



# Transgender people in the EU

## Social and legal issues

*Transgender people constitute a varied, yet distinct group facing specific social and legal problems.*

*It has been reported that in most EU Member States (MS) transgender people do not enjoy adequate access to healthcare.*

*The unemployment rate of transgender people is high when compared to general society. When employed, they are often discriminated against at the workplace.*

*Changing gender is subject to many conditions and the acquired gender is not automatically recognised. Questions arise as to whether relevant procedures do not entail breaches of fundamental rights.*

*Throughout the EU, the protection of transgender people against discrimination is based on sex, sexual identity or has no specific legal basis. Only two MS recognise gender identity as a discrimination ground.*

*In EU law, gender identity is not a distinct ground for discrimination. However, the Court of Justice of the EU (CJEU) has held that the prohibition of discrimination on the basis of sex is applicable to some transgender people.*

*The European Parliament has taken steps to raise awareness of transgender-related problems, most recently illustrated by a resolution on the Roadmap for Equality.*

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### Context

The notion of transgender people covers a wide range of identities, from people who cross-dress to **transsexuals** who feel the need to or already have altered their bodies so as they match their preferred gender.

All these individuals have, however, one thing in common, and that is their **gender identity**, characterised by some degree of discomfort with their biological sex. The category of **gender** is different from biological sex assigned at birth, as it includes a social aspect of difference between sexes. It should not be confused with **sexual orientation**, i.e. attraction to members of the same, the opposite or both sexes.

When the discrimination of transgender people is addressed, they are often considered as a part of a larger lesbian, gay, bisexual and transgender (**LGBT**) community. There are, however, some social and legal problems specific to them, which justifies separate analysis.

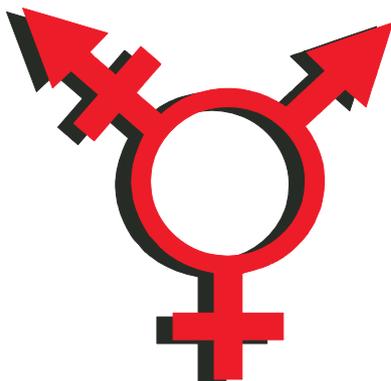


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## Health-related issues

### Gender identity disorder

The two major international classifications of mental health illnesses – the American [DSM](#) and the WHO [ICD](#) – use the term 'gender identity disorder' in relation to people feeling persistent discomfort with their biological sex. These classifications are reflected in national medical classifications all around the world, including the EU MS.

As both DSM and ICD are currently under review, some voices have advocated the 'depathologisation' of transsexuality. It is argued that diagnosing individuals as having a mental disorder 'labels' them and leads to their stigmatisation. Other diagnostic structures should therefore be considered, for example within endocrinology (the study of hormones) or surgery.<sup>1</sup>

However, so far, such proposals have not gained support either within the bodies drafting these classifications, or among psychiatrists in general. Moreover, many transgender people fear that the change could hamper their access to transgender health care. This is because healthcare systems require the diagnosis of a disorder as a condition for receiving medical or psychological treatment.

### Gender reassignment therapy

From a medical point of view transgender identity is thus a mental disorder, but one which is incurable by psychological therapy. The therapy leading to a change of gender is therefore the treatment of choice. This is a very untypical situation as this form of therapy is about physically modifying the body so as to align it with one's perception of gender, the perception considered to be a disorder.

The therapy **involves** hormone treatment, which may be extended to gender reassignment surgery (that can include phalloplasty or vaginoplasty) and other medical interventions (e.g. speech therapy and permanent hair removal).

Transgender people differ in their **attitude** towards this therapy. Whereas for some this is the only way to lead a meaningful life, others would like to live in their preferred gender without having to undergo such far-reaching treatment, which has (in case of surgery) irreversible effects.

The **quality of surgery** varies from one Member State to another. There are few surgeons with the level of expertise required to perform adequately this kind of surgery. As a result some transgender people seek healthcare abroad.

### Reimbursement

National healthcare systems in the EU differ with respect to their coverage of gender reassignment therapies.

