

Gender identity and access to health care in Croatia - legal framework

Pošćić, Ana; Martinović, Adrijana

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Gender identity and access to healthcare in Croatia – legal framework

Abstract

The Croatian Constitution guarantees every person the right to healthcare in accordance with the laws, as well as the right to healthy life. The practical realisation of the right to equal treatment in healthcare depends on having accessible healthcare facilities for everyone, without discrimination based on prohibited grounds, including gender identity and expression. These two grounds are explicitly recognised in the Croatian anti-discrimination legislation, and serve to protect and ensure equal access to healthcare services and health protection for transgender persons. The protection of intersex individuals is less explicit.

The evaluation of the existing regulatory framework reveals that it might be easier to access certain health services at the cost of public health insurance in connection with, or after the legal recognition of change of legal gender or living in another gender identity. Even though the legal and clinical framework concerning the recognition of sex change or living in another gender identity has significantly improved in recent years, there are no other rules in place to accommodate or recognise special needs of transgender or intersex persons in healthcare. In addition, accessibility of specific health services for transgender and intersex persons may be impeded by the lack of funding and non-transparent decision making.

1. Introduction

Access to healthcare is a multifaceted concept and depends on financial, organisational, social, cultural, ethical, legal, technological and other factors and capabilities shaping a particular healthcare system. Equity and equality in access to healthcare are important aspects of the right to health as a fundamental human right, as understood in various international human rights treaties and other legal instruments.¹

¹ Universal Declaration of Human Rights (1948); Constitution of the World Health

The international standards for access to healthcare are translated into national constitutions, laws, policies and other regulations. The Croatian Constitution guarantees every person the right to healthcare in accordance with the laws, as well as the right to a healthy life.² Every person has the right to health protection and the right to enjoy the highest attainable standard of health.³ Equal treatment in realisation of the right to health protection and provision of health services of standardised quality and equal content are guaranteed to everyone,⁴ and any violation of these rights can be sanctioned.⁵ Elimination of discrimination is the essential requirement of the guarantee of equal access to healthcare. There are laws and regulations prohibiting discrimination based on protected characteristics, such as sex, age, ethnicity, etc. in various fields of public and private life, including the provision of health services.⁶ This paper will explore these guarantees and standards in relation with the access of transgender and intersex persons to healthcare in Croatia. The question is how the existing national regulatory framework applies in clinical practice and whether it is appropriate for securing the equality of access.

This paper is structured as follows. We will first provide a short overview of the general legal framework for the protection against discrimination of transgender and intersex persons in Croatia, along with the standard definitions of the fundamental concepts (2.). We will then proceed with identifying and analysing the main legal instruments concerning access to healthcare for transgender and inter-

Organisation (1946); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of all Forms of Discrimination Against Women (1979); Convention on the Rights of the Child (1989); European Social Charter (1961); Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1997). See also United Nations, Economic and Social Council: The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc No. E/CN.4/2003/58, 13 February 2003, pp. 6–10.

² Ustav Republike Hrvatske [Constitution of the Republic of Croatia]. In: Narodne novine Nos. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014, Articles 58 and 69.

³ Zakon o zdravstvenoj zaštiti [Health Protection Act]. In: Narodne novine Nos. 100/2018 and 125/2019, Article 5(1).

⁴ Zakon o zdravstvenoj zaštiti (Note 3), Article 26(1)(1) and (3).

⁵ Zakon o zdravstvenoj zaštiti (Note 3), Articles 242(1) and 245(1)(1) and (2).

⁶ Zakon o suzbijanju diskriminacije [Anti-Discrimination Act]. In: Narodne novine Nos. 85/2008 and 112/2012; Zakon o ravnopravnosti spolova [Gender Equality Act]. In: Narodne novine Nos. 82/2008 and 69/2017.

sex persons (3.). In doing so, we first consider the special regulatory framework aimed at collecting necessary medical documentation for the change of legal gender (3.1.). We then move to the conditions for access to and funding of specific healthcare services (3.2.). In the following section, we briefly analyse the connection between the legal change of gender and access to health services (3.3.). Before concluding (5.), we will critically evaluate the existing regulatory framework to reveal its strengths and potential weaknesses (4.).

2. Transgender and intersex discrimination – general legal framework and definitions

2.1. *Definition of key concepts*

Since we will be focusing on the position of transgender and intersex persons in healthcare, we should first define these concepts. There is no legal definition of transgender and intersex in the Croatian legislation. In order to understand these terms, we rely on the definitions from the authoritative international instruments and guidelines, which are based on contemporary scientific knowledge and evidence.⁷ Transgender is usually used as an umbrella term, an adjective referring to persons whose gender identity and/or gender expression differ from the sex/gender assigned to them at birth. This term encompasses various forms and descriptions used by persons whose gender identity crosses or transcends culturally defined gender categories, such as transsexual, gender-queer, gender-fluid, non-binary, cross-dresser, trans man, trans woman and others.⁸ Intersex refers to an

⁷ Yogyakartaprinciples.org: The Yogyakarta Principles. Principles on the application of international human rights law in relation to sexual orientation and gender identity (2006). http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (accessed 29.9.2020); Eli Coleman, Walter Bockting, Marsha Botzer, Peggy Cohen-Kettenis, Griet DeCuyper, Jamie Feldman, Lin Fraser, Jamison Green, Gail Knudson, Walter J. Meyer, et al.: Standards of Care for the Health of Transsexual, Transgender, and Gender- Nonconforming People. 7th Version. World Professional Organisation for Transgender Health (WPATH) 2012. <https://www.wpath.org/publications/soc> (accessed 1.8.2020).

