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Women and Youth

Report on Reform of the Transsexuals Act (Transsexuellengesetz)

Short Version in English:

Nicht amtliche Version der Ergebnisse des Gutachtens Regelungs- und Reformbedarf für transgeschlechtliche Menschen

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Report on Reform of the Transsexuals Act (Transsexuellengesetz)

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1.
Introduction

Anyone who finds at some time that their gender identity differs from their gender assigned at birth is confronted with making others understand this mismatch and demanding that their gender identity be respected. In legal terms, this can mean a change of registered sex and any gender-specific forenames. In Germany, this procedure is governed by the Transsexuals Act (Transsexuellengesetz/TSG), takes place before a local court (Amtsgericht) and requires detailed assessments from two assessors. Member states of the Council of Europe are called upon to develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people.[1] Several European states have since followed Argentina's example in lowering the bar for such procedures. Germany similarly faces the question of how to reform its Transsexuals Act to comply with these calls and today's standards of basic and human rights. Academics[2] and policymakers[3] alike have repeatedly called for reform of the Transsexuals Act and put forward proposals. This report was commissioned by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) for the Interministerial Working Group on Intersexuality/Transsexuality. It analyses the current legal position in Germany, in particular regarding conformity with basic and human rights. It describes how the law has developed internationally and puts forward a proposal for future legislation on gender assignment and forename changes. Finally, it cites areas where there is further need for action and legislation.

The report has been compiled on the basis of national and international statute law, case law, the stated positions of international bodies, relevant legal, medical and social sciences literature, and survey data. Data was also collected specifically for the report: All German local courts competent to preside over proceedings under the Transsexuals Act were surveyed, asking about their experience, numbers of cases, and factors for delays. A national online survey of transgender people asked about experience with completed or ongoing Transsexuals

1 Resolution 2048 (UN Doc. 1347) of the Parliamentary Assembly of the Council of Europe, "Discrimination Against Transgender People in Europe" of 22 April 2015; Recommendation CM/Rec(2010)5 of the Committee of Ministers of 31 March 2010; and Council of Europe, Commissioner for Human Rights Thomas Hammarberg (2011), Recommendation 5.1 concerning Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe.

2 Sigusch (1991), p. 337; Becker/Berner/Dannecker/Richter-Appelt (2001); Bruns (2007); Grünherger (2008); Briken/Dannecker/Richter-Appelt/Becker (2009); Pfäfflin (2011); Becker (2013); Vogel (2013); Güldenring (2013); Schmidt (2013); Sigusch (2013); Meyenburg/Renter-Schmidt/Schmidt (2015).

3 Bundesweiter Arbeitskreis TSG-Reform; TranslnterQueer e.V.(2016); Bundestag motion by BÜNDNIS 90/DIE GRÜNEN, BT-Drs. (Bundestags-Drucksache) 16/947; bill introduced by BÜNDNIS 90/DIE GRÜNEN, BT-Drs. 16/4148; Bundestag motion by the FDP, BT-Drs. 16/9335; Bundestag motion by DIE LINKE, BT-Drs. 16/12893; bill introduced by BÜNDNIS 90/DIE GRÜNEN, BT-Drs. 16/13154; bill introduced by BÜNDNIS 90/DIE GRÜNEN, BT-Drs. 17/2211.

Act proceedings and further needs for action and legislation. Lawyers were additionally asked in guided interviews to describe their experience from legal practice.

Work on the report was supported by an interdisciplinary Advisory Board composed of social sciences and law academics and representatives of special-interest organisations.[4] The authors also received advice from additional university institutions.[5]

4 Members of the Advisory Board: Prof. Dr. Konstanze Plett (University of Bremen), Juana Remus (Humboldt University of Berlin), Richard Köhler (Transgender Europe), Arn Sauer (Bundesverband Trans* e. V.; Transinter-Queer e. V.), Dr. Aline Oloff (Technical University of Berlin) and Kati Wiedner (Trakine e. V.).

5 Centre for Transdisciplinary Gender Studies, Humboldt University, Humboldt University of Berlin; Institute of Public Health and Nursing Research, University of Bremen; Institute of Sex Research and Forensic Psychiatry, University Medical Centre, Hamburg-Eppendorf.

2.
Report findings

When it was enacted in 1980, the Act on Forename Changes and Determination of Gender Affiliation in Special Cases (Transsexuals Act – Transsexuellengesetz/TSG) was described as "the most progressive law in the world" and the "most human and comprehensive of all solutions ... so far in any state under the rule of law".[6] It no longer lives up to that description. Following six decisions by the Federal Constitutional Court (Bundesverfassungsgericht)[7] holding specific requirements under the Transsexuals Act to be unconstitutional and so inapplicable, the parts that remain no longer provide a viable and practicable legal basis for proceedings to change a person's name and registered sex. Some of the remaining provisions raise severe basic and human rights concerns. Moreover, the Transsexuals Act falls short of providing a comprehensive solution for the entire compass of policy needs related to transgender persons, which go far beyond changing a person's forename(s) and registered sex.

2.1 Legislation and reform needs in connection with the Transsexuals Act

2.1.1 Need for reform of access: Requirements for change of forename and registered sex

The Transsexuals Act is in need of reform in multiple respects. Analysis of how it came into being and its evolution in Federal Constitutional Court case law[8] shows its overall scheme to be no longer intact, and it is no longer possible or indeed even lawful for its intended purpose to be pursued. First of all, the Transsexuals Act is based on a medical and diagnostic notion of 'transsexuality' as a psychological condition that is no longer valid in light of contemporary sexual research. 'Transsexuality' relates to a medical diagnosis developed in the 1970s that presupposes rejection of the genitalia as being inconsistent with the individual's identity, an urgent desire for gender reassignment surgery, and asexual or heterosexual orientation.

