



# RIGHT TO SELF-DETERMINATION OF GENDER

Comparative law study on five questions related to gender identity



## Index

Introduction .....	1
Purpose of this report .....	2
Methodology .....	2
Disclaimer .....	2
Acknowledgments .....	3
<b>PART I: What are the conditions prescribed by the law to access the right to gender self-determination? (e.g. age; period of time). .....</b>	<b>4</b>
<b>ARGENTINA.....</b>	<b>4</b>
<b>BELGIUM.....</b>	<b>6</b>
<b>CANADA.....</b>	<b>8</b>
<b>DENMARK.....</b>	<b>13</b>
<b>FRANCE .....</b>	<b>13</b>
<b>LUXEMBOURG .....</b>	<b>14</b>
<b>NETHERLANDS.....</b>	<b>14</b>
<b>NORWAY .....</b>	<b>15</b>
<b>PORTUGAL.....</b>	<b>15</b>
<b>PART II: What is the legal regime applicable to minors who want to exercise their right to gender self-determination? Does the legal regime change depending on the minor's age? What was the rationale behind this legal regime? .....</b>	<b>16</b>
<b>ARGENTINA.....</b>	<b>16</b>
<b>BELGIUM.....</b>	<b>19</b>
<b>CANADA.....</b>	<b>19</b>
<b>DENMARK.....</b>	<b>22</b>
<b>FRANCE .....</b>	<b>22</b>
<b>LUXEMBOURG .....</b>	<b>22</b>
<b>NETHERLANDS.....</b>	<b>24</b>

NORWAY .....	25
PORTUGAL.....	25
PART III: If a person wants to rectify their self-determination, what are the limitations, deadlines and procedures to the second and subsequent changes? .....	
ARGENTINA.....	26
BELGIUM.....	26
CANADA.....	27
DENMARK.....	27
FRANCE .....	27
LUXEMBOURG .....	27
NETHERLANDS .....	28
NORWAY .....	28
PORTUGAL.....	28
PART IV: Are non-binary people recognized or not? If so, how is it administratively regulated in relation to official documentation?.....	
ARGENTINA.....	29
BELGIUM.....	30
CANADA.....	30
DENMARK.....	31
FRANCE .....	32
LUXEMBOURG .....	32
NETHERLANDS .....	32
NORWAY .....	33
PORTUGAL.....	33
PART V: What is the legal regime applicable to trans people who are in prison or in the sports sector? .....	
ARGENTINA.....	33

BELGIUM.....	34
CANADA.....	35
DENMARK.....	39
FRANCE .....	40
LUXEMBOURG .....	42
NETHERLANDS .....	42
NORWAY .....	43
PORTUGAL.....	43
Concluding Remarks .....	44

## Introduction

The right to gender self-determination is one of the major legal advancement of our time. As social and scientific knowledge grows, so does our understanding of the complexity of human nature, including that gender identity is not a decision or a whim, but a fact – subjective as it may be – that we must accept.

As society begins to understand that sometimes the gender we assign to people at birth is incorrect, we have to find legal tools to recognize that fact and the gender identity of trans people. This tool is the right to self-determination of gender: the right of a person to determine and express its own gender, as part of the free development of one's personality, defined in article 22 of The Universal Declaration of Human Rights.

This is not an easy task. Acknowledging that gender identity exists, that gender is not only a social construct imposed by society, but also that it is subjective, intimate and only knowable by the individual person is an enormous task, both politically and legally. This is so because all social and legal structures are based on the assumption that "sex" and "gender" are binary and objective, external issues, defined by "biology" and "society", independently of individuals, such that the only perceived option available for people is to accept said designation.

But facts should be recognized, and trans people and gender identity demonstrate that well. We exist, our identities exist and we must have laws in place to protect us, attend to our necessities and recognize our realities. International organizations like WHO, UN, EU and others have begun to recognize gender self-determination as the best way to integrate and support trans people.

In the fight for the right of gender self-determination as a fundamental human right in Spain, it is key to observe the different strategies, legal texts, conditions, limits and concepts used by different countries to legislate this right. Understanding and advancing on public policies are, always, a comparative task, in order to learn from best practices, how it has been addressed, the limitations and, also, to show that the fear of change is not justified. That is why this comparative study is so valuable. Because, in the end, knowing how this issue has been solved in other countries is key to solving it in Spain.

Uge Sangil  
FELGTBI+ President

## Purpose of this report

This report aims to identify the law and practice relating to gender self-determination in 9 selected countries across Europe and the Americas, namely Argentina, Belgium, Canada, Denmark, France, Luxembourg, the Netherlands, Norway and Portugal. Specifically for Canada, this report provides an investigation on the federal level, as well as on the provincial level of its four biggest provinces, i.e. British Columbia, Alberta, Ontario and Quebec. The findings provide a comparative view of the main legal requirements and procedures in each of these jurisdictions. It is hoped that this report can serve as a tool for Spain in its legislative reform.