⁸ Coleman et al.: Standards of Care (Note 7), p. 97; Marjolein van den Brink, Peter Dunne: Trans and intersex equality rights in Europe – a comparative analysis. Luxembourg 2018, p. 34; Lucy Arora, Ralitsa Donkova, Hayley D'Souza, Evelyn Jager, Nathalie Meurens, Kate Regan, Sarah Vandenbroucke: Legal Gender Recognition in

experience of physical variance whereby individuals »cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex«,⁹ which may be evident through primary and secondary sex characteristics. The principle of equality and non-discrimination in relation to these groups is primarily guaranteed under the protected characteristics of gender identity and gender expression. 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«,¹⁰ while gender expression denotes an individual’s presentation of gender through physical appearance, mannerisms, speech, behavioural patterns, names and personal references.¹¹ Gender identity is a wider term which includes gender expression as a ground of protection, but gender expression does not necessarily correspond to a person’s gender identity.¹² Legislation in many European countries prohibits discrimination based on gender/sexual identity and/or gender expression.¹³ In some jurisdictions, however, discrimination based on gender identity and expression is

the EU: *The Journey of Trans People towards Full Equality*. Luxembourg 2020, pp. viii, 27; University of California, Davies Campus: *LGBTQIA Resource Centre Glossary*. <https://lgbtqia.ucdavis.edu/educated/glossary> (accessed 5.7.2020).

⁹ Council of Europe, Commissioner for Human Rights: *Human Rights and Intersex People: Issue Paper* (2015), p. 13. <https://book.coe.int/en/commissioner-for-human-rights/6683-pdf-human-rights-and-intersex-people.html> (accessed 7.8.2020).

¹⁰ yogyakartaprinciples.org: *The Yogyakarta Principles* (Note 7), p. 6.

¹¹ yogyakartaprinciples.org: *The Yogyakarta Principles plus 10. Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (2017), p. 6. http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (accessed 7.8.2020).

¹² yogyakartaprinciples.org: *The Yogyakarta Principles plus 10* (Note 11), p. 6; Jens M. Scherpe (Ed.): *The Legal Status of Transsexual and Transgender Persons*. Cambridge 2015; Jens M. Scherpe, Anatol Dutta, Tobias Helms (Eds.): *The Legal Status of Intersex Persons*. Cambridge 2018; Konstanze Plett: *Begrenzte Toleranz des Rechts gegenüber individueller sexueller Identität*. In: Gunnar Duttge, Wolfgang Engel, Barbara Zoll (Eds.): *Sexuelle Identität und gesellschaftliche Norm*. Göttingen 2010, pp. 53–68; Luisa Lettrari, Manuel Willer: *Aktuelle Aspekte der Rechtslage für intersexuelle Menschen*. In: Maximilian Schochow, Saskia Gehrmann, Florian Steger (Eds.): *Inter* und Trans*identitäten. Ethische, soziale und juristische Aspekte*. Gießen 2010, pp. 257–278.

¹³ Susanne Burri, Linda Senden, Alexandra Timmer: *A Comparative Analysis of Gender Equality Law in Europe* 2019. Luxembourg 2020, p. 13; Isabelle Chopin, Ca-

not explicitly recognised, but can be subsumed under the wide interpretation of sex as a protected anti-discrimination ground.¹⁴ Sex characteristics, understood as each person's physical features relating to sex, have in recent years become more prominent and have been identified as another protected ground in international jurisprudence and literature. It is held that intersex discrimination is better covered under the protected ground of sex or sex characteristics, than gender identity or sexual orientation, since it refers to person's bodily characteristics.¹⁵ Although there is no uniform approach, it is widely accepted that transgender and intersex persons are protected against discrimination either on grounds of sex, gender identity, gender expression or sex characteristics. However, the limit of protection depends on interpretation of these terms in national legal systems.¹⁶

Another term relevant for our discussion is gender dysphoria. It is a diagnostic category, used in the healthcare setting. It describes the (clinically significant) dissatisfaction or stress caused by incongruence between gender identity and sex assigned at birth (and gender role associated with that sex and/or primary and secondary sex characteristics).¹⁷ For a long time, the term gender identity disorder was a diagnostic description used for classification of this concept in international taxonomies.¹⁸ The American Psychiatric Association has

therine Germaine: *A Comparative Analysis of Non-Discrimination Law in Europe* 2019. Luxembourg 2020, pp. 12–15.

¹⁴ van den Brink, Dunne: *Trans and intersex equality* (Note 8), p. 47.

¹⁵ European Union Agency for Fundamental Rights: *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU. Comparative legal analysis. Update 2015.* Luxembourg 2015, pp. 70–71.

¹⁶ United Nations: *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc No. A/73/152, 12 July 2018, pp. 3–4.

¹⁷ Norman M. Fisk: *Gender dysphoria syndrome: The conceptualization that liberalizes indications for total gender reorientation and implies a broadly based multi-dimensional rehabilitative regimen.* In: *Western Journal of Medicine* 120 (1974), pp. 386–391; Geoffrey M. Reed, Jack Drescher, Richard B. Krueger, Elham Atalla, Susan D. Cochran, Michael B. First, Peggy T. Cohen-Kettenis, Iván Arango-de Montis, Sharon J. Parish, Sara Cottle, Peer Briken, Shekhar Saxena: *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.* In: *World Psychiatry* 15 (2016), pp. 205–221; Coleman et al.: *Standards of Care* (Note 7), p. 96.

