has the right to respect for his private and family life, his home and his correspondence”. The European Court of Human Rights has ruled that failure of a state to alter the birth certificate of a person to the preferred gender constitutes a violation of Article 8 of the Convention.<sup>21</sup> Member states are thus required to legally recognise the gender change of transsexual persons.

A common feature of most gender recognition procedures, if in place at all, is the combination of cumbersome legal and medical requirements, the borderlines of which are often blurred. Lengthy processes of psychological, psychiatric and physical tests are characteristic features of such procedures. Some, like genital examinations by psychiatrists, amount to non-respect of the physical integrity of the person. Often transgender people choose not to enter the official procedures at all due to discriminatory medical processes and inappropriate treatment, or due to the fact that only one course of treatment is available. They are then, in turn, denied legal recognition of their preferred gender and name, or gender reassignment treatment that fits their own wishes and personal health needs.

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21. See Eur. Ct. HR, *B. v. France* judgment of 25 March 1992 (Series A no. 232-C) (distinguishing the *Rees* and *Cossey* judgments), Eur. Ct. HR, *Sheffield and Horsham v. the United Kingdom* judgment of 30 July 1998, Eur. Ct. HR, *Christine Goodwin v. the United Kingdom*, Appl. no. 28957/95, judgment of 11 July 2002. Eur. Ct. HR (4th sect.), *Grant v. the United Kingdom*, Appl. no. 32570/03, judgment of 23 May 2006.

Despite ample case law from the European Court of Human Rights in favour of recognition, legal recognition remains a challenging process for many transgender persons in the Council of Europe member states.

## **Conditions for the change of sex and name**

Access to procedures to change one's sex and one's first name in identity documents is vital for a transgender person to live in accordance with one's preferred gender identity. Indeed, the ability to live in the preferred gender and be legally recognised as such is preconditioned by identity papers that are used to conduct everyday life, for example when using a health insurance card, a driving licence or an educational certificate during a job application process. The often lengthy and bureaucratic processes for the recognition of sex and name change result in the inability to travel with valid documents, even to visit relatives in a neighbouring country for a weekend. It could also lead to restrictions on participation in education or employment wherever birth certificates are necessary or sex is indicated on national identity cards. It can mean that transgender people without the correct documentation are effectively hindered from meaningful participation in the labour market, leading to unemployment.

There is a need to distinguish between procedures for the change of first name and those for the change of sex. However, both processes frequently require that the individual concerned must first be considered eligible for the procedure by the medical profession.

It should be stressed that the eligibility conditions for the change of sex in documents vary widely across Europe. It is possible to roughly distinguish three categories of countries. In the first category, no provision at all is made for official recognition. As pointed out above, this is in clear breach of established jurisprudence of the ECtHR.<sup>22</sup> In the second and smaller category of countries, there is no requirement to undergo hormonal treatment or surgery of any kind in order to obtain official recognition of the preferred gender. Legal gender recognition is possible by bringing evidence of gender dysphoria<sup>23</sup> before a competent authority, such as experts from the Ministry of Health (in Hungary), the Gender Reassignment Panel (in the UK) or a doctor or clinical psychologist. In the third category of countries, comprising most Council of Europe member states, the individual has to demonstrate:

1. that (s)he has followed a medically supervised process of gender reassignment – often restricted to certain state appointed doctors or institutions;
2. that (s)he has been rendered surgically irreversibly infertile (sterilisation), and/or
3. that (s)he has undergone other medical procedures, such as hormonal treatment.<sup>24</sup>

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22. See European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on the grounds of sexual orientation in the EU Member States*, Part I Legal Analysis, p. 131-133.

23. This is the phenomenon pointing to the discontent persons feel with the biological sex they were born with. See paragraph 3.3 for a more detailed explanation.

24. Additionally, people may also have to demonstrate that they have lived for a long period of time in the new gender – the so called ‘real life experience’. The ‘real life experience’ preceding hormonal treatment and sex reassignment surgeries forms the three elements of the ‘triadic therapy’ often in place in member states as a requirement for recognition of the new gender.

Such requirements clearly run counter to the respect for the physical integrity of the person. To require sterilisation or other surgery as a prerequisite to enjoy legal recognition of one's preferred gender ignores the fact that while such operations are often desired by transgender persons, this is not always the case. Moreover, surgery of this type is not always medically possible, available, or affordable without health insurance funding. The treatment may not be in accordance with the wishes and needs of the patient, nor prescribed by his/her medical specialist. Yet the legal recognition of the person's preferred gender identity is rendered impossible without these treatments, putting the transgender person in a limbo without any apparent exit. It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.

It needs to be noted that many transgender people, and probably most transsexual persons among them, choose to undergo this treatment, often including the elimination of procreative organs. The treatment is often desired as a basic necessity by this group. However, medical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation. It is disproportionate for the state to prescribe treatment in a "one size fits all" manner. The basic human rights concern here is to what extent such a strong interference by the state in the private lives of individuals can be justified and whether sterilisation or other medical interventions are required to classify someone as being of the one sex or the other.