Overall, available data suggests that it is not reimbursed in the majority of cases. 79% of transgender people surveyed in 2009 were refused state funding for hormone treatments, and 82% were refused state funding for surgery to change their sex. 51% of respondents undergoing such surgery covered the entire cost of the procedure themselves.<sup>2</sup>

### General healthcare

The available data on the overall state of health of transgender people is inconclusive. For example, while a Swedish study showed that their state of mental health is worse than that of heterosexuals, homosexuals and lesbians, a UK study found that there are no differences in terms of major health problems between LGBT people and the general population.<sup>3</sup>

Several studies revealed however a high rate of suicide attempts among transgender people, ranging from a quarter to one-third of the trans population.<sup>4</sup>

Transgender persons often suffer negative experiences with healthcare systems. Some healthcare professionals are uninformed, biased, or rude towards them. Roughly a quarter of respondents to an [EU-wide study](#) reported adverse treatment by healthcare professionals because they were



transgender.<sup>5</sup> As a result many transgender people tend to avoid doctors' visits.

When seeking private medical insurance, the applications of transgender people are refused on a regular basis.

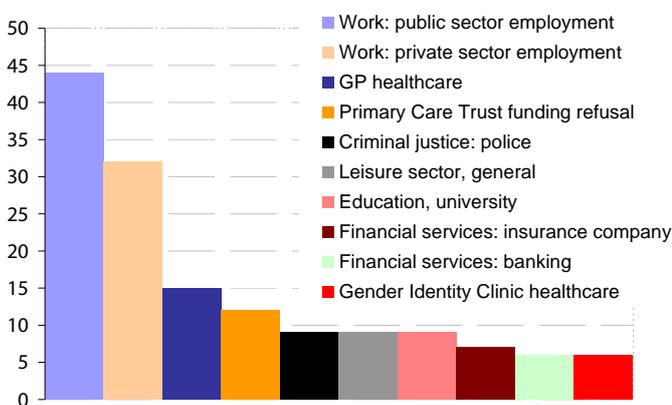
### Transgender people on the labour market

The situation of transgender people on the labour market appears to be very problematic when compared to the non-transgender population.

**Unemployment** figures are high for this group. For example, 31% of respondents in a [UK survey](#) were in full-time employment (40% of transgender women and 36% of transgender men). In the general population the respective figures were 57% for women and 72% for men.<sup>6</sup>

Evidence suggests that when employed, transgender people are **discriminated against at work** more than in any other sphere of life (see figure 1). This includes harassment by co-workers and employers, as well as refusal of use of the toilet of one's choice and even dismissal from work. While some transgender people feel forced to resign from their jobs, others choose not to reveal their gender identity to their employer and colleagues. 42% of respondents of the same UK survey did not live in their preferred gender out of fear of losing their job.

**Figure 1 - Areas of life in which transgender people experience discrimination**



Source: [Press for Change](#) (2007)

This 'escape strategy' may however be impossible when a transgender person wishes to undergo gender reassignment. This is because, as a condition for the change of gender, transgender people are often asked to prove they have lived in their preferred gender for some time. They are also assessed on their ability to maintain employment. Transition at work is thus likely to become a trigger point for discrimination.

Following retirement, the access of transgender people to **pensions** is in some cases problematic. For example, in MS where the retirement age is different for men and women, transgender women are refused pensions despite reaching the required age. This happens both before and after reassignment and is contrary to established CJEU case law ([K.B.](#) and [Richards](#) cases).

Unemployment or precarious employment result in limited access to public health insurance and the lack of income to pay for specialised transgender care. It may also contribute to social exclusion of a person, the process that in some cases starts as early as school time. Following a series of unsuccessful attempts to 'live a normal life' some transgender people turn to illegal activities or work in the sex industry.<sup>7</sup>

### Legal aspects of the change of gender

#### Access to gender reassignment therapy

Access to therapies leading to the change of gender and in particular to surgery is restricted: the life history of the patient is analysed and they are asked to prove that their will to change gender is permanent. This should be confirmed by so-called 'real life experience' i.e. having lived for a long time in a way corresponding to the preferred gender. In some MS, prior judicial authorisation is needed.

#### The conditions for acquiring a new gender

The conditions of gender reassignment – the process of legally acquiring a new gender – vary throughout the EU. In some MS it is not necessary to undergo hormonal treatment or



surgery to have the change of gender recognised by the state. This group includes Finland, Hungary, Spain, Sweden and the UK. In these countries it is enough to prove to a competent authority that the person has permanently lived with transgender identity.

In some MS, hormonal treatment and/or surgery are required. The person must then prove that they have:

- followed a medically supervised process of gender reassignment
- been rendered surgically irreversibly infertile (sterilisation), and/or
- undergone other medical procedures, such as hormonal treatment.