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6 Translated quotations from the German Bundestag debate on the bill (164th session of the 8th electoral term): Member of the Bundestag Dr. Rolf Meinecke (SPD), Plenarprotokoll 8/164, p. 13174, and Member of the Bundestag Torsten Wolfgramm (FDP), Plenarprotokoll 8/164, p. 13175.

7 Federal Constitutional Court (Bundesverfassungsgericht) decision of 16 March 1982 (minimum age for amendment of birth certificate) – 1 BvR 938/81 – BVerfGE 60, 123; decision of 26 January 1993 (minimum age for change of forename) – 1 BvL 48/40, 43/92 – BVerfGE 88/87; decision of 6 December 2005 (forced reinstatement of forename after marriage in original gender) – 1 BvL 3/03 – 115, 1; decision of 18 July 2006 (application of Transsexuals Act to foreign nationals whose lex personalis is not German law – 1 BvL 1/04 – BVerfGE 116, 243; decision of 25 July 2008 (requirement of unmarried status) – 1 BvL 10/05 – BVerfGE 121, 175; and decision of 11 January 2011 (operation and sterilisation requirement) – 1 BvR 3295/07 – BVerfGE 128, 109.

8 For detailed information, see Annex 1, part 1.2.

With these diagnostic criteria now seen to be medically and psychiatrically misconceived[9], the term 'transsexuality' has increasingly fallen out of use when referring to gender identity independently of such criteria. Various alternative terms have come into being. The term 'transgender' was initially intended to signify that it is not (or not necessarily) a matter of physical attributes or of sexuality, but individual role identity. An asterisk (*) came to be added in order to indicate that the prefix 'trans' was understood to be followed by any possible ending – both transsexual and transgender, or simply 'trans'. The online survey of transgender persons[10] carried out for this report showed that while on the one hand there are a large number of different terms and ways of describing oneself, there are also individuals who understand themselves as transsexual in the conventional sense but reject 'trans*' because it is intended to include individuals who do regard themselves not as being wholly 'the other' gender but as both genders or neither 'female' nor 'male'. In the following, the term 'transgender' is used and is intended to denote any form of incongruence between gender identity and assigned sex. The terms 'transsexual' and 'transsexuality' used in the Transsexuals Act are no longer in keeping with the times, and are too narrow.

The basic two-tier approach comprising a partial solution ('kleine Lösung' – name change only, Section 1 of the Transsexuals Act) and a full solution ('große Lösung' – change of registered sex, i.e. a 'sex change' before the law, Section 8 of the Transsexuals Act) also proved unfit for purpose as the provisions that separated the two were found unconstitutional and can no longer be applied. The 'partial' and 'full' change now have the same criteria, that the applicant, "in consequence of his or her transsexual disposition no longer feels that he or she is affiliated with his or her sex as registered at birth but with the other sex and has been under compulsion to live according to his or her perceptions for at least three years" (Section 1 (1) 1 of the Transsexuals Act). Moreover, it must be "capable of being assumed with a high degree of probability that the person's affiliation with the other sex will no longer change" (Section 1 (1) 2 of the Transsexuals Act). To verify that both of these requirements are met, the court must obtain assessments from two assessors "who by virtue of their training and professional experience are sufficiently acquainted with the special problems of transsexualism" (Section 4 (3) of the Transsexuals Act). Under Section 1 (1) 3, the applicant must also be a German within the meaning of the German Basic Law (Grundgesetz/GG), a stateless person or a displaced foreigner whose habitual residence is in Germany, a foreigner entitled to asylum or a foreign refugee whose place of residence is in Germany, or a foreigner whose domestic law does not have comparable provisions to the German Basic Law and who holds a permanent right of residence or a renewable residence permit and permanently and lawfully resides in Germany.[11]

Until a Federal Constitutional Court decision of 2011[12], the full change was subject to an additional requirement under Section 8 (1) of the Transsexuals Act that the applicant be permanently infertile (Section 8 (1) 3) and had "undergone surgery modifying his or her external genitalia attaining a substantial approximation in appearance to that of the other sex"

9 For detailed information, see Annex 4, part 1 (further reform needs in healthcare) and Annex 1, part 1 (development and subsequent evolution of the Transsexuals Act).

10 See Annex 3, part 2.

11 The last two possibilities were inserted by an act of 20 July 2007 (BGBl. I, 1566) after being made necessary by a Federal Constitutional Court decision of 18 July 2006 (BVerfGE 116, 243–270).

12 Federal Constitutional Court, decision of 11 January 2011 – 1 BvR 3295/07 – BVerfGE 128, 109.

(Section 8 (1) 4). A further requirement for changing a person's registered sex – that the applicant not be or no longer be married (Section 8 (1) 2) – was declared unconstitutional by the Federal Constitutional Court in 2008.[13] The provisions in Section 8 (1) 2, 3 and 4 no longer apply having been found unconstitutional. This took away the main point of focus of the continuing policy debate and invalidated the partial change/full change distinction central to the Transsexuals Act.

The partial solution was originally meant as an intermediate stage. This was based on the assumption that all transgender persons ultimately seek gender reassignment surgery. The partial solution was intended as a way of trying out the change of gender role in everyday life before making the decision to operate. The ability to take on a new forename was meant to prevent difficulties at work, when looking for employment or accommodation, and in official dealings. Because of the time and cost-intensive assessment procedure that had to be gone through even for a change of forename, this purpose was never attained. The partial solution also had another purpose: It was meant to enable persons who were married and wanted to stay married, and who were unable to apply for a change of registered sex because of the requirement of unmarried status under Section 8 (1) 2, to live out their gender identity with a suitable forename. The unmarried status requirement and the operation requirement under Section 8 of the Transsexuals Act **must be viewed in historical context with Section 175 of the German Criminal Code** (Strafgesetzbuch/StGB), which was still in force when the Transsexuals Act was drafted and enacted. The Federal Constitutional Court had confirmed the constitutionality of Section 175 as recently as 1973.[14] Same-sex marriages (resulting from application of the Transsexuals Act) can no longer be prevented following a Federal Constitutional Court decision of 2008. The stated purpose also no longer appears to carry much weight following the repeal of Section 175 of the German Criminal Code, the unconstitutionality of discrimination on grounds of sexual orientation, and the resultant equivalence of marriage and registered life partnership.