Two important national court rulings support this view. On 27 February 2009, the Austrian Administrative High Court ruled that mandatory surgery was not a prerequisite for gender (and name) change.<sup>25</sup> A transgender woman, who underwent all changes apart from the genital surgery and lived as a woman in all social relations, could establish to the court that her particular employment situation would not be conducive to the several months' sick leave needed for the operation and that she could not leave her family financially uncared for. This led the court to point out that the legislator had to abolish the original requirement since the court was not able to establish any need for this specific requirement pertaining to transsexual women. In Germany, the Federal Supreme Court has indicated in a judgment that “an operative intervention as a precondition for the change of gender is increasingly regarded as problematic or no longer tenable among experts”.<sup>26</sup>

The key point here is that there is no inherent need to enforce one set of specific surgical measures for the classification of an individual to be eligible for changing sex. Similar reasoning lies behind the Spanish *Ley de Identidad de Género* and the British *Gender Recognition Act*.<sup>27</sup> Both laws have recognised that the protection of the majority's assumed unease with the procreation of transgender people – which is, due to hormonal treatment and the wishes of most concerned

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25. After the constitutional court ruled against the case (VfGH 29.09.2008, B 411/08, B 412/08), the Administrative High Court made the legal change possible in 2009 (VwGH 27.2.2009).

26. BVerfG, 1 BvL 3/03 (6 December 2005).

27. More on the Spanish law, see Raquel Platero, *Open Forum on Spain: Outstanding challenges in a post-equality era: The same-sex marriage and gender identity laws in Spain*, University of Madrid (2008); on the UK law, see . [http://www.opsi.gov.uk/acts/acts2004/ukpga\\_20040007\\_en\\_1](http://www.opsi.gov.uk/acts/acts2004/ukpga_20040007_en_1)

individuals, extremely rare – does not justify a state’s disregard of their obligation to safeguard every individual’s physical integrity. States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.

Regarding conditions to be eligible for the change of first name, there is a similar pattern to some of the procedures for change of gender described above. The process can be easy or require lengthy and/or costly procedures and medical interventions, or it can be denied entirely. In some countries names can only be changed upon medical testimony that the (full) gender reassignment has taken place, including genital surgeries which are not accessible or wished for by persons for a number of different reasons. In other countries such proof is not necessary but instead, or in addition, people need to have a gender dysphoria diagnosis and two years of hormonal treatment to qualify for the name change. As a consequence, transgender people are, for a long period in their lives, effectively barred from meaningful and full participation in society, education or employment as they may face continuous problems with ‘justifying’ who they are. The Commissioner’s Office has received numerous individual reports of transgender persons who, as a result of lack of proper documents, report discrimination and exclusion to a worrying extent. It’s also crucial to note that, even when a person has obtained a legal recognition of the new gender, the person may still face practical problems within institutional settings such as hospitals, police stations and prisons.

## Consequences for family life

In some countries there is a legal obligation that a transgender person who is legally married to his or her different-sex partner has to divorce before his or her new gender can be recognised. This is particularly problematic in states which do not recognise same-sex marriage, where the change of gender would effectively lead to a same-sex marriage. As same-sex marriage is only possible in five member states of the Council of Europe<sup>28</sup>, married transgender persons find themselves forced to divorce prior to their new gender being officially recognised. In numerous cases, forced divorce is against the explicit will of the married couple, who wish to remain a legally recognised family unit, especially if they have children in their care.

Indeed, forced divorce may have a negative impact on the children in the marriage. In several countries the parent who has undergone the gender change will lose custody rights of the children. In other states ambiguous legislation is in place and hardly any attention is given to the best interests of the child.<sup>29</sup> This can lead to hardship as in the case where both spouses wished to remain married so that the non-transsexual male partner would not lose custody of the child and could continue to receive state benefits in addition to his part-time work, in order to support his disabled, and now transsexual, spouse in providing care for the joint child.<sup>30</sup>

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28. Belgium, Netherlands, Spain, Norway, Sweden.

29. Prof Stephen Whittle OBE, Dr Lewis Turner, Ryan Combs, Stephenne Rhodes - Transgender EuroStudy: Legal Survey and Focus on The Transgender Experience of Health Care - 2008 -- Transgender Europe and ILGA-Europe, pages 22-23.

30. In the country concerned custody is usually awarded to the mother and the transsexual law specifies that the relationship with previously born children remains that of the former registered sex.

The Austrian Constitutional Court has granted a transsexual woman the right to change her sex to female while remaining married to her wife. The court ruled that “changing a sex entry in a birth certificate cannot be hindered by marriage.” The German Constitutional Court has ruled similarly, legally obliging the German Government to change the law before the end of August 2009.<sup>31</sup> Both rulings call on the state to accept 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.

## **Access to health care**

The right to the highest attainable standard of health is guaranteed by several treaties, including the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. However, transgender persons suffer from several problems in achieving this standard. The Transgender EuroStudy sheds an alarming light on the experiences of transgender people in relation to inequality and discrimination in accessing healthcare in Europe.<sup>32</sup>

The first aspect in discussing health care for transgender persons is the existence of international and national medical classifications defining transsexuality as a mental disorder.

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31. Austrian Constitutional Court, BVerfG, 1 BvL 1/04 (18 July 2006); German Constitutional Court, BVerfG, 1BvL 10/05 (27 May 2008).

32. Prof Stephen Whittle OBE, Dr Lewis Turner, Ryan Combs, Stephenne Rhodes - Transgender EuroStudy: Legal Survey and Focus on The Transgender Experience of Health Care - 2008 - Transgender Europe and ILGA-Europe.

There are currently two established international systems for classifying mental illnesses: the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) which includes the term ‘gender identity disorder’ as a mental health disorder and uses it to describe persons who experience significant gender dysphoria, i.e. discontent with the biological sex they are born with.<sup>33</sup> Secondly, the WHO *International Statistical Classification of Diseases and Related Health Problems* (ICD) lists transsexualism as a mental and behavioural disorder. It is important to stress that transgender persons are thus labelled as having a *mental* disorder.<sup>34</sup> As the DSM and ICD systems are often reflected in national medical classifications in Europe, they are frequently applied to diagnose transgender persons in Council of Europe member states.