¹⁸ American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders. 4th Edition (DSM-IV)*; World Health Organisation: *International Classifi-*

replaced it in 2013 with the term gender dysphoria, to reduce the stigma associated with the term disorder.¹⁹ However, gender dysphoria is still classified and diagnosed as a mental disorder (although gender non-conformity in itself is not sufficient for this diagnosis).²⁰ In ICD-10,²¹ the gender identity disorder was categorised under the chapter on mental and behavioural disorders as well. The pathologizing of gender and sexual identities is heavily criticised, because it »reduces their identities to diseases, which compounds stigma and discrimination«. ²² Therefore, the ICD-11, which was adopted in 2019 and is supposed to be implemented by 2022, depsychopathologizes this diagnostic category and includes it in the new chapter on conditions relating to sexual health under the term »gender incongruence«. ²³ The changes in classification are based on accumulated scientific, clinical, social, and human rights understandings and advances over the years with the aim of depsychopathologizing of diagnostic categories related to sexuality and gender identity, while still preserving access of transgender and intersex individuals to healthcare services.²⁴ The ICD-11 has still not been translated and applied in Croatia. However, the Croatian Professional guidelines for elaboration of opinion of health workers and psychologists on the establishment of conditions and requirements for sex change and living in another gender identity (hereinafter: the Professional guidelines)²⁵ willingly

cation of Diseases (ICD-10 Version: 2019). <https://icd.who.int/browse10/2019/en#/F60-F69> (accessed 1. 9. 2020).

¹⁹ American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders. 5th Edition (DSM-V). <https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets> (accessed 1. 9. 2020).

²⁰ European Union Agency for Fundamental Rights: Protection (Note 15), p. 16.

²¹ World Health Organisation: ICD-10 (Note 8).

²² United Nations: Report of the Special Rapporteur on the right of everyone to enjoyment of the highest attainable standard of physical and mental health, UN Doc No. A/HRC/35/21, 28 March 2017, pp. 11–12; European Parliament: Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)).

²³ World Health Organisation: International Classification of Diseases (ICD-11). <https://icd.who.int/browse11/l-m/en#http%3a%2f%2fid.who.int%2fid%2fentity%2f411470068> (accessed 1. 9. 2020).

²⁴ Reed et al.: Disorders related to (Note 17), p. 206; United Nations: Report (Note 16), pp. 5–6.

²⁵ Stručne smjernice za izradu mišljenja zdravstvenih radnika i psihologa o utvrđivanju uvjeta i pretpostavki za promjenu spola i životu u drugom rodnom identitetu [Professional guidelines for elaboration of opinion of health workers and psycholo-

depart from the concept of »gender identity disorder« and are entirely based on the concept of »gender dysphoria«. Even though the Professional guidelines were published in 2016, more than three years before the adoption of the new ICD-11, their drafters acknowledge the forthcoming reconceptualization of gender identity disorders in ICD-11.

2.2. *The Croatian legal framework*

The Croatian Constitution guarantees equality of all persons before the law.²⁶ Everyone in Croatia shall have rights and freedoms, regardless of race, skin colour, sex, language, political or other opinion, national or social origin, property, birth, education, social status or other characteristics.²⁷ This is a general equality provision with a non-exhaustive list of prohibited discriminatory grounds. Discrimination under Article 14(1) of the Constitution is not an independent legal basis for the constitutional complaint, and it has to be brought forward together with some other (material) constitutionally guaranteed right.²⁸ »Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, the inviolability of ownership, the conservation of nature and the environment, the rule of law and a democratic multiparty system, are the highest values of the Croatian constitutional order and a ground for interpreting the Constitution.«²⁹

The Anti-Discrimination Act is a horizontal act in the field of the prohibition of discrimination and the creation of equal opportunities, and includes an exhaustive list of prohibited discriminatory grounds: sex, race, ethnic origin, skin colour, language, religion, political or other opinion, national or social origin, property, trade union membership, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity, expression and sexual or-

gists on the establishment of conditions and requirements for sex change and living in another gender identity]. In: Narodne novine No. 7/16.

²⁶ Ustav Republike Hrvatske (Note 2), Article 14(2).

²⁷ Ustav Republike Hrvatske (Note 2), Article 14(1).

²⁸ Constitutional Court of the Republic of Croatia: U-III-3804/2010, para. 7; U-III-2325/2006, para. 6; U-III-3192/2003, para. 6.

²⁹ Ustav Republike Hrvatske (Note 2), Article 3.

ientation.³⁰ Therefore, transgender and intersex persons are protected against discrimination primarily under the characteristics of gender identity and expression from the Anti-Discrimination Act. The Anti-Discrimination Act has a very broad personal and material scope of application, as it applies to the conduct of all state, regional and local bodies, as well as all legal and natural persons, especially in (but not limited to) the fields of work and working conditions, education, science, sport, health protection, social security, justice and administration, housing, public media, access to goods and services, membership in trade unions, civil society organisations and political activities, and participation in culture and arts.³¹ It regulates judicial protection in special anti-discrimination proceedings. In addition to the Anti-Discrimination Act, the Gender Equality Act is *lex specialis* in the area of gender discrimination.³² The Gender Equality Act is specifically aimed at the protection and promotion of gender equality as a fundamental value of the Croatian constitutional order. It defines and regulates methods of protection against discrimination based on sex and establishment of equal opportunities for men and women.³³ Four of the grounds protected under the Anti-Discrimination Act, namely sex, marital status, family status and sexual orientation, are also protected grounds under the Gender Equality Act, but neither act specifically mentions transgender or intersex persons.

