

The National Advisory Board on
Social Welfare and Health Care Ethics ETENE

17 April, 2013

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Reference: Ministry of Social Affairs and Health/5023/2012

NEEDS FOR AMENDMENTS IN ACT ON LEGAL RECOGNITION OF THE GENDER OF TRANSSEXUALS

On 12 December 2012, the Ministry of Social Affairs and Health has requested a statement on the needs to amend legislation on transsexual persons, primarily the Act on legal recognition of the gender of transsexuals. The request for statement quotes a report issued in connection with a visit to Finland by Nils Muiznieks, Council of Europe Commissioner for Human Rights, according to which the requirement of infertility or unmarried status of the person for the recognition of gender should be removed.

On 30 January 2013, the Advisory Board heard Professor Kevät Nousiainen from the University of Turku and Professor Aila Tiitinen from the University of Helsinki as experts in the matter. Professor Tiitinen submitted specifying comments after the hearing. In addition, Aino Mattila, docent of social psychiatry and specialist in psychiatry, submitted a written statement.

Primarily, the matter concerns section 1 of the Act on legal recognition of the gender of transsexuals (563/2002) that establishes as the basic condition for a person to be legally recognised to belong to the gender opposite to that according to which he or she is recorded in the population information system, that the person presents a medical statement stating that he or she permanently feels to belong to the gender opposite to that assigned to him or her and lives in that gender role, and that he or she has been sterilised or is for some other reason infertile. The act does not require the implementation of hormonal or surgical treatment related to gender reassignment. More detailed provisions on the medical statement referred to in section 1 of the Act are laid down in a decree of the Ministry of Social Affairs and Health on the arrangement of examinations and treatment aiming at gender reassignment as well as on the medical investigation related to the legal recognition of the gender of transsexuals (1053/2002).

In a detailed rationale for the Act, the requirement of infertility is justified by the following statement: "were this not the case, situations could arise where a person who has been legally recognised as a woman would father a child or a person whose gender has been legally recognised as a man would become pregnant." The Legal Affairs Committee and the Social Affairs and Health Committee did not comment on this particular paragraph. The matter was not taken up in the Constitutional Law Committee.

To the knowledge of the Advisory Board, the European Court of Human Rights has not issued a decision on a case concerning sterilisation as a requirement for the reassignment of gender. There are, however, cases where sterilisation has been set as a condition for other measures, and these have been deemed violations of Article 3 of the Convention on Human Rights. In the Constitution of Finland, the realisation of this Article is based largely on section 7 on the right to life and personal integrity. Section 10 of the Constitution concerns the right to privacy. The European Court of Human Rights has found that the objective of Article 8 on the right to respect for private and family life is to protect individuals from government interference in their private life. Sterilisation as a condition for gender reassignment can be interpreted as a government measure where voluntary nature of consent given can be viewed as questionable. In Sweden in 2012, the Administrative Court of Stockholm overturned a decision rejecting an application to recognise gender reassignment issued by the National Board of Health and Welfare. It is possible that in a similar case a Finnish court would come up with the same ruling by applying the primary nature of the Constitution in the interpretation of legislation.



From a legal standpoint, the requirement of sterilisation thus appears at the very least problematic and it is highly possible that a national court or the European Court of Human Rights would assume a different position in an individual case.

Yet, the practice is less rigid than could be understood from a strict interpretation of the wording. Gender reassignment is preceded by an investigation stage, where it is examined whether the person meets the criteria laid down in legislation. Both treatment and the examinations of gender identity are concentrated to the University Hospitals of Helsinki and Tampere. A statement issued on the basis of a personal meeting with a specialist in psychiatry of both university hospitals must be available on each person. Hormonal and surgical treatment will only be initiated after a sufficient research stage. The patient is informed of the impact, risks and benefits of the procedures and of what can and cannot be achieved through the treatments.

Once it has been continued for a sufficient period of time, the hormone treatment will prevent the functioning of the gonads, which has been perceived to fulfil the sterilisation requirement posed by legislation. Many of the impacts of the hormone treatment are reversible, although this may not always be the case. What is noteworthy about this process is that infertility is not the result of a separate procedure but is caused by treatment related to gender reassignment. At the same time, it must be noted that infertility is not a medical requirement for a process of gender reassignment.

Legal recognition of a person's gender is thus possible even if they haven't undergone surgical treatment. As a general rule, hormone treatment is initiated in some form upon the person's own request. In practice, gender reassignment surgery is not undertaken before the decision on the legal recognition of gender. Moreover, not everyone is willing to have surgical treatment or such treatment can be prevented due to medical reasons, such as an underlying illness. In some rare cases, health reasons may prevent the initiation of hormone treatment, in which case infertility must be achieved through other means. Such procedures have no justification pertaining to the actual gender reassignment process.

The Advisory Board finds that the sterilisation requirement is at the very least questionable as concerns the realisation of the personal integrity guaranteed by the Constitution and that no medical reasons pertaining to gender reassignment exist for it. The unconventional father-mother setting that was referred to in the rationale for the Act as a potential cause for confusion remains secondary to personal integrity. The removal of the sterilisation requirement would have little impact on current practice. The decree associated with the act would continue to require a thorough medical investigation that the person feels he or she belongs to the opposite gender and that they have felt this to be their identity for a sufficiently long time. In case the sterilisation requirement is abolished, the initiation of hormone treatment would, in principle, no longer constitute a necessary condition for gender reassignment.

The Commissioner for Human Rights also drew attention to the fact that a valid marriage or registered relationship prevents the legal recognition of the new gender. The condition in section 1 of the Act on legal recognition of the gender of transsexuals is subject to the exception in section 2 of the Act, according to which legal recognition of the new gender is possible if the married spouse or the other partner in the registered partnership has personally given the Register Office his or her consent to that. In practice, this means that unless the other party to a marriage or registered partnership states his or her consent to a change in marriage or registered partnership, the person requesting gender reassignment must take measures to dissolve their marriage or registered partnership. Were this condition to be abolished, in case of a possible disagreement, the active party in altering status of the marriage or registered partnership would have to be the partner of the person seeking gender reassignment, not the individual him/herself. In its current form, the Advisory Board considers the regulation unnecessary.

The Advisory Board goes on to state that in lieu of transsexual it would be more appropriate to employ the expression transgender.



On behalf of the Advisory Board

Chairman

Markku Lehto

General Secretary

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FOR YOUR INFORMATION

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