



European  
Social  
Charter

Charte  
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CONSEIL  
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## **EUROPEAN SOCIAL CHARTER**

Comments from the Albanian LGBT Network and ILGA Europe  
on the  
8<sup>th</sup> Report by Albania on the implementation  
of the European Social Charter  
(RAP/RCha/ALB/8(2013))

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## European Social Charter

### Submission by Aleanca LGBT<sup>1</sup>, Transgender Europe<sup>2</sup> and ILGA-Europe<sup>3</sup> on the 8th report by Albania on the implementation of the revised European Social Charter

#### Article 11 -- The right to protection of health

##### Access by transgender persons to gender reassignment treatment

#### Introduction

In many Council of Europe member states transgender persons face significant obstacles when seeking gender reassignment treatment. These obstacles fall into three broad categories:

- failure of health services to provide necessary treatment, and where it is provided, failure, often, to provide treatment of an acceptable quality
- imposition of arbitrary requirements, including a diagnosis of mental disorder for accessing transgender health care
- failure to cover expenses for medically necessary treatment

The human rights situation of transgender persons in general, and the above questions in particular, have been extensively researched in recent years by the Office of the Commissioner for Human Rights, and documented in an Issue Paper, *Human Rights and Gender Identity* and a report, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*. Relevant extracts are set out in Appendices 1 and 2.

In *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* it is reported that (i) in 13 member states no facilities needed for gender reassignment treatments were identified, while even in the 28 member states where some facilities were identified, some countries did not make all necessary treatments available; (ii) in 16 countries access to health insurance to cover these treatments was "highly problematic", while in some others provision was minimal, or provided only to some transgender persons.

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<sup>1</sup>Aleanca LGBT is an Albanian non-governmental organization that envisions a free, open and equal Albanian society that embraces diversity and is inclusive of people of all sexual orientations and gender identities. Aleanca LGBT had been created by a group of LGBT young people who had been working as volunteers this past four years to change the reality for LGBT people in Albania.

<sup>2</sup> Transgender Europe - TGEU, a not-for-profit umbrella organisation working for the full equality of trans persons in Europe, has 64 member organisations in 36 countries, enjoys participatory status to the [Fundamental Rights Platform](#) and is elected member of the [Platform of European Social NGOs Social Platform](#). TGEU is in the process of applying for participative status at the [Council of Europe](#).

<sup>3</sup> ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, enjoys consultative status at [Economic and Social Council of the United Nations \(ECOSOC\)](#) and participative status at the [Council of Europe](#). ILGA-Europe has more than 391 national and local lesbian, gay, bisexual and transgender (LGBT) member organisations in 47 European countries.

*Human Rights and Gender Identity* observes that "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."<sup>4</sup>

### **Relevant Council of Europe human rights standards**

Appendix III sets out the relevant Council of Europe human rights standards. In addition to the jurisprudence of the European Court of Human Rights (ECtHR), both the Committee of Ministers and the Parliamentary Assembly have made recommendations in this field. The former, in its *Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity*, has required that "transgender persons have effective access to appropriate gender reassignment services", and that "any decisions limiting the costs covered by health insurance for gender reassignment procedures should be lawful, objective and proportionate." The Explanatory Memorandum adds that "such coverage should .. be ensured in a reasonable, non-arbitrary and non-discriminatory manner". The Parliamentary Assembly has called on member states to "ensure in legislation and in practice [the right of transgender persons] ... to access gender reassignment treatment....".