Croatia is an EU Member State, and its anti-discrimination legal framework is shaped in accordance with the EU anti-discrimination and equality law *acquis*, which includes primary and secondary EU law sources, as well as the case law of the Court of Justice of the European Union. There is no explicit reference to gender identity, gender expression or sex characteristics as protected grounds in the EU non-discrimination and equality legal framework.³⁴ The protection of transgender and intersex persons in EU law remains largely within the boundaries of sex discrimination, despite the fact that such

³⁰ Zakon o suzbijanju diskriminacije (Note 6), Article 1(1).

³¹ Zakon o suzbijanju diskriminacije (Note 6), Article 8.

³² Zakon o ravnopravnosti spolova (Note 6).

³³ Zakon o ravnopravnosti spolova (Note 6), Article 1.

³⁴ Marcin Orzechowski, Marianne Nowak, Katarzyna Bielińska, Anna Chowaniec, Robert Doričić, Mojca Ramšak, Paweł Łuków, Amir Muzur, Zvonka Zupanič-Slavec, Florian Steger: Social diversity and access to healthcare in Europe: how does European Union's legislation prevent from discrimination in healthcare? In: *BMC Public Health* 20 (2020), <https://doi.org/10.1186/s12889-020-09494-8>.

an approach is not entirely fit for purpose.³⁵ Equal access to health services is guaranteed under the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.³⁶ However, since this Directive relies on the binary perception of sex, the question is whether it would be capable of protecting transgender, and especially intersex persons from discrimination in access to health services.³⁷ Since gender identity and expression are expressly mentioned in the list of protected grounds under the Croatian Anti-Discrimination Act, it follows that the Croatian anti-discrimination legal framework establishes more explicit protections for transgender and intersex persons, than the EU legal framework.

3. Access to healthcare for transgender and intersex persons

The practical realisation of the right to equal treatment in healthcare depends on having accessible healthcare facilities for everyone, without discrimination based on prohibited grounds, including gender identity and expression.³⁸ Laws and regulations are instrumental in ensuring equal access. However, this does not just mean ensuring access to services typically available to the general population. Some of the health services are transgender or intersex specific, e.g. gender confirmation surgery, specific hormonal therapy, voice therapy, etc. Enjoyment of the highest attainable standard of health should include entitlements to these specific health services as well, based on medical need.

In this section, we will take a look at the main legal instruments and clinical guidelines developed in the context of the change of legal

³⁵ van den Brink, Dunne: *Trans and intersex equality* (Note 8), pp. 46–49; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). In: *Official Journal of the European Union* L 204 (26.7.2006), Recital 3.

³⁶ Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. In: *Official Journal of the European Union* L 373 (21.12.2004).

³⁷ van den Brink, Dunne: *Trans and intersex equality* (Note 8), p. 77.

³⁸ World Health Organisation: *Sexual Health, Human Rights and the Law*. Geneva 2015, p. 24.

gender and living in another gender identity. It is important to highlight that the change of legal gender and life in another gender identity in Croatia is possible even without submitting to gender confirmation medical procedures. Nevertheless, it is based on medical opinions by professionals experienced and trained in working with transgender persons. In order to facilitate this process, the previously mentioned Professional Guidelines with clinical instructions were developed and adopted in 2016.³⁹

3.1. *Legal recognition of gender: change of sex and living in another gender identity*

The procedure of legal recognition of gender is regulated in the Act on State Registries⁴⁰ and the Ordinance on collection of medical documents and establishing conditions for change of gender and life in another gender identity (hereinafter: the Ordinance).⁴¹ The gender label can only be changed from male to female and vice-versa, there is no option to abstain from expressing gender in the official registries and documents. There is no age limit, i. e. minors are also allowed to apply for the legal recognition of gender; their parents or caretaker have to co-sign the application. Self-determination is not sufficient for the change of legal gender in the Registry of birth and other official documents. A positive opinion of the National Health Council is required to obtain a formal decision of the competent administrative body allowing the registration of change of gender. The National Health Council is a special body comprised of nine distinguished medical professionals appointed by the Croatian Parliament at the proposal of the Minister of Health with the task of monitoring various areas of health protection, providing expert opinion in the field of planning, programming, and development, providing opinion in the process of the change of gender, as well as other important issues

³⁹ Stručne smjernice (Note 25).

⁴⁰ Zakon o državnim maticama [Act on State Registries]. In: Narodne novine Nos. 96/1993, 76/2013 and 98/2019.

⁴¹ Pravilnik o načinu prikupljanja medicinske dokumentacije te utvrđivanju uvjeta i pretpostavki za promjenu spola ili o životu u drugom rodnom identitetu [Ordinance on collection of medical documents and establishing conditions for change of gender and life in another gender identity]. In: Narodne novine No. 132/2014.

in the field of health.⁴² The National Health Council issues the opinion on the basis of requisite medical documentation. The details on the method of collection of medical documentation, and requirements and conditions for the change of gender and living in another gender identity are prescribed in the Ordinance. The collection of medical documentation, and requirements and conditions for the change of gender and living in another gender identity are based on the principles of humanity in the protection of patients' rights, protection of the well-being and rights of a child, prohibition of discrimination and confidentiality of personal data.⁴³ No person shall be forced to undergo medical procedures, including gender confirmation surgery, sterilisation or hormonal therapy as a condition for recognition of the change of sex or living in another gender identity.⁴⁴ Everyone is guaranteed the right to respect of personal and family life in accordance with their own gender identity.⁴⁵ The requisite medical documentation includes an opinion of a psychiatrist, a clinical psychologist, and an endocrinologist. The specialists can provide their opinion jointly if they agree, or separately in cases of disagreement.⁴⁶ However, in order for their opinion to qualify for this procedure, the specialists must have experience and training in the field of health protection of transgender persons and must be included in the List of specialists adopted by the Minister of Health (hereinafter: the List).⁴⁷ The List includes specialists in the field of psychology, psychiatry, endocrinology, gynaecology, and surgery. In several fields (psychology, psychiatry, and endocrinology) there are different specialists for adult and children applicants. Out of 15 specialists included in the List, only two are not from Zagreb. Although it may be expected that highly specialised experts will be concentrated in the capital city, it nevertheless may have adverse impact on equal geographical distribution and accessibility of these services. Alternatively, a person may submit medical

⁴² Zakon o zdravstvenoj zaštiti (Note 3), Article 146(1).

