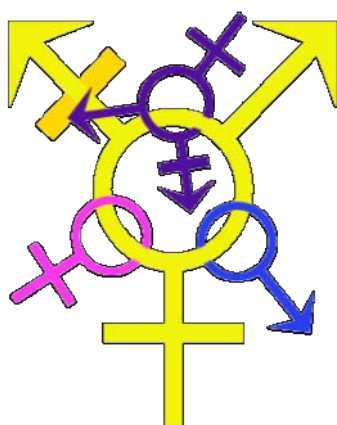


DOING GENDER IDENTITY JUSTICE
EVALUATION THREE YEARS TRANSGENDER LEGISLATION IN THE
NETHERLANDS
2014 – 2017



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5 December 2017

Summary

This study contains an evaluation of the experiences with the Dutch transgender legislation, since its last amendment entered into force on the 1st of July 2014. This research was commissioned by the Dutch Scientific Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum*, WODC) of the Ministry of Justice and Security. The central research question of this evaluation was:

To what extent does the law of the 1st of July 2014 comply with the objectives of the law, namely the simplification of the procedure and respect for human rights, and are there – including in the light of the experiences abroad – possibilities to further the law's compliance with its objectives, without compromising its feasibility or increasing the prevalence of (identity) fraud?

Background and legal framework

The Dutch government registers certain personal data of its residents. A birth certificate is issued to those persons born in the Netherlands. The information contained in the birth certificate is transferred to a '*persoonslijst*' (registration of individual data) in the *Basisregistratie Personen*, (BRP, the Dutch population registration), which is kept up to date by the municipalities. Persons who temporarily or permanently move to the Netherlands must also register themselves at the municipality. Their personal data will also be included in the BRP. The information in the BRP is used for multiple aims, such as statistical research, policy development, the sending of invitations for sex-specific population screenings and surveys and for identification objectives.

One of the components of the data that is registered is sex. Sex is determined at birth on the basis of the physical characteristics of the child. There are two options: male (M) and female (F). For children with (apparent) ambivalent sex characteristics (intersex condition/DSD), there is a possibility for a temporary birth certificate to be issued, which states that the gender could not yet be determined. Within three months a definitive certificate is issued on which an M or an F is filled in, unless it is still not possible to determine the sex. It is therefore possible that persons who are born in the Netherlands are not legally regarded as an M or an F. These persons receive an X in their passport. In practice this does not seem to occur. If persons with an intersex condition discover later in life that their legal sex is not correct, they can request the court to instruct a civil registrar to correct this mistake in the birth certificate (art. 1:24-24b Civil Code).

The information in the BRP will be updated accordingly. The fact that the gender entry was corrected will not be visible.

For persons who physically match the (medical) norms for an M or an F, but do not identify with their registered sex (transgender individuals), there is a possibility to change their legal gender from an M to an F or vice versa (art. 1:28 Civil Code). Up until the last amendment of 1 July 2014 it was required to physically adjust to ‘the other sex’ as much as possible and undergo a permanent sterilisation procedure. These requirements were repealed, because they were considered outdated and contrary to human rights standards, in particular the right to self-determination. Hereby it became possible to disconnect the change of legal sex from a possible medical transition. It is however still required to obtain a declaration from an authorised medical expert. The minimum age of 16 years was simultaneously introduced. The amendment constituted a procedural change as well: since July 2014 it is possible to declare at the municipality that one has the conviction that they belong to the other sex. The more expensive and time consuming application proceedings before a court of law were no longer necessary.

During the parliamentary debates, the requirement of an expert declaration as well as the minimum age were subject to debate. The declaration is considered an interference with one’s right to self-determination by interest groups, transgender persons and several politicians. Moreover, the minimum age was controversial. The responsible State Secretary of Security and Justice, Fred Teeven, pledged to evaluate the law within three years. This study contains that evaluation.

Approach

Data concerning the use of the law were obtained with the help of the Central Bureau for Statistics (*Centraal Bureau voor Statistiek*, CBS) and the three academic hospitals with gender clinics (VUmc, UMCG and LUMC). Experiences with the functioning of the law and views on it were collected through two methods. Semi-structured interviews were conducted with the three largest interest groups in the Netherlands, namely Transgender Network Nederland (TNN), Nederlands Netwerk Intersekse/DSD (NNID) and COC Nederland, as well as with patient organisation Transvisie. Moreover interviews were conducted with medical experts of three gender clinics, with civil servants of Department of Identity of the Ministry of Foreign Affairs, and with civil

servants of civil affairs at the municipalities of Utrecht and The Hague. Telephone interviews were conducted with thirteen parents of transgender children.