These classifications are in turn problematic and increasingly questioned by civil society actors<sup>35</sup> and health care professionals.<sup>36</sup> Such classifications may become an obstacle to the full enjoyment of human rights by transgender people, especially when they are applied in a way to restrict the legal capacity or choice for medical treatment. It needs to be noted though that this question is a significant dividing line within

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33. The Diagnostic and Statistical Manual of Mental Disorders, 4th Edition lists ‘gender identity disorders in adolescents and adults’ (category 302.85) under the chapter ‘sexual and gender identity disorder’ and ‘gender identity disorder in children’ (category 302.6). See [www.icd9data.com/2009/Volume1/290-319/300-316/302/302.85.htm](http://www.icd9data.com/2009/Volume1/290-319/300-316/302/302.85.htm).

34. The ICD can be found at [www.who.int/classifications/icd/en/](http://www.who.int/classifications/icd/en/). Transsexuality is listed under chapter 5 (Mental and Behavioural Disorders), category F64.

35. Statement on the Reform to the DSM, Transgender Europe (TGEU), 2 November 2008. TGEU is the European network of transgender groups and individuals.

36. Many specialised health care professionals point out that the treatment consists primarily of physical modifications to bring the body into harmony with one’s perception of mental (psychological, emotional) gender identity, rather than vice versa. This line is maintained by WPATH, the World Professional Association for Transgender Health. However, WPATH has not yet updated its Standards of Care from 2001 and still includes transsexualism as mental disorder yet changes are currently under discussion.

the transgender movement itself. Many transgender people feel threatened by a possible change in the classification systems, since they fear it could result in further restrictions in accessing transgender health care. They consider that because health care systems require a diagnosis to ‘justify’ medical or psychological treatment, it is essential to retain a diagnosis to ensure access to care. Others, however, argue that being diagnosed as having a mental disorder stigmatises individuals in society and makes them objects of medicine, rather than subjects who are responsible for expressing their own health needs. Alternative classifications should be explored in close consultation with transgender persons and their organisations.<sup>37</sup> From a human rights and health care perspective no mental disorder needs to be diagnosed in order to give access to treatment for a condition in need of medical care.

The second aspect in discussing health care is access to gender reassignment therapy, which is usually available after a person has reached 18 years of age. However, in some countries, like the Netherlands, transgender youth may begin treatment to offset puberty and receive counselling, so as to allow them to make informed decisions about their future gender identity. Then at the age of 18 they can proceed with gender reassignment treatments, if they still wish to. Recently, some other countries, for example Belgium and Germany, have started to provide similar treatment for youth under 18.

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37. There is now an opportunity to change this position as the DSM catalogue is currently reviewed. A working group will revise the DSM and this will result in the DSM-V scheduled to be published in 2012. See also the joint statement of 28 May 2008 issued by the American organizations National Center for Transgender Equality (NCTE), the Transgender Law and Policy Institute (TLPI), the Transgender Law Center (TLC) and the Transgender Youth Family Allies (TYFA).

The European Court of Human Rights has established as a positive duty that states provide for the possibility of undergoing surgery leading to full gender-reassignment. Depending on an individual transgender person's wishes and needs, the person thus has to have access to hormone treatment, gender reassignment surgery or other medical interventions, such as lasting hair removal and voice training. It is important to recognise that for most people concerned treatment is a medical necessity to make meaningful life possible. Treatment must be adapted to the individual's needs in order to have successful results.

The case law of the European Court of Human Rights clearly requires states not only to provide for the possibility to undergo surgery leading to full gender-reassignment, but also that insurance plans should cover “medically necessary” treatment in general, which gender reassignment surgery is part of.<sup>38</sup> The ruling of the Court has been successfully referred to by transgender people in several countries, such as Lithuania and Belgium, to extend the coverage of their health insurance. This standard should be implemented in all Council of Europe member states. However, the Transgender EuroStudy surveying the healthcare experience of transgender persons in the EU found that 80% of transgender people in the EU are refused state funding for hormone treatments, and 86% of transgender persons in the EU are refused state funding for surgery to change their sex. As a result, over 50% of transgender persons undergoing surgery to change their birth sex pay entirely for the procedures on their own. There

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38. *van Kück v. Germany* (Application no. 35968/97) - paragraphs 47, 73 and 82 and *L. v. Lithuania* (Application no. 27527/03) - paragraphs 59 and 74.

is a lack of information about the situation in non-EU Council of Europe member states. However, it seems that most of them do not provide publicly-funded gender reassignment treatment or only offer it partially. This is clearly against the standards set by the European Court of Human Rights.

Experiences of transgender persons with the healthcare system are often negative, with healthcare professionals being uninformed, biased and sometimes overtly rude with their clients, for example referring to the client in the not-preferred gender.<sup>39</sup> The above-cited study found that only 30% of respondents, when seeking help or a referral for gender reassignment procedures, experienced what the survey defined as the minimum acceptable level of assistance – a practitioner wanting to help, but lacking information about transgender health care. One third reported that they were refused treatment because a medical practitioner did not approve of gender reassignment.<sup>40</sup>

Some countries only allow one clinic in the whole country to provide treatment, sometimes hampering new research and, potentially, the quality of care. The right to access gender reassignment treatment should include a reasonable choice of available treatment centres and treatment expenses should be reimbursed according to the national health care rules. The quality of transgender-related treatment often does not even come close to the ‘highest attainable standard of

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39. Another example is when a transsexual man enters hospital to have his internal female organs removed, but is placed on a female ward.

