

Recognition of the civil status of transgender people in Norwegian law

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Preface

This report was originally written as a contribution to the XXth International Congress on Comparative Law in Fukuoka, Japan in 2018 under the topic “Conditions of the recognition of the civil status of transsexual and transgender people”. The aim of the report is to give a primarily descriptive account of the legal regulations regarding the recognition of trans people’s civil status in accordance with Norwegian law, as well as an account of the historical development of such regulations.

The report was written in 2017 and the information is therefore based on the current legal regulations at that time. In certain areas the information has been updated. This includes revision of Section 4 regarding Regulation of civil status, in light of the new Population Register Act (folkeregisterloven), which came into effect 1 October 2017.

Oslo, 20 June 2019,

Andrea Vige Grønningsæter and Lars Arnesen

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1 Introduction

In the annual report produced by ILGA-Europe for 2016, Norway was ranked second out of the European countries as regards the human rights situation for lesbian, gay, bisexual, transgender and intersex people (LGBTI).¹ This represented a significant improvement on previous rankings and is largely connected to changes within the Norwegian legal system regarding the recognition of trans people's gender identity.² Over the last couple of years, major changes have occurred in the regulation of trans people's legal position in Norway. From being more or less invisible within domestic law, trans persons' legal rights have, to an increasing degree, been recognised and set down in statutory law.

These developments have resulted in significant changes to the legal definition of gender. Additionally, the ability to change legal gender has progressed from being a purely medical issue to being recognised as a human right, independent of medical assessments or surgery. At the same time, the changes to the Norwegian legal system are both new and, in some areas, ongoing. This report will present the current regulations relating to trans persons and describe how Norwegian law has developed over time in this area.

The report will begin with a descriptive overview of the current legal regulations regarding trans persons in Norway. This will include the rules for registering and changing civil status, including legal gender and personal name (see Sections 4 to 6). Together, these form the basis for the right of trans persons to legal recognition of their gender identity in Norwegian law. This part of the report will present the current anti-discrimination legislation relating to trans persons (see Section 7), and trans persons' access to treatment in the national health care services (see Section 8).

The report will then go on to look at what effects and consequences these regulations have for the legal position of trans persons as a group, and their wider significance for Norwegian law as a whole (see Section 9). Following this, there will be an overview of how these legal regulations have developed over time (see Sections 10). Finally, the report will look at current discussions relating to the position of trans people within the Norwegian legal system (see Section 10).

¹ Rainbow Europe (2016). Accessible: <https://rainbow-europe.org/#8652/0/0>.

² See as example, ILGA Europe, Annual Review of the Human Rights Situation for Lesbian, Gay, Bisexual, Trans and Intersex People in Europe (2016), p. 13. Accessible: https://www.ilga-europe.org/sites/default/files/Attachments/annual_review_2016-for_web.pdf.

2 Terminology

In this report, the term ‘gender identity’ is used in accordance with the definition provided by the Yogyakarta Principles.³ Unlike in English, there is no differentiation between ‘sex’ and ‘gender’ in the Norwegian language. The term ‘sexual identity’ is therefore not used in the report, to avoid connotations of sexual orientation. The term ‘gender’ will be used consistently throughout the report, rather than the term ‘sex’. Where the report refers to biological aspects of the body, terms such as biological, bodily or birth gender will be used.

‘Transgender people’ is used as an umbrella term to refer to people whose gender identity and/or gender expression does not correspond to the gender they were assigned at birth (as opposed to cis-persons). The term ‘transsexual’ is used to refer to people who have been diagnosed with the condition F 64.0 transsexualism in accordance with WHO guidelines.⁴ In this report, the term ‘intersex’ refers to people who, on the basis of medical assessments, are considered to have atypical sex characteristics.

³ The Yogyakarta Principles are a set of principles developed to provide guidance on the application of international human rights in relation to sexual orientation and gender identity. In accordance with the introduction to the Principles, gender identity is understood to refer to “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”. Accessible: http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.

⁴ The definition of transsexualism that is used in Norway corresponds to ICD-10, Chapter V (2016). Accessible: <https://icd.who.int/browse10/2016/en>.

3 Legal framework

Norway is a constitutional monarchy with a parliamentary democratic system of governance. The Constitution, adopted in 1814, is the foundation of the Norwegian legal system. Parliament approved several substantial amendments to the Constitution in 2014, including a new Bill of Rights establishing a number of fundamental human rights relevant to transgender issues, including the right to private life and the right to non-discrimination.⁵ Constitutional review by the Supreme Court has been quite prevalent since the adoption of the Bill of Rights in 2014. However, no legal advances in relation to transgender rights have so far been achieved through constitutional review.

Several important human rights instruments were already in place prior to the adoption of the Bill of Rights in 2014. One of the most important factor for transgender issues was Norway's membership of the Council of Europe. Norway ratified the European Convention on Human Rights of 1950. The Convention became a Norwegian legislative act with priority over all other legal instruments.⁶ The Convention thus has priority second only to the Constitution. Both private individuals and civil society organisations have legal standing and can sue the government for violations of the Convention.

Despite the right to sue, there were no case law relating to transgender issues until after the new Act on Change of Legal Gender came into effect in 2016.⁷ All progress up until the Act was passed, has occurred solely by the legislative and executive branches of government. There are numerous reasons for this, but there is only room here to point to a few. Firstly, there is a well-established administrative complaints system in Norway. Instead of costly court proceedings,

⁵ LOV-1814-05-17 The Constitution of the Kingdom of Norway, Chapter E.

⁶ LOV-1999-05-21-30 The Human Rights Act, provisions 2 and 3.

⁷ See Section 10.1 for more information. After the Act on Change of Legal Gender was passed, however, two lawsuits were brought against the Norwegian government in 2018 regarding the previous regulation of change of legal gender. The first case regarded a transgender person who had been unable to change her legal gender until July 2016 due to not being diagnosed with transsexualism. The second case concerned a transgender person who had felt compelled to undergo irreversible sterilisation in order to be able to change his gender status. In relation to the first case the District Court concluded that rejecting the plaintiff's request to change gender status had constituted discrimination in violation with Norway's anti-discrimination. Apart from this, however, the District Court found that the previous practice had not violated either of the the plaintiffs' rights. Both cases have been appealed to the Court of Appeal. The judgments are not published, but may be accessed by contacting Oslo District Court.

people residing in Norway have the option to file a complaint to the Equality and Anti-Discrimination Ombud. A decision made by the Ombud may be appealed before the Equality and Anti-Discrimination Tribunal.⁸ A supportive decision from either the Ombud or the Tribunal may be helpful for subsequent legal proceedings. Of particular importance was the Ombud's decision in 2014 which concluded that the requirement of having to undergo irreversible sterilisation in order to change legal gender status – at that time – was unlawful and in breach of Norwegian anti-discrimination legislation. The decision was specifically referred to in the preparatory legislative work of the recently adopted change of legal gender legislation, as will be described in further detail in Section 5 below.

Secondly, the Parliament has a multi-party structure which is quite receptive to concerns flagged by minority groups. Parliamentarians are also easily accessible to the general public, which makes it possible for civil society to raise concerns directly with political decision-makers. Lastly, it should be noted that, even though the legal mechanism of judicial review has not played a part in the advancement of transgender issues, the legal instruments of human rights have had a significant argumentative force in the debate driving recent advances in Norway.⁹

Norwegian legislative texts are rather brief and generally require interpretative aid from other sources. In most cases, the most important of these is in most cases the legislative preparatory work. Most major acts of Parliament are supported by lengthy preparatory work of several hundred pages. Expert reports and assessments may also be part of the preparatory work. This was the case for the legislation on transgender rights, where the legislative text is accompanied by preparatory work comprised of a report from an expert panel and documents prepared by the Ministry of Health. This work will frequently be referred to in this report.¹⁰

It is worth noting that Norway is not a member of the European Union, which makes EU Human Rights instruments, and in particular the EU Charter of Fundamental Rights, less important. Nevertheless, Norway is very responsive to EU legislation and case law, in line with its cooperation agreement with the EU, the European Economic Area Agreement.

⁸ LOV-2005-06-10-40 The Anti-Discrimination Ombud Act, provisions 3 and 7.

⁹ See section 10.2 of the report.

¹⁰ Preparatory works include all official documents that are produced as a part of the legislative process. Some of the main preparatory works are Official Norwegian Reports (in Norwegian 'NOUs') which are drawn up by committees and expert groups appointed by the ministry, as well as the government's Propositions to the Parliament (in Norwegian 'Prop. L').

4 Regulation of civil status

In Norway, a person's civil status is regulated by means of a system of compulsory population registration.¹¹ The purpose of this system is to ensure efficient and correct registration of the personal data of people who live in Norway or are connected to Norway in such a way that they are required to have an administrative identification number. The register is regulated by the Population Register Act, which is organised by the Ministry of Finance and administered by the Directorate of Taxes.¹² In accordance with the Population Register Act, the authorities may, among other things, record information about a person's name, date and place of birth, gender, address, citizenship, marital status, and family members.¹³

4.1 Assignment of personal name

In accordance with the Personal Names Act, everyone resident in Norway must have at least one given name and one surname, and must use these names in matters involving public authorities.¹⁴ Once a child is born, the child's parents or guardians are required to report the child's name to the authorities within six months. In the event that the six month deadline has passed without the parents give notice of a name, the child will be given the mother's surname.¹⁵ A person's personal name may be changed in accordance with the rules laid down by the Personal Names Act.¹⁶

4.2 Assignment of legal gender

Upon first-time registration in the National Population Register, everyone born in Norway, or who lives in the country, is issued a mandatory national identification number (officially

¹¹ An optional population registration act was introduced in Norway in 1905. This act permitted the local authorities to establish population registers on a voluntary basis. After the Second World War this act was superseded by the 1946 Population Register Act, which made population registration compulsory. The current National Population Register Act came into effect in 2016.

¹² LOV-2016-12-09-88, The Population Register Act, provision 1-3.

¹³ FOR-2017-07-14-1201, Regulations regarding the Population Register Act, provision 3-1-1.

¹⁴ LOV-2002-06-07-19, the Personal Names Act, provision 1.

¹⁵ The Personal Names Act, provision 2.