⁴³ Pravilnik o načinu (Note 41), Article 2(1).

⁴⁴ Pravilnik o načinu (Note 41), Article 2(2).

⁴⁵ Pravilnik o načinu (Note 41), Article 2(3).

⁴⁶ Pravilnik o načinu (Note 41), Article 5(2).

⁴⁷ Lista stručnjaka koji imaju iskustva u radu s transrodnim osobama [The List of specialists with experience in working with transgender persons]. In: Narodne novine No. 59/2015.

documentation and opinion of foreign experts who have been monitoring the transition of the applicant in another country.⁴⁸

In addition to the medical documentation, the report of the competent Social Welfare Centre about personal and family circumstances of the applicant has to be submitted to the National Health Council as well. The National Health Council is required to issue an opinion within 30 days from the day of receiving complete application and documentation.⁴⁹ If additional documentation is needed, a 30-day period is counted from the day of receiving that documentation, but the opinion has to be provided within the maximum of 60 days from receiving the application.⁵⁰ Even though there are no sanctions for violation of these time limits, their inclusion in the Ordinance is a welcome improvement in comparison to the previously applicable Ordinance from 2011 (hereinafter: the 2011 Ordinance).⁵¹ The 2011 Ordinance did not contain any time limits in which the National Health Council had the obligation to adopt an opinion after receiving the application. This resulted in substantial delays in the procedure, because the National Health Council did not convene for very long time periods. The new Ordinance clearly stipulates the obligation of the National Health Council to convene in session within eight days after receiving the application.⁵²

The National Health Council is not entirely bound by a finding and opinion of the specialists. If the finding or opinion is incomplete or unclear, if the findings and opinions of two or more specialists are contradictory, if the opinion is not sufficiently explained or there is reasonable doubt as to the correctness of the opinion, and these deficiencies cannot be remedied, the National Health Council shall request the finding and opinion of another expert from the List of experts, or the opinion of the health institution.⁵³ This will be rather difficult, or even impossible where only one specialist in a particular field is included in the List, such as in the field of endocrinology and

⁴⁸ Pravilnik o načinu (Note 41), Article 5(4).

⁴⁹ Pravilnik o načinu (Note 41), Article 9(2).

⁵⁰ Pravilnik o načinu (Note 41), Article 9(6).

⁵¹ Pravilnik o načinu prikupljanja medicinske dokumentacije te utvrđivanju uvjeta i pretpostavki za promjenu spola ili o životu u drugom rodnom identitetu [Ordinance on collection of medical documents and establishing conditions for change of gender and life in another gender identity]. In: Narodne novine No. 121/2011.

⁵² Pravilnik o načinu (Note 41), Article 9(1).

⁵³ Pravilnik o načinu (Note 41), Article 9(3).

surgery. The opinion of the health institution may also be requested if, due to the complexity of the case, it is reasonable to expect that it might result in a joint opinion.⁵⁴ These provisions provide a considerable leeway for the National Health Council to intervene in the procedure.

The Ordinance provided an explicit basis for the elaboration of the Professional guidelines.⁵⁵ They were prepared by the specialists from the List and adopted by the Minister of Health. They rely primarily on the terminology and standards of care from the Standards of Care for the Health of Transsexual, Transgender, and Gender Non-Conforming People (version 7) developed by the World Professional Association for Transgender Health (WPATH).⁵⁶ The Professional guidelines are accompanied by the Clinical instructions addressing the specific health issues of transgender and intersex persons. The Professional guidelines aim at standardisation and facilitation of the procedure for the preparation of an opinion on sex change and living in another gender identity. It is highlighted that protocolising of the procedure is necessary to protect transsexual and transgender persons from stigmatisation, non-professional and paraprofessional attitudes to which they may be exposed.⁵⁷ The need for an individualised and multidisciplinary approach is emphasised throughout the Professional guidelines. They are based on the understanding that the purpose of healthcare is to help individuals in a safe and efficient manner to attain continuous satisfaction with their gender identity, which will improve their general health condition, psychological well-being and self-fulfilment.

The Professional guidelines do not contain references to intersex persons at all. In addition to transgender persons, they refer to transsexuals. This is an older term used in medical and psychological communities,⁵⁸ which describes persons who seek to change or have already changed their primary and/or secondary sex characteristics by medical interventions (e.g. hormonal treatments, surgery), typically accompanied by a permanent change in gender role.⁵⁹ An intersex

⁵⁴ Pravilnik o načinu (Note 41), Article 9(4).

⁵⁵ Pravilnik o načinu (Note 41), Article 6(1).

⁵⁶ Coleman et al.: Standards of Care (Note 7).

⁵⁷ Stručne smjernice (Note 25).

⁵⁸ Arora et al.: Legal Gender Recognition (Note 8), pp. viii, 28.

⁵⁹ Stručne smjernice (Note 25); Coleman et al.: Standards of Care (Note 7), p. 97.

variance remains largely invisible in the national context, as it is based on the binary perception of sexes.