A basic and human rights analysis of the remaining requirements for changing a person's name and registered sex shows that the Transsexuals Act as it now stands violates basic rights and international human rights conventions such as the ECHR.[15]

The assessment requirements (Section 4 (3)) in particular do not stand up to legal scrutiny. The original purpose of making the change of name and registered sex require an assessment by two independent assessors was – according to the act's drafting history – to avoid a violation of moral principles (i.e. to avoid toleration or even facilitation of homosexual relations by the state), to protect against rash decisions, and to fulfil a kind of counselling role: The purpose of requiring an assessment for a change of forename was to ensure that persons not yet undergoing medical treatment (a change of registered sex required somatic care in any case) be "provided with guidance as to the importance of medical advice and support."[16] This purpose is at odds with legal reality. The Germany-wide survey showed the assessment to come across not as helpful support, but in many cases as an encroachment on self-determination and the pri-

13 Federal Constitutional Court, decision of 27 May 2008 – 1 BvL 10/05 – BVerfGE 121, 175.
14 Federal Constitutional Court, decision of 2 October 1973 – 1 BvL 7/72 – BVerfGE 36, 41.
15 For detailed information, see Annex 1, part 2.
16 Bundestags-Drucksache 8/2947, p. 12 (2.5).

vate sphere.[17] Conversely, health insurance funds often ask to be provided with the assessments compiled under the Transsexuals Act for a change of forename and (since the repeal of the operation requirement under Section 8 of the Act) registered sex in order to facilitate the assessment they themselves need to carry out to decide on funding for somatic gender reassignment measures.[18] It was reported that in some cases where a person has not gone through proceedings under the Transsexuals Act, health insurance funds will question the diagnosis of transsexuality in order to refuse funding for gender reassignment measures. This reverses the sequence originally laid down in Section 8 of the Transsexuals Act (physical reassignment first, change of registered sex second). As a result, people may be refused appropriate health care because they lack the psychological resources to devote themselves to what are frequently drawn-out altercations with a health insurance fund in addition to the assessment proceedings under the Transsexuals Act.

The findings of the surveys conducted for this report, and those of other surveys, paint a picture of assessment procedures that in many cases are disproportionately time and cost-intensive and are experienced as degrading and discriminatory, thus violating applicants' basic rights.[19] The local courts surveyed cited the assessment procedure as the main factor driving individual variation in case duration (an average of 9.3 months with a range from 5 to 20 months).[20] The requirement not just for one but for two assessments is unique in the German legal system and is regarded as lacking rationale and as evidence that there must have been "a very great desire for control [...] in the drafting of this act".[21]

The assessment is often felt to be degrading. Adults report being asked to disclose intimate details from childhood and their sexual past. Under the diagnostic criteria applied today, however, neither childhood psychosexual development nor sexual orientation are key determinants of present transgender identity. Transgender persons report frequent comments about their choice of clothes not corresponding with gender stereotypes for the gender identity under assessment, and of hobbies and everyday lifestyle being assessed for conformity with gender stereotypes. One assessor reportedly asked an applicant to take off their pullover and threw balls for them to catch in order to assess their motor coordination in undressing and catching.[22] Subjects not infrequently have to endure degrading physical examinations. Most persons undergoing assessment feel entirely at the mercy of such situations because a court is extremely unlikely to grant an application for a change of forename/registered sex if the assessors are not persuaded of the applicant's transgender disposition. This gate-keeping effect can result in applicants disclosing far more intimate details than they need to out of fear of not convincing the assessors. This compounds the feelings of dependency and humiliation.

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17 See Annex 3, part 2.

18 This emerged from the survey of lawyers (Annex 3, Part 3), of transgender persons throughout Germany (Annex 3, Part 2) and academic papers by practitioners; see Becker (2013), p. 146, with reference to Pfäfflin, who cited this as a problem as early as 1987: Pfäfflin (1987).

19 For detailed information on the following, see the surveys, Annex 3, Part 2, and the legal analysis, Annex 1, Part 2, at 2.2.4.

20 See Annex 3, part 1, at 4.8. According to responses from lawyers (Annex 3, Part 3), some years ago there were also judicial districts where it was possible for the proceedings to be completed within six months. This is reportedly no longer possible or now very rare since local courts generally are overstretched.

21 Vogel (2013), p. 183; see also Meyenburg/Renter-Schmidt/Schmidt (2015).

22 As reported by Fahrenkrug (2016), p. 63.

Children experience the assessment as particularly intrusive. Parents report of difficulties explaining to a child why it is then still necessary to answer intimate questions put by a stranger when the child has already persuaded family members and possibly also the school to accept their identity and now wants nothing more than the right passport for a trip abroad or an unsupportive school to use the right forename and pronoun. There are isolated reports of children having to endure eight or even twelve-hour assessment sittings[23], apparently to 'test' the earnestness of their wish to go through proceedings under the Transsexuals Act. This must undoubtedly be considered a violation of human dignity and the right to physical integrity, and is also likely to be in contravention of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Increasing numbers of assessors themselves are now in favour of the assessment requirement being abolished.[24] The criterion under Section 4 of the Transsexuals Act – that the person's transsexual disposition must have persisted for three years and is highly likely to be permanent – is reportedly negated in just 1% of assessment cases.[25] A person's gender identity, it is reported, is not capable of being assessed by another, and assessment can thus only reflect what the person says about their own self.[26] This is backed up by the case numbers recorded since the Transsexuals Act entered into force, with the proportion of applications rejected under 5% and falling.[27]