¹⁶ The Personal Names Act, provision 1 and 10.

known as their ‘birth number’).¹⁷ The national identification number consists of 11 digits, of which the first six correspond to the person’s date of birth (in the order ‘dd-mm-yy’). The final five digits comprise three individual digits and two control digits. A person’s legal gender is indicated by the ninth digit in the national identification number (the last individual digit).¹⁸ If the person is registered as a woman, this digit is an even number; if the person is registered as a man, an odd number is used.¹⁹

There are no provisions in the Population Register Act, or in other legislation, on how or when the legal gender of a child should be reported to the registration authorities. Legal gender is usually registered either by medical staff or by the parents themselves. In the case of foreign-born residents, legal gender is registered based on identity documents presented to the registration authorities. The Population Register Act does not define what legal gender should be based on. There is thus no guidance as to whether the registration should be based on physical criteria, sexual organs or on gender identity.

A consequence of the Norwegian system of registering civil status is that everyone resident in Norway must be categorised within a binary gender model as either male or female, typically at birth. . Furthermore, information about a person’s legal gender is revealed in all situations where the national identification number is used to identify the individual in question. A person’s legal gender is also made apparent in identification papers, such as their passport or proof of status as an asylum seeker or refugee.²⁰ While there is no general obligation to provide proof of identity in Norway, a person is still required to identify themselves to the authorities or to private actors in various situations. The national identification number is also used by several public and private institutions.²¹ Consequently, a lack of correspondence between a person’s gender identity and/or gender expression and their legally assigned gender may create significant challenges, as will be discussed in more detail in Section 9 below.

¹⁷ The Population Register Act, provision 2-2.

¹⁸ Regulations regarding the Population Register Act, provision 2-2-1.

¹⁹ Ibid.

²⁰ Regulations regarding the National Population Register provisions 2-6 and 2-7.

²¹ Anniken Sørli, *Tvungen identitet – en vurdering av norsk forvaltningspraksis’ krav om irreversible sterilisering ved endring av juridisk kjønn* [Forced identity – an assessment of the requirement in Norwegian administrative practice for irreversible sterilization when changing legal gender], *Journal of family law, inheritance law and child welfare law issues*, vol. 4 2014, p. 273.

5 Change of legal gender

This part of the report will give an overview of the current Norwegian regulations regarding the right of trans persons to change their legal gender. Norwegian law sets out the following rules for changing gender status:

- A person may change their legal gender on the basis of their gender identity - no medical diagnosis or treatment is needed (self-declaration model).
- There is no limit to how many times a person may change their legal gender.

Furthermore, there are certain age and consent limitations for particular groups. The two bullet points will be explained in further detail in section 5.1 below, while the additional requirements some groups are subject to are covered in section 5.2.

5.1 Procedure for changing gender status

Until recently the process of changing legal gender status was not regulated by formal legislation, but relied upon administrative practice based on medical assessments: one of the main requirements for changing legal gender was the need for the person to have been diagnosed with the condition F 64.0 transsexualism and to have undergone ‘full gender reassignment treatment’.²² On 1 July 2016, however, the Changing Legal Gender Act came into force, which substantially modifies the requirements for changing gender status.

Under this Act, all persons who are resident in Norway, and who identify as the opposite gender from the one they are registered as in the National Population Register, are entitled to have their legal gender changed.²³ The system for changing legal gender in Norway follows a self-declaration model. This means that the central requirement for changing one’s gender status under Norwegian law is the individual’s own personal experience of their gender identity. There is no requirement that the applicant must have been diagnosed with transsexualism or has undergone medical treatment such as gender-reassignment surgery or hormone treatment. As a general rule, medical considerations regarding the applicant’s gender are thus not relevant to the process of changing one’s gender status in Norway.²⁴

²² Ibid, p. 279.

²³ LOV-2016-06-17-46, The Changing Legal Gender Act, provision 2.

²⁴ The Changing Legal Gender Act does not require medical assessments as a condition for changing gender status, with the exception of children under the age of six. See point 5.1.1.

Applicants are entitled to change their legal gender regardless of their civil status and are not required to provide witnesses or other documentation to substantiate their gender identity. However, as a part of the application process, the applicant must submit a written declaration stating that they identify as the opposite gender to the one they have been assigned in the National Population Register.

In order to change their gender status, the person in question must first contact the Directorate of Taxes, declaring that they want to change their legal gender. Information about the effects and consequences of changing legal gender will then be sent to the applicant's registered home address. On receiving this information the applicant must send a signed return slip, confirming that the application to change gender status still stands, and declaring that they identify as the opposite gender to the one they are registered as in the National Population Register.²⁵

The purpose of requiring the applicant to confirm that they have received information about the effects of changing gender status before an application may be granted, is to make sure that the request for the change is based on an informed decision and that the applicant is aware of the practical and legal consequences that this change entails. By sending the information to the home address of the applicant the government can also ensure that the initial request to change gender status, which is delivered electronically, has been sent by the right person. Furthermore, the requirement for the applicant to confirm that they have received the information before their application can be granted means that the procedure will take some time to complete. This may in turn prevent impulsive applications from being submitted.²⁶

The Directorate of Taxes is responsible for making sure that the formal aspects of the application are fulfilled, for example that the requisite form has been signed and that the age requirement is satisfied.²⁷ Applications are processed by the local tax office (acting as the Population Register Authority).²⁸ The Directorate of Taxes is also responsible for giving applicants guidance on the application procedure, the requirements that must be met, and the consequences of

²⁵ Ibid, page 36.

²⁶ Ibid, page 31.

²⁷ See point 5.2.1.

²⁸ Changing Legal Gender Act, provision 5.

changing their gender status.²⁹ If an application is rejected, the decision may be appealed in accordance with the rules set forth in the Public Administration Act. Complaints are considered by the County Governor of Oslo and Viken, on behalf of all the counties in Norway.³⁰ The complaints body is based in the capital, Oslo, in order to ensure that complaints are handled by specialists in the field.

There is no limit on how many times a person may change their gender status. During the preparation of the Act, it was considered whether such a limit should be introduced. It was also considered whether changing back to the previous gender status should only be allowed after a set waiting period. In the preparatory works of the Act, the Ministry of Health and Care Services (hereafter, the Ministry of Health) argued that this could have unreasonable consequences for individual applicants, and that such limits should therefore not be introduced unless repeated changes of legal gender proved to be a substantial problem.³¹

5.2 Age limits and consent requirements for particular groups

The Changing Legal Gender Act limits the right to change their gender status to persons who are resident in Norway.³² Both Norwegian citizens and foreign nationals are therefore entitled to change their legal gender if they fulfil the requirements for being considered residents. As a general rule, someone is considered to be a resident if they have legally resided in a Norwegian municipality for a period of at least six months.³³ However, the Ministry of Health has laid down regulations pursuant to the Act that extend the right to change legal gender to include Norwegian citizens living outside Norway. These regulations came into effect on 1 January 2017.³⁴

²⁹ Prop. L (2015-2016) page 30.

³⁰ The Changing Legal Gender Act, provision 5.

³¹ Prop. L (2015-2016) page 31.

³² The Changing Legal Gender Act provision 2.

³³ See Regulations regarding the Population Register Act chapter 4.

³⁴ FOR-2016-12-12-1565 Regulations regarding Changing Legal Gender for Norwegian Citizens Residing Abroad.

5.2.1 Children

Where the applicant to change legal gender is a child, certain additional requirements apply. These conditions are set out in the fourth provision of the Act, which sets the requirements for changing gender status according to the age of the children, who are divided into:

- Children above the age of sixteen,
- Children between six and sixteen years old,
- Children under the age of six.

Children in the first category, who are sixteen years old or older, are entitled to submit an application to change their legal gender on their own initiative, without parental consent.³⁵ Sixteen is the age when children in Norway are considered to have legal competence to consent to health treatment.³⁶ There is a discussion in the preparatory works of the Act as to whether the age limit should be set higher, to match the legal age of maturity of 18. However, the Ministry of Health pointed to the fact that a person's gender identity is formed at an early age, and that children with a gender identity that does not correspond to the gender they were assigned at birth might find it difficult and painful not to have their gender identity recognised legally. It was also stated that children who are sixteen or older are considered to have reached sufficient maturity to consider the consequences of changing their legal gender.³⁷

As regards the second category, the fourth provision of the Act states that children between six and sixteen years old must make their application with the person or persons who have parental responsibility for them. If the parents of the child have joint parental responsibility, but the application to change legal gender is only supported by one of the parents, a change in gender status may be granted if it is deemed to be in the best interests of the child.³⁸ Children in this age group are thus required to obtain the consent of at least one of their parents. If the parents disagree about whether the child should be able to change gender status, the decision is made by the County Governor of Oslo and Viken.³⁹ If the application is rejected, the decision may be appealed to the National Health Ombud. If neither of the parents supports the child's wish to

³⁵ The Changing Legal Gender Act, provision 4 first paragraph.

³⁶ LOV-1999-07-02-63, the Patients' and Users' Rights Act, provision 4-3.

³⁷ Prop. 74 L (2015-2016), p. 27.

³⁸ The Changing Legal Gender Act, provision 4, second paragraph.

³⁹ Ibid, provision 5.

change their gender status, the child must wait until they are 16 before an application can be granted.

Finally, where the child is under the age of six, a change in legal gender can only be made if the child is born with an atypical gender development (meaning that the child must have been diagnosed with an intersex condition).⁴⁰ In these cases, it is the person or persons who have the parental responsibility for the child who submit(s) the application to change gender status on behalf of the child. However, children who are old enough, or mature enough, to form their own opinion should be heard before a decision is made. For an application to be granted, documentation of the child's medical condition must be provided by health professionals. This means that, for this age group, the general rule that an applicant does not need to support their gender identity by means of medical assessments does not apply. During the hearing of the proposal for the Changing Legal Gender Act, several actors criticised this, pointing to the fact that the Act otherwise aims to remove the link between legal regulation of gender status and medical assessment. However, according to the preparatory works of the Act, the requirement for atypical gender development to be documented is intended to protect the youngest children, in view of the fact that the general rule should be that parents or others with parental responsibility should not be able to change the child's legal gender without the consent of the child. In the view of the Ministry of Health, children under the age of six are not sufficiently mature to understand the consequences of changing their legal gender, and the possibility of changing their gender status should therefore be limited to children with atypical gender development.⁴¹

5.2.2 Persons under guardianship

According to the third provision of the Changing Legal Gender Act, adults who have been placed under guardianship are entitled to apply to change their legal gender on their own initiative. It is stated in the preparatory works of the Changing Legal Gender Act that changing gender status is an area where it is especially important to protect the individual's right to self-determination, since it relates to a person's emotional connection to a specific gender. Consideration was also given to whether a person under guardianship should be required to obtain the consent of their guardian before an application to change their gender status could be granted.