40. Transgender EuroStudy loc. Cit. p.55 and 58. See also the report of Bence Solymár (2005), The situation of Transgender People in the Hungarian Social and Health Care System, in: Takács J. (ed.): *A léöök mütétei (Surgery of the Soul)*, Budapest: Új Mandátum Kiadó.

health’, sometimes resulting in life-long bodily harm. Many transgender persons who opt for gender reassignment surgery are forced to go abroad, facing great difficulty in reimbursing their expenses. Overall, the situation creates inequalities in access to healthcare within a country and between countries.

In addition, access to gender reassignment surgery is further complicated or conditioned by so-called “protocols” and conditions regarding childhood, sexual orientation, or clothing tastes, which are highly questionable. There are accounts of transgender people having to undergo genital examinations by psychiatrists, having to tell a set story of their childhood which is the only acceptable one; sometimes their claims are only considered genuine if they have at least one proven suicide attempt. Other transgender persons are being forced to stereotype themselves to the extreme in their preferred gender to fit eligibility criteria, leading to ridicule in daily life. The examples are too numerous to list, but it is safe to state that the majority of tests and processes conducted in most countries will usually include aspects that can at best be called incomprehensible.

A third aspect concerns access to general non-transgender related healthcare. The European Union Agency for Fundamental Rights (FRA) reports that “a quarter of the respondents in the EuroStudy reported adverse treatment by healthcare professionals because they were transgender. A fifth reported that being a transgender person affected the way they access healthcare. As a result many transgender people report avoiding doctors’ visits as much as possible for fear

of inappropriate behaviour”.<sup>41</sup> The FRA report also refers to the Engendered Penalties Study which found that 29% of respondents felt that being transgender adversely affected the way they were treated by healthcare professionals.<sup>42</sup>

The results of the problems transgender persons encounter in accessing their right to health care are reflected in health statistics. Several studies referenced in the FRA study show that a quarter to one third of transgender people surveyed had attempted suicide. In research carried out in Ireland 26% of transgender persons had attempted suicide at least once<sup>43</sup> and half of the transgender respondents in a large-scale study into the health situation for LGBT people in Sweden had at one point or another in their lives considered taking their own life - 21% had actually tried to do this.<sup>44</sup>

## **Access to the labour market**

The right to work is part of the European Social Charter, and includes the right to safe and healthy working conditions. Transgender persons face a number of problems in accessing and maintaining this right.

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41. European Union Agency for Fundamental Rights, Homophobia and Discrimination on the grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation, p.122.

42. Stephen Whittle, Lewis Turner, Maryam Al-Alami, Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination available at <http://www.pfc.org.uk/files/EngenderedPenalties.pdf> and as referenced in European Union Agency for Fundamental Rights, Homophobia and Discrimination on the grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation

43. Supporting LGBT Lives: A Study of the Mental Health of Lesbian, Gay, Bisexual and Transgender People, was published in 2009. Information on suicide among transgender persons can be found on page 95.

44. Statens Folkhälsoinstitut (2005) Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer, Östersund: FHI, p. 21.

Employment, and thus financial means, is crucial for transgender people to access health care. Having a job implies, in many Council of Europe member states, having a health insurance which should facilitate reimbursement of expenses related to transgender health care. However, since hormone treatments or surgery for transgender persons are not always covered by health insurance schemes, the income from employment is sometimes the only way for transgender people to pay for their specific health care in practice.

Unemployment is a major concern for transgender persons. The Engendered Penalties study shows that only 31% of the respondents are in full-time employment. The exact figure for transgender women is 40% and for transgender men 36%, while among the non-transgender population these figures are 57% for women and 72% for men. Spanish research into unemployment amongst transgender people showed that 54% of the respondents were unemployed.<sup>45</sup> Some jobless transgender persons, particularly transgender women, are unable to find employment, and see no other option but to work in the sex industry.

When employed, many transgender people face problems at the workplace, in particular continuous bullying by colleagues or being refused use of the preferred toilet. Some people are pushed to resign after being put under pressure, teasing, and

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45. Data, as referenced in European Union Agency for Fundamental Rights, Homophobia and Discrimination on the grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation and Esteva, I et al. (2001) Social Inequalities: Demographic Characteristics of Patients Treated at the First Gender Identity Disorder Unit in Spain, Paper presented at the XVII Harry Benjamin International Gender Dysphoria Association Symposium, Galveston, Texas.

insults. The lengthy and time-consuming legal requirements to be recognised by the law force transgender people to lead a double life or to inform the employer and colleagues about their intention to change gender earlier than is convenient. There are many practical problems which have an impact on being able to continue working. For example, a work contract might state 'male', while the legal requirements for accessing gender reassignment surgery state that a transgender woman present herself in female attire at work. This means that the person concerned cannot decide herself when she deems it appropriate to inform her colleagues and employer about her gender identity.

Post-operative transgender people are often accidentally referred to in their 'old' gender through numbers on social security cards or mistakes by human resource departments. There is very little recourse available if the effects of this accidental revelation are negative and harassment at the work place becomes unbearable. The Commissioner's office has received individual reports on consistent and degrading workplace discrimination, which go clearly against the right to safe and healthy working conditions and freedom from discrimination in the workplace.

Research is still quite limited, but the statistics available show a bleak situation. The Engendered Penalties study found that 23% of the respondents felt the need to change their jobs because of discrimination experienced on grounds of their gender identity. Only about 30% were treated with dignity by co-workers; 10% experienced verbal abuse and 6% were physically assaulted. Forty-two percent of respondents not living in their preferred gender role did so because they were

afraid of losing their jobs.<sup>46</sup> In a Scottish study, 37% of the respondents were on unemployment benefits.<sup>47</sup> Research from Finland<sup>48</sup> showed similar findings. Seventy-seven percent of transgender employees did not tell their employers about their gender identity, and about 50% of the respondents found this to be stressful.