The third group is composed of MS where the matter is not regulated by law.<sup>8</sup>

### The consequences of the new gender's recognition

As the consequence of legal recognition transgender people expect to have their sex and first name changed in identity documents and administrative documents. This is indispensable for everyday life, where one cannot do without documents like a driving licence or an educational certificate (e.g. when looking for a job).

There is no uniformity in MS as to procedures for the change of first name. Whereas in some countries the process is relatively easy (as in Belgium), in others it is lengthy and sometimes can only be done after medical intervention. In Ireland such a possibility does not exist at all.

### Marriage and divorce

*Divorce as a condition or the consequence of gender reassignment*

In married couples a change of gender would lead to a same-sex marriage, which is

not recognised by a clear majority of MS (all but four).

Therefore, in a number of countries there is an obligation for them to **divorce** (e.g. UK and Poland). In others, gender reassignment leads to the marriage being automatically dissolved (Bulgaria and Hungary). This may

be against the will of the married couple wishing to remain a legally recognised family. In some countries gender reassignment means losing custody rights to children.

*The right to marry following the change of gender*

17 MS allow persons who have undergone gender reassignment to marry a person of the opposite gender to their acquired gender. In Ireland and Portugal this is not possible. In the remaining MS it is not

regulated by law.

### Free movement of transgender people

Transgender people may find it difficult to exercise rights to freedom of movement within the EU.

Firstly, following the change of gender, it is often problematic to obtain new identity documents indicating the appropriate name and sex. This can render travelling abroad impossible.

Secondly, the recognition of the new gender in another Member State is not guaranteed, as there is no mutual recognition in this area.

Finally, when a person's physical appearance does not match the name or sex indicated in their identity papers, they risk abuse by border guards.

### Fundamental rights of transgender people

The way transgender issues are addressed by authorities, health professionals and other bodies has raised human rights concerns. Seen from this perspective, the very definition of transsexuality as a mental disorder is arguably problematic, especially when such a diagnosis is used to restrict one's legal capacity or choice of medical treatment.<sup>9</sup>

Various international organisations and bodies have pointed to breaches of the human rights of transgender people. These include the European Court of Human Rights (ECtHR), the Parliamentary Assembly and the Committee of Ministers of the Council of Europe (CoE), as well as a group of experts



which, under the United Nations' auspices, drafted the so-called [Yogyakarta Principles](#).<sup>10</sup>

### **Access to gender reassignment therapy**

In its 2003 [van Kück v. Germany](#) ruling, the ECtHR stated that CoE MS were obliged to provide the possibility to undergo surgery leading to full gender reassignment. In addition, this surgery should be covered by insurance plans as 'medically necessary' treatment.

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

#### *Burdensome procedures*

The process of gender reassignment is often very lengthy and complicated. In some MS it combines legal and medical procedures, arguably including unnecessary elements, some of which – like genital examinations by psychiatrists – may amount to non-respect of the physical integrity of the person. Transgender people who do not wish to undergo these procedures, but who at the same time would like to have their preferred gender recognised by law, are denied such a possibility.

This approach of the state has been characterised as a 'one size fits all' attitude and an unacceptable interference with the private lives of individuals.<sup>11</sup>

In particular, the requirements for divorce and sterilisation are questioned by human rights bodies. According to the [CoE Human Rights Commissioner](#): "only unmarried or divorced transgender persons who have undergone surgery and become irreversibly infertile have the right to change their entry in the birth register. In reality, this means that the state prescribes medical treatment for legal purposes, a requirement which clearly runs against the principles of human rights and human dignity." It is argued that transgender people are thus the only group in Europe subject to legally prescribed, state-enforced sterilisation.<sup>12</sup>

This is contrary to Yogyakarta Principle no 3 stating that "(...) 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 (...)".

#### *Change of sex in identity documents*

Whereas for a long time the ECtHR considered this issue as being at the discretion of the CoE MS, it then came to overrule its case law, ruling<sup>13</sup> that the CoE states were obliged to recognise the change of sex in identity documents. It stated that the failure of a state to modify the birth certificate of a person so that it reflects the preferred gender is a violation of Article 8 ECHR, according to which everyone has the right to respect for his private and family life.

### **Right to marry**

The Court has also confirmed the postoperative transsexuals' right to marry a person of the sex opposite to their acquired sex (Article 12 ECHR).

While the law of most EU MS is in accordance with the above judgments, there are exceptions, as well as countries where there is legal uncertainty in this respect due to the lack of relevant provisions.