⁴⁰ Ibid, provision 4, third paragraph.

⁴¹ Prop. 74. L (2015-2016) p. 28.

Such consent is required, for example, before the person under guardianship can get married.⁴² However, unlike the consequences of getting married, those of changing legal gender were not considered to be of a nature to make it necessary to protect persons under guardianship by requiring the consent of their guardian.⁴³

⁴² LOV-1991-07-04-07, the Marriage Act, provision 2.

⁴³ Prop. L. 74 (2015-2016), p. 28-29.

6 Change of personal name

The right of trans persons to change their name is regulated by the Personal Names Act, which gives general rules for the requirements and procedure for changing personal names. In accordance with the current regulations, the following general rules apply:

- A person's name must correspond to their gender status (meaning that a person who is registered as a legal woman may not use a 'boys' name' and vice versa). Nevertheless, transgender people are not required to change their legal gender in order to change their name to one that matches their gender identity.
- The right to change one's personal name is limited to once every ten years. There can be exceptions to the ten years limit, for example where there are special circumstances that justify making a change sooner. The change of legal gender may be such an exception.

The first bullet point will be explained in further detail in section 6.1 below, while the last bullet point is dealt with in section 6.2, which covers limits on changing personal names.

6.1 Procedure for changing personal name

Generally speaking, Norwegian law is quite liberal as regards what names may be approved as personal names. In accordance with the main rule in the eighth provision of the Personal Names Act, a given name should be approved unless it is registered as being in use as a surname in the National Population Register. Even so, the name may still be used as a given name if it was originally a given name or has traditionally been used as one in Norway or abroad, or if the name comes from a culture that does not differentiate between given names and surnames.

In addition to this, however, the tenth provision of the Personal Names Act lays down that a notification to take, change or remove a name should not be approved if the bearer's personal name could become a significant disadvantage to them, or if there are other good reasons for rejecting the name. This provision gives the authorities the right to make a discretionary assessment of whether a name should be disallowed in the best interests of the person who would have the name. This could, for example, be the case if parents wanted to give their child a name that could be considered offensive or inappropriate in Norwegian society.

The Ministry of Justice and Public Security has issued guidelines on the interpretation of the Personal Names Act.⁴⁴ According to these guidelines, the wording in the tenth provision of the Act indicates that there should be a liberal approach to what names should be accepted, and that an application for a personal name should only be rejected in rare circumstances.⁴⁵ At the same time, the guidelines stipulate that as a general rule, ‘girls’ names’ may not be used for boys’ and vice versa. When deciding whether a name is a boys’ name or a girls’ name, the decisive factor is what gender the name has traditionally been used for (the original use of the name). If the name in question has traditionally been used for both boys and girls, the name should be accepted for both genders. If the original use of the name cannot be documented, the name may still be used for both men and women, provided that there is a sufficiently well-established tradition of doing so. This means that the name must have been used quite often and for quite a long time for a certain gender.⁴⁶

An exception to the general rule regarding gendered names is made where the person in question has started a ‘process of changing gender’, including hormone treatment, even if this process is not yet complete. The same applies to persons with a ‘transgendered identity’, regardless of whether they have begun a process of changing gender or not.⁴⁷ As a consequence, people who identify as transgender may change their personal name to a name that does not correspond to their legal gender even if they do not plan to change their gender status or undergo medical treatment in the future. This could, for example, apply to people who identify as both male and female, or as non-binary, people who do not wish to undergo surgery or other types of medical treatment, or trans people who, for various reasons, do not feel the need to change their legal gender to match their gender identity.⁴⁸

⁴⁴ Rundskriv G-20/2002 [Circular No. 20/2002]

⁴⁵ Ibid, point 2.7.3.1.

⁴⁶ To satisfy the requirement on the extent of use, the use of the name for the gender in question must be more than what can be considered ‘insignificant’. As regards the history of the use of the name, it must be possible to trace its use for more than one generation.

⁴⁷ G-20/2002, point 2.7.3.1.

⁴⁸ The first known case in Norway of someone changing their personal name to a name that did not correspond to their legal gender occurred in 2000, when the physician and sexologist Esben Esther Pirelli Benestad was allowed to include ‘Esther Pirelli’ in Benestad’s previous name (‘Esben Benestad’). Both a female and a male name were thus included in the personal name.

People who want to change their personal name must send a notification to a local tax office (which serves as the Population Register Authority). The tax office decides whether the notification should be accepted.⁴⁹ Notification may be given electronically or on paper, using the form issued by the Directorate of Taxes. If a notification of change of personal name is rejected, the decision may be appealed in accordance with the provisions of the Public Administration Act. Appeals are decided by the County Governor of the county where the applicant is resident.⁵⁰

If a notification about taking, changing or removing a name involves a child under the age of 16, it must either be submitted by the person or persons with parental responsibility for the child, or these persons must have given their consent. If the child in question is 12 or over, the child too must have consented to the change. If consent has not been given (either by those with parental responsibility or by a child over the age of 12), notification of the change of personal name can only be accepted if there are special reasons for doing so.⁵¹

The age from which a child may submit notification of a change of their personal name without the consent of their parents (or others with parental responsibility) was lowered from 18 to 16 in 2016, when the Changing Legal Gender Act came into force. This was done to ensure that children who are allowed to change their legal gender without parental consent may also change their personal name to correspond with their new gender status.⁵² At the same time, a second paragraph was added to provision 12 of the Personal Names Act, which stated that, if the notification of a change of personal name involves a child who has changed their gender status in accordance with the fourth provision of the Changing Legal Gender Act (i.e. where the child is between 12 and 16 years old), only one of the parents needs to give their consent to the child's personal name being changed. This amendment was made to ensure that the parent who did not support the change in gender status could not block the child from changing their personal name to match their new legal gender.⁵³

6.2 Limits on how often a person may change their personal name

⁴⁹ The Personal Names Act, provision 11.

⁵⁰ Ibid.

⁵¹ Ibid, provision 12.

⁵² Prop. L 74 (2015-2016), page 33.

⁵³ Ibid.

Whereas the Changing Legal Gender Act sets no limits on how often a person can change their gender status, there is a limit on how often a person can change their personal name. As a general rule, people over the age of 16 cannot take, change or remove their given name or surname more than once every ten years.⁵⁴ The Act allows certain exceptions to this rule, however for example if

- a person wishes to take the surname of their spouse or of a partner that they have lived with for over two years or have had a child with,
- someone wants to change their personal name back to a given name or a surname that they had previously had, or to take the surname of their step parents, foster parents or adoptive parents, or
- change or remove their name in some other circumstances that justify allowing this.⁵⁵

The last category is intended to prevent situations where it would be unreasonable not to allow a person to make changes to their personal name and requires discretionary assessment by the authorities.

⁵⁴ The Personal Names Act, provision 10.

⁵⁵ The Personal Names Act, provision 10(2) no. 1-5.

7 Anti-discrimination legislation

Trans people have been included in Norwegian anti-discrimination legislation since 2014. In June 2017 a general Anti-Discrimination Act was passed, which merged the previous four anti-discrimination acts into one. The new Act came into force on 1 January 2018. The main points of the new Act may be summed up as follows:

- The Act prohibits discrimination on the basis of 12 specified grounds, including gender identity and gender expression.
- The categories ‘gender identity’ and ‘gender expression’ are particularly intended to protect trans persons and intersex persons against discrimination.
- The Act prohibits direct and indirect discrimination and applies to all areas of society.

The general rules regarding the prohibition against discrimination will be presented in section 7.1, while the position of trans persons and intersex persons is presented in section 7.2.

7.1 The Equality and Anti-Discrimination Act

The purpose of the Act is to promote equality and prohibit discrimination on the basis of 12 protected grounds. These protected grounds are gender, pregnancy, parental leave in relation to birth or adoption, caregiving responsibilities for family members, ethnicity, religion, life stance, disability, sexual orientation, *gender identity*, *gender expression*, age and other significant personal characteristics. The last category, “other”, is meant to ensure that the prohibition against discriminations can be developed in future to include characteristics other than those that are currently explicitly mentioned.⁵⁶ The first provision of the Act also states that the Act particularly aims to improve the position of women and minorities. Additionally, the Act is designed to help to remove barriers in society arising from disability and to prevent further such barriers from being set up.

The Act defines ‘equality’ as including a right for all people to be respected, irrespective of biological, social or cultural differences. It is also stated that equality means there should be equal opportunities and rights, for example, by means of equal access to education, employment and income, as well as access to housing, goods and services. Finally, the first provision of the

⁵⁶ Innst. 389 L (2016-2017), Suggestions from the minority, suggestion 5. This suggestion was later passed by Parliament during the vote on the Act.

Act also states that equality is dependent on accessibility and accommodation.⁵⁷ The right to accessibility and accommodation relates to how society is organised and structured, for example, whether someone is able to participate in various arenas, exercise legal rights and make use of private and public services.⁵⁸ While the provision does not in itself create any direct rights or duties for the authorities or individuals, the purpose of the Act is of importance when interpreting the prohibition against discriminating on the grounds of gender identity or gender expression.

The Act applies to all sectors of society.⁵⁹ During the legislative process, it was proposed that family life and other purely personal relationships should be excluded from the scope of the Act. The Gender Equality Act, which preceded the current Equality Anti-Discrimination Act contained a provision that included family life and other purely personal relationships in its scope, while these areas were not covered by other anti-discrimination acts. However, the prohibition against discrimination in family life and personal relationships in the now repealed Gender Equality Act could not be enforced by the courts.⁶⁰ During the hearing of the proposal for the new Equality and Anti-Discrimination Act, several NGOs and institutions argued that it was important to include family life and other personal relationships in the scope of the act, despite the fact that it could not be enforced. It was claimed, among other things, that excluding these areas would send negative signals, and that the prohibition had important symbolic and historical value.⁶¹

The general rule regarding the prohibition against discrimination on the basis of a protected ground, is formulated in the sixth provision of the Act. The prohibition includes discrimination on the grounds of an ‘actual, assumed, former or future’ protected characteristic. It also includes discrimination on the grounds of a protected characteristic of another person with whom the person suffering discrimination has a connection. For example, the prohibition includes discrimination against someone because of a protected characteristic of their child, spouse or sibling.

⁵⁷ Prop. 81 L (2016-2017), p. 53.

