# Integrating Transsexual and Transgendered People (Part 1 of 3)

The Amicus brief from Liberty, Part 1 of 3

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## Preface

This Amicus brief is a valuable guide to the status of trans people in other countries, the result of a huge research exercise.

However, readers should please note that it was produced against a tight deadline on limited resources, which means that it is not complete … and in the time since it was written, the situation in some countries has changed.

So please take the findings here not as a *definitive* guide to status of trans people in the countries listed … but rather as a very useful *indication* of how the states concerned had approached the issues by 1997. We do not currently have the resources to maintain a regularly updated international guide, but readers may also like to look at the ILGA World Legal Survey, which examines the status of GLBT people around the globe.

*Claire McNab, December 1999*

# Integrating Transsexual and Transgendered People

**A Comparative Study of European, Commonwealth and International Law**

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# Introduction

Liberty is one of the UK's leading civil liberties and human rights organisations. Through the use of a combination of test case litigation, campaigning and lobbying, Liberty has, since 1934, sought to promote rights and protect civil liberties in the United Kingdom.

The focus of this research, *Integrating Transsexual and Transgendered People*, is the extent to which transsexuals and transgendered people are granted civil status in their postoperative gender. Central to the study is whether the Member States of the Council of Europe, and other jurisdictions, permit postoperative transsexuals to alter their birth certificates to reflect their new identity, thus enabling those individuals to live fully integrated lives.

The research was carried out during July, August and September 1997. A questionnaire, a copy of which is included in the appendix, was sent to relevant Government agencies, Consuls and Embassies, Universities, academics, lawyers and appropriate Non-Governmental Organisations. The questionnaire was also posted on the Internet. The responses were constructive and timely. These were followed up with telephone conversations to confirm details, and, where necessary, additional legal research was carried out.

Liberty was able to identify the position relating to transsexual and transgendered people in all of the Council of Europe Member States at that time. Additional research was undertaken in key Commonwealth jurisdictions and in a number of other countries, including the United States. The results can be found in full in Appendix A.

Liberty submitted this research as a Third Party Intervention to the European Court of Human Rights on the 24th October, 1997, in the cases of Sheffield v. United Kingdom and Horsham v. United Kingdom. These cases are due to be heard by the Court in February 1997. The significance and importance of the research required an authoritative analysis and interpretation. Liberty therefore instructed Laura Cox QC, barrister of Cloisters, Temple, London EC4 and Stephanie Harrison, barrister of 2 Garden Court, Temple, London EC4 to prepare a short review of the study, which follows this brief introduction.

Liberty would like to thank the Equal Opportunities Commission for funding this study under section 54(1) of the Sex Discrimination Act 1975. We would also like to thank Ceri Edwards for his invaluable assistance in the preparation of this research.

*Jonathan Cooper*
*Director of Law and Policy, Liberty*
*5 December, 1997*

# An analysis of a comparative study by Liberty on transsexuality and the law

" The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in a way that he deems best fits his personality. A transsexual does use those very fundamental rights".
*Judge Martens dissenting in Cossey v UK [1990] 13 E.H.R.R. 622 pg 648 para 2.7.*

"It is not the body alone which determines a persons sex, it is also his soul …."
*Neauchatel 2/7/1945 Swiss first instance judge.*

## Introduction

**1.** These quotations, separated by almost half a century, and certainly two generations, encapsulate a humanitarian sentiment that would accord to those diagnosed and treated for the medical condition of gender identity dysphoria (commonly called and hereafter referred to as transsexuals) full legal recognition of the gender reassignment, ensuring thereby a civil status congruent with the persons physical and psychological identity and making a social reality a legal fact.

**2.** The medical research into the etiology of Transsexualism, although by no means complete, leaves little room for dispute that the quest for and desire of full legal recognition of the gender reassignment by transsexuals is an issue involving the fundamental interest in the context of private life; and to the capacity of the individual to determine his/her identity. It incorporates an individual's right to self determination both as a private and a public person.

**3.** It is also clear that no other group in contemporary society undergoes such a long, painful, and sometimes dangerous process, often involving dislocation of all personal and social relationships, in order to achieve that personal identity.