The low rejection figures compare with an average total cost, established from survey responses for this report, of €1,868 per case under the Transsexuals Act, which has to be paid either by the applicants themselves or, if they are granted legal aid without an instalment plan, by the judicial treasury. According to the findings of the survey, performed for this study, of local courts competent to preside over proceedings under the Transsexuals Act[28], the ratio of legal aid applications granted to applications made indicates a legal aid quota of 42.2% (36.0% without and 6.3% with an instalment plan). If the responses of 22 out of the total number of 53 local courts competent to preside over proceedings under the Transsexuals Act are taken as representative, then based on an average cost of €1,868 determined from the information provided by 19 courts and a total number of 1,648 cases extrapolated from the judicial statistics, it can be inferred that a total of 593 cases were funded in their entirety from the judicial treasury in 2015 (the 36% of cases granted legal aid without an instalment plan), at a cost to the judicial treasury of €1,108,247, of which 88.9% or €985,231 was assessors' fees. The assessment procedure having been shown to be devoid of purpose, it remains to be established whether it also involves an improper use of taxpayers' money. That is beyond the scope of this report, however. Taken overall, the cost, time and stress involved in the assessment procedure add up to a

23 Report on the study "Coming-out – und dann...?! Ein DJI-Forschungsprojekt zur Lebenssituation von lesbischen, schwulen, bisexuellen und trans* Jugendlichen und jungen Erwachsenen" (Krell/Oldemeier (2015)), presented in the German Bundestag by Kerstin Oldemeier on 18 March 2016 at a conference held by the BÜNDNIS 90/DIE GRÜNEN parliamentary party, "jung. queer. glücklich?! Lebenswirklichkeiten queerer Jugendlicher in Deutschland".

24 See the papers referred to in Footnote 2, whose authors with the exception of Bruns and Grünberger are all assessors. Only one author, Vogel (2013), proposes limiting the assessment procedure to a single assessment while saying that the assessment process should be "designed to promote autonomy" rather than being "paternalistic".

25 Meyenburg et al. (2015), Meyenburg (2016).

26 Güldenring (2013).

27 For detailed information, see the analysis of all surveys conducted on the Transsexuals Act, Annex 3, part 1.

28 For the survey see Annex 3, Part 1, at 4.4 (costs of proceedings) and 4.6 (legal aid quotas).

major intrusion on basic and human rights, and notably on the general right of personality protected under Article 2 (1) read in conjunction with Article 1 (1) of the German Basic Law, the right to respect for private life under Article 8 ECHR, and the right to equal treatment under Article 3 (1) of the German Basic Law and Article 14 ECHR read in conjunction with Article 8 ECHR.[29] The assessment procedure conflicts with the right to sexual self-determination and with associated international calls for an application procedure without assessment and legislative trends in that direction worldwide. All countries that have reformed the law on changes of name and registered sex have abolished assessment requirements and others are in the process of doing so.[30]

Besides the assessment requirement under Section 4 (3) of the Transsexuals Act, which has been seen to be devoid of purpose and at minimum constitutionally unsuited or disproportionate, there are also other major procedural obstacles that stand in the way of a person freely living out their constitutionally protected gender identity.

The fact that the procedure takes place before a court is an access barrier in itself. At most local courts, Transsexuals Act applications are handled by the guardianship court. It is in the nature of guardianship cases that they tend to be urgent, requiring a decision within days even though they are not formally injunction proceedings. Because of this, proceedings under the Transsexuals Act cannot be fast-tracked as a rule, and are given lower priority. The expertise of the judges and court office staff is in guardianship law. Applicants and prospective applicants are often given incorrect information on the phone, for example about the procedure and access for minors. According to lawyers surveyed for this report,[31] staff at a number of court offices are apparently unaware that the Transsexuals Act does not set a minimum age, and that both a change of name and a change of registered sex can be applied for by a minor. Inaccurate information is also provided about other points, such as the fact that the unmarried status, operation and sterilisation requirements have been abolished. It is also unhelpful that the current German text of the Transsexuals Act published online by the Federal Ministry of Justice is difficult to read and misleading due to in parts faulty cross-referencing in footnotes[32]. This further hinders access to the law for the lay public.

29 For detailed information, see the legal analysis in Annex 1, part 2, at 2.2.4.

30 For detailed information, see the comparison of laws in Annex 2.

31 For the survey, see Annex 3, part 3.

32 URL: http://www.gesetze-im-internet.de/bundesrecht/tsg/gesamt.pdf [20 August 2016]. The operation and sterilisation requirements are still referred to in Section 8 (1) 3 and 4, and are neither formatted in italics nor marked with footnotes. Under Section 8 (2), there is an insertion headed “Fußnote” (“Footnote”) which translates as follows: “Section 8 (1) 3 and 4: Held incompatible with the German Basic Law and inapplicable until entry into force of superseding legislation in Federal Constitutional Court decision of 11 January 2011, I 224 – 1 BvR 3295/07 – BVerfGE 128, 109. Section 8 (1) 1: Held incompatible with the German Basic Law and therefore null and void, Federal Constitutional Court decision of 16 March 1982, I 619 – 1 BvR 938/81 – BVerfGE 60, 123.” The note on Section 8 (1) 1 (“Section 8 (1) 1: “Held incompatible with the German Basic Law and therefore null and void, Federal Constitutional Court decision of 16 March 1982, I 619 – 1 BvR 938/81”) is quite simply false. The requirements for a change of forename (Section 1 (1) 1 to 3) must also be met for a change of registered sex. The cited Federal Constitutional Court decision related to the unconstitutionality of the minimum age of 25 that originally applied in both instances. Any reference to inapplicability has been invalid since the Federal Constitutional Court held the minimum age for a change of forename likewise to be unconstitutional in 1993 and the reference to a minimum age was removed from the Act by an amending act dated 17 July 2009 (BGBl. I, 1978).