⁵⁸ Prop. 88 L (2012-2013) p. 75-76.

⁵⁹ The Equality and Anti-Discrimination Act, provision 2.

⁶⁰ LOV-2013-06-21-59 the Gender Equality Act, provision 26, second paragraph.

⁶¹ Prop. 81 L (2016-2017) p. 65-66.

Discrimination is defined as ‘direct or indirect differential treatment’ that is not lawful pursuant to provisions seven or eight of the Act. Direct discrimination refers to acts or omissions that have the purpose or effect of treating someone worse than others in the same situation, and where this is due to a protected ground. Indirect discrimination relates to any apparently neutral provision, condition, act or omission that results in a person being put in a worse position than others, and where this occurs due to the person’s sexual orientation, gender identity or gender expression. This means that it is not necessary to provide evidence that the relevant act or omission was meant to negatively affect an individual because of their gender identity or gender expression.

Differential treatment is not considered to violate the prohibition on discrimination where it has an objective purpose which it is necessary to achieve, and where this purpose and the impact of the differential treatment on the person whose position will be negatively affected are reasonably proportionate, in view of the intended result.⁶² Positive preferential treatment based on a protected characteristic is allowed if the preferential treatment is likely to promote the purpose of the Act, if the impact on the person whose position will be negatively affected is reasonably proportionate, in view of the intended result, and if the preferential treatment ceases once its purpose has been achieved.⁶³

In addition to the general prohibition against discrimination, the Act contains provisions that prohibit harassment because of a protected characteristic, as well as a prohibition against retaliation, or instructions or participation in discrimination or harassment. The Act also obligates authorities, employer and employee organisations, public employers and private employers who regularly employ more than 50 people to make active, targeted and systematic efforts to promote the purpose of the Act.

7.2 Protection for trans persons and intersex persons

Trans persons are protected against discrimination through the categories ‘gender identity’ and ‘gender expression’. In accordance with the preparatory works of the Equality and Anti-Discrimination Act, these terms refer to a person’s own experience of their gender. It is also stated that a person’s gender identity may or may not correspond with their biological gender (thereby

⁶² The Equality and Anti-Discrimination Act, provision 9.

⁶³ Ibid, provision 11.

including both trans persons and cis-persons). Gender expression is defined as the way a person expresses themselves, consciously or unconsciously, through their behaviour, clothes, physical appearance, language etc. In the preparatory works it is also emphasised that the categories gender identity and gender expression differ from the other grounds for discrimination because, to a great extent, they are based on a person's own subjective experience of themselves.⁶⁴

In principle, the Equality and Anti-Discrimination Act gives both cis persons and trans persons protection against discrimination on the grounds of their gender identity or gender expression. Despite this, the preparatory works specify that the Act is particularly meant to provide transgender people with protection against discrimination.⁶⁵ This also follows from the first provision of the Act, which declares that the Act particularly aims to improve the position of minority groups. As regards who is included in the term 'trans persons', the preparatory works of the Act state that there is no clear definition of trans persons, and that the term is used as a broad umbrella term. The preparatory works mention as examples people who have undergone gender reassignment treatment or who are currently receiving such treatment, as well as people who express their gender through a particular style of clothing, body language or makeup. These examples are not, however, meant to be an exhaustive list of the characteristics covered by the terms 'gender identity' and 'gender expression'. Both binary and non-binary persons are included in the categories, and the protected group is not limited to people who have been given a medical diagnosis.⁶⁶

In addition to trans persons, the categories 'gender identity' and 'gender expression' are also meant to include intersex persons. The preparatory works state that the term 'intersex persons' is used as an umbrella term that aims to include people who are born with various medical conditions resulting in 'unclear' sex characteristics. It is also stated that this will often mean that intersex children cannot be described as male or female at birth. In accordance with the preparatory works, as infants, intersex children in Norway are assigned a legal gender – either

⁶⁴ Prop. 81 L (2016-2017) p. 85-86.

⁶⁵ Ibid, p. 56.

⁶⁶ The section of the preparatory works of the Equality and Anti-Discrimination Act regarding the definition of the term 'trans persons' is quite brief. However, reference is made to the discussion in the preparatory works of the previous Sexual Orientation, Gender Identity and Gender Expression Anti-Discrimination Act, which makes the definition given in these documents relevant when considering who is meant to be included in the term 'trans person' in the context of the current legislation.

man or woman.⁶⁷ Although intersex persons are covered by the protected grounds ‘gender identity’ and ‘gender expression’, the preparatory works of the previous anti-discrimination legislation noted that intersex persons in general do not face challenges due to their gender identity or gender expression, but due to their biological gender.⁶⁸ Despite this, neither the previous regulations nor the current Equality and Anti-Discrimination Act explicitly mention sex characteristics as a protected ground against discrimination.

Instead, intersex persons are considered to be covered both by the protected grounds ‘gender identity’ and ‘gender expression’ and the category ‘gender’, depending on what the reason for discrimination is.

⁶⁷ Prop. 81 L (2016-2017) p. 86.

⁶⁸ Prop. 88 L (2012-2013) p. 111.

8 Access to treatment and health care services

In Norwegian law, the right of trans persons to medical treatment is regulated by general health care legislation. In current practice, the right to health care services for trans persons may be summed up as follows:

- Only persons who have been diagnosed with F 64.0 transsexualism have access to treatment in the public specialist health care services.
- The treatment is organised through the National Treatment Unit for Transsexualism.
- Through this unit patients may be offered health care services such as hormone treatment and surgery.
- The minimum age for receiving hormone treatment is, as a general rule 16. The minimum age for having surgery is 18.

The report will present an overview of some of the main principles in the Norwegian health care legislation in section 8.1. Further details of the health care services that are offered to trans persons will be given in section 8.2. The treatment that is offered to intersex persons will be presented in section 8.2.3.

8.1 Right to treatment and health care services

The Norwegian health care system is mainly public and is based on a principle of universal coverage. This means that everyone legally residing in Norway is entitled to treatment provided by the public health care services.

There are no acts or provisions in Norwegian law that specifically regulate trans persons' rights to health care services and medical treatment. Instead, the right to treatment is regulated by general health care legislation. In accordance with the Patients' and Users' Rights Act, a patient is entitled to immediate necessary health care from the municipal or specialist health care services.⁶⁹ What constitutes 'necessary health care', and the content and extent of the services,

⁶⁹ The Patients' and Users' Rights Act, provision 2.1.a and 2.1.b

depends on the assessments of health care professionals in the light of the needs of the individual patient. The term ‘necessary health care’ is a legal standard, meaning that the content of the term may develop and change over time.⁷⁰

Provision 2-2 of the Specialist Health Care Services Act states that the health care services provided to patients must be adequate. This means that the treatment must be of a certain quality and based on professional assessments of the patient’s needs. If the health care services are not adequate, the health professionals in charge of the treatment may be held accountable.⁷¹ Another central principle of Norwegian health care legislation is the patient’s right to self-determination. As a general rule, medical treatment can only be given if the patient consents to it.⁷² In order for consent to be valid, the patient must have received sufficient information about their health condition and the nature and consequences of the treatment that is offered. As a rule, children over the age of 16 are entitled to make their own decisions regarding whether or not they wish to receive health care services.⁷³ However, the minimum age may be lowered for certain health care decisions, and younger children are also entitled to have their say, depending on their age and maturity, when decisions about them are being made.⁷⁴

The Norwegian health care system is divided into primary health care services that are provided at a local level by general physicians and other health professionals, and specialist health care services that are organised on a regional or national level.⁷⁵ To ensure that people living in Norway have access to the primary health care services they need, all residents are entitled to be assigned a general practitioner.⁷⁶ With the exception of situations where health care services must be given immediately, a patient must obtain a referral from their general practitioner or another health professional who has the authority to make referrals, before they can receive treatment from the specialist health care services.

⁷⁰ Prop. 91 L (2010-2011), p. 161.

⁷¹ LOV-1999-07-02-64 The Health Personnel Act, provision 4.

⁷² The Patients’ and Users’ Act, provision 4-1.

⁷³ Ibid, provision 4-3.

⁷⁴ Ibid, provision 4-4.

⁷⁵ Primary health care services are regulated by the Municipal Health Services Act (LOV-2011-06-24-30), while specialist services are regulated by the Specialist Health Care Services Act (LOV-1999-07-02-64).

⁷⁶ Regulations on System of Assigned General Physicians [Forskrift om fastlegeordning i kommunene].

8.2 Treatment offered to trans persons

Health care services for people who experience gender dysphoria may be considered to constitute the ‘necessary health care treatment’ that a patient is entitled to receive in accordance with current medical practice in Norway. However, only people who have been given the diagnosis F 64.0 transsexualism have access to treatment from the public specialist health care services. Children may also be assessed and diagnosed with the condition F 64.2 Gender Identity Disorder in Childhood.⁷⁷

The treatment that is available is given by the National Treatment Unit for Transsexualism (NTUT), which is located at the University Hospital in Oslo. In 2001 the University Hospital was given the responsibility for managing the nationwide treatment offered to transsexuals (people diagnosed with F 64.0), and in 2010 the unit was turned into a national treatment service. The NTUT is responsible for providing highly specialised health services, including the psychiatric, endocrinological and surgical part of the treatment. If a patient who has been referred to the specialist health care services in connection with gender dysphoria has not been given the diagnosis F 64.0, they are not entitled to treatment in the NTUT.⁷⁸

In order to be accepted for assessment and, potentially, treatment by the NTUT, the patient must first obtain a referral from a psychologist or psychiatrist in a public psychiatric institution for children or adults. The patient will normally be given a preliminary diagnosis by the referring health professional. This diagnosis will then be considered by the NTUT in their own assessment of the patient. If the patient is rejected, they will be referred back to the general specialist health care services. A report in 2012 stated that no specific health care services have been put in place for this group.⁷⁹ However, in some cases, patients with the diagnosis F 64.8 Other Gender Identity Disorder or F 64.9 Unspecified Gender Identity Disorder are given hormone treatment, despite not fulfilling the diagnostic criteria required to be accepted for full treatment by the NTUT.⁸⁰

⁷⁷ The Directorate of Health and Care Services, 'Retten til rett kjønn' ['The Right to Right Gender'] 2015, p. 39.

⁷⁸ Ibid, page 39-40.

⁷⁹ Ministry of Health and Care Services, Review of the medical treatment offered to transsexuals and trans persons [Gjennomgang av behandlingstilbudet til transseksuelle og transpersoner], 2012, page 13

⁸⁰ Directorate of Health (n 79), page 40.