**4.** The transsexual person looks to the state, which has facilitated and sanctioned that process, through the availability and the funding of treatment and surgery, now to provide the legal recognition of the full consequences of that process and to confer on every individual the legal status to that newly acquired identity.

**5.** Attention is focused upon the means of achieving the aim of full legal recognition of the gender reassignment, namely a change to the civil register of births. In this respect it must first be recognised that, in the UK, it is not primarily the refusal to alter the birth register that denies full legal recognition to the gender reassignment but the adoption of the test for legal sex laid down in 1970 in the case of *Corbett v Corbett* [1970] 2 All ER 33, since this forms the basis for the legal inalienability of civil status. The reasoning of Omerod J. is well rehearsed. However, as the Court observed in both *Rees* (pg 67-68 para. 47) and *Cossey* (pg 641 para. 42) it needs to be regularly revisited because it is the continuing attachment to this legal analysis of sex (chromosomal, gonadal and genital) excluding any notion of the psychological (soul) and ignoring entirely the physical consequences of the reassignment, which presents the primary obstacle in the UK to permitting change to the birth register.

**6.** In reviewing the Court's considerable jurisprudence on the legal rights of transsexuals over the past twenty years and particularly since the decision in *Rees v UK* [1986] 9 EHRR 56 it is apparent that there has been an increasing recognition of the arguments in favour of affording transsexuals congruent civil status. This is reflected in the diminishing margin of the majority between the judgments of the Court in *Rees* and *Cossey* (12:3 and 10:8 respectively) and in the number of the Member States of the Council of Europe ('Member States') where legal recognition of the gender reassignment through change to the birth register was made possible. In *Rees* the Court proceeded on the basis that there were five such Member States, by the time of Cossey 14 such states were identified by Judge Martens. However, in all previously decided cases involving the UK, including the most recent *X,Y,Z v UK* Application No.21830/93 22 April 1997 the Court gave its judgment on the basis that the available information did not reveal a "common standard" amongst the member states with regard to the legal rights of transsexuals but rather concluded there exists "a diversity of practice" and "little common ground" [*Cossey* (pg 641 para 40), *XYZ* para 52 of judgment].

**7.** It is in this context and with regard to the importance, in this area of decision making, of reflecting social development and current circumstances, that the organisation Liberty, at the invitation of the Court, commissioned a comparative study of national law and practice in recognising transsexual rights in Europe, the Commonwealth and other common law jurisdictions. The study is funded by the Equal Opportunities Commission (EOC).

**8.** This authoritative research is the first of its kind to be available to the Court. It provides a comprehensive and reliable review of the current state of development in this area and in these comparative jurisdictions. It is hoped that the Court will find it of considerable assistance.

## The Method

**9.** The information was obtained over a two month period between July and September 1997. Essentially it took the form of responses to Questionnaire, with follow-up by telephone for detail or clarification. Responses were received from government sources at Ministerial, departmental and consular level, from non-governmental organisations, and academics. The extent of the responses both from the number of countries and from the various sources exceeded expectation and was marked by spontaneity, cooperation and a genuine willingness to contribute.

**10.** The remit of the study was broad but the priority was in obtaining information with regard to:

i. availability of gender reassignment surgery;
ii. means of recognition of the reassignment through changes in the birth register;

**11.** Whilst it was recognised, as referred to above, that in the UK it is not primarily the refusal to alter the birth register that denies full legal recognition to the gender reassignment but the adoption of the test for legal sex in *Corbett*, the study did not seek to establish the exact legal test for determining sex but assumed that where change to the birth register was possible, the test was other than chromosomal, gonadal and genital at birth.

The aim was to identify the existence of any mechanism for the change of civil status, whether that be administrative, judicial or legislative. No specific distinction was made as to

the means of recognition, though explanations were sought as to how the process was completed.

**12.** The research is in two parts firstly in statistical form showing the analysed data obtained; and, secondly, country by country with annotation of the responses.