Minors and non-Germans face particularly high barriers to access. For **minors**, the requirement to obtain approval from the family court (second sentence of Section 3 (1) of the Transsexuals Act) is a further delaying factor that may also involve additional difficulties. Cases are reported by law practitioners[33] where the family court made its approval conditional on the opinion of the youth welfare office (although this is not a procedural requirement), yet the youth welfare office was unsupportive or even discriminatory. No matter whether this procedure is backed by the law, the outcome is a threefold appraisal by authorities not qualified in the matter. Such instances highlight the practical difficulties and stress faced by transgender children and those close to them. Parents of a child who is refused access to proceedings under the Transsexuals Act, or refused acceptance at school, face the choice between urging them not to live out their gender identity or encouraging them to do so despite the risk of discrimination and bullying. Both options harbour a high risk of psychological harm.[34] There is inadequate provision for access by minors who receive **no support from parents or guardians**. Theoretically, minors in this situation would have to rely on a (partial) withdrawal of parental rights, with the application then being made by the youth welfare office, which would also support the child in discussions with the parents. According to the lawyers surveyed, however, this support is not provided in practice. Applicants then usually wait until they come of age. An additional problem here as a rule is that if parents are required to pay maintenance, legal aid is not granted, or it is only granted if the parents provide the information required for the purpose. Young adults are thus either forced into a confrontation with their parents or have to wait until they can afford to pay the costs themselves – which given the poor job opportunities of transgender persons is not a strong prospect and itself unreasonably delays recognition of the person's gender identity.

A problem with regard to **applications by non-Germans** is determining whether there are 'comparable arrangements' in the domestic law of their country of origin. Aside from the requirement for assessments, legal practitioners cite this as the factor that causes the greatest delays.[35] This is a severe restriction on the ability of non-German nationals living in Germany to exercise their basic rights. A less onerous criterion might be the person's habitual residence, as is now used in matters of non-contentious jurisdiction – one need look no further than the European Succession Regulation and other proceedings relating to personal status, such as marriage (Section 98 of the Family Matters and Matters of Non-contentious Jurisdiction Act – Familiensachen/Freiwillige Gerichtsbarkeit-Gesetz/FamFG). It is not possible to predict whether this would lead to an increase in the number of applications for a change of name and/or registered sex. In case of doubt, anyone who can change their forename and registered sex in their home country without problem will follow that route to avoid going through the recognition procedure in Germany. A number of countries already only give access to nationals who are resident domestically. An example is Switzerland, which refers German-resident Swiss nationals to the procedure in Germany. Under Section 1 (1) 3 of the Transsexuals Act, however, access to the procedure is only open to persons whose domestic law does not make comparable arrangements, making it necessary to go into the substantive division of powers between Swiss federal law and the cantons, and into whether an applicant's home canton is indeed not comparable, for example because it still requires gender reassignment surgery.

33 For the survey of lawyers, see Annex 3, part 3

34 For detailed information, see the legal analysis, part 2, at 2.2.6.

35 See survey of local courts, Annex 3, part 1, at 4.8, and of lawyers, Annex 3, Part 3.

This is not stipulated on in Swiss law, however, and so is subject to evolving case law in each judicial district and hence to ongoing change. A country of origin that has comparable arrangements will in case of doubt recognise a change of name or registered sex obtained in Germany. Where the other country does not have comparable arrangements, the Federal Constitutional Court has stipulated that access must be provided. Even under the current legal position, therefore, it is not always possible to prevent a mismatch between papers issued in a person's country of origin and papers issued in Germany (primarily residence titles, Convention travel documents and birth certificates subsequently recognised in Germany). This has to be tolerated. The Federal Constitutional Court has held avoiding such conflicts of laws to be a legitimate aim, and that is the aim served by application, exceptions apart, of the nationality rule. It also saves people from running into 'identity problems' with their country of origin. It cannot, however, justify encroachments on basic rights.[36]

The decision as to whether proceedings can be pursued and hence are pursued in a person's home country should be left to the person concerned in exercise of their rights of self-determination; only then are their basic rights fully respected.

The public interest in people having papers that exactly match those issued by other countries is not as consequential as the public interest in other-country nationals resident in Germany having papers that match their social gender role and are useful for identification purposes. As gender identity is a major part of individual personality, people who are refused access to the procedure for a change of name and registered sex are not going to keep living out their assigned gender role just because that is what it says in their papers. Instead, the upshot is a mismatch between gender role and identification papers, which is neither in a person's constitutionally protected interests nor in the public interest.

Overall, the implementation of the procedure under the Transsexuals Act does not conform with the recommendations of the Commissioner for Human Rights or the stipulations of Resolution 2048, as the procedure is neither quick or transparent or accessible, nor is it based on self-determination.

The procedural obstacles mentioned encroach on basic and human rights. Encroachments of such severity face a high justification threshold. Set against those individual rights is a putative state interest in subjecting a change of forename and registered sex to onerous conditions, an interest which proves beyond the grasp of argument and ultimately does not exist, and for that reason alone is out of all proportion with the severity of the encroachments.

Aside from the Transsexuals Act, which like the proposed bill is lex specialis, German naming law is governed in other respects by the Act on Changes of Surnames and First Names (Namensänderungsgesetz/NamÄndG) of 1938. Compared internationally, this lays down extremely restrictive conditions for a change of forename, although the Federal Constitutional Court has clarified with regard to the 'important reason' required under Section 11 read in

36 Federal Constitutional Court, decision of 18 July 2006 – 1 BvL 12/04 – BVerfGE 116, 243, at 49 and 72 et seq.

conjunction with Section 3 of the Act that the public interest in retention of the existing name carries less weight for a change of forename than for a change of surname.[37]

A gender-specific forename that does not match a person's gender identity is also likely to be an 'important reason' within the meaning of the Act on Changes of Surnames and First Names, which does not require two independent expert assessments (taking that act's scheme and teleology in isolation from the Transsexuals Act, it would not be possible anyway for it to require such assessments when there is a manifest gender disparity).