The Clinical instructions are not binding. Their main purpose is to help the experts in providing adequate care. They highlight that the clinical approach to persons with gender dysphoria is anchored in contemporary scientific approach to health and psychosocial care, and should not depend on personal views of healthcare providers. The differences in gender identity and expression should be acknowledged and not pathologized, and the care provided in a manner which affirms gender identity and reduces the stress arising out of gender dysphoria. Patients should be given reliable, timely and scientifically based information about available treatments. Simple, accessible and appropriate healthcare services are based on informed consent and provided in accordance with individual healthcare needs in full acknowledgment of a person's preferred gender expression. The Clinical instructions stress the necessity of a continued care for an individual and his/her family and the readiness of specialists trained to work with gender non-conforming persons to support them and advocate their interests in their families and surroundings (schools, work, and other surroundings). This is an important expression of the overall approach implemented throughout the Professional guidelines which surpasses the merely medical function and is deeply rooted in ethical considerations. Detailed instructions on psychological and psychiatric, as well as endocrinological assessment and treatment are provided. Psychodiagnostic assessment of the psychologist and psychiatrist result in an opinion which is used for the application to the National Health Council, or as a gateway for further hormonal and/or surgical treatments. Further instructions on reproductive health and gynaecological care for transmen and transwomen who already had or are planning gender confirming surgery are specified. Gynaecological care should be provided according to the medical need and regardless of the sex registered in official documents. However, there are no instructions on surgical procedures, as they are not available in the Croatian health system.

The above presented framework for recognition of legal gender applies since 2014 and it is a welcome development in comparison to the previous situation. In the absence of clear and unequivocal legal provisions, the formal possibility to register a legal change of gender

under the previous legal framework⁶⁰ was effectively obstructed in practice. It was practically impossible to change sex without the actual sex reassignment surgical procedure, even though it was never prescribed as a formal requirement for the change of legal gender. The reason for this partially lied in the attitude of the National Health Council that it cannot be determined for certain that an individual would not ›change his/her mind‹ about the change in cases where no gender reassignment surgery took place and when the change of gender is not ›irreversible and complete‹.⁶¹ The turning point which resulted in the development of clearer legal framework and professional guidelines came in 2014, with the ground-breaking Decision of the Constitutional Court,⁶² concerning a minor applicant whose legal battle to have his preferred sex and name registered in the Registry of births started in 2010. The Constitutional Court found that the constitutional guarantees regarding the duration of legal proceedings and the right to personal life and privacy, including the right to live in another gender identity were infringed in this case. The importance of the Constitutional court's decision in this matter lies in the fact that the court definitely put an end to arbitrary interpretation of the existing legal framework, but it also accelerated the adoption of the new, more efficient regulatory framework, which is presently applicable.

We now turn to the issue of access to and funding of specific healthcare services and the application of this regulatory framework in practice.

⁶⁰ Naputak za provedbu Zakona o državnim maticama i upisu posvojenja u maticu rođelih [Directive for implementation of the Act on State Registries and registration of adoption in the Registry of Births]. In: Narodne novine No. 26/2008.

⁶¹ Constitutional Court of the Republic of Croatia: U-IIIB/3173/2012, Decision of 18 March 2014, para. 3; Ombudsperson for Gender Equality: Annual Report for 2013, Annual Report for 2014, Annual Report for 2015. <https://www.prs.hr> (accessed 1.9.2020).

⁶² Constitutional Court of the Republic of Croatia: U-IIIB/3173/2012, Decision of 18 March 2014.

3.2. *Access to and funding of specific healthcare services*

Full realisation of the right to health is contingent upon the availability of adequate, equitable and sustainable financing for health.⁶³ There is a substantial gap between the recognition of the need for transgender specific healthcare services and the available funding for such services.⁶⁴ Healthcare services related to gender transition may include hormonal therapies, surgical procedures, psychological counselling, permanent hair removal, voice therapy, use of prosthetic medical devices. Surgical procedures may include genital surgery, operation of the internal reproductive organs, breast augmentation and mastectomy, aesthetic surgery (such as face and body traits, or reduction of thyroid cartilage).⁶⁵

The right to health protection, as one of the rights arising out of mandatory health insurance in Croatia, is guaranteed to every insured person under equal conditions.⁶⁶ Insured persons participate in covering healthcare services to a limited amount, and many healthcare services are covered entirely by the Croatian Health Insurance Institute.⁶⁷ Some health services are not covered from the mandatory health insurance, such as therapeutic and diagnostic procedures and medicines applied at the request of an insured person, experimental treatment, or aesthetic surgery (with limited exceptions).⁶⁸

The Professional guidelines contain clear instructions about the necessary care for transgender and transsexual persons, including a flowchart of different procedures and treatments to be provided, with indications whether the treatment is available with or without diagnostic, and whether obligatory referral by a specialist is needed.⁶⁹

⁶³ United Nations: Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc No. A/67/302, 13 August 2012, p. 3. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/461/01/PDF/N1246101.pdf?OpenElement> (accessed 23. 10. 2020).

⁶⁴ United Nations: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc No. A/74/181, 17 July 2019, pp. 5, 7. <https://undocs.org/pdf?symbol=en/A/74/181> (accessed 23. 10. 2020).

⁶⁵ Stručne smjernice (Note 25), Flowchart 2.

⁶⁶ Zakon o obveznom zdravstvenom osiguranju [Mandatory Health Insurance Act]. In: Narodne novine Nos. 80/2013, 137/2013 and 98/2019, Article 19(1).

