

Submission by Transgender Europe

to the Public Consultation “Order of issuing the medical organisation of the document of gender reassignment”

(Об утверждении формы и порядка выдачи медицинской организацией документа об изменении пола), published on October 5, 2017 on:

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prepared by Richard Köhler, richard@tgeu.org

To:

Pavel Evgenii Schegolev

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Dear Pavel Evgenii Schegolev,

We are hereby submitting respectfully our observations to the public consultation on the proposed “Order of issuing the medical organisation of the document of gender reassignment”, as well as some solutions to identified problems. **We are concerned that the proposed diagnosis, scope, length legal certainty, and costs appear to be at odds with the international state of the art in legal gender recognition and trans-specific healthcare, as well as with developments in international human rights. Instead, we propose a simple administrative affidavit procedure to close the current legal gap and ensure quick, transparent and accessible legal gender recognition procedures in Russia.**

About the submitting organisation:

Transgender Europe (TGEU) is a not-for-profit regional umbrella organization working for equality and the advancement of the human rights of trans gender persons in Europe. Founded in 2005, it represents 129 member organizations and 200 individual members in 42 countries and is registered under German law. TGEU advocates for the rights of transgender persons at the Council of Europe (where it has participatory status), the European Union and the Organization for Security and Cooperation in Europe, builds capacity of organizations and initiatives supporting transgender equality and rights at the national level and engages in research into the human rights situation of transgender people in Europe and other parts of the world. TGEU has been championing the advancements related to legal gender recognition in Europe and has been advising the World Health Organisation on gender identity-related categorizations in the International Classification of Diseases.

TGEU has been undertaking ground-breaking research on health and wellbeing of transgender people in Europe, such as the *Trans Euro Study* (2008), or *Overdiagnosed but Underserved. Trans Healthcare in Georgia, Poland, Serbia, Spain, and Sweden* (2017).

Medical state of the Art:

The world's leading professional association on healthcare for transgender, transsexual and gender-variant people, WPATH urges states to de-medicalise and de-pathologise of trans identities in general, and in particular in regard to legal gender recognition.

The WPATH emphasized that “legally recognized documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely,” and that barriers to LGR may harm the physical and mental health of the person in question. “No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone’s gender identity, so these should not be requirements for legal gender change.”¹ Consequently, Governments were urged “to eliminate unnecessary barriers, and to institute simple and accessible administrative

¹ *WPATH Statement on Legal Recognition of Gender Identity*, 19 January 2015, http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf.

procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity" and that "no mental health treatment or diagnosis" should be a

requirement.

Proposed Diagnosis

The proposed diagnosis of "sexual re-orientation" is not used in science, academia or relevant human rights literature relating to legal gender recognition, or gender identity or gender expression of a person, anywhere in the world. Besides a misleading connotation conflating "gender identity" and "sexual orientation", with introducing this new terminology, Russia runs the risk of falling behind international developments in research and scientific developments.

The Standards of Care Version 7 (SoC7), the world's leading clinical guidance for health professionals to assist transsexual, transgender, and gender nonconforming people, published by WPATH, does not provide diagnostic criteria where the single aim is to establish a diagnosis. Instead, it only defines mental health screening in order to facilitate access to surgery or hormones, reducing it to a minimum.

The World Health Organisation (WHO) is suggesting in the next version of the International Classification of Diseases (ICD-11) to remove all trans-related diagnoses from the Mental Health Chapter.² Instead, a new chapter (Conditions related to Sexual Health) is proposed with the placement of two new diagnoses Gender Incongruence in Adolescence/adult (GIAA) and Gender Incongruence in Childhood (GIC), to facilitate access to medical treatment and cost coverage thereof. The de-psychopathologisation of trans identities has been driven by the motivation to reduce stigma and to improve human rights compliance. It results from a global process involving trans communities, scientists and academia,³ including field-testing of the new categories in Brazil, India, Lebanon, México and South Africa^{4,5,6}. The approval of ICD-11 is planned to take place in the World

² World Health Organisation. ICD-11 Beta Draft (Joint Linearization for Mortality and Morbidity Statistics). 2017; <http://apps.who.int/classifications/icd11/browse/l-m/en>. Accessed 20 April 2017

