



**Legal seminar 6 October 2009
on the implementation of EU law on equal opportunities and anti-discrimination**

**SUMMARY WORKSHOP PROCEEDINGS
DISCRIMINATION AGAINST TRANSGENDER PEOPLE: GENDER IDENTITY AS A GROUND OF
DISCRIMINATION**

Panel members

Chair: Prof. Christa Tobler, Universities of Basel and Leiden, expert non-discrimination Network
Speakers: Prof. Stephen Whittle, Manchester University
Mr. Silvan Agius, Policy and Programmes Officer, ILGA Europe
Rapporteur: Prof. Mark Bell, University of Leicester, expert non-discrimination Network

The first theme which emerged from the workshop was the need for greater clarity in the use of language and terminology. This is an area where a variety of terms are used, such as transsexual, transgendered, gender reassignment, gender identity. Within the case-law of the Court of Justice, and now also within Directive 2006/54, the term 'gender reassignment' is adopted. This is generally understood as referring to those individuals who undergo a process of medical and surgical intervention in order to align their physical appearance with their gender identity. In contrast, the term transgender is an umbrella concept which embraces a wider range of situations. In particular, many individuals do not undergo surgical intervention, but present themselves in a manner which corresponds with the gender identity rather than the biological sex assigned to them at birth. In this regard, the concept of 'gender identity' was proposed by Prof Whittle: 'those people whose gender identity or presentation is different from that expected of someone of their natal sex'.

The advantage of a focus on gender identity is that it escapes the emphasis on medicine and surgery and reflects the social reality that discrimination is caused by the individual's appearance, dress and voice. Indeed, most people will not know whether or not the individual has undergone or intends to undergo any surgery, so this is not what causes discrimination and harassment.

The case-law of the European Court of Human Rights has already referred to the concept of gender identity. A detailed definition can be found within the Yogyakarta Principles:

Understanding 'gender identity' 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.¹

Turning to consider the picture in the Member States, there was little consistency on how this matter is addressed. Mr Agius informed us that in 13 Member States discrimination related to gender reassignment is deemed to be sex discrimination; in two it is treated as sexual orientation discrimination; in one it is treated as sexual identity discrimination; and in 11 the legal situation is uncertain. This patchy picture concealed some instances of good practice, for example, where equality bodies are actively engaging in initiatives relating to gender identity discrimination (Belgium, Sweden, France, Netherlands, UK, Equinet).

¹ <http://www.yogyakartaprinciples.org/index.html>

In considering the options for legal reform, one possibility would be to seek a change in EU law in order to recognise expressly the ground of gender identity discrimination. This would, though, encounter legal obstacles given that it is not foreseen within Article 13 of the EC Treaty. Other contributors suggested that keeping gender identity under the auspices of gender equality had value, because it recalled the premises of gender equality, which are challenging stereotypes and norms about how people should appear and behaviour according to their genders. The decision in the *Coleman* case was mentioned as one opportunity for improving the current legal situation. The approach of the Court of Justice in that case appears to favour the prohibition of discrimination on grounds of gender, regardless of the actual gender of the person affected. Extending this to gender reassignment, this could mean that those who are associated with gender reassignment, or perceived as undergoing gender reassignment, could receive legal protection, even if they were not actually intending to undergo any medical or surgical intervention. This could enlarge the protection of the existing gender equality legislation to cover more parts of the transgender umbrella. Finally, it should be noted that Article 21 of the Charter of Fundamental Rights provides a non-exhaustive list of discrimination grounds ('any ground such as ...'), so there is scope here for the recognition of gender identity discrimination.