### **The obligations of Contracting Parties**

Article 11 of the European Social Charter requires the Parties to take appropriate measures designed "to remove as far as possible the causes of ill-health." Relevant supporting principles established in the case law of the Committee are as follows:

- The applicable definition of "health" is that set out in the Constitution of the World Health Organisation: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>5</sup>
- With regard to the right to the highest possible standard of health: "The health system must be able to respond appropriately to avoidable health risks, that is ones that can be controlled by human action".<sup>6</sup>
- With regard to the right of access to health care: "The health care system must be accessible to everyone... Restrictions on the application of Article 11 may not be interpreted in such a way as to impede disadvantaged groups' exercise of their rights to health. This interpretation is the logical consequence of the non-discrimination provision in Article E of the Charter."<sup>7</sup>
- With regard to costs: "The right of access to health care requires that the cost of health care should be borne, at least in part, by the community as a whole."<sup>8</sup> This also requires that the cost of health care must not represent an excessively heavy burden for the individual. Steps must therefore be taken to reduce the financial burden on patients, in particular those from the most disadvantaged sections of the community."<sup>9</sup>

The Committee specifically addressed the question of access to health care by transgender persons in its Conclusions on the 2nd report by Malta:

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<sup>4</sup> see Appendix I - extracts from *Human Rights and Gender Identity – Issue Paper* by the Commissioner for Human Rights

<sup>5</sup> Conclusions 2005, Statement of Interpretation on Article 11§5

<sup>6</sup> Conclusions XV-2, Denmark, pp. 126-129

<sup>7</sup> Digest of the case law of the European Committee of Social Rights – 1 September 2008. Article 11, right of access to healthcare – page 82

<sup>8</sup> Conclusions I, Statement of Interpretation on Article 11; Conclusions XV-2, Cyprus

<sup>9</sup> Conclusions XVII-2, Portugal

"According to another source, the Maltese authorities do not offer the possibility of hormone therapy or sex change surgery, some health professionals know nothing about the specific health issues faced by transgender persons thus jeopardising the quality of the care provided in this sphere and discrimination has been experienced by transgender people when attempting to access routine health care. The Committee refers to Committee of Ministers Recommendation Rec(2001)12 to member states on "the adaptation of health services to the demand for health care and health care services of people in marginal situations" and asks for the next report to describe the situation as regards access to health care for all people in marginal situations, particularly transgender people."

### **The situation in Albania**

The Report of the Commissioner for Human Rights *Discrimination on grounds of sexual orientation and gender identity in Europe* lists Albania among the member states whose medical services make no provision for gender reassignment treatment, and where recovery of costs for such treatment is "highly problematic".<sup>10</sup> It also states that Albania is one of the member states where it has failed to identify any legislation regulating legal gender recognition.<sup>11</sup>

The supporting legal study commissioned by the Commissioner for Human Rights states as follows:

"The national Albanian health scheme does not cover medical operations for transsexuals. Such medical operations are not available in Albania as hospitals are not technically prepared to handle such operations."<sup>12</sup>

A co-author of this submission, Aleanca LGBT, reports that recent efforts to raise the situation of transgender persons with the authorities have met with incomprehension. They also confirm that there is no access to gender reassignment treatment for transgender persons in Albania. Indeed, a recent experience suggests wider problems. When accompanying a Roma transgender sex worker to seek medical treatment, the doctor asked the representative of Aleanca: "Why don't you leave these people to die?"<sup>13</sup>

The 8<sup>th</sup> national report of Albania does not address the above concerns.

The Albanian authorities have published a *Plan of measures for non-discrimination on the basis of sexual orientation and gender identity*. While this is considered an excellent initiative and warmly welcomed, it does not address the issues raised in this submission.

### **Conclusion**

The failure of the Albanian authorities to provide the medical facilities for gender reassignment treatment (or the alternative of such treatment abroad), and to ensure that medical insurance covers, or contributes to the coverage of such medically necessary treatment, on a non-discriminatory basis, are evidence that Albania does not meet the requirement to provide effective access to health care for all, without discrimination. Accordingly, we respectfully request that the Committee return a finding of non-conformity with Article 11 of the Social Charter.

