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Comments from the Irish LGBT Network and ILGA Europe
on the
10th Report by Ireland on the implementation
of the European Social Charter
(RAP/RCha/IRL/10(2013))

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European Social Charter

Submission by the Transgender Equality Network Ireland¹, Transgender Europe² and ILGA-Europe³ on the 10th report by Ireland 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.

¹ Transgender Equality Network Ireland (TENI), a not-for-profit organisation that works to improve conditions and advance the rights and equality of transgender people and their families in Ireland. www.teni.ie

² 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](#).

³ 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 45 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."⁴

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."⁵
- 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".⁶
- 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."⁷
- 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.⁸ 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."⁹

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

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

⁵ Conclusions 2005, Statement of Interpretation on Article 11§5

⁶ Conclusions XV-2, Denmark, pp. 126-129

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

⁸ Conclusions I, Statement of Interpretation on Article 11; Conclusions XV-2, Cyprus

⁹ 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 Ireland

Appendix IV sets out a report by the Transgender Equality Network Ireland, *Transgender Access to Healthcare in Ireland*. Its conclusion is as follows:

"There are many barriers for trans people in accessing healthcare in Ireland. There is a lack of accessible medical procedures available and most individuals are referred to Charing Cross in the UK for gender reassignment surgeries. Many trans people enter the private system because there is a lack of services (mental health) or because they've been denied funding for procedures by the HSE. When people do access HSE services, they can experience delays and barriers, such as lack of knowledge and awareness of the specific healthcare issues and prejudice on the part of some healthcare providers, which cause unnecessary hardship.

Overall the lack of coordinated and accessible services and the social stigma associated with trans people prevent individuals from readily seeking the health treatment they need. Furthermore, there is very limited research or documentation of these experiences and barriers which contributes to the difficulties in effectively advocating for change."

Conclusion

The shortcomings in the provision of healthcare for transgender people in Ireland, outlined above, are evidence that Ireland 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.

9 January 2013

Human Rights and Gender Identity – Issue Paper by the Commissioner for Human Rights¹⁰**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.

¹⁰ <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"¹¹

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.¹²

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 identity¹³

"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

¹¹ *van Kück v. Germany* (Application no. 35968/07) - paragraphs 47, 73 and 82.

¹² *L. v. Lithuania* (Application no. 27527/03) - paragraphs 59 and 74

¹³ Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies

“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-reassignment, but also that insurance plans should cover “medically necessary” treatment in general, which gender reassignment surgery may be part of.⁹¹ 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,⁹² 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)¹

“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;”



Transgender Access to Healthcare in Ireland

Compiled by Broden Giambrone and Vanessa Lacey

Health and social care services are significantly underdeveloped in Ireland and the Health Services Executive (HSE) has no policy or framework to specifically address the health and social care needs of the transgender [hereafter trans] community. Trans individuals face significant barriers in accessing healthcare due to inconsistent provision of services, undeveloped treatment pathways and lack of knowledge and training by service providers.

Research

There is very little data and information about the health determinants, health status, risk profiles and health-seeking behaviours of the trans population in Ireland. Therefore we rely on a small number of health related studies conducted on the LGBT community in Ireland that have included trans participants. For instance, the HSE LGBT Health report (2009) documented barriers facing the trans community in accessing healthcare. These included the absence of a designated gender service to coordinate delivery of care, limited provision of psychological support services, limited availability of essential health services – surgeons, post-operative care, endocrinologists, psychiatrists and therapists and prohibitive cost of gender reassignment treatment such as laser hair removal/electrolysis. Mayock et al. (2009) found that there was considerable stress associated with the limited medical and support services available to trans people and documented various barriers including a lack of information on available services and procedural and financial pressures that impacted trans people's sense of health and well-being.¹⁴ Despite their limited scope, these studies provide evidence that trans people face significant health challenges that are further compounded by inequities in access to health and social services.

In one trans specific study, Collin and Sheehan (2004) reviewed current national and international literature. Fifteen trans individuals completed and returned a questionnaire and six individuals participated in in-depth interviews. The report highlighted the difficulties in accessing health services and concluded that:

¹⁴ The study included a questionnaire with 1,110 respondents (46 respondents identified as transgender) and 40 in-depth interviews (4 trans people were interviewed).

- the experience is characterized by stigma and exclusion
- policy is non-existent
- service provision fails to specifically acknowledge and address transgender needs
- treatment in relation to gender reassignment if so desired and associated treatment paths is key to the quality of life of transsexual people [sic].