The **public interest in regulating personal status** is likely to carry even less weight in relation to registered sex. Of all the identity-related attributes protected from discrimination under the first sentence of Article 3 (3) of the German Basic Law, only sex and parentage are automatically registered.[38] **It is likely that there is no longer a constitutional need for registering a person's gender affiliation**, just as there is no such need in respect of other attributes such as race, religion, etc.; indeed in the case of race, but not only race, there can no longer ever be such a need. Gender affiliation is registered for historical reasons. Numerous differences between the rights and obligations of women and men made it a regulatory necessity to be able to determine voting eligibility, liability for conscription, etc. With conscription in abeyance, the only question that is now answered with reference to gender in the law is whether a relationship between two people is classified as heterosexual or homosexual and thus whether a couple can marry or enter into a life partnership. Since all the various legal consequences brought up for judicial review have been found incompatible with European law and unconstitutional, upholding the distinction between these two institutions under family law must be seen more and more as a matter of a legal policy interest, with the regulatory interest carrying diminishing weight. It is not capable of justifying the aforesaid obstacles to a change of registered sex that encroach on basic rights. This report was not tasked with examining whether gender affiliation is an attribute that needs to be officially registered. Reference is made to the report 'Geschlechtervielfalt im Recht' ('Gender Diversity in Law') currently being compiled by the German Institute for Human Rights. It is to be noted, however, that as long as gender affiliation is still to be officially registered, the procedure for changing a person's registered sex in line with their gender identity must be made to encroach as little as possible on basic rights, since otherwise it is unconstitutional and in contravention of international law.

2.1.2 Further need for reform of the Transsexuals Act

The Transsexuals Act is not only in need of reform with regard to the requirements for a change of name and registered sex. The provisions are also inadequate regarding parenthood in respect of transgender persons and regarding the prohibition on disclosure.

There are several cases before the German courts – one of them before the Federal Court of Justice (Bundesgerichtshof/BGH)[39] – concerning the name and gender under which a parent of a child born subsequent to the parent's transition is recorded on registration of the child.

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37 Federal Constitutional Court, decision of 10 October 1989 – 1 BvR 358/89 – BeckRS 2014, 52597.

38 Religious affiliation is registered on request and confirmed on reaching the age of religious maturity.

39 Appeal against decision of Berlin Higher Regional Court (Kammergericht) of 30 October 2014 – 1 W 48/14 – before the Federal Court of Justice as case XII ZB 660/14.

Persons whose registered sex has been changed but whose reproductive organs are functional are fighting for the right to be registered with their present identity. The Transsexuals Act does not stipulate on the question at issue in these cases because it is based on the former legal position where a person had to be sterile before they could apply for a change of registered sex. There is an urgent need here for solutions that safeguard the basic rights of parents and most of all of children. A child must thus be protected from inadvertent disclosure of the fact that a parent is transgender – which is precisely what happens when a child is enrolled in primary school with a birth certificate showing the parent with a forename and gender role that do not match their social gender role.

The prohibition of disclosure under Section 5 of the Transsexuals Act, as legal practitioners report, is not formulated strongly enough. The institutions concerned (public agencies, schools, universities, etc.) are unaware of the prohibition on disclosure and do not have the practical expertise to know what information may not be disclosed and what courses of action carry the risk of inadvertently outing someone. Additional guidance also needs to be issued as to what other data must be deleted or amended and who should have access to earlier records. For example, protection from involuntary outing cannot be ensured without a change of social/pension insurance number. Nor is it necessary for every member of staff at a bank, insurance, library or the public broadcasting licence fee authority even to be able to see that someone is transgender simply by glancing at a record showing the person's previous name. There is no sanction against a breach of the prohibition on disclosure as it is not an offence.

2.2 Further legislation and reform needs

Aside from the provisions on changes of name and registered sex, the greatest potential for discrimination is in the schools/training/universities sector and in health care. In these and all other settings, lack of education about transgenderism leads to misgivings, misguided advice and treatment and thus as a whole to – frequently unwitting – discriminatory conduct.

In health care, the greatest need for reform is with regard to the provision of gender reassignment measures. Firstly, current standards of treatment in Germany no longer come up to medical standard of care, and secondly, even the existing treatment and assessment guidelines are often not followed correctly, resulting in severe delays in treatment or even no medical care at all.

The greatest problem in health care provision for transgender persons is cited as a lack of specialist knowledge at the health insurance funds' Medical Review Board (Medizinischer Dienst der Krankenkassen/MDK).[40] Lawyers involved in cases concerning funding for gender assignment measures report that where health insurance funds refuse funding, it is almost always because of a faulty assessment by the MDK based on incorrect diagnosis criteria or inaccurate information about the current status. Applicants were reported in many cases to be kept waiting for treatment for years and to suffer severe stress because of the failure to grant it.

40 See Part C (Annexes), Annex 3, Part 3 (survey of lawyers) and for detailed information on this subject: C. Annex 4 (Further reform needs).

It is reportedly found to be especially humiliating if – of all institutions involved – a health insurance fund questions that a person is transgender. The fight for recognition and adequate health care, it was reported, cost applicants a lot of energy and sapped their mental resources to face the problems of everyday life as a transgender person. This significantly limited their ability to participate in society. Leading practitioners providing treatment additionally report that the burden of suffering in transgender persons often only arises when they are refused the prospect of somatic measures in the near future for reasons such as restrictions within the health care system (referred to as anticipated suffering).[41] Rather than seeking the best treatment to reduce the applicant's suffering, the MDK has reportedly developed a tendency when reviewing applications to question the diagnosis arrived at by practitioners and to look for errors.[42] This was confirmed by lawyers, who said that requirements in treatment and assessment guidance were often misinterpreted to the detriment of applicants, and documentation submitted in support of applications was called into question or declared to be insufficiently detailed.

There are also problems, however, concerning the provision of transgender patients with health care that is not directly connected with being transgender. A lack of specialist information and awareness result in involuntary and unnecessary outing, extended waiting periods, and overall to transgender persons having less trust in the health system.