The need for national non-discrimination legislation in all Council of Europe member states, which includes gender identity as a ground for discrimination in the labour market is thus evident. It is particularly important that changes to non-discrimination laws are also accompanied by awareness-raising campaigns for employers and employees so that the size and the seriousness of the problem is understood. Employers should be better aware of the situation of transgender people to guarantee a safe work environment for all. Special transitional measures may be needed to amend existing work rules, such as dress codes or the use of restroom facilities. Another important aspect is that educational institutions should have the duty to change retroactively the name and sex of a transgender person in degree certificates. This would ensure that transgender persons can continue to benefit from their vocational and academic training and enables them to apply for work appropriate to their professional qualifications rather than pretending they never had any training.

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46. Whittle, S, Turner, L, Al-Alami M (2007) Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination, Wetherby: The Equalities Review.

47. Scottish Transgender Alliance (2008) Transgender Experiences in Scotland - Research Summary, Edinburgh: Equality Network, p. 14

48. Lehtonen, J, Mustola, K (2004) „Straight People don't tell, do they...?“ Negotiating the boundaries of sexuality and gender at work, Helsinki: Ministry of Labour

A final problem related to employment is the inequality in receiving pensions. In some countries, the age for state pension entitlement for men is 65 and for women 60. Prior to legal recognition transgender women who have reached 60, may be refused pensions that they would normally receive if born female. Yet many older transgender women find that they have to leave their jobs, in order to prevent disclosure of their identity by virtue of the fact that they do not qualify for a pension. Then, even after legal recognition, these women are refused backdated pensions for the period in which they had to rely on their own income and savings. In spite of overwhelming legal arguments they have so far been denied pension rights that other women in the country (born female) enjoy without question, despite rulings of the European Court of Justice to this effect.<sup>49</sup> In other countries, where a couple has had to divorce, because the transgender partner is required to in order to receive gender reassignment treatments, or to enjoy legal recognition, surviving spouses of transgender people are barred from receiving their survivor's pension. A woman who has been a homemaker all her life will find herself without access to her spouse's pension because they have had to get divorced, against their explicit will, in order to enable her spouse's gender change.

## **Transphobia and violence against transgender persons**

Articles 2 and 5 of the ECHR guarantee the right to life and security for every person. In spite of this, many transgender people live in fear and face violence in the course of their

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49. Case C-423/04, Sarah Margaret Richards v Secretary of State for Work and Pensions, judgment of 27 April 2007.

lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder. Transphobia – understood as the irrational fear of, and/or hostility towards, people who are transgender or who otherwise transgress traditional gender norms – can be considered as one of the main causes of violence and intolerance that many transgender persons face. Some people seem to have a problem with the mere existence of human beings whose outer expression of their inner gender identity is not the same as their gender determined at birth. Aggression against transgender people cannot, however, be excused as resulting from ignorance or lack of education.

The Engendered Penalties study found that 72% of respondents experienced some form of harassment in public. Forty-six percent stated that they had experienced harassment in their neighbourhoods and 21% stated that they avoid going out. The EuroStudy found that 79% of respondents had experienced verbal abuse, threatening behaviour, physical or sexual abuse while out in public.

At school and in the family environment, transgender children and young adults often face an unsafe environment with bullying at school and even expulsion from the family. Forty-one percent of female-to-male and 16% of male-to-female teenagers experienced serious insults by their family, to the point that 20% of female-to-male people were disinherited and cut off from their family entirely.<sup>50</sup> When people notice at an early age that they identify more closely with the opposite gender and express the wish to become a

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50. Whittle, S, Turner, L, Al-Alami M (2007) Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination, Wetherby: The Equalities Review.

girl or boy, there is very little proper counselling and few support networks available for these transgender youth and their parents. Transgender children and youth, therefore, face problems in seeking information, support or treatment. It is in the best interest of the child to receive such information and support, since silence and ignoring their problems only leads to exclusion, self-hatred, bullying, failure in school and exceptionally high suicide rates among transgender youth. In France, research shows that 34% of transgender youth attempted suicide before having access to information and treatment. Under international human rights law transgender children have the right to access appropriate information, support and necessary protection. This was confirmed by the Committee on the rights of the Child which recommended states provide “adequate information and support to (...) transsexual young people (...)”.<sup>51</sup>

Transgender men and women have a high risk of becoming victims of a hate crime or a hate-motivated incident.<sup>52</sup> An authoritative OSCE report states that: “Homophobic hate crimes and incidents often show a high degree of cruelty and brutality. They often involve severe beatings, torture, mutilation, castration, even sexual assault. They are also very likely to result in death. Transgender people seem to be even more vulnerable within this category”.<sup>53</sup> Despite these findings, gender identity as a possible bias ground for

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51. Concluding observations on United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, October 9, 2002.

52. See for example Basaran, Y, Aybasi, I and Cakmak, S (2009) Problems of Transgender Women: A Survey Conducted in Istanbul (forthcoming publication) and European Commission’s Turkey 2008 Progress Report, p. 23.

53. OSCE/ODIHR (2007) Hate Crimes in the OSCE Region: Incidents and Responses; Annual report for 2006; Warsaw: OSCE/ODIHR, p. 53f.

hate crimes is not explicitly recognised in the legislation of most Council of Europe member states. One of the very few exceptions is the recently adopted Scottish hate crime bill which explicitly mentions transphobic hate crime. It is also not clear whether states, alternatively, include ‘gender identity’ under the category of ‘gender’ or ‘sex’ in their hate crime legislation.