8 January 2013

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<sup>10</sup> see Appendix II

<sup>11</sup> Commissioner for Human Rights - *Discrimination on grounds of sexual orientation and gender identity in Europe* - 2nd edition: section 5.2

<sup>12</sup> Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - Legal Report: Albania by independent researcher Krenar Loloçi – COWI - The Danish Institute for Human Rights

<sup>13</sup> Email to ILGA-Europe from Xheni Karaj, chairperson of Aleanca LGBT, dated 19 Dec 2012. Ms Karaj was present at the discussion with the doctor.



***Human Rights and Gender Identity – Issue Paper by the Commissioner for Human Rights<sup>14</sup>*****Relevant extracts on access to health care*****3.3 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.....

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. [ .....]. 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. [.....]

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 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.....

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 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.

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<sup>14</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1476365>

**Commissioner for Human Rights report on Discrimination on grounds of sexual orientation and gender identity in Europe - 2nd edition:**

**Extracts relating to access to health for transgender persons**

**Recommendations - 6. Access to health care, education and employment**

2) Review any requirements of a diagnosis of mental disorder for accessing transgender health care in view of eliminating obstacles to the effective enjoyment, by transgender persons, of the rights to self-determination and the highest attainable standard of health.

4) Make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible to transgender persons subject to informed consent and ensure that they are reimbursed by health insurance.

**Chapter 6 – access to healthcare, education and employment**

**Specific obstacles for transgender persons when accessing health services**

Transgender persons who wish to undergo gender reassignment treatment can face a range of obstacles when trying to access health services. The European Court of Human Rights has established that states have a positive duty to provide for the possibility to undergo gender reassignment as “medically necessary” treatment, which should be covered by insurance schemes. Failure to provide this places a disproportionate burden on a person “in one of the most intimate areas of private life”, according to a groundbreaking ruling in 2003. The Court restated this in another case in 2007.

Twenty-eight member states offer full or partial gender reassignment treatment to transgender persons (Austria, Belgium, the Czech Republic, Germany, Denmark, Estonia, Finland, France, Hungary, Greece, Georgia, Iceland, Ireland, Italy, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Serbia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and Ukraine). The differences between these 28 member states are significant, ranging from member states where quality expertise centres are available and those where some but not all necessary treatment is available. In Malta and Ireland, for example, hormonal treatment is available, but no surgery. In yet other member states services are only available in one city.

In 13 member states (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Liechtenstein, Lithuania, Luxembourg, Moldova, Monaco, Montenegro and San Marino) no facilities needed for gender reassignment treatments were identified. Transgender persons from these 13 countries wishing to undergo gender reassignment would then have to go abroad (they are explicitly advised to do so in some member states). For the remaining six member states information on availability of health facilities is unclear.

A person who wants to access gender reassignment treatment must usually meet a strict and unified “one size fits all” list of requirements. Such requirements may be based on legislation or regulations, though often this is rather a matter of custom and practice. Generally requirements include medical and psychological assessments of the applicant and/or the diagnosis of gender dysphoria or gender identity disorder (following the WHO classification). Yet other member states require applicants to



undergo a “real-life experience” (RLE) by living in the preferred gender for a specified length of time, which varies by state. Doctors may assess the “success” of such RLE on the basis of the person’s clothing taste and gender-normative behaviour. According to transgender persons, they have to perform in a highly stereotypical way, often going to the extremes in their preferred gender to fit the eligibility criteria. Other requirements include the risk of suicide of the client, absence of “homosexual inclinations”, or vague concepts such as “no serious flaws in the ability for social adaptation”. Concerns have also been raised by transgender persons in relation to medical professionals who have large decision-making powers over their access to treatment.

### **Financial obstacles to accessing gender reassignment treatment**

The European Court of Human Rights has required states to provide insurance to cover expenses for “medically necessary” treatment, which gender reassignment surgery is a part of. However, research for this report shows that access to health care insurance is highly problematic in at least 16 countries (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, Moldova, Montenegro, Poland, Romania, the Russian Federation, Serbia, Slovakia and Turkey). In these countries transgender persons claim that they must bear the financial burden of medically necessary health care themselves.