Places of education and training are by nature places where young people are in the process of finding their identity. It is thus all the worse when the education system fails to provide support in this regard or even practices or tolerates discrimination and stigmatisation. Past national and international surveys and the surveys conducted for this report show the school setting to be a place where exclusion and discrimination is experienced to a heightened degree, both from teachers and other students. There are reports, for example, of recurring insults, being addressed with the wrong pronoun, and social exclusion. The cause is overwhelmingly cited as lack of knowledge on the part of school heads and staff. As a result, transgender children are frequently excluded from social activities, forced to use what they regard as the wrong toilet or changing room, or forced to take part in gender-specific sports instruction that does not match their needs, or excluded completely from specific activities.[43] This can lead to young people suffering significant psychological stress and long-term harm that could be relatively easily avoided. A recent study has shown that transgender minors who are respected and encouraged in their gender identity and have few experiences of discrimination are no more susceptible to depression, suicidal tendencies and other psychological conditions than minors who identify with the gender assigned at birth.[44]

41 Nieder/Cerwenka/Richter-Appelt (2014), p. 24/25.
42 Nieder/Cerwenka/Richter-Appelt (2014), p. 27/28.
43 See further reform needs in Part C (Annexes), Annex 4, at 2.2.
44 Olson et al. (2015), p. 7.

3.
Recommendations for action

The following recommendations for action can be inferred:

3.1 Repeal of the Transsexuals Act/introduction of a new act

As the Transsexuals Act, in its entirety, is neither fit for purpose nor corresponds with the current status of research in medicine, human rights studies and gender studies, nor appears capable of safeguarding the constitutionally protected interests of transgender persons, it is recommended that the federal legislature replace it with a new act that is in keeping with the times. Reform of the existing act is out of question because too many changes are needed. Even its title would have to change from the derogatory-sounding 'Transsexuals Act'. The Transsexuals Act should therefore be repealed and superseded by an 'Act Concerning the Recognition of Gender Identity and for the Protection of Self-Determination in Gender Assignment' ('Gesetz zur Anerkennung der Geschlechtsidentität und zum Schutz der Selbstbestimmung bei der Geschlechtszuordnung'). With regard to the change of forename and registered sex, the new act would be lex specialis in relation to the Act on Changes of Surnames and First Names and the Civil Status Act.

3.1.1 Abolition of assessment/diagnosis requirements

The act should no longer require assessments. A person's forename and registered sex are a matter of self-perception and hence self-determination. A change of forename and registered sex is not legally connected to the question of whether specific medical or therapeutic measures are medically indicated. They must not therefore be made conditional on the presence of specific medical diagnostic criteria and their confirmation by external assessors. There is no identifiable or materially demonstrable public interest to justify such an assessment. For a change of forename and/or registered sex, it should suffice for adults, and for adolescents from the age of 14, to exercise their right of self-determination in the form of an application in which they declare that their forename or registered sex does not correspond with their gender identity. This declaration would effectively correspond to the 'important reason' required under the Act on Changes of Surnames and First Names.

3.1.2 Improved access for minors/peer counselling

To ensure that families have adequate support in the decision regarding a change of forename or registered sex and that parents or guardians only set the procedure in motion for children in accordance with their free will, the change of name or registered sex should be attached to a counselling requirement. It is recommended that an application for a change of name or registered sex should be submitted with written confirmation that the child and the parents or guardians have separately taken counselling at a counselling centre and have had explained to them the rights of the child to gender self-determination and the legal and potential social consequences of a change of forename and registered sex. From the age of 14, a change of forename and/or registered sex should be permitted without the applicant being represented by their parents or guardians. From this age, minors are legally capable of taking responsibility for actions and (identity-related) decisions, as with the age of criminal responsibility and the age of religious maturity. Before making an application, minors over the age of 14 should also receive counselling, in particular if parental support is lacking, in order to explain to them the legal and potential social consequences of going through the procedure for a change of name and/or registered sex and to support them in deciding whether making an application comes into question for them.

It is urgently recommended that the criteria be primarily a matter of human rights and social policy (see also the preamble to S2k-Leitlinie "Varianten der Geschlechtsentwicklung", the medical guidelines on disorders of sexual differentiation[45]). The provisions on counselling and support therefore come before the purely procedural provisions relating to a change of forename and/or registered sex in the proposed bill. It is therefore recommended that both federal and Länder policymakers expand the availability of counselling. This also applies with regard to the counselling needs of adult transgender persons as well as of relatives, employers and others around them. With regard to referral and the provision of support for counselling centres, it should be borne in mind that peer counselling is particularly important in terms of awareness and understanding.

3.1.3 Improved access for non-Germans

Access to the procedure for a change of forename and/or registered sex for persons who are not German nationals should no longer be made conditional on a person's domestic law having comparable arrangements, as determining this point generally poses major difficulties and delays the proceedings. This restriction is also questionable from a human rights perspective. The criterion should be habitual residence in Germany.

45 Leitlinie der Deutschen Gesellschaft für Urologie (DGU) e. V., der Deutschen Gesellschaft für Kinderchirurgie (DGKCH) e. V., der Deutschen Gesellschaft für Kinderendokrinologie und -diabetologie (DGKED) e. V., published at AWMF, as of July 2016, http://www.awmf.org/uploads/tx_szleitlinien/174-001l_S2k_Geschlechtsentwicklung-Varianten_2016-08_01.pdf [21.10.2016].

3.1.4 Procedure to be presided over by registry offices

It is recommended that, as in other countries, the procedure should be made an administrative rather than a court matter. With the assessment requirement gone, there would no longer be any complex questions to be weighed and no assessments to be appraised. It is therefore recommended that the procedure be presided over by registry offices, which keep the civil registry and issue new birth certificates. Applicants should also be given a certificate documenting the change for them to present to other public agencies and private-sector entities so that records, certificates, references, etc. can be amended. The additional possibility of making the requisite declarations before a notary who then sets the procedure in motion instead of a registry office would further facilitate access to the procedure given that notaries' offices are found throughout Germany.