### **No state response to hate crime**

The limited official statistics available suggest that crimes against transgender people represent a significant proportion of violent hate crimes overall. Moreover, they are characterised by serious physical violence that in some cases exceeds the levels of violence present in other types of hate crimes.<sup>14</sup> Transphobia<sup>15</sup> as a motive for crime is however disregarded in most MS and is not considered an aggravating circumstance. One could argue that transgender people's right to physical integrity, as well as the right to life and security for every person are thus put into question.

## Third-country transgender people

### **Transgender asylum seekers**

#### *Qualification as refugees*

Whereas there are cases of transgender people being granted refugee status in some



MS, there is no EU-level act aligning MS practices in this respect.

According to [UNHCR](#), asylum claims relating to gender identity may be recognised under the 1951 [Geneva Convention](#). Transgender persons fall under the Convention definition of refugees as members of a 'particular social group'. However, there are differences between MS and only some of them explicitly define transgender people as a distinctive social group.

It is also argued that an 'act of persecution of gender-specific nature', the term used in the [Qualification Directive](#) covers severe harm experienced by transgender persons.<sup>16</sup>

#### *Detention*

The lack of access to adequate healthcare – which is likely in detention centres – could lead to an interruption of the continuous hormonal treatment some transgender persons need. Similar problems are faced by transgender people in prison who run the risk of discontinuing hormone therapy. This may cause serious health problems or physiological changes, such as osteoporosis and baldness.

Moreover, when held in detention centres transgender people also run the risk of ill-treatment, including sexual violence, by other asylum seekers, especially if they are not placed in detention areas corresponding to their preferred gender.

#### **Family reunification**

Under the [Family Reunification Directive](#), in case of divorce MS have no obligation to grant an autonomous residence permit to the spouse of a third-country national. Therefore when a couple is forced to divorce because of a spouse's change of gender, one partner may be precluded legally from joining their former spouse in a Member State or even staying there with them.

#### **Discrimination and hate crime in neighbouring countries**

There are numerous cases of discrimination and hate crime in countries neighbouring the EU, such as [repeated killings](#) of

transgender people in Turkey. The EU has limited legal means to influence the situation in these countries. Some political pressure is possible though, with respect to candidate countries and potential candidate countries.

The Commission's [reports](#) on progress towards accession for Croatia, the former Yugoslav Republic of Macedonia, Serbia and Turkey indicate both positive and negative developments in the situation of the LGBT community in these states. The [2009 Turkey progress report](#) points to the fact that the principle of 'unjust provocation' is applied by courts in favour of perpetrators of crimes against transgender people. Moreover, provisions of the criminal code on 'public exhibitionism' and 'offences against public morality' are used against LGBT people in a way that the report qualifies as discriminatory. The law on misdemeanours is in turn used to impose fines against transgender persons.

Finally, administrative obstacles are used against the registration of LGBT associations, the legality of which is conditional on not "encouraging lesbian, gay, bisexual, transvestite and transsexual behaviour with the aim of spreading such sexual orientations".<sup>17</sup>

## EU law and policy

### **EU legal framework**

EU law does not provide for a specific prohibition of discrimination on the grounds of gender identity.

However, in 1996 the CJEU held that discrimination arising from gender reassignment is a form of sex discrimination (case [P v. S](#)). The Court affirmed that EU directives on equal treatment in employment and occupation were thus applicable to transsexuals. In this case the prohibition of discrimination applies on the basis of the acquired gender and not of the sex given at birth. The Court's reasoning was that discrimination arising from gender reassignment is based, essentially, or even



exclusively, on the sex of the person concerned. Where an individual is dismissed from work because of their intention to undergo or having undergone gender reassignment, they are treated unfavourably in comparison with persons of their biological sex.

Further case law confirmed this approach. For example in the [K.B.](#) case the Court stated that a woman-to-man transsexual was entitled to a survivor's pension in case of the death of his partner whom he could not marry due to non-recognition of his new gender in the birth certificate. In the [Richards](#) case, the CJEU held in turn that a transsexual worker who had undergone male-to-female gender reassignment surgery had the right to collect her retirement pension as a woman (at the age of 60 and not 65).

According to the EU Fundamental Rights Agency and various stakeholders this prohibition of discrimination should be extended to all transgender people.<sup>18</sup>

Today, in EU law the prohibition of discrimination on the basis of sex covers several areas, such as employment and occupation, social security, social advantages, and access to and supply of goods and services. It has an extensive legal basis in the Treaties (including Article 19 TFEU) and in several directives. The most recent sex discrimination directive – the 2006 [Gender Recast Directive](#) – was the first EU legal act to make an explicit reference to discrimination based on 'gender reassignment'. Recital 3 of its preamble quoted the CJEU's [P v S](#) ruling.