The issue of gender self-determination entails wider topics than just identifying one's gender on an identity card. It involves other pertinent issues, for example, treatment and rights of minors in gender self-determination, whether self-determined gender can be reversed and others. We have identified and selected a few key issues and this report studies the different treatments in place in these countries, again with the intention of helping Spain in formulating its legislation on this topic.

## Methodology

For the purpose of this report, the key question is the existence of and conditions to the right of gender self-determination. It is explored in **Part I** with practical knowledge including the documents required to be filed and the charges involved. From Part II to Part V, an overview of the following issues is provided:

- **Part II:** What is the legal regime applicable to minors who want to exercise their right to gender self-determination? Does the legal regime change depending on the minor's age? What was the rationale behind this legal regime?
- **Part III:** If a person wants to rectify their self-determination, what are the limitations, deadlines and procedures to the second and subsequent changes?
- **Part IV:** Are non-binary people recognized or not? If so, how is it administratively regulated in relation to official documentation?
- **Part V:** What is the legal regime applicable to trans people who are in prison or in the sports sector?

Law firms including Dechert, Dentons, DLA Piper and Marval O'Farrell Mairal have carried out the necessary research in different countries for this report between May and June 2021. This report focuses on the key legal and procedural considerations. Therefore, the research approach is a strict analysis of the law, and no survey or interview has been carried out with experts or stakeholders involved in these issues.

## Disclaimer

This report is the result of a desk-based research and provides for a general overview of the law which is not deemed to be exhaustive, particularly as the law may have changed after the research was carried out in June 2021. The researchers have endeavoured to access the most up to date versions of legislation accessible online for each country. As such this publication should not be construed as legal advice to the reader and should not be used as a substitute for the expertise of

suitably qualified local counsel. FELGTBI+, Dechert, Dentons, DLA Piper and Marval O'Farrell Mairal will accept no responsibility for any actions (including legal actions) taken or not taken on the basis of this report.

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## PART I: What are the conditions prescribed by the law to access the right to gender self-determination? (e.g. age; period of time).

### ARGENTINA

Pursuant to Law No. 26,743 governing Gender Identity (the "**Gender Identity Law**"), every person has the right to the recognition of their gender identity, to develop their gender identity freely and to be treated according to their gender identity. The gender marker change procedure is an administrative proceeding, which is simple, free of charge <sup>1</sup> and requires only a few steps. The requirements may differ slightly depending on whether the person is an Argentine-born citizen or not, as outlined below.

#### Procedure for Argentine citizens

Requirements among Argentine citizens differ based on how they obtained their citizenship.

For Argentine-born citizens, the requirements to request gender marker change and change of name and associated image are the following:

- (1) To provide evidence of being at least 18 years old;
- (2) To file a request (using a preset form) with the National Registry of Persons or its appointed offices requesting the change of gender marker in their birth certificate and the issuance of a new Argentine ID;
- (3) To provide the new chosen name with which the person wishes to be registered;
- (4) To demonstrate that the person's birth was duly registered (if the person's birth was not duly registered, they will have to register their birth first); and
- (5) To surrender their Argentine ID.<sup>2</sup>

Under no circumstances will the person be required to prove total or partial genital reassignment surgery as a precondition or to prove that they have been subjected to hormonal therapies or other psychological or medical treatments.

Once the requirements mentioned above have been met, the pertinent public official will proceed (without further judicial or administrative proceedings) to notify the change of gender marker and name to the Civil Registry of the jurisdiction where the person was born and to issue the new Argentine ID reflecting the person's self-perceived gender. The legal effects of these changes are effective as to third parties from the moment of registration with the corresponding Registry.<sup>3</sup>

In addition, the Gender Identity Law provides that, even if a person has not had their name changed on their ID, they have the right to be called by their chosen name at their sole request, both by public and private entities.<sup>4</sup>

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<sup>1</sup> Article 6 of Law No. 26,743 and Article 1 of Resolution No. 1795/2012 of the Argentine Directorate of the National Registry of Persons. The latter is available in Spanish here: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/199531/norma.htm>

<sup>2</sup> Requirements (4) and (5) are provided in Article 3 of Decree No. 1007/2002

<sup>3</sup> Articles 6 and 7 of Law No. 26,743

<sup>4</sup> Article 12 of Law No. 26,743



Regulatory Decree No. 1007/2012 (the "**Decree**") provides that the Civil Registries Directorates (both Federal and Provincial) must approve a simple form to be used for gender marker change requests and assign available officers to process such requests. It also provides that the registration procedure will be regulated by each jurisdiction while ensuring in all cases respect for the human right to gender self-determination, the exercise of which cannot be limited or restricted through regulations and which must always be interpreted in favor of the right to gender self-determination.<sup>5</sup>

For foreign-born Argentine citizens who either opted-in for citizenship or were naturalized pursuant to Law No. 346 of Citizenship and Naturalization (the "**Citizenship and Naturalization Law**"), the procedure is very similar to that applicable to Argentine-born citizens:

- (1) To hold and surrender their Argentine ID; and
- (2) To file a request (using a preset form) with the National Registry of Persons requesting the gender marker data change contained in their opt-in and/or naturalization file.