3.1.5 Provisions on parenthood in respect of transgender persons

The constitutionally protected interests of the children of transgender parents should be specially safeguarded by issuing them with a birth certificate in which the parents are designated in their social role, i.e. in accordance with their present registered sex and forename, or as 'parents'. Only the present forename should be stated. This corresponds with the reality in which the child lives and protects the child from potential discrimination as a result of disclosure that a parent is transgender. It does not appear expedient to uphold the right to knowledge of one's parentage by the old forename and the old registered sex being recorded (in addition or exclusively) in the register of births. Instead, the forename and registered sex should be recorded that are legally in force at the time of the birth. The separate terms for the parental roles ('mother' and 'father') should either be dropped by introducing a heading entitled 'parents' or should follow the social role and not be based on the biological contribution to the conception or birth. The civil registry should furthermore solely provide information about legal parenthood, which applies irrespective of biological contribution to the conception or birth – as is already the case for adoption, for instances where the husband is not the biological father (Section 1592 indent 1 of the German Civil Code), and for same-sex parenthood. To protect transgender parents and their children from involuntary disclosure that the parents are transgender, children born before a parent's change of forename/registered sex whose record in the registry of births still contains the old entries should also be issued on application with a birth certificate showing the new entries.

3.1.6 Introduction of a new prohibition against discrimination

In light of the findings showing the widespread discrimination that transgender persons suffer to this day in social life and in dealings with private-sector entities and also public agencies, it is urgently recommended that an express prohibition of discrimination on grounds of gender identity be incorporated in a legal text that has a substantial bearing on the rights of transgender persons. Under the case law of the European Court of Justice, gender identity is a part of the 'gender' attribute and is therefore covered by all prohibitions in European law against discrimination on grounds of gender.[46] The German legislature diverged from this when transposing

46 Established ECJ case law since "P. v. S.", Judgement of the Court of 30 April 1996, Case C-13/94.

the anti-discrimination EU directives into national law in using the term 'sexual identity' in the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz), which according to the act's explanatory memorandum encompasses both sexual orientation and gender identity.[47] The Federal Constitutional Court has not so far brought gender identity under the attribute 'gender' under the first sentence of Article 3 (3) of the German Basic Law, but has put its protection on an equal footing with the attributes there listed.[48] Expressly citing a prohibition of discrimination on grounds of gender identity would provide clarification, and people affected by such discrimination could rely upon respect of their gender identity not being a question of individual moral or political attitude, with clearly limited scope for interpretation. Introducing an express prohibition of discrimination on grounds of gender identity complies with the calls set out in Resolution 2048 of the Parliamentary Assembly of the Council of Europe of 2015 and the Recommendation of the Committee of Ministers of 2010.

3.1.7 Sanctions against breaches of the prohibition of disclosure

It is emphatically recommended that transgender persons be given more effective protection from disclosure that they are transgender. This includes stipulating in greater detail the scope for storing and making available information on a person's old forename and old registered sex as well as sanctions against breaches of the prohibition of disclosure. Breaches of the prohibition of disclosure should be made subject to effective penalties or fines that take into account the irreversible damage and the scale of discrimination that disclosure can lead to.

3.2 Promotion of public education

The survey findings reveal a very major need for public education and it is recommended that education and awareness measures be established as a key area of policy action alongside the legislative reform of the Transsexuals Act. It is not only private-sector entities which need to be made aware what rights transgender persons have and what courses of action are discriminatory against them. Public agencies, too, show in some cases severe knowledge gaps that need to be addressed with measures tailored to the target group.

3.2.1 Education in schools

School education is often a very formative time for children and adolescents. During pre-puberty and puberty, when gender identity is found and cemented, minors are particularly needful of respect and acceptance from those around them. The emphasis here must be on information and education. Education policy in the Länder should therefore place a focus on providing schools and teachers with accurate information and about the legal basis, including prohibitions against discrimination, and also about the consequences of a change of forename and registered sex. Suitable action should also be taken to raise awareness of the challenges faced by transgender (and inter* or non-binary) children in everyday school life. Going forward, it will become necessary to question gender-binary aspects of school such as sports

47 Bundestags-Drucksache 16/1780, p. 31.
48 Federal Constitutional Court, decision of 26 January 1993 – 1 BvL 38/92 – BVerfGE 88/87.

instruction in certain grades and the design of toilets and changing cubicles. In the short run, schools can work together with pupils and their parents to find answers to young people's self-determination needs. Alongside this, it is essential to give greater visibility to topics such as gender diversity and gender identity by incorporating them into curricula, teaching materials and project work.

3.2.2 Information for training providers and employers

Transgender persons all too frequently experience discrimination and stigmatisation in vocational training or at work. Employer associations, guilds and unions are encouraged here to conduct information campaigns for both private-sector and public employers. Accessible information material needs to be made available, training offered and encouragement given to make use of it. Alongside comprehensive information about gender diversity and the diversity of gender identities, information should also be provided about the legal basis, including prohibitions against discrimination, compensation obligations and the legal consequences of changes of forename and registered sex.

3.2.3 Health care system/health insurance funds

Based on the information gathered, health care provision in Germany is frequently inadequate, including in comparison with other countries. Under Resolution 2048 of the Parliamentary Assembly of the Council of Europe, member states are called upon to ensure stigma-free access to surgery, hormone treatment and psychological support that are reimbursed by the health care system.[49] Here, it is necessary to establish how urgently-needed knowledge can be disseminated through the various operational levels within the health insurance funds, their Medical Review Board and individual places of treatment. There is a need for further research in this regard.

49 Paragraphs 6.3.1 and 6.3.3 of Resolution 2048 (UN Doc. 1347) of the Parliamentary Assembly of the Council of Europe, "Discrimination Against Transgender People in Europe" of 22 April 2015.

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