8.2.1 Health care services for persons over the age of 18

Patients who are referred to the NTUT go through a psychiatric assessment which includes clinical conversations, questionnaires and structured interviews. The questionnaires and interviews collect information about a wide variety of topics, such as biological data about the patient, the intensity of the body dysphoria that the patient is experiencing, their gender specific behaviour, physical health and body image. The psychologist/psychiatrist in charge of the case fills out a number of forms regarding the patient's psychological health, problems relating to substance abuse, whether the physical appearance of the patient is feminine or masculine and to what degree the patient fulfils diagnostic criteria. A diagnosis is usually made around six months into the course of treatment.⁸¹

What treatment the patient is given is dependent on an individual assessment of their needs. However, in order to be offered hormone or surgical treatment, it is a requirement that the patient must first have undergone so-called 'real life experience'. Real life experience means living with the gender expression that corresponds to the patient's gender identity. The minimum period for real life experience is 12 months. In many cases the patient is already living with the desired gender expression before they are referred to the NTUT. The unit offers both feminising and masculinising hormone treatment. In some cases, male-to-female patients may be unwilling to undergo real life experience due to their physical appearance (for example, because of facial hair). In these cases, hormone treatment with an antiandrogen may be given before a final diagnosis is made.⁸²

Assessment of whether patients should be considered for gender reassignment surgery occurs 1-3 years after hormone treatment has been started. For male-to-female patients, referral to breast augmentation does not normally occur until the patient has completed two years of hormone treatment. This is because the breast development resulting from the hormone treatment is often considered to be adequate by many patients. The services offered at the University Hospital are limited to breast and genitalia surgery, including the removal of testicles and the construction of neo-vaginas and neo-penises. Some of the patients at the NTUT choose not to have all the surgical treatment that they are offered, and some do not wish for any surgical treatment. In addition to these health care services, patients in the NTUT may also have voice

⁸¹ Ibid, page 43-45.

⁸² Ibid, page 45.

lessons from a speech therapist, hair removal and various aids such as breast or penis prostheses, wigs or compression garments.⁸³ Male-to-female patients may also choose to store sex cells.⁸⁴ This option is not available to female-to-male patients.

All patients who have received treatment at the NTUT are offered regular follow-ups by psychiatrists, endocrinologists and plastic surgeons. Psychological follow-up interviews are offered every six months until the final operation, and three structured follow-up talks are also available every year, for five years after the end of the treatment. Once the patients are transferred back to the primary health care services, male-to-female patients are monitored in the same way as other women who are having oestrogen therapy, while female-to-male patients are monitored in the same way as men with a testosterone deficiency.⁸⁵

8.2.2 Health care services for children

Where a child is suspected of having the diagnosis F 64.2 Gender Identity Disorder in Childhood, their general practitioner is responsible for referring the child to a local children's and adolescents' polyclinic. Here the child will undergo a general child and adolescent psychiatric evaluation. If this evaluation results in F 64.2 as a preliminary diagnosis, the child will be referred to the NTUT. There is no minimum age for referral to the unit. If the child has not yet reached school age, the parents may be offered a conversation with specialists at the NTUT without the child being present, to map the child's development and receive information about how they may offer support with the child's gender expression.⁸⁶

Once a child is accepted as a patient at the NTUT, there is an admission interview to trace the child's developmental history in relation to gender identity, gender roles and sexual orientation. The aim of the admission interview is to begin to gauge whether the child's symptoms are consistent with the diagnosis F 64.2. At the same time, an assessment of potential psychological conditions or trauma is also made. On the basis of this the child's future needs for treatment or follow-up are considered. Like adult patients, children who are assessed at the NTUT must fill out questionnaires regarding their gender identity and gender expression, as well as answering

⁸³ Ibid, page 46-48.

⁸⁴ LOV-2003-12-05-100: The Biotechnology Act, provision 2-17.

⁸⁵ The Directorate of Health (n 79), p. 48-49.

⁸⁶ Ibid, page 49.

questions about behavioural and emotional problems. Parents and teachers also contribute to the assessment by providing information about the child's development.⁸⁷

Before the child reaches puberty the frequency of follow-ups at the NTUT varies from case to case; they may be every three, six or twelve months, as needed. At around 12 years of age the child will automatically be referred for endocrinological and psychiatric assessment. On the basis of these evaluations, the health professionals at the NTUT consider whether puberty-delaying treatment should be recommended. If it is decided that it should be, the child and parents are given information about the effects that delaying puberty might have and are told that the treatment is reversible. The child and parents are also given time to consider whether the patient wishes to receive the treatment or not. Over the last couple of years puberty-delaying treatment has only been given in a few cases (three patients received such treatment in 2014, and only one patient did so in 2013).⁸⁸

Hormone therapy is usually the first treatment offered to children, once the patient has turned 16. As a general rule, patients who are receiving puberty-delaying treatment will continue with it, while also receiving cross-sex hormones. In rare cases, on the basis of psychiatric assessment of the patient's needs, hormone treatment may be offered at an earlier age than 16. Surgical treatment is not offered until the patient is 18 years old. This is because surgical procedures are not carried out until it has been possible to assess the effect of hormone treatment.⁸⁹

8.2.3 Health care services for intersex people

As previously mentioned, children who are born with intersex conditions in Norway are assigned a legal gender as infants, and may be offered medical and surgical treatment, to help them look like their assigned gender. Two regional DSD teams in Bergen and Oslo offer medical and surgical treatment to intersex people. When children are born with an intersex variation, they are usually transferred within one or two days after birth to one of the DSD teams.⁹⁰ The DSD teams are made up of specialists and include paediatric endocrinologists, paediatric and plastic surgeons, paediatric psychiatrists and nurses. As already mentioned, Norway has no

⁸⁷ Ibid, page 50-51.

⁸⁸ Ibid, pages 52-53.

⁸⁹ Ibid.

⁹⁰ Mari Rian Hanger, 'Finner barnets egentlige kjønn' [Finding the real gender of the child], *Dagens Medisin*, (22/2008)

specific law or provision that regulates the medical and surgical treatment provided to trans persons or intersex people. Their rights to treatment are regulated by general patient rights acts, such as the Patients' and Users' Rights Act and the Specialist Health Care Services Act.

While this general framework sets out important rights for everyone in Norway, there are some problematic areas in relation to deciding which treatments should be classified as being 'medically necessary' treatments for intersex persons. Moreover, there is a lack of research and follow up studies on intersex treatments, which renders such surgical procedures problematic under existing patient rights legislation and raises questions as to whether the health care services provided are in fact 'adequate'. Intersex issues have been increasingly raised by Norwegian LGBTI and human rights activists, who condemn so-called 'sex normalising' treatment given to intersex children without their consent.⁹¹ The practice of the DSD teams was discussed in the national newspaper *Dagbladet* in January 2017.⁹² Norwegian DSD teams have recently outlined a careful and balanced approach to treating intersex people that sets out to meet human rights standards. However, it is unclear what this means in practice.

⁹¹ Kirsten Sandberg, The Rights of LGBTI Children under the Convention on the Rights of the Child, *Nordic Journal of Human Rights*, (4/2015) p. 337-352, Kirsten Sandberg, 'Interkjønnbarn' [Intersex Children], *Tidsskrift for familierett, arverett og barnerett* (4/2016), Redd Barna, LLH, Skeiv Ungdom, *Rettane til LHBTI-barn i Noreg: Vurdering og tilrådingar i lys av FN sin barnekonvensjon* [The Rights of LGBTI Children in Norway: Assessments and Recommendations in light of the Convention on the Rights of the Child] (2016),.

⁹² *Dagbladet* 31.1.2017 (<http://www.dagbladet.no/kultur/norge-bryter-med-fns-barnekonvensjon/66922729>), *Dagbladet* 29.1.2017 (<http://www.dagbladet.no/kjendis/hanne-28-ble-utsatt-for-operasjoner-som-ikke-var-medisinsk-nodvendig--det-ble-et-traume-pa-grunn-av-det-de-gjorde/66908547>).

9 Particular issues related to the regulation of gender and gender identity

Norwegian legislation is usually formulated in a gender-neutral manner, or regulations apply equally to men and women. For example, the obligation to do military service is not dependent on a person's gender, and the Marriage Act now defines marriage as being between 'two persons of the same or opposite gender'.⁹³ However, Norwegian law uses gender as a legal category in legislation that aims to promote equality (for example, through rules on gender quotas or affirmative action in the labour market), or regulations regarding reproduction (for example, welfare benefits in connection with pregnancy) or parenthood. The next part of the report will give some examples of legal areas that are affected by the regulations regarding the recognition of the gender identity of trans persons.

9.1 Effects of changing legal gender

People who have been granted a change in their legal gender are entitled to be issued with a new National Identification Number that corresponds to their new gender status. Such a person is also entitled to have their gender status changed in identification papers such as passports. As a general rule, the new legal gender should also be recognised in other legal regulations where a person's gender status is relevant.⁹⁴ This includes, among others, the provisions in the Gender Equality Act and the Court of Justice Act regarding gender quotas (gender balance).⁹⁵ For example, in cases where the Gender Equality Act requires that 'both genders' should be represented on publicly appointed committees, it is a person's legal gender that is relevant when considering if the requirement has been fulfilled.

However, the Changing Legal Gender Act also makes certain exceptions where a person's legal gender status is not recognised because of provisions in other legislation. This includes situations where using a person's 'birth gender' is considered necessary to establish the parenthood

⁹³ LOV-2016-08-12-77, the Conscription and Service in the Norwegian Military Act, provision 6. It should be noted that this Act was revised in 2013.

⁹⁴ The Changing Legal Gender Act, provision 6.

⁹⁵ LOV-2013-06-21-59, the Gender Equality Act, provision 13 and LOV-1915-08-13-5, the Court of Justice Act provisions 27, 64, 65.

of a child in accordance with the Children's Act.⁹⁶ In this area, Norwegian law makes a difference between recognition of the gender identity (and legal gender) of female-to male trans persons and male-to-female trans persons. If a person who has changed gender status from female to male later gives birth to a child, parenthood of the child will be decided in accordance with the provisions in the Children's Act regarding motherhood, rather than fatherhood.