⁶⁷ Zakon o obveznom (Note 66), Article 19(2–4), Article 35.

⁶⁸ Zakon o obveznom (Note 66), Article 34.

⁶⁹ Stručne smjernice (Note 25), Flowchart 2.

However, the rules on funding of healthcare services have significant implications on the accessibility of healthcare services for transgender and intersex persons. Certain surgical procedures which may be part of the gender confirming healthcare are not performed in Croatia (genital surgery). Moreover, the general approach is that genital surgery is considered as aesthetic surgery and there is no possibility to obtain that type of care abroad at the expense of the mandatory health insurance either.⁷⁰ Many other surgical procedures, such as mastectomy and breast augmentation, are also considered as aesthetic surgical procedures which are not covered from the mandatory health insurance.⁷¹ While it is true that many transgender persons do not submit to full medical transition and adaptation of primary and/or secondary sex characteristics, at least some do, and these limitations clearly obviate the proclaimed individual approach to the treatment of gender dysphoria.

Other issues concerning funding are associated with the fact that publicly funded hormonal therapy or medical devices (which are included in the basic list of medicines or medical devices and covered entirely from the mandatory health insurance) may be of inferior quality to those available under co-payment scheme (additional or supplementary list) or not refundable at all.⁷²

On the other hand, storing sperm, egg cells or embryos before resorting to hormonal therapies or surgical treatment, in accordance with the conditions prescribed under the Croatian Act on medically assisted fertilization is funded from the mandatory health insurance.⁷³ The Clinical instructions also recommend that regular gynaecological care, if fully covered from the mandatory health insurance, should be provided to transwomen and transmen, depending on the scope and type of treatment they were submitted to, regardless of the legal gender in the official documents. By analogy, access to any other medical treatment, such as breast cancer screening, should be guaran-

⁷⁰ Stručne smjernice (Note 25), Flowchart 2.

⁷¹ Ombudsperson for Gender Equality: Annual Report for 2019, Zagreb, 2020, pp. 167–168; TransAid: Annual Report for 2019. Zagreb, 2020. http://transaid.hr/wp-content/uploads/2020/09/2019_lzvjestaj-o-radu.pdf (accessed 15. 9. 2020).

⁷² TransAid: Mogućnosti u Hrvatskoj [Possibilities in Croatia]. <http://transaid.hr/mogucnosti-u-hrvatskoj/> (accessed 15. 9. 2020).

⁷³ Zakon o medicinski potpomognutoj oplodnji [Act on Medically Assisted Fertilization]. In: Narodne novine No. 86/2012.

ted in accordance with the medical need, regardless of the legal gender of the person.

3.3. *The relation between the legal change of gender and access to health services*

As we have seen, the legal recognition of gender change or living in another gender identity is not based on self-determination, but requires specialist medical opinions and a positive opinion of the National Health Council. However, the link between the regulatory framework for the legal change of gender and living in another gender identity, on one side, and access to health services, on the other, seems too rigid. The procedure is the same, even if a person does not want to change legal gender, or at least not at that particular point in time. For example, in order to access hormonal treatment they will have to follow the path set in the Professional guidelines and Clinical instructions.⁷⁴ This means that it will not be possible to start hormonal therapy without the referral, which results from the psychodiagnostic evaluation by a psychiatrist and a psychologist. Currently, the diagnosis of gender dysphoria (gender identity disorder under ICD-11) is necessary for hormonal therapy. On the other hand, a person will not have necessarily already started with the hormonal therapy, or willing to start it, before or during the process of the legal gender recognition. Nevertheless, the opinion of an endocrinologist is a required medical documentation to be submitted with the application to the National Health Council.

The conclusion which necessarily arises from the above considerations is that it might be easier to access certain health services at the cost of public health insurance in connection with, i. e. after the legal recognition of either the change of legal gender or living in another gender identity. However, legal recognition in such cases should be seen as a barrier to access. There is also the risk that transgender persons may be »overdiagnosed« and subjected to extensive medical examinations, especially psychodiagnostics,⁷⁵ which is not necessarily required under the Ordinance and intended by the Professional guidelines.

⁷⁴ TransAid: Annual Report (Note 71).

⁷⁵ TransAid: Annual Report (Note 71).

4. Evaluation of the existing regulatory framework

Apart from the legal and clinical framework concerning the recognition of sex change or living in another gender identity, there are no other rules in place to accommodate or recognise the special needs of transgender or intersex persons in healthcare. The general rules on equality of access apply. This may entail numerous practical deficiencies, especially when it comes to specific medical procedures designated for persons of a particular sex, or medical procedures which are usually provided only to persons of a certain sex. The EU equality law framework does not offer appropriate solutions for these situations. The Directive 2004/113/EC specifically provides that the differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.⁷⁶ The Croatian Anti-Discrimination Act, as we have shown, is more accommodating and explicitly prohibits discrimination based on gender identity and expression.⁷⁷ However, implementation of equality law standards requires a comparator.⁷⁸ The question remains, who would be a suitable comparator in such cases? Will transgender women be compared with cisgender women when it comes to access to certain healthcare services (such as breast implants, mastectomy, gynaecological examinations and treatments), or will they legally be considered male and be denied such access? Where a person changes legal gender, will they be left out of, for example, preventive screening programmes (such as breast cancer screening or prostate examination), even where they should be entitled to them based on their biological sex characteristics? Even though the right to health protection should be based on medical necessity,⁷⁹ it is likely that transgender and intersex persons could suffer adverse consequences in access to and financing of healthcare services, especially if a certain service is considered as unnecessary for the treatment. For example, after years of inconsistent practice where financing of mastectomy was dependent on individual assessments of specialists, in 2017 the Croatian Health Insurance Institute completely stopped fi-

⁷⁶ Directive 2004/113/EC (Note 36), Recital 12.