The lack of health policy for trans people has led to ad hoc arrangements between individual medical practitioners, mainstream health services and individuals seeking care and treatment. Treatment arrangements have been made by local health services on a case-by-case basis. These decisions have not been underpinned by policy or protocols and could be subject to the willingness, sensitivity and knowledge of the health personnel involved. Some geographical areas lack a high level of trans awareness among health professionals, leaving the individual seeking care in a vulnerable position. Some healthcare providers operate only in the private healthcare system and therefore lack of financial resources can be a limiting factor for some individuals seeking care and treatment.

Mental Health & Gender Dysphoria

In Ireland it is commonly accepted practice that individuals must be diagnosed with Gender Identity Disorder (GID) by two mental health professionals before accessing hormone replacement therapy or surgeries. This usually consists of a diagnosis made by a clinical psychologist and/or psychiatrist. There are very limited public psychiatric and psychological supports for trans people and individuals navigate the system without signposts. Healthcare professionals in the general mental health services are trained during their professional training on gender identity but generally do not have current or specialist knowledge in this area. Anecdotal evidence suggests that individuals seeking support and care in relation to gender dysphoria still face unpredictable and sometimes negative responses from practitioners. Many trans individuals access private services which are themselves limited and costly.

There are no specialists in Ireland to support young trans or gender questioning people. There are no services for young people under sixteen and local Child and Adolescent Psychiatry Services (CAPS) have little knowledge of the issues. Anecdotal evidence from parents suggests that CAPS are ill equipped to address the issues involved. In certain cases, after a period of assessment, they may refer the child to the UK's Tavistock Clinic.

Endocrinology and Hormone Replacement Therapy (HRT)

There is one endocrinologist located in Loughlinstown Hospital (Dublin) with expertise in hormone therapy for trans people. This clinic currently serves the needs of the majority of individuals medically transitioning in the Republic of Ireland and has links with mental

health services. The clinic has a long waiting list and serves a limited catchment area meaning that there are significant geographical and administrative barriers.

Anecdotal evidence suggests that some trans people will travel to the UK for hormone replacement therapy to circumvent the endocrinology unit at Loughlinstown. There is also some evidence that service barriers may lead to cases where people access hormones on the black market, usually at great expense.¹⁵ Lack of proper medical supervision exposed those who do access hormones to health risks.

Gender Reassignment Surgery (GRS)

The HSE will cover a variety of gender reassignment surgery procedures¹⁶. The majority of 'bottom' or genital surgeries are referred to Charing Cross Hospital in the UK through the HSE's Treatment Abroad Scheme (E112 Scheme). However, this scheme is often difficult to access and there are documented cases of individuals being denied funding and subsequent legal action.¹⁷ Collins & Sheehan (2004) found that all participants in their study who had undergone gender reassignment surgery had funded it through their own resources.¹⁸ However, there are conflicting reports on this issue.¹⁹

The HSE does not publish data on the number of applications or referrals, however, various media sources recently reported that the HSE received 14 applications for surgeries between 2005-2010 and granted them all.²⁰ However, based on anecdotal information this figure appears low.

Trans men and women wishing to undergo 'top' surgeries in Ireland have had limited success. There is anecdotal evidence suggesting only two surgeons perform these surgeries and both are overburdened with cancer patients and can only perform limited surgeries for trans people each year. Post-surgery care in Ireland is also limited as service providers are ill equipped to address these issues.

Electrolysis/laser hair removal is a critical issue for trans women as there can be severe complications post-surgery if hair removal has not been undertaken in the genital region. This service is not currently available in the public system. The prohibitive cost of such treatment represents a formidable barrier to successful transition.

Conclusion

There are many barriers for trans people in accessing healthcare in Ireland. There is a lack of accessible medical procedures available and most individuals are referred to Charing Cross

¹⁵ Collins & Sheehan, 2004, p.42.

¹⁶ There is no standard definition of gender reassignment surgery or what procedures will be covered.

¹⁷ Collins & Sheehan, 2004, p.40

¹⁸ Collins & Sheehan, 2004, p.40.

¹⁹ In 2004, Collins & Sheehan found that "six health boards stated that transsexual people can apply for funding for such surgery [...]; four reporting that they had received applications (although infrequently) and three boards noting that they had funded surgery under the scheme (there were no reports of refusals in this respect). Two boards stated that they had never received requests for funding." (p.34).

²⁰ Campos, A. HSE pays for 14 sex-change ops abroad. The Herald, September 14 2011.

in the UK for gender reassignment surgeries. Many trans people enter the private system because there is a lack of services (mental health) or because they've been denied funding for procedures by the HSE. When people do access HSE services, they can experience delays and barriers, such as lack of knowledge and awareness of the specific healthcare issues and prejudice on the part of some healthcare providers, which cause unnecessary hardship.

Overall the lack of coordinated and accessible services and the social stigma associated with trans people prevent individuals from readily seeking the health treatment they need. Furthermore, there is very limited research or documentation of these experiences and barriers which contributes to the difficulties in effectively advocating for change.

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