On the other hand, if a person who has changed legal gender from male to female later conceives a child with a female partner by using assisted reproductive technology in accordance with the Biotechnology Act, parenthood may be established in accordance with the provisions regarding so-called 'co-maternity'.⁹⁷ Thus, using the person's 'birth gender' is not considered as necessary to establish parenthood of the child in these cases. Male-to-female trans persons may therefore be recognised legally as mothers rather than fathers, while it is not possible for female-to-male trans persons to be legally recognised as fathers. However, if a male-to-female trans person conceives a child with a female partner without using assisted reproductive technology approved by the Norwegian health care authorities, the requirements in the provisions regarding 'co-maternity' are not fulfilled, and the parenthood of the male-to-female trans person will need to be established through the provisions regarding fatherhood instead.⁹⁸

In addition to this, provisions that apply to women who have given birth to a child also apply to persons who have given birth to a child after changing their gender status to a man. For example, this includes provisions in the National Insurance Act regarding pregnancy benefits where an employee is entitled to stop working 'because she is pregnant', and when calculating parental benefits and lump-sum grants given to 'a woman who has given birth to a child'.⁹⁹

As a consequence of these exceptions, the Changing Legal Gender Act does not constitute full legal recognition of the gender identity of trans persons. Instead the Act can be considered to establish a 'two track system' whereby a person's legal gender decides their legal position in

⁹⁶ Prop. L (2015-2016) page 31-32.

⁹⁷ The conditions for being granted status as 'co-mother' are given in the Regulations on Co-Maternity (FOR-2008-12-15-1362). In Norwegian legislation, the term 'co-mother' refers to a woman who has the status of a parent of the biological child of her female spouse or cohabitant, where the child has been conceived by assisted reproductive technology in accordance with the Biotechnology Act. The term was first introduced in 2009 in the new Act on Marriage, which recognises the right of same-sex partners to get married.

⁹⁸ Prop. L (2015-2016) page 37.

⁹⁹ Ibid, c.f. the National Insurance Act provisions 14-4 and 14-17.

most situations, but where the ‘birth gender’ (or in other words the gender that the person was assigned at birth) will continue to be relevant in other situations, particularly in regard to pregnancy benefits and parenthood, despite the change in gender status.¹⁰⁰

9.2 Continuation of a binary gender system

The Changing Legal Gender Act also limits the right to change gender status to either ‘man’ or ‘woman’. This is expressed through the formulation in provision 2 of the Act, which gives the right to change their gender status to persons who identify as ‘the other gender’ – that is, not the one they are registered as in the National Population Register. The Act therefore perpetuates a binary understanding of gender, and it is not legally possible to register any legal gender other than man or woman under Norwegian law. In the report ‘The Right to Right Gender’ that was written by an expert committee appointed by the government ahead of the preparation of the Changing Legal Gender Act, it was recommended that the possibility of introducing a third legal gender option should be evaluated by the authorities.¹⁰¹ This recommendation has not so far been followed up by the Government.¹⁰²

9.3 Anti-discrimination regulations

To a certain extent, an implicit lack of legal recognition of the gender of trans persons may also be found in the Norwegian Equality and Anti-Discrimination Act. As previously mentioned, transgender persons are included in the Act through the protected categories ‘gender identity’ and ‘gender expression’. The preparatory works explicitly specified that transgender people are not considered to be covered by the category ‘gender’. Based on the wording of the preparatory works, this would seem to be the case even if a transgender person is exposed to discrimination due to being perceived as a cisgender person.¹⁰³

This means that, although the Equality and Anti-Discrimination Act recognises the right of trans persons to protection against discrimination, the fact that discrimination against trans persons is not considered to be covered by the protected ground ‘gender’, may still be seen as an implicit

¹⁰⁰ Lars Arnesen, ‘Bør retten anerkjenne mer enn to kjønn’ [‘Should Norwegian Law Recognise More Than Two Gender Options?’], *Journal for Critical Law*, vol. 2 2017, p. 86.

¹⁰¹ The Directorate of Health (n 77) p. 6.

¹⁰² See section 12.1.1.

¹⁰³ Cisgender refer to a person whose gender identity and gender assigned at birth corresponds.

lack of recognition of trans persons' gender because of the separation of 'gender identity' from 'gender' (implicitly understood as the biological, bodily or birth gender of a person). However, this difference is mainly academic, and will most likely not have any practical consequences for people who are covered by the protection against discrimination.

In addition to this, the new regulations regarding recognition of the gender identity of trans persons have also sparked discussions of questions such as the use of public changing rooms and access to safe spaces for women in cases where trans persons have not undergone medical treatment and surgery.¹⁰⁴ In March 2017, a trans woman was denied access to a spa centre in Oslo on a day reserved for women. According to officials from the spa, this was because the trans woman had not undergone genital surgery.¹⁰⁵ Although the spa later apologised and acknowledged that the matter should have been dealt with in a different manner, the case illustrates potential challenges that have not yet been solved in relation to the new legislation on changing legal gender. Following the incident at the spa centre, officials from public swimming pools in Oslo said that if a person is legally a woman and has a female gender expression but has not undergone genital surgery, they will be required to use the male changing room rather than the one for women.¹⁰⁶

Whether denying trans persons access to public changing rooms if they have not had genital surgery constitutes discrimination in accordance with the Equality and Anti-Discrimination Act, or violates the core rule in the Changing Legal Gender Act – that a person's legal gender should be used in regard to other legislation – are questions that have not yet been considered by the Equality and Anti-Discrimination Ombud or Tribunal, or by the courts. As a consequence, such questions as how the individual rights of trans persons and those of other groups as regards discrimination should be balanced in practice, or what responsibility the authorities have for changing existing structures that exclude trans persons from public spaces, still remain unanswered.

¹⁰⁴ Dagbladet 19.04.2017: <http://www.dagbladet.no/kultur/kjonn-er-ikke-en-folelse-bent-hoie/67497701>

¹⁰⁵ Dagbladet, 10.03.2017: <https://www.nrk.no/ostlandssendingen/transperson-nektet-inngang-pa-spa-1.13419722>

¹⁰⁶ NRK 15.03.2017: <https://www.nrk.no/ostlandssendingen/-har-du-mannlig-kjonnorgan-sa-gar-du-i-herregarderoben-1.13423555>

10 The development of the legal regulations

The regulation of the gender identity of trans persons has undergone substantial changes over the last couple of years. Norwegian law has gone from considering the lack of correspondence between the assigned gender of trans people and their gender identity as a purely medical issue, to increasingly considering the recognition of a person's gender identity as a legal issue that should be regulated separately from medical assessments and treatment. This part of the report will look at why these changes to Norwegian law have occurred, and at the actors that have been involved in the developments.

10.1 Previous regulations for changing legal gender

Although it has been possible to change legal gender in Norway since the 1960s, the process for doing so was not laid down in formal legislation until the Changing Legal Gender Act came into force in 2016. Before this, the requirements for changing one's gender status was developed through administrative practice. This practice was based on the medical assessments of the National Treatment Unit for Transsexualism (NTUT). The requirements included being diagnosed with the condition F 64.0 transsexualism, real-life experience of at least twelve months' duration, hormone treatment and the surgical removal of testes or ovaries.¹⁰⁷ During the period of real-life experience, the person in question had to live full-time as the gender they identified as. As a consequence of the surgical requirement, the minimum age for changing legal gender was effectively 18.¹⁰⁸

In accordance with administrative practice, a change in gender status could be made once the health authorities confirmed to the Directorate of Taxes that a full gender reassignment treatment (including surgery) had been completed. People who did not fulfil the criteria for being given the diagnosis of transsexualism, or who did not wish to have surgical removal of testes or ovaries as a part of their medical treatment, could not change their legal gender and be issued with a new national identification number.¹⁰⁹ From June 2013 the Directorate of Health also began issuing confirmations that a full gender conversion had been made for persons who had

¹⁰⁷ Sørli (n 19), p. 10.

¹⁰⁸ Ibid.

¹⁰⁹ The Directorate for Health (n 77) p. 64.

undergone treatment by institutions other than the NTUT.¹¹⁰ This included people who had received treatment abroad.

The medical and legal reasoning for requiring persons to have undergone ‘a full gender conversion’ before a change in their legal gender could be made is not set out in written regulations. In statements that were made to the authorities between the 1950s and the 1970s by health professionals working with transsexual patients, it was presumed as a matter of course that transsexuals should not be able to reproduce. In a statement made in 1979 to the Ministry of Church and Education regarding changing legal gender, national identification numbers and personal names, attending physician in psychiatry Per Anchersen wrote that an indispensable prerequisite for changing legal gender must be that the person had first undergone sterilisation. He also said that, for male-to-female patients, this did not constitute a problem, as castration was included in the feminising surgery that the patients themselves wanted. For female-to-male patients, Anchersen recommended castration, as there would otherwise be a theoretical possibility that the patient would be changed into a ‘menstruating man’. Using simple sterilisation for these patients was not considered to be sufficient as this might be unsuccessful and result in the patient becoming a man with the ability to become pregnant. According to Anchersen, this would create insoluble legal complications and discredit the medical treatment offered to transsexuals.¹¹¹

These statements indicate that the background to the requirement to have undergone castration before a person’s legal gender could be altered, was connected both to the fact that, within the medical profession and in society in general, such surgeries were considered to be treatment that the patients themselves wanted, and to perceptions of gender as binary and mutually exclusive categories. It was also common practice in several countries at the time, including in neighbouring countries to Norway, to assess the right to change legal gender in conjunction with diagnostic requirements and established medical treatment.¹¹² Unlike the approach taken in Denmark or Sweden, however, the Norwegian practice of requiring that persons who experienced gender dysphoria should undergo castration was not included in general legislation relating to sterilisation. In the preparatory works of the Norwegian Sterilisation Act that was passed

¹¹⁰ Ibid.

¹¹¹ Ibid, page 65.

¹¹² Ibid page 66.

in 1977, the Medical Faculty at the University of Oslo recommended that these procedures should be subject to an application procedure and regulated in law.¹¹³ However, this recommendation was not followed in subsequent legislation.

10.2 Criticism against the requirements for changing legal gender

In recent times, there has been increasing criticism in Norway of the former requirements for changing gender status. This shift in focus was particularly directed at the requirement that trans persons should undergo irreversible sterilisation before their legal gender could be altered and was connected with national and international developments.