## Results

**13.** Of the 37 member states 23 permit change of the birth certificate in one form or another to reflect the reassigned sex of the person. Only Albania, Andorra and Ireland join the UK in positively prohibiting such a change. Albania and Andorra, however, exclude themselves from the study to the extent that gender reassignment itself is not permitted. 10 states have no clear position. The majority in this category are states of the former Eastern Block, 3 of which are Balkan states whose legal systems are generally in a flux following the civil war in former Yugoslavia (Figure 1 and 2).

**14.** It is only the UK and Ireland of the member states where gender reassignment is legal and publicly funded but the State will not give full legal recognition to the new gender identity (Figure 7).

**15.** Outside of Europe there is a very similar pattern with Canada, Australia, New Zealand and 50 of the 52 states of the United States of America, all making provision for full legal recognition of the gender reassignment. It has been permissible in South Africa by legislation since 1974. In other states such as Namibia, India, Pakistan, Egypt despite a greater divergence of cultural and social norms, none have a positive prohibition on the full legal recognition of the change of gender identity equivalent to that in the UK

**16.** The statistics, therefore, show that, over the decade since the Court decided *Rees* there has been a 30% increase in member states giving full legal recognition of the assignment and conversely a 37% reduction in those member states who refuse to give such recognition. The consequence is that 59% of the members states make positive provision and in only 10% of states is there an unequivocal law preventing change to the birth certificate (Albania, Andorra, Ireland, UK) (Figure 4 and 5).

## Observations

**17.** A number of observations can be made in respect of the results of the study:

i. there is a body of states that have had in place for over a decade the means of conferring congruent civil status to transsexuals Denmark Switzerland (1945), Sweden (1972), Belgium (1979), Germany (1980), Italy (1982), the Netherlands (1985), Luxembourg (1985), Spain (1987), and no adverse consequences, legal, administrative, or social have been documented. Transsexuals have been apparently fully legally integrated into these civil societies with little or no controversy of note.
ii. Despite the expansion of the membership of the Council of Europe and a greater diversity of legal traditions and social norms the trend of recognition has continued and strengthened in the 1990's.
iii. In those member states who deny legal recognition, it is on the basis of fundamental moral objections to Transsexualism and not for reasons of administrative convenience and consistency, since in those states gender reassignment itself is prohibited (Albania

and Andorra). Even in Ireland where it is not prohibited, the reassignment is not actually carried out in practice.

iv. Despite the complex maze of issues that Transsexualism has given rise to and the controversy that is said to attach to them there is a remarkable consistency in approach that has been rapidly achieved since the 1980's. And that it can be inferred that, with the awareness of these issues, not least through the litigation in the European Court, attitudes have been surprisingly swift to adapt and action taken to fully integrate the legal rights of transsexuals.

## Conclusions from the Study

**18.** Over the last decade there has been an unmistakably clear trend in the Member States towards giving full legal recognition to gender reassignment. The cumulative effect is that the majority of member states now make provision for such recognition. The developed consensus is now firmly in favour of full recognition and the diversity of approach limited by that fact.

**19.** Both the trend and the consensus identified in Europe prevails in other common law jurisdictions including those upon which the impact of European jurisprudence is most keenly felt and vice versa, namely the USA, Canada and Australia. It transcends an extremely wide variety of cultural and social norms.

**20.** This significant and enduring development in the practice of states reflects a general and increasing societal recognition of the importance of the transsexuals right to congruent personal identity and the need for tolerance of a different mode of human behaviour, affording respect for the dignity of the transsexual person and the protection of his/her private life.

## Development in European Community Law

**21.** The social developments in the practice of the member states identified in this study was both reflected and underscored by the decision of the European Court of Justice (ECJ) in *P v S and Cornwall County Council* C-13/94, 30 April 1996 in which the Advocate-General (without the benefit of dedicated study) observed "a clear tendency, especially since the early 1980's towards ever greater recognition of transsexuality and by judicial decision". For his part and in the context of construing the equality provisions of the Community (Equal Treatment Directive 76/207/EEC), he observed " there is no doubt…….the principle of alleged immutability of civil status has been overtaken by events" (para 9). The powerfully worded opinion, it is submitted, gives renewed force to the arguments of transsexuals in the Human Rights Court, which would normally be expected to be leading the way in these matters. The Advocate-General has added a new urgency to the need for law to reflect a changed social reality, warning that:

"the law cannot cut itself off from society as it actually is and must not fail to adjust as quickly as possible. Other wise it risks imposing outdated views and taking a static role" (para 9).