In the remaining 31 member states, research for this report shows that there is partial or full reimbursement. In Germany, Portugal, Sweden and Italy public health insurance covers most if not all expenses related to a person’s gender reassignment treatment. In Greece, Iceland and Ireland, payment by public health insurance for treatment abroad has been reported, though not confirmed as a general rule. In San Marino, since gender reassignment facilities are not available in the country, transgender persons may have the costs of surgeries performed abroad reimbursed by the national health fund. Hungary’s health insurance cover for gender reassignment treatment is 10% of the total costs. In the Netherlands, not all surgery is covered, and some surgery is covered only partially. Malta covers only hormone treatment. Norway covers costs for some but not all transgender persons, depending on the particular diagnosis of the person. In Switzerland private health insurance companies have in the past refused transgender people. In the judgment *Schlumpf v. Switzerland* the European Court of Human Rights found that the refusal of the insurance company to cover the costs of the applicant’s gender reassignment surgery due to non-compliance with the requirement to complete two years of observation in order to ascertain the existence of “true transsexualism” was in violation of Article 8. In the UK around 86% of transgender respondents claimed that they were refused state funding for surgery and more than 80% claimed they were refused funding for hormone treatment. Over half of transgender respondents said they had funded their own treatment. Coverage of public health insurance is unclear in the countries not mentioned above.

## Council of Europe standards – transgender access to health

### I. Jurisprudence of the European Court of Human Rights

In *van Kück v. Germany*, the ECtHR found that the burden on the applicant to prove the medical necessity of gender reassignment and the genuine nature of her transsexualism during court proceedings was unreasonable. The ECtHR held that

- "the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security"
- "the civil court proceedings touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination"<sup>15</sup>

*L v. Lithuania* involved the case of a transgender person who could not complete full gender-reassignment surgery owing to the absence of legal provisions regulating such surgery. The ECtHR found that the circumstances of the case left "the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his true identity", and that there had been a violation of Article 8. It ruled that if the necessary legal provisions could not be implemented within three months, the State must pay the applicant €40,000 as an alternative, to enable him to have the final stages of the necessary surgery performed abroad.<sup>16</sup>

### II. Committee of Ministers

#### **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<sup>17</sup>**

"35. Member states should take appropriate measures to ensure that transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise in the field of transgender health care, without being subject to unreasonable requirements; no person should be subjected to gender reassignment procedures without his or her consent.

36. Member states should take appropriate legislative and other measures to ensure that any decisions limiting the costs covered by health insurance for gender reassignment procedures should be lawful, objective and proportionate."

#### **Explanatory memorandum to the Recommendation**

"35-36. The Court's case-law considers the right to sexual self-determination as one of the aspects of the right to respect for one's private life guaranteed by Article 8 of the Convention and requires Contracting States to provide for the possibility to undergo surgery leading to full gender-

<sup>15</sup> *van Kück v. Germany* (Application no. 35968/07) - paragraphs 47, 73 and 82.

<sup>16</sup> *L. v. Lithuania* (Application no. 27527/03) - paragraphs 59 and 74

<sup>17</sup> Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies

reassignment, but also that insurance plans should cover “medically necessary” treatment in general, which gender reassignment surgery may be part of. Where legislation provides for coverage of necessary health care costs by public or private social insurance systems, such coverage should then be ensured in a reasonable, non-arbitrary and non-discriminatory manner, taking into account also the availability of resources.

Concerning the conditions governing gender reassignment procedures, international human rights law provides that no one may be subjected to treatment or a medical experiment without his or her consent. Hormonal or surgical treatments as preconditions for legal recognition of a gender change (see §19 above) should therefore be limited to those which are strictly necessary, and with the consent of the person concerned. ...”

### **III Parliamentary Assembly**

#### **Discrimination on the basis of sexual orientation and gender identity**

Resolution 1728 (2010)

“16.11. address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to:

[16.11.1. -2.]

16.11.3. access to gender reassignment treatment and equal treatment in health care areas;”