The information on the experience with the functioning of the law was supplemented with a number of surveys. One survey on the website of the Dutch Association of Civil Affairs (*Nederlandse Vereniging voor Burgerzaken*, NVVB) was answered by 55 civil servants of civil affairs. One questionnaire for transgender children and youth up to 26 years on the website of TNN was answered by 177 persons. A written survey, which was distributed at the 'Outside of the Binary Day' (*Buiten de Binary Dag*) in Nijmegen on the 14th of October 2017, was answered by 9 respondents. Moreover, TNN shared the anonymised answers to an online survey on the functioning of the law, which was put online earlier this year by the organisation. This survey was answered by 97 persons.

A limited exploration of the experiences in four countries which allow a change of legal sex on the basis of a self-declaration was carried out on the basis of semi-structured interviews with at least one representative of an interest group and one government official who was tasked with the functioning of the law per country, with the exception of Ireland, where information was provided by the Minister of Social Affairs and Social Protection. Moreover, literature and jurisprudence were used for this study.

Numbers

Research of the SCP has previously shown that the number of persons who change their legal sex has significantly increased since the amendment. In 2012 and in 2013 only 81 persons per year have made use of the law. In 2014 almost 10 times the amount of people has changed their legal sex (780). In 2015 this number decreased to 455, but it has since then increased again (526 in 2016). In total around 2500 expert declarations were issued. It is estimated that about 50 to 60 of those declarations were requested by persons who were not in the medical transition trajectory. In two instances a declaration has been refused. The age of the persons who want to change their legal sex is decreasing. The group of people between 26 and 45 years of age was the largest group by far before 2014 and that remained in the year of 2014 as well, but they were surpassed in 2015 by the group 19-25 year olds, which is now the largest. If these patterns progress as they are currently (see table 3 in chapter 2) the group 16-18 year olds will surpass the much larger group of 26-45 within a year or two.

Since 2006 only 6 persons have changed their legal sex for a second time in the BRP (see table 4, chapter two).

The expert declaration

To change one's legal sex an expert declaration must be submitted. Doctors and psychologists who are not employed at one of the three gender clinics can follow a one-day training, which is provided by the VUmc. Mid-October 2017 20 persons outside of the gender team of the VUmc had followed the one-day training, with which they acquired the authority to issue the expert declarations.

Arguments to keep the expert declaration as a requirement to change one's legal sex were the expected contribution to prevent identity fraud, prevent mistakes and ill-considered changes (for example as a consequence of a psychosis or impulse) and as an insurance for the sustainability of the conviction to change one's legal sex. The expert declaration would also make the tasks of the civil servants of civil affairs easier.

The respondents from the latter group were mainly positive regarding the expert declaration. They suspect that the declaration functions as a barrier against rushed or fraudulent changes, and that thereby repeated changes are prevented. Repeated changes were considered undesirable due to the legal status of a birth certificate and, because the *persoonslijst* in the BRP would become a 'mess' due to frequent changes, and it would become difficult to work with for the users of the BRP-information (such as government agencies).

Gender experts are a bit more ambivalent about the declaration regarding transgender persons of full age. The most important reason for this ambivalence was the fact that the expert declaration does not insure the sustainability of the conviction. Moreover the added value of the supplied information and the consult is not always clear. A problem occurs in cases where the social transition is not very successful. Namely older transgender individuals experience this. When the social environment continues to treat them as their sex assigned at birth, they sometimes prefer to continue their public life in their sex assigned at birth and to lead their private life in their self-identified gender identity. Medical experts consider that the text of the declaration does not correspond with the conviction to change back, considering this group does not have the conviction 'to belong to the other sex'. Their legal sex still corresponds with their conviction, but the social environment presents a problem.

Interest groups agree that the declaration does not have any added value, the procedure is slowed down and made more expensive and – most importantly – it is an interference with the right of self-determination of transgender individuals. With a few exceptions, these views correspond with the respondents of various surveys.

No indications of fraud by using the possibility of a change of legal sex have been found. Most respondents could not properly imagine how (identity) fraud could be committed by using the Dutch transgender legislation, mainly to the fact that the citizen service number (*burgerservicenummer*) remains unchanged. The informants of the Department of Identity and of Civil Affairs both suspect that the related change of first name could contribute to the ‘untraceability’ of persons.: who is searching (for example, for collecting a traffic fine) for a man named A.J. Jansen, will not ‘recognize’ a woman named B.T. Jansen in a list of all Jansens as the person concerned. This does not mean, however, that it is impossible to collect a fine: the coding of the *persoonslijst* does, for example, show if the sex has been changed. To the informants it seems unlikely that such an untraceability will significantly increase when the expert declaration would be abolished or if the procedure would be simplified in another way. A common, if not the most important reason for untraceability is the omission of a change of address.