³ See Drescher J, Cohen-Kettenis P, Winter S. Minding the body: situating gender identity diagnoses in the ICD-11. *Int Rev Psychiatry*. 2012;24(6):568-577; A rationale for this recommendation was developed in the article "Minding the Body: Situating gender identity diagnoses in the ICD-11" *International Review of Psychiatry*, 24, 568-577), by J. Drescher, P. Cohen-Kettenis and S. Winter; Reed GM, Drescher J, Krueger RB, et al. Disorders related to sexuality and gender identity in the ICD 11: revising the ICD 10 classification based on current scientific evidence, best clinical practices, and human rights considerations. *World Psychiatry*. 2016;15(3):205-221. doi:10.1002/wps.20354

⁴ Beek TF, Cohen-Kettenis PT, Bouman WP, de Vries ALC, Steensma TD, Witcomb GL, et al. (2016) Gender Incongruence of Adolescence and Adulthood: Acceptability and

Health Assembly in May 2018, and to be implemented by governments from January 2019.⁷ This should also be reflected in new proposals affecting legal gender recognition, if based on a mental health diagnosis, and trans-specific healthcare in Russia.

We would also like to point out the contribution of mandatory mental health diagnosis in legal gender recognition can have on an individual: 63% of trans respondents in a German study felt that the mental health diagnosis required for gender recognition is a source of significant distress for them.⁸ 84,4% of trans respondents (n= 885) to a comparative survey in Georgia, Sweden, Spain, Serbia and Poland were of the opinion that legal gender recognition should be accessible without any medical requirement such as, mental health diagnosis, hormones or surgery. Only every fourth (25,5% trans-healthcare provider (n=888) in the same survey was of the opinion that legal gender recognition should be restricted to those with a diagnosis.⁹

→ We suggest removing any reference to a mandatory mental health screening or diagnosis, or involvement of mental health professionals from the proposed medical certificate and order. Instead a certified affidavit should be used to attest the intent of the person to change their name, patronymic and/ or gender marker.

Scope of the regulation

The proposed regulation is currently limited to Russian citizens, which in face of the multicultural reality of Russia bears the risk of excluding residents, e.g. citizens of states on the territory of the former Soviet Union, from accessing legal gender recognition.

→ We suggest changing the wording “citizens” to “residents”.

Clinical Utility of the World Health Organization’s Proposed ICD-11 Criteria. PLoS ONE 11(10): e0160066. doi:10.1371/journal.pone.0160066.

⁵ Robles R, Fresán A, Vega-Ramírez H, et al. Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11. *The Lancet Psychiatry*. 3(9):850-859.

⁶ Report on the Shanghai Conference of the ICD-11 Field Studies Coordinating Group. *Shanghai Archives of Psychiatry*. 2014;26(1):57. doi:10.3969/j.issn.1002-0829.2014.01.010.

⁷ See WHO, ICD-11 Revision Conference Report Tokyo, Japan, 12-14 October, 2016.

⁸ LesMigras 2012 “...nicht so greifbar und doch real” quantitative und qualitative Studie zu Gewalt und (Mehrfach-) Diskriminierungserfahrungen von lesbischen bisexuellen Frauen und Trans* in Deutschland.

⁹ Transgender Europe, Overdiagnosed but Underserved. Trans Healthcare in Georgia, Poland, Serbia, Spain, and Sweden: Trans Health Survey, 2017

Length of proceedings

TGEU welcomes the short time span indicated for the decision-making in an individual case. This is certainly advancement to the status quo.

However, it is not comprehensible why a mandatory time span of 1.5 years is introduced for the required psychiatric assessment. Such a standardised waiting period is not in compliance with the requirement for individual assessment, as stated by the European Court of Human Rights in *Schlumpf v. Switzerland*: Applying a bureaucratic rule in a rigid manner without regard for the individual's medical needs violates the right to a fair trial.

→ We suggest to remove any reference to a mandatory time span.

Legal certainty:

The proposal foresees that the medical commission can issue a decision of refusal, without specifying on which grounds a (positive) referral of an accredited psychiatrist after 1.5 years of psychiatric assessment can be refused. In case of a negative decision by the medical commission there should be a possibility to appeal the decision, to ensure the right to legal gender recognition remains “practical and effective, not theoretical and illusory” (Goodwin

& I v. UK).

Further on, the limitation of the validity of the certification poses questions to its usability after the inherent 12 months validity. The time limit seems arbitrary given the substantial amount of time and resources and individual has to invest to obtain said medical form. Also, the proposal does not rationalise the reason for the time limit. The time limit can become a barrier to legal gender recognition if the individual is not able to apply for legal gender recognition within the 12 months following the commission's decisions.

→ We suggest to remove the time limit on the validity of the certificate.