### European Parliament's actions

Parliament has so far adopted only one

### Prohibition of discrimination in MS

MS address discrimination of transgender people in various ways. Only Hungary and Sweden recognise gender identity as a **distinct discrimination ground**. Thirteen MS consider it as **sex discrimination**. In Germany and Spain it is treated as discrimination on the basis of **sexual orientation**. In eleven remaining MS it falls under none of these categories. In these MS transgender people can only rely on a general prohibition of discrimination enshrined in the Constitution or legislation.

**resolution** on discrimination against transsexuals.<sup>19</sup> In this September 1989 text, Parliament expressed the belief that human dignity and personal rights should include the right to live according to one's gender identity. It therefore called on MS, Commission and Council to guarantee actual enjoyment of this right through adequate legislation and funding.

Recently, transgender issues have re-emerged on the EP agenda, when Parliament [adopted](#) the [Figueiredo report](#) on the Commission's 2006-

2010 Roadmap for Equality between women and men. With respect to transgender people Parliament:

- called on Commission, Council and the MS to launch a campaign to raise awareness of discrimination against them and improve their access to legal remedies
- advocated accessibility of gender reassignment procedures and their reimbursement by public health insurance schemes
- stressed that gender identity should be explicitly covered by the new EU gender equality strategy.

### Main references

[Human Rights and Gender Identity](#), Issue Paper / CoE Commissioner for Human Rights, July 2009.

Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part I: [Legal Analysis](#) and Part II: [The Social Situation](#) / Fundamental Rights Agency, June 2008 and March 2009.

[Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care](#) / TGEU, April 2008.



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## Endnotes

- <sup>1</sup> [Transgender EuroStudy](#), April 2008, p. 67.
- <sup>2</sup> Ibid pp 9–10.
- <sup>3</sup> Statens Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer / Folkhälsoinstitut, 2005 and [A systematic review of lesbian, gay, bisexual and transgender health in the West Midlands region of the UK compared to published UK research](#) / Unit of Public Health, Epidemiology & Biostatistics, West Midlands Health Technology Assessment Group, 2009.
- <sup>4</sup> See e.g. Transgender EuroStudy (30 %), [Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination](#) / S. Whittle, L. Turner, M. Al-Alami, Wetherby: The Equalities Review, 2007, (34,4 %), Attempted suicide among transgender persons: The influence of gender-based discrimination and victimization/ K. Clements-Nolle, R. Marx, M. Katz, *Journal of Homosexuality*, 2006 51(3): pp.53-69 (33.2% of transgender youth).
- <sup>5</sup> Transgender Eurostudy, p. 10.
- <sup>6</sup> [Human Rights and Gender Identity](#), Issue Paper / CoE Commissioner for Human Rights, July 2009, p. 30.
- <sup>7</sup> As described in '[Cruel and unusual](#)', documentary / Janet Baus, Dan Hunt and Reid Williams, 64 min. 2006.
- <sup>8</sup> [Human Rights and Gender Identity](#), Issue Paper, p. 18.
- <sup>9</sup> Ibid, p. 7.
- <sup>10</sup> E.g. CoE [resolution 1728 \(2010\)](#) and [recommendation CM/Rec\(2010\)5](#).
- <sup>11</sup> Human Rights and Gender Identity, Issue Paper p. 19.
- <sup>12</sup> Ibid.
- <sup>13</sup> [B. v. France](#) case and the groundbreaking [Christine Goodwin v. UK](#) case.
- <sup>14</sup> [2008 Hate Crime Survey: Lgbt](#) / Human Rights First.
- <sup>15</sup> The term is defined as "irrational fear of gender non-conformity or gender transgression, such as a fear of, or aversion to, masculine women, feminine men, cross-dressers, transgenderists, transsexuals and others who do not fit into existing gender stereotypes about their birth gender." (FRA report, part II: The Social Situation, p. 109).
- <sup>16</sup> Human Rights and Gender Identity, Issue Paper p. 38.
- <sup>17</sup> The Turkey 2009 Progress report, p. 19.
- <sup>18</sup> FRA report, part I: Legal issues, pp. 131-132.
- <sup>19</sup> Resolution on discrimination against transsexuals, 12/09/1989, OJ C 256/34.