As a result, transphobia is usually not considered an aggravating factor for hate crimes committed against transgender persons, as shown by the sentences for perpetrators of hate motivated killings in for example Portugal and Turkey.<sup>54</sup> Therefore one can only conclude that transgender people are effectively in most countries excluded from specific legal protection, despite their high risk of falling victim to hate crimes.

The OSCE has stressed in this regard:

“By explicitly condemning bias motives, they send a message to offenders that a just and humane society will not tolerate such behaviour. By recognizing the harm done to victims, they convey to individual victims and to their communities the understanding that the criminal justice system serves to protect them”.<sup>55</sup>

Moreover, most states do not record or monitor hate crimes or hate motivated incidents of a transphobic nature. These crimes normally go unreported by the police. This was also noted by the OSCE report which observed that transphobic hate-motivated incidents are among the most under-reported

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54. Human Rights Watch, We need a law for liberation – Gender, sexuality, and human rights in a changing Turkey. OSCE/ODIHR (2007) Hate Crimes in the OSCE Region: Incidents and Responses; Annual report for 2006; Warsaw: OSCE/ODIHR, p. 54.

55. Hate Crime Laws: A Practical Guide, p.7 available at [http://www.osce.org/publications/odihr/2009/03/36671\\_1263\\_en.pdf](http://www.osce.org/publications/odihr/2009/03/36671_1263_en.pdf).

and under-documented. One of the few exceptions is the UK, which has a policy of documenting the number of hates crimes committed against transgender people. The Crime Prosecution Service in England and Wales has developed a policy and practice to ensure that all transphobic crime is investigated<sup>56</sup> and in Northern Ireland transphobic hate crimes are reported as part of the annual crime statistics.<sup>57</sup>

In practice, transgender people are often afforded little protection by law enforcement officials in the event of a transphobic hate crime or incident. In many cases transgender people who turn to law enforcement agencies for protection are often ridiculed, harassed or just ignored, despite the positive obligation of states under the European Convention of Human Rights to investigate these crimes and bring the perpetrators to justice.

## **Transgender refugees and migrants**

The UNHCR has confirmed that asylum claims relating to gender identity may be recognised under the 1951 United Nations Convention Relating to the Status of Refugees provided the criteria in the refugee definition are met.<sup>58</sup> Transgender persons are considered under the Convention to be members of a ‘particular social group’. However, in most Council of Europe member states transgender persons are

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56. <http://www.cps.gov.uk/Publications/prosecution/homophobia.html> (26.10.08).

57. PSNI Statistics (2008) Annual Statistical Report, Statistical Report No. 3; Hate Incidents & Crimes; 1st April 2007 – 31st March 2008; Belfast: PSNI; 2008.

58. UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008. This Guidance Note supplements UNHCR’s earlier Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees from May 2002. Both guidelines are relevant for the assessment of asylum claims made by transgender individuals.

not explicitly defined as a distinctive “social group”, while other countries, such as France and Austria, have done so. In Sweden transgender people are considered legally to be covered by the category “gender”. It would be an important step forward if member states cite gender identity explicitly as a possible ground for persecution requiring international protection. It can also be argued that ‘gender-specific acts of persecution’, the term used in the EU Qualification Directive, can be understood as including serious human rights violations and other kinds of severe harm experienced by transgender persons.

There is a need for practical instructions as to how asylum claims are processed from persons who are persecuted because of their gender identity. Such instructions should give guidance to asylum officers how to conduct interviews in a ‘transgender sensitive’ way. Such guidance is also needed for situations in which a transgender person arrives with an identity document which does not indicate the preferred gender.

Transgender persons who have applied for asylum sometimes face problems in detention and reception centres from fellow asylum seekers (often from their home country) and there is a serious risk of re-traumatisation for transgender asylum-seekers.<sup>59</sup> Sometimes transgender persons are not placed in the men’s/women’s living quarters they wish to be in, leading to potentially dangerous situations, including heightened risk

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59. See for example research conducted by the Helsinki Citizens Assembly and the Organisation for Refugee, Asylum & Migration (ORAM): *Unsafe haven – the security challenges facing lesbian, gay, bisexual and transgender asylum seekers and refugees in Turkey* (2009).

of sexual violence, harassment and other ill-treatment. There is a need to create an environment in such centres to avoid harassment of transgender persons. Another problem is the lack of access to health care which can lead to an interruption of the continuous hormonal treatment some transgender persons need.<sup>60</sup>

Besides asylum, migration and travel is another problem for transgender people. The problems faced in obtaining new identity documents with the appropriate name and sex change can prevent transgender people from travelling to a neighbouring country, even on a simple family weekend visit. There is the fear of abuse by border control guards when their physical appearance does not correspond with the name or sex indicated on their identity papers. Freedom of movement can, thus, be severely hampered.

Problems may also arise in the field of family reunification. The country of citizenship sometimes forces the transgender person to divorce after gender reassignment, which can become an obstacle to family reunification and the possibility to go on living with the former spouse in another country. This has a detrimental impact on the children involved in the household as well. Finally, recognition of the change of gender is not necessarily accepted in the country that a transgender person migrates to.

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60. Similar problems are faced by transgender people in prison who may face periods of time without hormone therapy. This may result in a long time without treatment and may cause serious health problems, such as the development of osteoporosis in transsexual men, and irreversible physiological changes to take place such as the development of baldness in transsexual women. Transsexual people will frequently face difficulties in accessing assessment, hormone therapies, or surgery as many prisons or prison systems feel they do not have the facilities to manage transsexual prisoners, or in some cases, they are seen as forgoing their right to such treatments because of their conviction.