Various actors were involved in increasing awareness of and attention to the legal position of trans persons. In 2000, the national health care services that were offered to transsexual patients at the University Hospital in Oslo were temporarily shut down. As a consequence of the termination of the medical treatment, the Harry Benjamin Resource Centre (HBRC) was founded. The HBRC is a patients' rights organisation for people who have been diagnosed as transsexual (or who are being assessed for this diagnosis). The focus of the HBRC has therefore primarily been on medical issues and gender reassignment treatment.¹¹⁴

In addition to the HBRC, the Association for Transgender Persons in Norway (ATPN) was established in 1966. Historically, this organisation was mainly concerned with gender expression: at that time the term 'transvestites' was used to describe trans people. Over time, the focus of the ATPN broadened to include all people who want to adopt a different gender expression from the one they were assigned at birth, as well as people with a different gender identity from the one they were assigned. The general LGBT organisations in Norway also expanded their focus to include the position of trans persons in their work. The major organisations, FRI – the Norwegian Organisation for Sexual and Gender Diversity – and the youth organisation, Queer Youth, began including trans issues in their main policies from around 2008. These organisations approached trans issues from a legal rights perspective rather than from a medical one.¹¹⁵

¹¹³ Ibid, page 67.

¹¹⁴ Luca Dalen Espseth, 'Kjønn og "andre" kjønn' [Gender and 'other' genders], Master's thesis submitted at the Centre for Gender Studies, University of Oslo 2017, p. 8.

¹¹⁵ Ibid, page 9-10.

In the years that followed this resulted in wider political attention to the issue, first among the political youth parties, and later also among the main political parties. Trans persons were also more visible in the media, and in 2013 a television documentary titled ‘Born in the Wrong Body’ was aired on one of the national channels. Those working for a change in the existing practice regarding the requirements for changing one’s legal gender focused on the individual stories of trans persons who were either unable to alter their gender status because they had not been diagnosed with the condition of transsexualism, or who felt pressured to undergo surgical procedures that they did not want and did not consider necessary.

The issue was also framed in a human rights context. For example, it was argued that the administrative practice of requiring irreversible sterilisation was in breach of the European Convention on Human Rights, article 3 on degrading treatment, and article 8 on the right to privacy.¹¹⁶ In 2013, a master’s thesis was submitted in the Faculty of Law in Oslo, which argued that the current administrative practice of requiring irreversible sterilisation could not be maintained, since it infringed with trans persons’ human rights. The thesis was later published in the Norwegian Journal of Family Law.¹¹⁷ In 2014, Amnesty International published the report ‘The state decides who I am: lack of legal recognition for transgender people in Europe’. In this report, Norway was among the countries examined. Following the report, Amnesty demanded that the Norwegian authorities should establish an open procedure that ensured that transgender people had a right to legal recognition of their gender identity, and that having a transgender identity should be removed from the national classification of psychiatric conditions. In addition to this, the Equality and Anti-Discrimination Ombud issued a statement the same year which concluded that the requirement for trans persons to have undergone castration in order to change their legal gender was in breach of the Act Relating to a Prohibition Against Discrimination on the Basis of Sexual Orientation, Gender Identity and Gender Expression (the Sexual Orientation Anti-Discrimination Act).¹¹⁸

In December 2013, the increasing attention on the issue resulted in the Ministry of Health appointing an expert committee with the mandate to review the requirements for changing one’s gender status in Norway, and to assess the need for changes to the health care services offered

¹¹⁶ See for example (in Norwegian): <https://www.amnesty.no/ikke-publisert/transpersoners-rettigheter-ikke-iva-retatt>

¹¹⁷ Sørli, (n 21) p. 272-294.

¹¹⁸ The Equality and Anti-Discrimination Ombud, case number 14/840 2014.

to persons who are experiencing gender dysphoria. The expert committee presented their views in 2015, in the report ‘The Right to Right Gender – Health for All Genders’. They concluded that the requirements for changing legal gender and the medical health care services offered to persons experiencing gender dysphoria should not be connected. Instead, it was suggested that trans persons should be able to change their gender status on the basis of their own experience of their gender identity.¹¹⁹

In the review that was carried out by the expert committee, the international human rights framework was a key source, and the report included assessments of what limits human rights such as the right to privacy and non-discrimination impose on national legislation. Reference was also made to case law from the European Court of Human Rights regarding recognition of gender identity, such as, for example, *Christine Goodwin v. the United Kingdom*, *Van Kück v. Germany* (in regard to the right to privacy) and *YY v. Turkey* (in regard to the requirements for changing legal gender).¹²⁰ Reference was also made to statements from international actors such as the CEDAW committee and the UN Special Rapporteur on Torture, which criticised requirements for castration in connection with changing legal gender. When assessing the Norwegian requirement for castration, the committee also referenced case law from other countries, including decisions from the Constitutional Courts in Germany and Austria, and a decision from the Swedish Administrative Court of Appeal.¹²¹ Several of these assessments and references were also included in the preparatory works of the Changing Legal gender Act.¹²² The expert committee concluded that the requirement for irreversible sterilisation was in breach of trans persons’ fundamental human rights.¹²³

10.3 The development of protection against discrimination

As in the case of the regulation of changing one’s legal gender, protection against discrimination for trans persons in Norway has only been introduced in the last couple of years. Until

¹¹⁹ The Directorate of Health and Care Services (n 58), p 102-119.

¹²⁰ Ibid p. 69-71.

¹²¹ C.f. BVR 395/07 (Germany, 11 January 2011), case B 1973/08-13 (Austria, 3 December 2009) and verdict no. 1968-12, The Courts of Appeal in Stockholm (Sweden, 19 December 2012).

¹²² Prop. 74 L (2014-2015), p. 10-11.

¹²³ The Directorate of Health and Care Services (n 58), p. III.

2014, trans persons were not protected through domestic anti-discrimination legislation, although people who had been given the diagnosis F 64.0 were considered to be included in the scope of the Gender Equality Act by virtue of the practice of the Equality and Anti-Discrimination Ombud and Tribunal. Despite the fact that trans persons were mentioned neither in the Gender Equality Act nor in the preparatory works of the Act, the Ombud and Tribunal found that people who had been diagnosed as transsexual came within its scope.¹²⁴ Apart from this, however, trans persons were not mentioned in the anti-discrimination legislation. This was in contrast to gay and lesbian people, who were given limited protection in relation to the labour and housing markets.¹²⁵

The Sexual Orientation Anti-Discrimination Act introduced gender identity and gender expression as independently protected discrimination grounds for the first time in Norwegian law. The Act used the neutral terms gender identity and gender expression as protected grounds for transgender and intersex people. These terms were also used in the new Act. In 2014, in the case previously mentioned in section 10.2, the Act was one of the laws invoked by the Equality and Anti-Discrimination Ombud as support for claiming that the previous requirements for changing legal gender constituted illegal discrimination against trans persons.

In this case the Ombud stated the opinion that the practice of requiring a diagnosis, hormone treatment and gender reassignment surgery as conditions for changing gender status was in breach of provision 5 of the Sexual Orientation Anti-Discrimination Act, by constituting illegal discrimination on the basis of gender identity. In its considerations, the Ombud referred both to case law from the European Court of Human Rights and to recommendations in other international sources such as the Yogyakarta Principles, the Council of Europe Commissioner for Human Rights and the World Professional Association for Transgender Health (WPATH). It is worth noting that, at the time when the Ombud was considering the case, the government had already appointed an expert committee to consider the requirements for changing gender status. The case was not brought before the Tribunal.

¹²⁴ Tribunal case no. 19/2008. The case related to a woman who had applied for a position as a process technician in a petroleum company. A few years previously the woman had undergone gender reassignment surgery, and she argued that it was due to this that she was hired for the job. The Tribunal found that having gender reassignment treatment constituted a protected discrimination ground under the Gender Equality Act but did not find a link between the woman's gender identity and the fact that she had not been hired for the position in question.

¹²⁵ Previously, discrimination in the labour market on the grounds of sexual orientation was forbidden under provision 13-2 of the Labour Act, c.f. Prop. L 88 (2012-2013), p. 13.

In 2017 the four previous anti-discrimination acts were merged into the current Equality and Anti-Discrimination Act. In accordance with the proposition to Parliament from the Ministry of Children and Equality, the new Act aims to strengthen protection against discrimination by making the legislation more accessible than in the past. Although the Act is largely a continuation of the former regulations, the Ministry stated its opinion that one act is more user-friendly than four separate acts and will therefore provide more effective protection. The new Act has, however, been criticised by some legal scholars for weakening the enforcement mechanisms of the anti-discrimination legislation.

10.4 From pathologisation to human rights?

To sum up, the development of the Norwegian regulation of changing one's legal gender has moved from the pathologisation of trans persons, where such changes were associated with medical treatment and surgery, to the recognition of gender identity as a human rights issue, with the requirements for changing legal gender being separated from medical assessments, diagnosis and treatment. In this process both national actors, such as trans and LGBT organisations, and international developments and human rights frameworks have played an important role.

Nonetheless, however, the pathologisation of trans persons continues. For example, being a transsexual is still classified as a psychiatric condition in Norwegian medical practice.¹²⁶

¹²⁶ This understanding is in line with the current definition of the ICD-10 Chapter V. In the updated version of the ICD (ICD-11), transsexualism has been removed from the chapter on mental illnesses, and the term 'gender incongruence' has been added to a new section on conditions related to sexual health. It is unclear if, and when, the new definition will have consequences for the medical treatment that is offered to transgender people in Norway.

11 Current discussions

The regulations on gender identity, gender expression and trans persons is an area of Norwegian law that, over that last couple of years, has undergone major changes that are still being discussed, by NGOs, legal scholars and in society in general. As a consequence, many of the issues that are mentioned below have only recently begun to attract attention and, in many cases, formal proposals to change existing legislation have not as yet been put forward.

11.1 Gender-neutral and/or ‘third gender’ legal options

11.1.1 Third legal gender options

As part of the process making the Changing Legal Gender Act, the government appointed an expert committee to assess the previous requirements for changing gender status, and to make recommendations on new regulations. While it was outside the mandate of the expert committee to evaluate the possibility of introducing a third legal gender option, the committee nonetheless recommended that this possibility should be assessed by the authorities. This recommendation was not followed up in the later legislative process. The Minister for Health, Bent Høie, who was in charge of making the Changing Legal Gender Act, later stated that the idea of introducing a third legal gender category was not sufficiently debated in current Norwegian politics at that time, and that the government did not have any plans to propose legislation that would introduce a third option.¹²⁷

Since the passing of the Changing Legal Gender Act, the issue of whether a third legal gender option should be introduced has been given increasing attention by the political parties and by Norwegian media. In April 2017, Parliament voted on a proposal to ask the government to introduce a third legal gender option. The proposal was rejected; there were 92 votes against it and 8 votes for it (the representatives from the Liberal Party, the Socialist Left Party and the Green Party voted in favour).¹²⁸ Since the vote in Parliament the Norwegian Labour Party has passed a new party manifesto for the period 2017-2021, which states that the party is ready to consider a third legal gender option. This means that four of the national political parties have now adopted a positive stance on either introducing a third gender category or considering this

¹²⁷ Health Minister Høie has stated this in interviews with Norwegian newspapers, see for example: <http://www.altaposten.no/lokalt/nyheter/2016/02/22/Vil-ha-et-tredje-kj%C3%B8nn-12188738.ece>.