However, civil servants consider that, in the events of serious fraud, it cannot be excluded that the Dutch transgender legislation can be abused. However, they added, it does not seem likely that the change of legal sex would be the sole change for the purposes of fraud. However, in cases of persons with foreign birth certificates, it cannot be ruled out that a person remains a man in their country of birth, while she is a woman in the Netherlands. Other countries have varying resolutions regarding this point. In Norway and Ireland the equivalent of a citizen service number is necessary for a change of legal sex; in Malta refugees can change their legal sex, but other persons with a foreign nationality cannot. Argentina does not distinguish between persons of foreign origin where it is and is not possible for changes of legal sex to be recognized.

The expert declaration is also meant to create a barrier against a rushed or erroneous change of legal sex. According to information provided by the gender clinics only two requests for a declaration have been refused up until mid-October 2017, due to the fact that there was doubt whether the person in question actually had a sustainable conviction to belong to the other sex. It should be noted that by far the largest portion of

declarations have been given in the course of the medical trajectory. It has not been investigated how many patients leave the medical trajectory, because the medical experts doubt their 'conviction'. The respondents of varying surveys do not regret their change of legal sex.

On the other hand, figures show that since 2012 only six repeated changes of legal sex have taken place. In three cases the first change took place under the old procedure through the court. This is an indication that the amendment did not lead to more rushed and/or ill-considered changes. It is not possible to predict whether other amendments in the law will lead to more decisions to change back.

In the three other researched countries that provided figures, few (Ireland: two) to none (Malta and Norway) have changed their legal sex back to what it was. In relation to this, it must be noted that the fact that in none of these (four) countries is it possible to change one's legal sex with one action. In Norway, for example, the country which apparently has the most simple procedure, one must request a form online, which must be subsequently received by mail, signed and sent back. This way it ensures that the persons in question receive information regarding the practical consequences of the change, and they can decide for themselves when they actually want to have the change of legal sex take place, because the form does not expire.

In Norway and Malta the procedure for the first and second change of legal sex is the same. In Ireland and Argentina there is a different procedure for the latter cases.

Interest groups and transgender individuals have practical objections as well as in principle to the requirement of an expert declaration. In principle, the requirement is considered an interference with the right to self-determination. The declaration and the related consultation are not experienced as valuable. They are of the opinion that the information provided during the consultation can easily be received in another way. Practical objections concern the costs of the declaration (315 euro, if one consultation is sufficient). For many respondents these costs are the reason to wait until the medical expert is prepared to give the declaration within the medical trajectory: 'You can only make use of the law when you have a diagnosis. Very annoying, because therefore you can't modify your document. Or, well, you can, but then you have to pay a lot of money.' One also wonders which 'administration costs' (65 euros) are involved with the issuing of

the declaration. Several respondents have emphasized that other costs are also involved to obtain the declaration, such as travel costs to Amsterdam or Groningen, taking time off and such. A second practical objection is that the intertwining of the medical and legal trajectory leads to a lengthening of the trajectory: for those who are not in the medical trajectory a maximum waiting time of a few weeks applies, but this does not apply to the large group of persons who are waiting for their declaration within the medical trajectory, because they often need to wait for their diagnosis which can take up to a year. In this sense it must be noted that the detachment of the medical and legal trajectory seems to have only been partially realized.

In all four researched countries self-determination was an important argument to not (or no longer) require an expert declaration. The European countries emphasized that the detachment of the medical treatment and the legal registration was essential to comply with the envisioned change of legal sex by the Committee of Ministers of the Council of Europe, namely: ‘quick, transparent and accessible’. Hereby can be noted that the European Court of Human Rights concluded in their judgment of April 2017 (*A.P., Garçon et Nicot c. France*) that the requirement of an expert declaration did not, in that case, violate article 8 ECHR. Mainly Norway and Malta were downright laconic regarding the chance that persons may come back on their decision to change their legal sex: they do not consider it as a weighty problem. The Norwegian government informant responded to the question related to the risk of fraud that he thinks that Norwegian society is sufficiently robust to deal with that. Moreover, in other countries this discussion played no significant role.