## Good practices

The human rights situation of transgender people in Europe is not positive. However, some of the problems have been acknowledged and ‘good practices’ are increasing. In the legal field we have recently seen constitutional courts acknowledging that national laws violate the human rights of transgender persons. In the UK the Gender Recognition Bill can, to a large extent, and excepting the divorce requirement, be considered an example of good practice. It was drafted with the participation of transgender people and led to a viable format, circumventing violations like forced sterilisation, medical treatment conditions, or exaggerated procedures.

In the field of employment, some trade unions have developed guidelines for employers on protecting transgender people at work, such as the Dutch ABVAKABO and the UK trade union UNISON. In the Italian city of Torino a programme has been set up to reintegrate transgender people in employment after their gender reassignment surgery.<sup>61</sup> It consists of a distinct investigation of the needs and skills of the transgender person and gives options for temporary jobs in a number of companies, with the possibility of further permanent employment.

A few countries have developed high quality medical centres providing supportive care without resort to excessive psychiatric assessment procedures and giving health insurance coverage that includes all available forms of gender reassignment surgery and hormone treatment.

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61. This is an initiative in which NGOs, job agencies and the city council work together.

In the UK, Germany and the Netherlands there are support groups for children, teenagers and their parents who have questions around gender identity. Their work is crucial. However, there are not enough of these services available and the public funding for those that do exist is scarce, most are under constant threat of closure.

A few local school and university boards across Europe have acknowledged the need to address the high instances of bullying and exclusion experienced by transgender youth. For example, the UK Government Department for Children, Schools and Families is working with the major transgender support groups in the UK to produce guidance for schools on transphobic bullying. Moreover, the Centre for Excellence in Leadership has worked with a transgender rights group to publish a self-study course on transgender issues for senior staff and managers in colleges and other higher educational institutions.<sup>62</sup> Regarding the issue of university degrees and papers with the new name and sex of a transgender person, the University of Torino issues student identity cards with the chosen name before the legal name change has occurred in order to facilitate matters for transgender students.

In 2008 and 2009 European-wide research projects started on human rights of transgender persons. Some Council of Europe member states have started nationwide research on the situation of transgender people. The European Commission is planning to publish in 2009 a report on transgender

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62. Whittle, S; Turner, L (2007) *Leading Trans Equality: A Toolkit for Colleges*, Lancaster: The Centre for Excellence in Leadership, available at [http://services.pfc.org.uk/files/CEL\\_toolkit.pdf](http://services.pfc.org.uk/files/CEL_toolkit.pdf).

discrimination in EC law, which is being drafted by the EU Network of Legal Experts on Non-discrimination. And the year 2010 will hopefully lead to solid recommendations by the Council of Europe Committee of Ministers that should include, for the first time, gender identity-specific human rights concerns.

What is now needed in particular is promotion of a human rights approach to the challenges transgender people face. To help with this, educational campaigns promoting respect and mutual understanding are needed. The information deficit on the specific problems of transgender persons and the bullying and ridiculing they receive need to be addressed. The Commissioner's Office has launched a comparative study on the situation of LGBT persons in Council of Europe member states, and gender identity discrimination will have a prominent role in this research. The results are expected in autumn 2010.

It is important that gender identity discrimination be addressed by NHRs and Equality Bodies. A good example of this is the 2006 New Zealand Human Rights Commission's report on discrimination experienced by transgender people.<sup>63</sup> In 2008, the Belgian Institute for Equality between Women and Men also launched a study on the situation of transgender persons in Belgium. The results are expected in 2009.

Support for civil society organisations promoting human rights of transgender persons, on the national and European

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63. To be who I am. Report of the Inquiry into Discrimination faced by transgender people, available at [www.hrc.co.nz/hrc\\_new/hrc/cms/files/documents/21-Jan-2008\\_19-03-12\\_Transgender\\_Final\\_2.pdf](http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/21-Jan-2008_19-03-12_Transgender_Final_2.pdf).

level, is crucial for their ability to conduct lobby and advocacy activities. Only a handful of governments, such as the Netherlands, Norway and Scotland, have so far provided funding to transgender NGOs. The city councils of both Vienna and Berlin financially supported the first two European Transgender Councils in 2005 and 2008, which is currently the only specific forum for transgender people on a European level.

Finally, discussions are also needed to link the human rights of transgender persons to a variety of other debates and topics: violence against women, domestic violence, multiple discrimination, economic, cultural and social rights. A good example of this is the UK Public Sector Gender Equality Duty which requires all public authorities in the UK to eliminate unlawful discrimination and harassment on the grounds of sex and to promote equality of opportunity between women and men “including transsexuals of both genders”.<sup>64</sup>

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64. Equality and Human Rights Commission (2008) Overview of the gender equality duty, Guidance for public bodies working in England, Wales and Scotland, available at [www.equalityhumanrights.com/](http://www.equalityhumanrights.com/).

## **Recommendations to Council of Europe member states**

Member states of the Council of Europe should:

- 1.** Implement international human rights standards without discrimination, and prohibit explicitly discrimination on the ground of gender identity in national non-discrimination legislation. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity should be used to provide guidance for national implementation in this field;
- 2.** Enact hate crime legislation which affords specific protection for transgender persons against transphobic crimes and incidents;
- 3.** Develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents;
- 4.** Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change;
- 5.** Make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible for transgender persons, and ensure that they are reimbursed by public health insurance schemes;

- 6.** Remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender;
- 7.** Prepare and implement policies to combat discrimination and exclusion faced by transgender persons on the labour market, in education and health care;
- 8.** Involve and consult transgender persons and their organisations when developing and implementing policy and legal measures which concern them;
- 9.** Address the human rights of transgender persons and discrimination based on gender identity through human rights education and training programmes, as well as awareness-raising campaigns;
- 10.** Provide training to health service professionals, including psychologists, psychiatrists and general practitioners, with regard to the needs and rights of transgender persons and the requirement to respect their dignity;
- 11.** Include the human rights concerns of transgender persons in the scope of activities of equality bodies and national human rights structures;
- 12.** Develop research projects to collect and analyse data on the human rights situation of transgender persons including the discrimination and intolerance they encounter with due regard to the right to privacy of the persons concerned.

