

Human Rights and Gender Identity and Expression



Issue Paper | Summary

Summary

In 2009, the Commissioner's predecessor, Thomas Hammarberg, published a first [Issue Paper on Human Rights and Gender Identity](#). A landmark publication at the time in the field, it became a core document and reference for the work of human rights actors within Europe and beyond. In the succeeding 15 years, the human rights landscape for transgender (trans) people has changed significantly. There is now greater visibility and awareness of trans people at all levels of society, and significant progress has been made in certain areas to provide better legal protection and recognition of their human rights. As discussed in Chapter I, an increasing body of judgments and soft-law standards have been developed at the regional and international level, which have brought clarity, extended protection to areas not previously considered in the previous Issue Paper, and firmly anchored gender identity within human rights law. There is also greater understanding of the challenges and needs of trans people, as well as the application of human rights in different – and changing – contexts.

Despite these legal advances, trans people remain unable to enjoy their human rights on an equal footing with others today. Across Europe, trans people continue to face shockingly high rates of discrimination, violence and insecurity in their daily lives. Legal protection and recognition remains uneven across the continent, and in some countries, it is stalling or even regressing. All of this must be framed in the context of a current backsliding in respect of human rights, where marginalised groups are increasingly instrumentalised for political gain, and where anti-gender movements are increasingly well-organised, well-funded and gaining traction (Chapter III). While anti-gender narratives ultimately undermine the rights of everyone, their focus on so-called traditional norms around sex, gender and expression is particularly destructive of the rights of trans people.

Against this background, the Commissioner finds it both timely and urgent to provide an updated Issue Paper on human rights and gender identity and expression. First and foremost, it is crucial that harmful anti-gender narratives are addressed, and that issues relating to trans people are reframed within the paradigm of their human dignity and equality in the enjoyment of human rights. At the same time, a decade and a half after

the publication of the first Issue Paper, now is an opportune moment to take stock of progress, to push for renewed momentum for tackling long-standing challenges, and to provide guidance and pathways for ensuring that trans people can fully enjoy their human rights, set against the backdrop of contemporary knowledge and realities.

The Paper covers a range of issues relating to the enjoyment of human rights (Chapter II), the aim being to address matters where there are particular complexities, challenges, or developing practices, rather than to provide a comprehensive review. Certain areas addressed in the first Issue Paper – such as non-discrimination, violence, family law, healthcare, legal gender recognition (LGR), asylum and employment – are re-examined in view of recent developments. In addition, this Issue Paper addresses matters that have recently become a flashpoint for hostile public debate, such as access to single-sex spaces and categories in sport, sanitation, detention and in other facilities, and the related framing of trans people's rights as a fundamental threat to women's rights. It also addresses the rights and interests of trans children and youth in various settings, the recognition and protection of non-binary people, and interconnections with gender expression. Drawing on previous work carried out by the Commissioner, the Paper further considers how a number of issues specifically impact trans people and their human rights, including conversion practices, inclusive national curricula and comprehensive sexuality education, and the criminalisation of sex work.

Each thematic section provides an outline and discussion of the relevant human rights at stake, along with a short description of the current state of play for trans people in the region. Emphasis is placed on their lived experiences, including those who are further marginalised due to their characteristics or status. Where relevant, the Paper sets out and addresses common arguments or concerns relating to various issues, emphasising a human rights- and evidence-based process for resolving any real or perceived conflict of interests and freedoms. Guidance and recommendations on upholding the human rights of trans people are then offered, with a focus on ensuring strong human rights, legal and policy frameworks. As these frameworks must be effectively implemented, methods to increase capacity, raise awareness and positively influence societal attitudes are explored, while several examples of promising practices and tools across member states, the Council of Europe and other institutions are provided. A summary of key recommendations is provided at the outset, which aims to build on those already provided in the 2009 Issue Paper.

As stated at the outset in the introduction, the Commissioner recognises that the trans community is not homogeneous, but rather represents a diverse group of individuals with differing experiences, identities and views. She also acknowledges the deeply personal nature of the issues discussed, and the language used, in this area. Where possible, the Issue Paper attempts to reflect this diversity, by recognising multiple and intersecting forms of discrimination, and by emphasising the principle of personal autonomy and the importance of solutions which promote individualised approaches and meaningful choices. Regarding terminology, the Issue Paper sets out a working glossary for the purpose of ensuring that the concepts used are clear. While efforts have been made to ensure that terminology is based on current understanding and good practice, the Issue Paper does not purport to be an authority on the matter, nor to suggest that there is a one-size-fits-all solution to language in this field. The Commissioner is also sensitive to the fact that interpretations and the use of language may evolve over time.