**22.** The ECJ took the courageous step suggested to them by the Advocate General and did so placing at the fore "respect [for] the dignity and freedom" of the transsexual if they were denied the equal protection from discrimination afforded to other men and women within the

member states (para 22).

**23.** The refusal to afford full legal recognition to the gender reassignment and, thereby, deprive transsexuals of a congruent civil status by denying the legal recognition of the current gender identity in the view of the authors, therefore, goes to the heart of the guaranteed right to respect for private life and the central obligation in Article 8 ECHR to ensure the protection of personal identity.

**24.** There are very real and recurrent practical consequences resulting from the lack of an integrated and congruent civil status; and the continuation of the *Corbett* test may deprive transsexuals in the UK, of whatever nationality, the "dignity and freedom" inherent in the equality provision of the European Community. This will also extend to contexts as wide ranging as criminal justice, to financial services, and aspects of social life such as membership of clubs. Indeed in any sex specific aspect of civil life the transsexual person is exposed to the indignity, humiliation and social embarrassment of revealing their past gender identity, and necessitates public consumption of matters of a most intimate nature, which are intrinsic to a transsexual person's private life.

**25.** Added to this social stigma is the process of marginalisation whereby the risk of being identified as transsexual acts as a deterrent to fully engaging in society: in being prepared to participate in the legal system in particular as a complainant but also as a witness, to apply for jobs in the police force, in the armed services, maybe even the prison service and nursing, to obtain insurance or a private pension or to engage in single sex social activities by joining sports or other social clubs.

**26.** The absence of full reconciliation of the physical, psychological and social identity and the legal person, therefore, in principle and in practice for transsexuals in the UK perpetuates the difficulties and anguish inherent in the transsexual situation. The denial of a congruent civil status is a daily infringement of the right to respect for the private life of the transsexual person in the same way that potential criminal liability of consenting adults for homosexual acts has been found to be by the Court. *Dudgeon v United Kingdom* (1981) 4 EHRR 149, para 64 and *Norris v Ireland* (1991) 13 EHRR 186 at para. 38.

**27.** The material before the Court showing the social developments and current circumstances in the rest of Europe and in much of the international community would appear to undermine a claim to "the margin of appreciation" in respect of this issue. Very serious questions are raised by the UK Government's continued denial of a congruent civil status and personal identity for transsexual people.

Dated: 24th day of October 1997 (Signed) Laura Cox QC

(Signed) Stephanie Harrison

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**Figure 1: Member states of the Council of Europe**

| Country | Is gender reassignment legal? | Can a transsexual alter their birth certificate? | Is it legal for a transsexual to marry following surgery? |
|---|---|---|---|
| Albania | No | No | No |
| Andorra | No | No | No |
| Austria | Yes | Yes | Yes |
| Belgium | Yes | Yes | Yes |
| Croatia | | | |
| Cyprus | | | |
| Czech Republic | Yes | Yes | Unclear |
| Denmark | Yes | Yes | Yes |
| Estonia | Yes | Yes | Yes |
| Finland | Yes | Yes | Yes |
| France | Yes | Yes | Yes |
| Germany | Yes | Yes | Yes |
| Greece | Yes | Yes | Yes |
| Hungary | Yes | No legislation | No legislation |
| Iceland | Yes | No legislation | No legislation |