Costs:

The lengthy assessment procedure and involvement of highly specialised medical experts raises concerns over coverage of involved costs. In order to ensure that legal gender recognition remains accessible independent of income or economic status, the individual should not have to bear costs that might occur in the process of obtaining the medical certificate. Otherwise, it bears the risk the right to legal gender recognition remains inaccessible for many who may need it.

→ We suggest to either offer cost coverage through e.g. legal aid or make the procedure accessible without or very low cost for the individual.

International Human Rights Assessment:

The proposal foresees a mandatory psychiatric assessment, as well as the involvement of a psychiatrist, a sexologist and a medical psychologist in the foreseen medical commission without indicating an added medical value, such as providing access to medically necessary treatment. This constitutes psycho-pathologisation of an individual seeking legal gender recognition, and is thus in contradiction with obligations arising from international human rights.

— The proposal foresees limiting a person’s self-determination by making it depended on a third party’s opinion. Whereas, the mandatory involvement of psychiatry in legal gender recognition is itself already problematic. “Psychiatric requirements within legal gender recognition proceedings [...] impact [trans people’s] lives and violate their human rights: The right to private life (Article 8 of the European Convention on Human Rights ECHR)) is infringed through forced medical treatment, through pathologisation and resultant stigmatisation, dependence and heteronomy; the right to non-discrimination (Article 14 ECHR), and possibly, the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 ECHR).”¹⁰

..... The proposal does not address diagnostic criteria for the establishment of the diagnosis “sexual re-orientation”. The problem of legal uncertainty of what is required for legal gender recognition is thus shifted towards the diagnostics process. This again runs counter the requirement of “transparent and accessible” procedures. In fact, it enables abuse and discriminatory refusal due to bias of the treating psychiatrist, relating to an individual’s sexual orientation, civil status (married/ single), surgical or other medical or social status etc.

— For its part, the European Court of Human Rights has described gender identity as “one of the most intimate areas of a person’s private life”,¹¹ as a free-standing “right”,¹² as “a fundamental aspect of the right to respect for private life”¹³ and as “one of the most basic essentials of self-determination,”¹⁴ linking it to a “right to sexual self-determination,” itself an aspect of the right to respect for private life.¹⁵ The European Court of Human Rights established that states should take “scientific and societal developments”¹⁶ into account when setting requirements for legal gender

¹⁰ See Anne Degner, Miriam Nomanni, „Psychiatry in legal gender recognition procedures in Europe, Working Paper, Humboldt Law Clinic for Human Rights, Berlin, 2016

¹¹ *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

¹² *Idem*, §75.

¹³ *Idem*, §75.

¹⁴ *Y.Y. v. Turkey*, Application no. 14793/08, §102, 10 March 2015 (extracts).

¹⁵ *Idem*, §78.

¹⁶ *Goodwin & I v UK, Application no. 35968/97, 11 July 2002*

recognition. Such developments are for example recent statements by the Council of Europe on legal gender recognition, and the proposed reform of the International Classification of Diseases by the World Health Organisation.

The Committee on Economic, Social and Cultural Rights¹⁷, the Committee of Ministers¹⁸ and the Parliamentary Assembly¹⁹ of the Council of Europe urged States to adopt “quick, transparent and accessible” LGR procedures “based on self-determination”²⁰, whereas the Council of Europe Commissioner for Human Rights asked for “expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents.”²¹ The Parliamentary Assembly specifically asks for the abolishment of “compulsory medical treatment, as well as a mental health diagnosis” in legal gender recognition procedures.²²

Final Conclusions:

In order to ensure compliance with scientific developments and international human rights, we urge you to replace:

- 1) the mandatory psychiatric assessment;**
- 2) the reference to “sexual re-orientation”;**
- 3) the automatic set time span of 1.5 years;**
- 4) the assessment by a medical commission; and**
- 5) the time limit of the medical certificate**

and suggest instead a simple procedure of a certified affidavit:

A written declaration upon oath made before an authorized official, such as a notary, certifying that the signing person is of the conviction that the current

¹⁷ *Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the Russian Federation*, of 6 October 2017, § 23.b

¹⁸ *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, §21.

¹⁹ Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.

²⁰ *Idem*.

²¹ *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, Recommendation §5.

²² Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.2.

currently recording of their gendered name, patronymic name and gender marker is not congruent with their gender identity, and that they express the will to change the gendered name, patronymic name and/ or gender marker to better match their gender identity.



We remain at your disposal should you have any questions.

Sincerely Yours,

A handwritten signature in blue ink, which appears to read "R. Köhler".

Richard Köhler

Transgender Europe

Senior Policy Officer

Deputy Executive Director