## Appendix

### **Mandate of the Commissioner for Human Rights**

The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the respect for human rights in 47 Council of Europe member states.

The first Commissioner, Mr Alvaro Gil-Robles, held the post between 15 October 1999 and 31 March 2006, while the current Commissioner, Mr Thomas Hammarberg, assumed the position on 1 April 2006.

The fundamental objectives of the Commissioner for Human Rights are to:

- foster the effective observance of human rights, and assist member States in the implementation of Council of Europe human rights standards
- promote education in and awareness of human rights in Council of Europe member States
- identify possible shortcomings in the law and practice concerning human rights
- facilitate the activities of national ombudsperson institutions and other human rights structures, and
- provide advice and information regarding the protection of human rights across the region.

The Commissioner's work, thus, focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. Being a non-judicial institution, the Commissioner's Office cannot act upon individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals.

The Commissioner co-operates with a broad range of international and national institutions as well as human rights monitoring mechanisms. The office's most important intergovernmental partners include the United Nations and its specialised offices, the European Union, and the OSCE. The office also co-operates closely with leading human rights NGOs, universities and think tanks.

**RESOLUTION (99) 50 on the Council of Europe  
Commissioner for Human Rights** (adopted by the Committee of Ministers on 7 May 1999 at its 104th session)

The Committee of Ministers,

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms

Having regard to the decisions taken by the Heads of State and Government of the member States of the Council of Europe at their Second Summit (Strasbourg, 10-11 October 1997)

Considering also that the 50th Anniversary of the Council of Europe provides an occasion to enhance further the work undertaken since its creation,

Decides to institute the Office of Council of Europe Commissioner for Human Rights ("the Commissioner") with the following terms of reference:

*Article 1*

- The Commissioner shall be a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe.

2. The Commissioner shall respect the competence of, and perform functions other than those fulfilled by, the supervisory bodies set up under the European Convention of Human Rights or under other human rights instruments of the Council of Europe. The Commissioner shall not take up individual complaints.

### *Article 2*

The Commissioner shall function independently and impartially.

### *Article 3*

The Commissioner shall:

- a. promote education in and awareness of human rights in the member states
- b. contribute to the promotion of the effective observance and full enjoyment of human rights in the member states
- c. provide advice and information on the protection of human rights and prevention of human rights violations. When dealing with the public, the Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member States. Where such structures do not exist, the Commissioner will encourage their establishment
- d. facilitate the activities of national ombudsmen or similar institutions in the field of human rights
- e. identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member States and assist them, with their agreement, in their efforts to remedy such shortcomings

- f. address, whenever the Commissioner deems it appropriate, a report concerning a specific matter to the Committee of Ministers or to the Parliamentary Assembly and the Committee of Ministers
- g. respond, in the manner the Commissioner deems appropriate, to requests made by the Committee of Ministers or the Parliamentary Assembly, in the context of their task of ensuring compliance with the human rights standards of the Council of Europe
- h. submit an annual report to the Committee of Ministers and the Parliamentary Assembly
- i. co-operate with other international institutions for the promotion and protection of human rights while avoiding unnecessary duplication of activities.

#### *Article 4*

The Commissioner shall take into account views expressed by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe concerning the Commissioner's activities.

#### *Article 5*

1. The Commissioner may act on any information relevant to the Commissioner's functions. This will notably include information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations.
2. The gathering of information relevant to the Commissioner's functions shall not give rise to any general reporting system for member States.

### *Article 6*

1. Member States shall facilitate the independent and effective performance by the Commissioner of his or her functions. In particular, they shall facilitate the Commissioner's contacts, including travel, in the context of the mission of the Commissioner and provide in good time information requested by the Commissioner.

2. The Commissioner shall be entitled, during the exercise of his or her functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

### *Article 7*

The Commissioner may directly contact governments of member States of the Council of Europe.

### *Article 8*

1. The Commissioner may issue recommendations, opinions and reports.

2. The Committee of Ministers may authorise the publication of any recommendation, opinion or report addressed to it.

### *Article 9*

1. The Commissioner shall be elected by the Parliamentary Assembly by a majority of votes cast from a list of three candidates drawn up by the Committee of Ministers.

2. Member States may submit candidatures by letter addressed to the Secretary General. Candidates must be nationals of a member State of the Council of Europe.

*Article 10*

The candidates shall be eminent personalities of a high moral character having recognised expertise in the field of human rights, a public record of attachment to the values of the Council of Europe and the personal authority necessary to discharge the mission of the Commissioner effectively. During his or her term of office, the Commissioner shall not engage in any activity which is incompatible with the demands of a full-time office.

*Article 11*

The Commissioner shall be elected for a non-renewable term of office of six years.

*Article 12*

1. An Office of the Commissioner for Human Rights shall be established within the General Secretariat of the Council of Europe.
2. The expenditure on the Commissioner and the Office of the Commissioner shall be borne by the Council of Europe.

**Issue papers** are commissioned and published by the Commissioner for Human Rights for the purpose of contributing to debate or further reflection on a current and important human rights matter. All opinions in these expert papers do not necessarily reflect the position of the Commissioner. The Issue Papers are available on the Commissioner's web-site: [www.commissioner.coe.int](http://www.commissioner.coe.int)

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