



Legislation and policies on gender identity and sex characteristics

This summary report outlines the main learning points from the Good Practice Exchange Seminar organised by the Directorate-General for Justice and Consumers, and hosted by the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth on 29–30 September in Berlin.

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Introduction

At this good practice exchange seminar, civil servants from the governments or national human rights institutions of 18 Member States and Norway:

- Learned about and discussed an overview of legislation and policies related to gender identity and sex characteristics in EU Member States and Norway;
- Shared and learned about case studies and good practice with regards to legal gender recognition, specific policy fields (health and healthcare, social inclusion and access to employment, general anti-discrimination policies, prison policies), and aspects related to policy implementation (data collection, national systems and databases, and communicating reforms efficiently);¹
- Shared their own experience and learned about that of colleagues from other Member State governments and experts.

Growing momentum

Currently, **20 European states are reviewing their laws or policies in relation to gender identity and/or sex characteristics.**

Legal gender recognition

Legal gender recognition is the process by which administrations change the name and/or gender marker of trans individuals in their records so official registers and documents (such as identity documents, birth or civil status certificates, school diplomas, etc.) match these individuals' gender identity. **As of April 2016, 22 Member States** (including Norway as of July 2016) **foresaw this procedure in law.** Procedures in Denmark,

¹ Three policy areas highly relevant to gender identity and sex characteristics – hate speech, hate crime and education – will be the subject of dedicated seminars in the future.



Ireland², Malta and Norway require no psychiatric diagnosis; no compulsory medical intervention, surgery or sterilisation; and no compulsory divorce. The Council of Europe and the EU Agency for Fundamental Rights pointed to such procedures as more respectful for the human rights of trans persons.

Existing standards

Council of Europe standards were referred to as particularly useful to guide new law- and policy-making, and in particular the *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, as well as jurisprudence from the European Court of Human Rights (ECHR). They were referred to as clearly and easily implementable, and human rights-compliant.

*A detailed compilation of **relevant jurisprudence and case law** at European level can be found in Transgender Europe's toolkit [“Legal Gender Recognition in Europe”](#). An update of this publication is foreseen in 2017.*

See also **Further resources** below.

Enabling parameters

Several elements were identified as likely to enable the review of laws and policies related to gender identity or sex characteristics.

Chiefly, **political leadership was cited as crucial**. The **constitutional protection from discrimination** on grounds that include gender identity has also been helpful.

Other enabling parameters include constructive comments made by civil society during **Universal Periodic Reviews** at the United Nations; the **inconvenience, lack of logic and impracticality** caused by inexistent or outdated legislation and policy on legal gender reassignment, making it imperative to review these; and the existence of a **national action plan against discrimination** warranting political attention to the topic.

The 2013 federal coalition agreement in Germany committed to specific policy efforts to address issues faced by transgender people. This enabled the creation of an inter-ministerial working group which examined specific barriers to trans people's enjoyment of their human rights.

² In Ireland, 16 – 18 year olds are still required to undergo psychiatric evaluation as part of medicalised access requirements.



Inter-department cooperation

Participants mentioned **cooperation between different departments or ministries was crucial to success** – for example through the establishment of inter-ministerial working groups. This allowed ownership to be shared across departments (for example with a ministry of justice “owning” the reform and a ministry of health implementing it), and for departments to coordinate policy outcomes with individuals’ rights in mind. This facilitated arbitration between different policy options.

In Austria, the Ministry of Justice established the working group “Transgender persons in the penal system” to examine how trans individuals’ rights can be better guaranteed in prisons.

In Croatia, the Office for Human Rights and the Rights of National Minorities set up a working group to develop recommendations on measures to improve the rights of transgender individuals across policy areas.

In Germany, a federal inter-ministerial working group was set up in 2014 to examine policies relating to gender identity and sex characteristics, and suggest improvements. Its areas of focus include medical care; expanding and strengthening counselling, education and prevention structures to trans individuals who need them; considering necessary legal amendments; and analysing the lived experiences and legal situation of transgender persons.

Consulting civil society

Participants heard that **it is essential to consult civil society**: not only transgender and/or intersex groups themselves, but also other professionals impacted by reform – such as medical professionals, employment or social inclusion professionals, or teachers. This ensured reforms were relevant and adapted to right-holders and those they interact with. Formally establishing a consultative group or council was cited as good practice.

One participant underlined that it is crucial to consult trans individuals when developing new policies, new guidelines, or reforming in the field of health and healthcare. It appeared particularly important to articulate reforms around trans people’s needs rather than on medical diagnosis. Developing information folders to guide care-seekers through the process, and to inform professionals in non-health fields, was also mentioned as a good practice.