| | | | |
|---|---|---|---|
| Ireland | Yes | No | No |
| Italy | Yes | Yes | Yes |
| Latvia | Yes | Yes | Yes |
| Liechtenstein | | | |
| Lithuania | | | |
| Luxembourg | Yes | Yes | Yes |
| Macedonia | | | |
| Malta | | | |
| Moldova | Yes | Yes | No legislation |
| Netherlands | Yes | Yes | Yes |
| Norway | Yes | Yes | Yes |
| Poland | Yes | Yes | No legislation |
| Portugal | Unclear | Unclear | — |
| Romania | Yes | No legislation | No legislation |
| San Marino | | | |
| Slovakia | Yes | Yes | Yes |
| Slovenia | | | |
| Spain | Yes | Yes | Yes |
| Sweden | Yes | Yes | Yes |
| Switzerland | Yes | Yes | Yes |
| Turkey | Yes | Yes | Yes |
| Ukraine | Yes | Yes | Yes |
| United Kingdom | Yes | No | No |

*Shaded areas indicate that the law is unclear or that the State in question has not pronounced on the specific issue.*

**Figure 2: Documents reissued in the reassigned sex of the transsexual person in Member states of the Council of Europe**

| Country | Driving licence | Passport | Identity card | Birth certificate | Social Security or NI card |
|---|---|---|---|---|---|
| Albania | No | No | No | No | No |
| Andorra | No | No | No | No | No |
| Austria | Yes | Yes | Yes | Yes | Yes |
| Belgium | Yes | Yes | Yes | Yes | Yes |

| | | | | | |
|---|---|---|---|---|---|
| Croatia | | | | | |
| Cyprus | | | | | |
| Czech Republic | — | Yes | — | Yes | — |
| Denmark | Yes | Yes | Yes | Yes | Yes |
| Estonia | Yes | Yes | Yes | Yes | Yes |
| Finland | Yes | Yes | Yes | Yes | Yes |
| France | Yes | Yes | — | Yes | Yes |
| Germany | Yes | Yes | Yes | Yes | Yes |
| Greece | Yes | Yes | Yes | Yes | Yes |
| Hungary | | | | | |
| Iceland | | | | | |
| Ireland | — | — | — | No | — |
| Italy | Yes | Yes | — | Yes | Yes |
| Latvia | Yes | Yes | — | Yes | Yes |
| Liechtenstein | | | | | |
| Lithuania | | | | | |
| Luxembourg | Yes | Yes | — | Yes | Yes |
| Macedonia | | | | | |
| Malta | | | | | |
| Moldova | Yes | Yes | — | Yes | Yes |
| Netherlands | Yes | Yes | Yes | Yes | Yes |
| Norway | Yes | Yes | | Yes | Yes |
| Poland | — | — | — | Yes | — |
| Portugal | Unclear | — | — | Unclear | — |
| Romania | | | | | |
| Russian Federation | Yes | Yes | Yes | Yes | Yes |
| San Marino | | | | | |
| Slovakia | — | — | — | Yes | — |
| Slovenia | | | | | |
| Spain | Yes | Yes | Yes | Yes | Yes |
| Sweden | Yes | Yes | Yes | Yes | Yes |
| Switzerland | Yes | Yes | Yes | Yes | Yes |
| Turkey | Yes | Yes | Yes | Yes | Yes |
| Ukraine | Yes | Yes | Yes | Yes | Yes |
| United Kingdom | Yes | Yes | — | No | No |

*Shaded areas indicate that the law is unclear or that the State in question has not pronounced on the specific issue.*

**Figure 3: States of the Council of Europe that legally perform gender reassignment surgery**

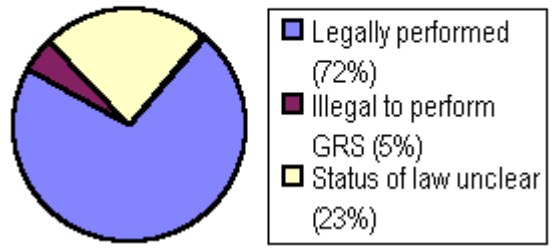



**Figure 4: Council of Europe States that prevented post-operative transsexuals from making changes to their civil identity in 1986 (at the time of Rees v. United Kingdom)**