The minimum age

The legislator decided to allow the possibility to change one’s legal sex for everyone who is 16 years of age and older. Parental consent is not a requirement for 16 and 17 year olds who want to change their legal sex. This is linked to the Medical Treatment Contract Act (*Wet op de Geneeskundige Behandelingsovereenkomst*, WGBO). An important reason for the choice of 16 years was the fact that 16 is also typically the age transgender persons in the medical trajectory may start with cross-sexhormones. Reasons behind the age requirement as such are in particular that a (legal) sex change is a particularly important decision for a child, including large consequences further in life. In relation to this concern, a reference is often made to studies which show that of all of the children who visit a gender clinic approximately only 20% end up changing their sex

(often referred to as ‘persisters’). The concern seems to be that children who change their sex early in life might have a more difficult time coming back on their decision. Mainly the gender clinics and Transvisie argue for the preservation of the minimum age of 16 years. Some experts did note that exceptions should be able to be made in a few instances. The caution regarding change of legal sex for children seems to be, at least partially, derived from the perceived interwovenness of the change of legal sex with the risks associated with social transition and medical treatment. The legal sex should be seen separately from it, though. Other suggestions were the correspondence with the WGBO-age in which children can decide with consent of their parents regarding medical interventions (12 years), the identification duty in public transportation (12 years) or the general identification duty (14 years).

The interest groups TNN, NNID and COC Nederland think that the minimum age should be abolished. They consider it to be contrary to the best interest of the child as laid down in the UN Convention on the Rights of the Child.¹ The Committee that monitors compliance with the Convention increasingly devotes attention to gender identity, including legal recognition.

Based on the results of the present study, it can be concluded that at least a proportion of transgender minors suffer from the impossibility to change the legal gender until they are 16 years old. All minors from and about who information was received, start their transition step by step. At a certain moment this will run counter to their daily life. For some children, for example those who use public transportation to travel to school and those who receive diplomas at a young age, it is more difficult than for others. The high school diploma is for many young transgender persons the moment they want to make the switch.

The interest groups raise the question why a change of legal sex should be the last step in the social transition of a child, especially when the parents’ consent to it. Social as well as legal transitions, as opposed to a physical transition, can be reversed. They also question the interpretation of the studies on ‘persisters’ and ‘desisters’ and the weight

¹ See for example: COC Netherlands, *Report on the environment and rights of a forgotten group of vulnerable children*, Amsterdam, 2013, <https://www.coc.nl/wp-content/uploads/2015/10/LGBTI-Childrens-rights-ENG.pdf>; and Linda Henzel, *Back me up! Rights of trans children under the Convention on the Rights of the Child*, Working Paper no. 13, Humboldt Law Clinic Grundt- und Menschenrechte & Transgender Europe, oktober 2016, <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf>.

that is attributed to it by the proponents of a minimum age. They point out that it does not have to be difficult for children to come back on their earlier decision if changing back is a simple procedure. Several parents endorsed this and believed that their child would have been spared a lot of suffering, if they had been able to change their legal sex and first name earlier.

Practices abroad vary per country. In Malta there is no minimum age; in Norway there is a minimum age of 6 years; Ireland allows an exception for the 18 year minimum age for 16 and 17 year olds, and in Argentina there is a minimum age of 18 years with the possibility of an exception from 14 years. It is difficult to draw a conclusion based on the widely divergent views and insights, but in general, a majority of Dutch respondents believe that children under the age of 16 should at least require the consent of either their parents or an expert.

Other Aspects

Privacy

A change of legal sex is automatically processed in the information in the *persoonslijst* in the BRP of relatives (parents, children and (ex) partners). As laid down in article 2.35 of the BRP Act, municipalities are obliged to notify these relatives in written form of this change. Many transgender respondents and the interest groups consider this a serious interference with their privacy. They would like to decide for themselves who they would like to inform of their transition. The interviewed medical experts were not aware of this provision and could therefore not provide their clients with any information regarding this topic. Some civil servants also indicated that they found this provision problematic.

There was no comparable provision in the countries researched in this study. However, in Malta the new legal sex of a parent is mentioned on the birth certificate of a child when that parent changes the sex. The main argument that was given for this is that children cannot choose their parents.

Some transgender respondents were disappointed that their former legal sex did not 'disappear' completely. The birth certificate cannot be replaced, but only updated, which means that the change stays visible. Upon request (art. 2.57 Wet BRP) it is, however, possible to delete the information regarding the change in the BRP, although the change

does remain possible to discover for a limited group of civil servants due to the coding in the *persoonslijst*.²

Marriage certificates can also not be adjusted. The reason for this is that the certificate reflects a historical fact. The marriage booklet, on the other hand, is not an official document and can be adjusted.

Some respondents would also like to see some other, non-governmental documents amended, such as the mortgage certificate. Article 1:28 paragraph 2 of the Civil Code determines that a change of legal sex does not have a retroactive effect in the area of persons- and family law. However, this does not exclude retroactive effect in other areas. This has not been examined in the context of this study.