Unfounded fears

Countries that have put in place legal gender recognition measures based on self-determination overwhelmingly found that **the fears and hesitations surrounding this area of law- and policy-making are unfounded and usually exaggerated.** Concerns about security (including an oft-cited theoretical question about a bank robber that would change their identity documents to escape criminal conviction; concerns about prison inmates' security; or about airport security) did not resist rational examination. Discussions highlighted that these concerns are exclusively rhetorical, and pragmatic solutions were always found through discussion. As one participant put in, "In the end, no one attempts to game the system."

Quantitatively, **some participants reported that only a very small percentage of their national population used the new procedures** (160 individuals in one country, 60 in another), although for these people it made an important and sometimes life-saving positive difference.

Several participants mentioned their administration had successfully opened legal gender recognition to minors under specific conditions and supervision, and witnessed no adverse developments. Several others mentioned they were currently considering policy options.

Learned lessons: Anti-discrimination

When reforming in the field of anti-discrimination, the seminar heard that two approaches were possible. The most common approach is to legislate in specific fields (e.g. employment, health, access to goods and services), which provides patchy and unequal protection to individuals. Another approach, **outlawing discrimination harmoniously and coherently across all or most sectors through one piece of legislation, was cited as more effective and systematic.**

Learned lessons: Employment and social inclusion

When reforming in the field of employment and social inclusion, participants heard that **it is essential to complement law and policy with support to individuals.** This can take the form of providing access to professional coaching and training for interviewing or job applications (for instance by funding relevant NGOs), facilitating internships for trans people (including in ministries themselves), or any policy measure that facilitates trans people's (re-)entry into the job market. Participants also heard about the example of an anti-discrimination campaign aimed at employees, focusing on the grounds of age, religion and gender identity.



Learned lessons: Data collection

Data collection in Member States remains too rare and haphazard. To palliate this gap, the European Commission has included gender identity aspects in its regular Eurobarometer on discrimination, and the EU Agency for Fundamental Rights will also repeat its landmark 2013 survey of LGBT people EU-wide in the coming years. Even in the absence of political will on these issues, participants hear that data collection remains important for future law- and policy-making when political support does materialise.

The latest Eurobarometer suggests 1% of the general population (through a methodology of random sampling) has experienced discrimination due to their gender identity – this means around 4 million individuals in the EU. As importantly, this research suggests that new laws protecting minorities can lead to high, measurable increase in society's social acceptance of these groups.

Learned lessons: Sex characteristics

Participants heard that **several Member States are currently reviewing their laws and policies in relation to sex characteristics** (i.e. issues relating to intersex people). This includes examples of states currently developing medical and legal protocols to deal with intersex aspects from birth; newly ensuring equal treatment on the ground of sex characteristics in the field of employment, vocational training or occupation; including intersex issues in the mandate of a national human rights institution; or initiating research into the extent and nature of problems intersex individuals face.

The Council of Europe started working on intersex issues in the context of bioethics, and will share future developments and findings in this area.

In Greece, protection against discrimination was extended to the area of goods and services, while a bill on equal treatment – including gender identity and sex characteristics – should be adopted shortly.



Further resources

For an overview of issues surrounding legal gender recognition:

- Council of Europe (2015) *Protecting human rights of transgender persons: A short guide to legal gender recognition*. Available from: <http://bit.ly/2ctivtT>.

For a comparative overview of trans people's experience of violence and discrimination in EU Member States:

- EU Fundamental Rights Agency (2014) *Being Trans in the European Union Comparative analysis of EU LGBT survey data*. Available from: <http://bit.ly/2c3AzYt>.

For a comparative overview of the legal and policy frameworks relevant to issues faced by trans individuals in the EU:

- EU Fundamental Rights Agency (2015) *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU: Comparative legal analysis – Update 2015*. Available from: <http://bit.ly/2c5fuBG>.

For an overview of the fundamental rights issues affecting intersex people:

- EU Fundamental Rights Agency (2015) *The fundamental rights situation of intersex people*. Available from: <http://bit.ly/2c3AHqZ>.

For an overview of the current and proposed laws for, and issues surrounding, legal gender recognition for children:

- Open Society Foundations (2015) *License to be yourself: Trans children and youth*. Available from: <https://osf.to/2d0inoZ>.

For an overview of issues affecting LGBTI children:

- Council of Europe (2016) *Equal opportunities for all children: Non-discrimination of lesbian, gay, bisexual, transgender and intersex (LGBTI) children and young people*. Available from: <http://bit.ly/2dH17IN>.

For other relevant EU-level studies, including Eurobarometers on Discrimination:

- http://ec.europa.eu/justice/discrimination/orientation/eu-action/index_en.htm