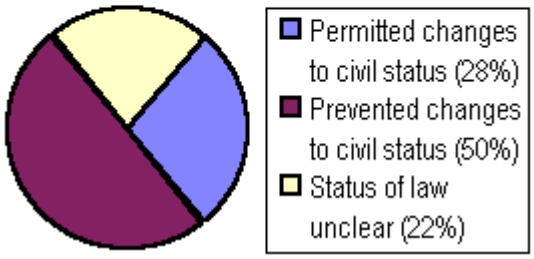



**Figure 5: Council of Europe States that prevented post-operative transsexuals from making changes to their civil identity in 1997 (at the time of Sheffield & Horsham v. United Kingdom)**

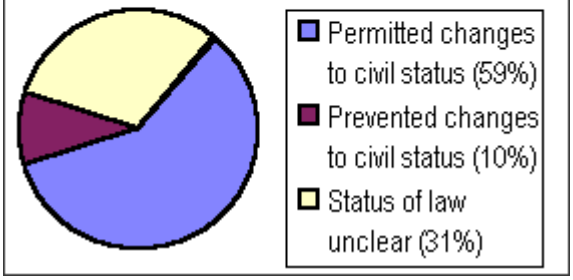



**Figure 6: How member states deal with issues around gender reassignment and the law (judicial, administrative and legislative)**

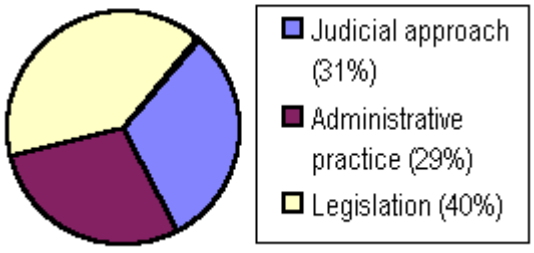



**Figure 7: States of the Council of Europe where gender reassignment surgery is performed, and the ramifications surgery has on civil status**

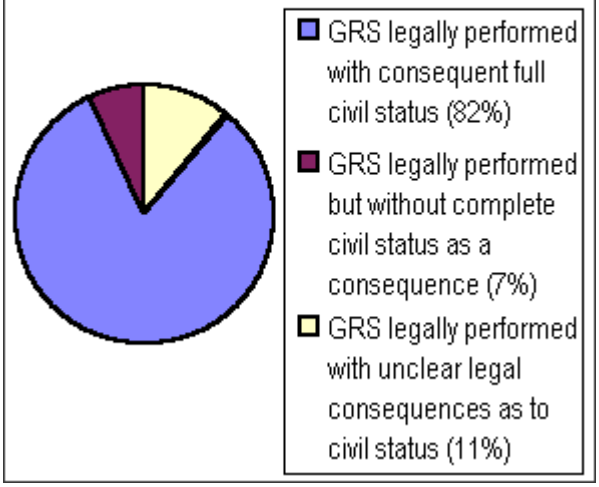


**Figure 8: States of the Council of Europe. Is the birth register an historical record or an indication of current identity?**

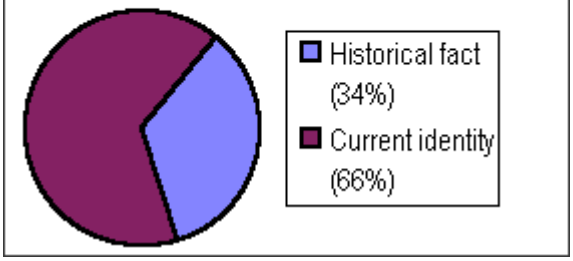



**Figure 9: States of the Council of Europe that open their birth records to the public**

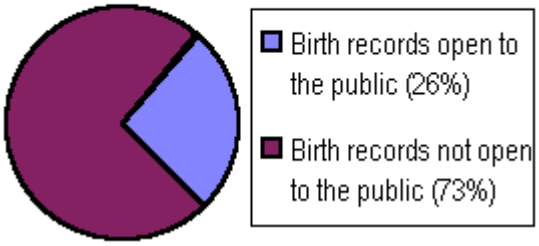



**Figure 10: States of the Council of Europe that allow post-operative transsexual people to marry people of the opposite sex to their reassigned sex**