The Issue Paper draws on country and thematic work carried out across the Commissioner's six-year mandate, with an emphasis on her conversations with trans adults and youth, trans and LGBTI organisations and human rights defenders. Information has further been gathered through consultations, country visits, roundtables, and meetings with a range of stakeholders. The Commissioner is extremely grateful to everyone who has shared their experiences and knowledge with her throughout this time.

Key recommendations

Detailed recommendations are included in each of the sections of the Issue Paper. Below is a selection of the Commissioner's key recommendations to Council of Europe member states:

1. Collect and record disaggregated data on the lived experiences of transgender (trans) and non-binary people, including discrimination and violence, to ensure effective and targeted policymaking to uphold their human rights in all fields of life.
2. Recognise (actual or perceived) gender identity and gender expression explicitly as prohibited grounds of discrimination in anti-discrimination legislation covering all fields of life and as aggravating factors in anti-hate speech and hate crime legislation. Ensure that these laws are effectively implemented, including by preparing policies to combat violence as well as discrimination and exclusion faced by trans people, notably in employment, healthcare, education, sports, and social protection and housing. Ensure that national equality bodies and national human rights institutions are mandated and resourced to examine the human rights of trans and non-binary people.
3. Immediately repeal, and refrain from adopting, laws or policies, which victimise, discriminate against, or legitimise hatred against trans people, including bans on legal gender recognition, bans on access to trans-specific healthcare, and bans on the public discussion of LGBTI people.
4. Ban and sanction the advertising and conduct of conversion practices targeting both children and adults and ensure that the ban covers gender identity and gender expression.
5. Adopt legislation which guarantees that trans people who want it have access to quick, transparent and accessible administrative procedures for legal gender recognition based on self-determination. These procedures should be accessible to minors with due regard to the child's views, maturity and best interests, and ideally without arbitrary age limits. Consider including a third gender option in identity, social

security and other public documents for those who seek it. Overall, review the need and proportionality of including gender markers on public documents at all.

6. Ensure that trans people have effective and stigma-free access to trans-specific healthcare services, including psychological, endocrinological and surgical procedures, without requiring a mental illness diagnosis, in line with the World Health Organisation ICD-11. Ensure that trans-specific healthcare is provided on the basis of free and informed consent, is covered by public health insurance schemes in accordance with national rules, is decentralised, adapted to individual health conditions, provided by trained medical professionals, and without discrimination.
7. Recognise the identity of trans school-age children and students in school settings, regardless of their legal gender/sex, including by allowing them to use their own names and pronouns, dress as they wish, and participate in sports and other activities according to their gender identity and expression.
8. Ensure that national laws prohibit discrimination due to gender identity and gender expression in all decisions relating to family life, including birth registration rules, custody, adoption and access to assisted reproductive technologies. When birth registration systems are gendered, trans people should be registered as parents in accordance with their gender identity, and alternative systems should continue to be explored to reflect the growing diversity of families.
9. Adopt robust laws and policies to ensure that everyone can take part in sports without discrimination or harassment due to actual or perceived gender identity and gender expression. National policies governing participation in sports should start from a position where trans people can participate according to their gender identity. Ensure that any limitation or restriction on participating in sport according to gender identity pursues a legitimate aim, is proportionate, and respects international human rights standards.
10. Ensure that, in both public and private locations, everyone is able to use the sanitation facilities in a dignified and safe manner, according to their gender identity when these are gender-segregated. As far as possible, ensure the presence of an all-gender inclusive option.
11. Recognise that a well-founded fear of persecution based on gender identity and gender expression may be a valid ground for the granting of refugee status under national law, and ensure that trans refugees,

asylum seekers and migrants have access to safe reception conditions, trans-specific healthcare services and legal gender recognition.

12. Ensure the safety of trans people deprived of their liberty, including by adopting robust policies to ensure a case-by-case review to determine the appropriate detention facility, and duly consider alternatives to detention. Unless they disagree, trans people should, in principle, be detained in accordance with their gender identity. Any decision to exclude trans people from a place of detention corresponding to their gender identity must be taken based on objective and clearly established criteria and must be implemented with proper regard for human rights standards.
13. Promote understanding and respect of trans and non-binary people through public outreach and awareness raising campaigns, as well as mandatory, comprehensive, scientifically based, and age-appropriate comprehensive sexuality education in schools which covers the diversity of gender identity and gender expression. Proactively counter rhetoric against the existence, rights and dignity of trans people, including misinformation and fear-mongering about trans people.
14. Consult and involve trans people and their organisations when developing legal and policy measures that concern them. Adopt and enforce effective measures to ensure that human rights defenders who support the rights of trans people can work in an enabling environment, without the threat of violence, discrimination or other abuse.
15. When designing relevant laws and policies or undertaking other measures, consider the role and responsibilities of all actors in countering discrimination and hatred and promoting the human rights of trans people, including public leaders, the media, internet intermediaries, as well as governmental and non-governmental organisations, private legal persons and associations in various fields.