⁷⁷ Zakon o suzbijanju diskriminacije (Note 6), Article 1.

⁷⁸ van den Brink, Dunne: Trans and intersex equality (Note 8), pp. 81–82.

⁷⁹ Zakon o zdravstvenoj zaštiti (Note 3), Article 5(1).

nancing mastectomy to transmen without explanation.⁸⁰ A possible reason for this might be that it is considered an aesthetic surgery, which is not covered from the mandatory health insurance.⁸¹

Available research shows that many trans individuals might refrain or delay seeking general care because of their gender identity, which results in poor health outcomes.⁸² Prejudice from healthcare providers or a lack of confidence in healthcare services are among the main reasons which effectively discourage trans individuals from accessing health services. The position of intersex individuals could be even worse, because they are practically invisible under the existing regulatory framework. In Croatia, health workers in general have a very modest knowledge of transgender issues and in many cases their treatment towards transgender persons is guided by their personal views and attitudes.⁸³ The Professional guidelines attempt to overcome some of these shortcomings. However, they are strongly tied to the legal recognition of gender change, which results in the same legal requirements applying for access to healthcare services, whether a person wishes to change legal gender or not.

⁸⁰ TransAid: Annual Report (Note 71); Ombudsperson for Gender Equality: Annual Report for 2019 (Note 71), p. 167.

⁸¹ Zakon o obveznom (Note 66), Article 34.

⁸² World Health Organisation: Sexual Health, Human Rights and the Law. Geneva 2015, p. 23; Adam Smiley, Aisa Burgwal, Carolina Orre, Edward Summanen, Isidro García Nieto, Jelena Vidi, Joz Motmans, Julia Kata, Natia Gvianishvili, Vierge Hård, Richard Köhler: Overdiagnosed but Underserved? Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden. In: Transhealth survey 2017, p. 5. https://tgeu.org/wp-content/uploads/2017/10/Overdiagnosed_Underserved-TransHealthSurvey.pdf (accessed 15. 8. 2020); United Nations: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc No. A/HRC/38/43, 11 May 2018, p. 10. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/132/12/PDF/G1813212.pdf?OpenElement> (accessed 23. 10. 2020); Arora et al.: Legal Gender Recognition (Note 8), pp. 145–151; European Agency for Fundamental Rights: Being trans in the EU: Comparative analysis of EU LGBT survey data. Luxembourg 2014, pp. 41–42; Bryony Whitehead: Inequalities in Access to Healthcare for Transgender Patients. In: Links to Health and Social Care 2 (2017), pp. 63–76; Joshua D. Safer, Eli Coleman, Jamie Feldman, Robert Garofalo, Wylie Hembree, Asa Radix, Jae Sevelius: Barriers to Health Care for Transgender Individuals. In: Current Opinion in Endocrinology, Diabetes and Obesity 23 (2016), pp. 168–171.

⁸³ Nataša Jokić-Begić, Anita Lauri Korajlija, Tanja Jurin: Psychosocial adjustment to sex reassignment surgery: a qualitative examination and personal experiences of six transsexual persons in Croatia. In: World Scientific Journal (2014), <https://doi.org/10.1155/2014/960745>.

The Ordinance on legal recognition of gender change was a welcome development after years of insecurity, because it had provided, for the first time in the Croatian legal setting, clear and explicit guarantees that no person shall be forced to undergo medical procedures, including gender reassignment surgery, sterilization, or hormonal therapy, as a condition for recognition of change of sex or living in a different gender identity. It has substantially contributed to the transparency, accessibility and acceleration of the procedure before the National Health Council.⁸⁴ However, further guidelines are needed to fully implement the guarantee of equality of access in clinical practice.

5. Conclusion

Croatia has a solid equality law framework, with explicit guarantees for the protection of transgender individuals against discrimination, based on prohibited grounds of gender identity and expression. It is based on and arises from the EU equality law *acquis*. Its material scope of application is wide and encompasses access to healthcare services and health protection. However, the position of intersex individuals is not quite unequivocal. They can rely on wide interpretation of gender, gender identity and expression as protected grounds, even though the prohibition of discrimination based on sex characteristics – which is still not expressly recognised in the Croatian laws – would be more appropriate for their protection.

Three main conclusions may be drawn. First, neither legal recognition of gender should be contingent on medical interventions, nor should access to healthcare be contingent on legal requirements. Under the current regulatory framework, the relation between the legal requirements for the change of legal gender, on one hand, and access to healthcare services, on the other, seems blurred. It seems that in clinical practice the same requirements for access to healthcare services apply, regardless whether a person is going through the process of legal change of gender or not. Extensive medical documentation is still necessary for the change of legal gender, and professional guidelines with clinical instructions were developed to facilitate this proce-

⁸⁴ Ombudsperson for Gender Equality: Annual Report for 2019 (Note 71), pp. 166–167.

ture. Even though they are developed and follow the contemporary standards of care, their application in practice may lead to over-medicalization and further stigmatisation of transgender and intersex individuals.

Second, accessibility of specific health services for transgender and intersex people may be significantly impeded by the lack of funding from the mandatory health insurance. The crucial question here is what is considered a medical necessity and which healthcare services are essential for the treatment. Further clarity and transparency in financing decisions from the Croatian Health Insurance Institute is needed.

Third, no matter how developed the legal framework may be, education and sensibilisation of health providers for transgender and intersex issues is paramount for its proper implementation in practice.