Many respondents were (unpleasantly) surprised by the large amount of agencies and bodies which need to be informed about the change of legal sex. This will possibly decrease if the policy intention is taken to steer towards restrictions on the use of sex information, also by non-government organizations and private companies.³

The law of descent also touches privacy. The lack of retroactive effect in parent/child relationships is experienced by some as very irritating. The three interest groups believe that the same applies to the exception for men who want to birth men and who are not considered the father, but the mother of their child in the law (art. 1:28c paragraph 3 Civil Code).

Transnational issues

These issues are very diverse and sometimes complex and it has therefore been chosen to not include them in this study. It is, however, clear from this study that not only transgender persons born abroad are struggling with this, but also civil servants of civil affairs. Nor has it been researched whether the requirement of an expert declaration from a Dutch authorized medical expert complies with the provisions in the area of the free movement of persons and services. Considering the fact that some residents, for example in connection with the long waitlists in the Netherlands, seek treatment abroad, Belgium in particular, this should be further researched.

² See also *Kamerstukken I*, 2013-2014, 33 351, C, p. 6.

³ *Kamerstukken II*, 2016-2017, 27859, nr. 99. This intention is repeated in the coalition agreement 2017-2022, *Vertrouwen in de toekomst*, 10 oktober 2017, p. 10.

Law on names

Many transgender persons, who change their legal sex, change their first names as well. The possibility to change one's name clearly meets a need. The linking of the first name change with the change of legal sex does result in two problems, namely for the persons who only want to change their legal sex, but not (yet) their first name, and for those persons who want to change their first name, but do not want to change their legal sex (yet). The latter group seems to consist mainly of persons who identify as non-binary and therefore do not want or cannot use the existing possibilities (M/F) which are offered by the Dutch transgender law. Some persons did indicate that they would like a more neutral first name. However, when the first name is changed separately from the change of legal sex, the normal (expensive) procedure in a court of law must be followed. One civil servant expressly found that the Dutch law on names is exceptionally rigid compared to other systems.

Practical points

The fact that one has to amend their birth certificate in the municipality where one was born as a part of the procedure to change one's legal sex confounds many respondents. One questions why this part of the procedure cannot be digitized. This is (mainly) an issue, because this part of the procedure often involves extra costs (travel costs, days off). After the amending of the birth certificate, there is a short period (varying from a few days to a few weeks) of a legal 'limbo', in which the identity papers of the persons concerned are no longer valid. One is therefore unwillingly forced to be in violation of several identification laws, because they are unable to identify themselves. For professional chauffeurs, for example, this can also result in a financial loss.

Another procedure for intersex individuals

The three interest groups advocate for a broader transgender law in the sense that it should also cover persons with an intersex condition/DSD, and which enables them to change their legal sex in a simple and (relatively) inexpensive procedure (at least as long as sex is registered by the government). Almost all civil servants are in favour of the maintenance of different procedures, because according to them they are two different phenomena. However, the biological differences between transgender and intersex individuals do not seem to provide a conclusive explanation for maintaining different schemes.

Conclusion

The research question regarding to what extent the current legislation corresponds with the objectives can be answered on the basis of the evaluation in the following manner:

The Dutch transgender law clearly meets a need. The administrative procedure has not caused any problems for the government. The requirements of an expert declaration and the minimum age of 16 can be experienced as objectionable by stakeholders. In practice it seems like the medical transition trajectory and the change of legal sex have hardly been disconnected. This seems to be mainly caused by the requirement of an expert declaration.

It is difficult to say to what extent the requirement of an expert declaration has an added value to the prevention of fraud or ill-considered or unjust change of legal sex. Therefore, it is also difficult to predict whether the abolishing of the requirement would lead to an increase of those phenomena. In the four countries that were researched there have been no cases of fraud to date and only few have decided to change back to their previous legal sex.

In light of the practical objections as well objections in principle against the current procedure with the expert declaration, the Norwegian model seems to provide the most useful elements: Norway has a simple, inexpensive and – in principle quick – procedure, with two moments of decision built in and where the person concerned can decide for themselves (in the second step) when they exactly want to change their legal gender. The procedure is not bound to any time limits.

The Dutch legislation at this moment does comply with current human rights standards. However, this area is rapidly developing. In the three European countries that were researched, but also in a few other countries (Portugal, Germany) current legislation is being re-evaluated to see whether their legal frameworks are still sufficient, with a particular focus on the minimum age and the position of persons who identify as non-binary.