¹²⁸ A record of the vote may be accessed in Norwegian at: <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2015-2016/160414/1>

possibility. While the current government parties, the Conservatives and the Progress Party, have not formally adopted a position on the issue, both parties were opposed to previous proposals to introduce a third legal gender category in Norwegian legislation.

Recently, the question of whether a third legal gender category should be adopted in Norwegian law has also been discussed in regard to existing national anti-discrimination legislation. Non-binary trans persons are covered by the protection against discrimination conferred by the 2014 Sexual Orientation Anti-Discrimination Act. A recent article in the journal *Critical Law* argues that the current regulation of legal gender, which only recognises two gender options, constitutes unlawful discrimination on the basis of gender identity.¹²⁹

11.1.2 Gender-neutral regulations

The Norwegian government is currently in the process of developing a new model for generating national identification numbers. This is because the present system will run out of unique digit combinations around the year 2040.¹³⁰ In connection with this process, it is being discussed whether the new national identification numbers should be gender-neutral.¹³¹ The Ministry of Finance gave the Directorate of Taxes responsibility for assessing the administrative, economic and societal consequences of changing the current model. In its assessment, the Directorate of Taxes states that, following an international trend, some countries are abandoning the binary gender model and introducing more legal gender categories.¹³² The Directorate also notes that there is a trend in Europe for identity papers (such as national identification cards) to no longer include information about the holder's gender.

In addition to these international aspects, the assessment of the Directorate also points to a statement made by the Equality and Anti-Discrimination Ombud, which refers to the previous Sexual Orientation, Gender Identity and Gender Expression Anti-Discrimination Act.¹³³ The

¹²⁹ The article is based on a master's thesis that was published in the Faculty of Law in Oslo in 2016, as a part of the research project 'Gender Identity and Sexual Orientation in International and National Law'. See Arnesen, 'Bør retten anerkjenne mer enn to kjønn?' ['Should Norwegian law recognise more than two genders?']

¹³⁰ Ministry of Finance, White paper regarding Proposal for new National Identification Numbers [Høring – forslag til ny personidentifikator (fødselsnummer)], section 2.

¹³¹ Ibid, point 4.2.

¹³² Directorate of Taxes, 'Rapport fra Skattedirektoratet – nytt system for fødselsnummer' ['Report from the Directorate of Taxes – New System for National Identification Numbers']. The Directorate's report takes as examples legislation in Australia, New Zealand, India, Nepal and Germany, c.f. p. 6.

¹³³ The statement may be found in Norwegian at: https://www.regjeringen.no/contentassets/6d541d1640b8438ab40f0f876516e0aa/96_ido.pdf.

Ombud argues that, since some people do not identify themselves within a binary gender system, it is detrimental to them that information about legal gender is revealed via the national identification number. The Ombud also says that the rights of non-binary people are an area of human rights law that is currently under development. To avoid expensive revisions at a later stage, this development should therefore be considered when choosing a new system.¹³⁴ In line with the advice from the Ombud, the Directorate of Taxes has recommended that a gender-neutral model for future national identification numbers should be selected, although the final proposal has not yet been considered by Parliament.¹³⁵

11.2 Protection against hate speech and hate crimes

At present, trans persons are not included in legislation regarding hate speech and hate crimes in Norway. Hate speech is explicitly prohibited in provision 185 of the Criminal Code, which declares that discriminatory or hateful speech on the basis of a person's skin colour, national or ethnic origin, religion or life stance, homosexual orientation or disability is prohibited. While the Criminal Code does not use 'hate crime' as a legal term, several of its provisions prohibit acts that can be considered to constitute hate crime in practice. In accordance with provision 186 of the Criminal Code, it is illegal to deny a person services, entrance to public performances, exhibitions or other gatherings on the grounds listed in provision 185. In addition to these provisions, penalties imposed under the Criminal Code may be increased if the crime in question was motivated by the previously mentioned grounds or by similar characteristics of other groups that are in special need of protection.¹³⁶ This last condition means that hate crimes that are motivated by a person's gender identity or gender expression could be interpreted as constituting grounds for increasing the offender's punishment.

In connection to the process of consolidating the anti-discrimination legislation into one overall Act, the Ministry of Children and Equality decided to conduct a review of the legal regulations regarding hate speech and hate crimes by means of an external assessment. In the subsequent report, it was recommended that the protected grounds should be expanded to include characteristics other than the ones that are protected in the current regulations, such as gender, gender

¹³⁴ Ibid page 2.

¹³⁵ Ministry of Finance, White Paper, page 13.

¹³⁶ The Criminal Code provision 77 i.

identity and gender expression.¹³⁷ It was also recommended that the current protected ground ‘homosexual orientation’ should be changed to ‘sexual orientation’, both because the other grounds do not distinguish between majority and minority groups (as in the case of ‘religion’) and because homosexual orientation is considered to be too narrow and does not correspond to the terminology that is used in other legislation.¹³⁸ So far, there have not been any formal proposals or changes as a result of the report.

11.3 Changes to the health services offered to trans persons

In connection with the review of the requirements for changing one’s legal gender, the expert committee that was appointed by the Ministry of Health made several suggestions about changes to the health care services that are offered to trans persons. The committee concluded that the current treatment had a number of shortcomings and issues, which meant that many persons who are experiencing gender dysphoria do not get the health care services they need and are entitled to. Because of this, the committee recommended that the health care services offered to patients experiencing gender dysphoria should be expanded to cover more people than at present.¹³⁹

In their assessment of the treatment offered by the National Treatment Unit for Transsexuals (NTUT) the committee also said there were ambiguities of some importance in the written material about the unit, together with a lack of clear referral routines and consistent descriptions of the healthcare services which are offered, and not offered, to the patient group that the unit is responsible for. According to the committee, the treatment offered by the NTUT does not cater for the needs of everyone entitled to health care services because of gender dysphoria, since patients who have not been diagnosed with F 64.0 transsexualism are not included in the unit’s patient group. The committee also noted that there is a clear trend in international guidelines to increase the number of those who are entitled to health care services related to gender dysphoria.¹⁴⁰

¹³⁷ Kjetil Larsen, ‘Utredning av det strafferettslige diskrimineringsvernet’ [‘Assessment of the protection against discrimination through the criminal code’], the Norwegian Centre for Human Rights, University of Oslo, 2016, p. 74.

¹³⁸ Ibid, page 71-72.

¹³⁹ The Directorate for Health (n 79), p. V.

¹⁴⁰ Ibid, page 124.

To address this situation the expert committee recommended that competence to assess, diagnose and treat people with gender dysphoria should be increased in all parts of the health care services. In regard to the recommendations concerning the specialist health care services, the expert committee were divided. As regards adult patients, the majority of the committee recommended that the treatment for to gender dysphoria should, to a considerable extent, be decentralised. The majority were of the view that the various regional health bodies should ensure that they can offer endocrinological treatment, surgery (with the exception of genital surgery) and other health care services needed by adults experiencing gender dysphoria. If the patient's needs can only be met by highly skilled specialists, the majority recommended that the patient should be referred to the NTUT. The majority recommended that the NTUT should be responsible for providing highly specialised health care, that might include diagnostics and hormone and/or surgical treatment. It was also stated that the NTUT should be responsible for assessing complicated endocrinological cases where there is insufficient competence at a regional or local level. The minority expressed concern that these measures would have a negative impact on the treatments offered by the NTUT, and instead recommended strengthening the medical services currently being offered by the unit.

In regard to the health care services offered to children, the majority of the expert committee recommended that this treatment should, as a rule, be offered at a regional level. The majority said that children and young people should only be referred to the NTUT if they are in need of specialist treatment. In general, the majority recommended that endocrinological treatment, and other health care needed by children and adolescents experiencing gender dysphoria should be provided by the regional health bodies. A minority of the committee expressed concern that the suggested changes would lead to the current treatment for children at the NTUT having to be closed down. In the minority's view, competence to treat children and young people experiencing gender dysphoria should be limited to one or two of the regional healthcare centres in order to ensure that treatment is adequate. Finally, the expert committee recommended that the authorities should develop national guidelines on the health care services offered to those experiencing gender dysphoria.

The recommendations and suggestions of the expert committee on health services for trans persons has not so far resulted in changes to the current system. During 2017, Norwegian newspapers published several articles that included statements from patients and health professionals

expressing concern about delays in treatment and a high staff turnover at the NTUT.¹⁴¹ The Directorate of Health has recently stated that national guidelines for health care services for trans persons are currently being developed, but that it is too soon to say when they will be completed.¹⁴²

¹⁴¹ See for example: [http://www.vg.no/nyheter/innenriks/kjoenn-og-identitet/helsearbeidere-bekymret-vegrer-seg-for-aa-sende-pasienter-til-rikshospitalet/a/24011648/#xtor=CS6-6-%5B24011648%20helsearbeidere bekymret vegrer seg for aa sende pasienter til rikshospitalet%5D](http://www.vg.no/nyheter/innenriks/kjoenn-og-identitet/helsearbeidere-bekymret-vegrer-seg-for-aa-sende-pasienter-til-rikshospitalet/a/24011648/#xtor=CS6-6-%5B24011648%20helsearbeidere%20bekymret%20vegrer%20seg%20for%20aa%20sende%20pasienter%20til%20rikshospitalet%5D) and <http://www.vg.no/nyheter/innenriks/oslo-universitetssykehus/nicolas-29-og-martin-30-om-rikshospitalet-moeter-aldri-samme-behandler/a/24011379/>

¹⁴² This was said in interviews given to Norwegian newspapers, see for example: <http://www.vg.no/nyheter/innenriks/kjoenn-og-identitet/vil-ha-slutt-paa-at-transseksuelle-betegnes-som-psykisk-syke/a/24083560/>