There is only a formal difference stemming from the fact that their birth certificate can't be updated because, being foreign-born, their birth is not recorded in the Argentine Civil Registry. Thus, the requirement to demonstrate due registration of birth is waived in their case.

On the other hand, for citizens who have obtained their Argentine nationality under the terms of Section 2 of the Citizenship and Naturalization Law (i.e. citizens by naturalization), the requirements are the same as those described above, but the National Registry of Persons is also required to notify the change to the Federal Judge who granted the person their citizenship card.<sup>6</sup>

### **Procedure for foreigners**

For foreign persons who apply for or have obtained legal residence in Argentina and would like to change their gender marker, the Decree provides different requirements depending on whether they have changed their gender marker/name in their country of birth or not:

- (1) Foreign persons who have changed their gender marker/name may request the gender marker change by filing their ID, birth certificate, passport, judicial ruling, or any other duly official document which provides the gender marker change and/or change of name, pursuant to the legislation of their country of birth<sup>7</sup>; and
- (2) Foreign persons who could not or have not changed their gender marker/name (and who are not stateless or refugees) may file the request if they:
  - i) have permanent legal residence in Argentina;
  - ii) have an Argentine ID for foreigners; and

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<sup>5</sup> Article 5 of Decree No. 1007/2002

<sup>6</sup> Article 1 of Resolution No. 493/2013 of the Directorate of the National Registry of Persons. Available in Spanish here: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/210000-214999/210592/norma.htm>

<sup>7</sup> Articles 9 and 10 of Decree No. 1007/2002

- iii) explain in their request the reasons why the gender marker change is not possible in their country of birth.<sup>8</sup>

Once fulfilment of all the above requirements has been verified by the National Registry of Persons or its appointed offices, the Registry then proceeds to process the request and give notice to the National Migration Office to implement the requested changes and issue the new Argentine ID.

### **Fee Waiver**

In addition to the change of gender marker procedure, there are also regulations for individuals requesting a change of gender marker to have the associated official fees waived.

Firstly, Resolution No. 273/19 of the Ministry of Justice and Human Rights provides that requests before the National Registry of Motor Vehicles for "gender marker change" are exempt from paying the Data Rectification fees.<sup>9</sup>

Secondly, Resolution No. 137/2016 of the Ministry of the Interior, Public Works and Housing provides that a fee waiver applies to "people who request the gender marker change procedure and consequent issuance of a National Identity Document, in accordance with the provisions of Law No. 26,743".<sup>10</sup>

## **BELGIUM**

The Belgian regulations are set out in Article 135/1 of the Belgian Civil Code.

Every:

- (1) Adult (+ 18 years old);
- (2) Emancipated minor; or

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<sup>8</sup> This procedure was simplified via Joint Resolution No. 1/2020 of the Directorate of the National Registry of Persons and the National Migration Office because the previous procedure requested a consular note explaining such motives and now it only requests the explanation of the interested person. Available in Spanish here: <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=344031> However, Joint Resolution No. 1/2012 (current and amended text) of the Directorate of the National Registry of Persons and the National Migration Office provides in Article 9.A.1.c that the requesting foreign person must explain "the reasons for which the gender marker change is not possible in their country of birth." This text differs slightly from that of the Decree and could imply that the change might not proceed if the requesting individual's country of birth allows the gender marker change and the individual has simply not applied for it. Available in Spanish here: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/205000-209999/206766/texact.htm>

<sup>9</sup> Article 1 of Resolution No. 273/19 of the Ministry of Justice and Human Rights. Available in Spanish here: <https://www.argentina.gob.ar/normativa/nacional/resoluci%C3%B3n-273-2019-322441/texto>.

<sup>10</sup> Appendix of Resolution No. 137/2016 of the Ministry of the Interior, Public Works and Housing. Available in Spanish here: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/270000-274999/270437/norma.htm>

- (3) Minor with discernment that is 16 or older, and that is convinced that the sex mentioned in their birth certificate does not correspond with their inner experienced gender identity,

can make a declaration to that end with the civil servant at the registry office. The constitutional court defined gender identity as the personal experience of the person concerned, that can differ from their biological, chromosomal or physical traits.<sup>11</sup>

These rules apply to Belgians and foreigners that are registered in the Belgian population register. The rationale is that a close connection to Belgium is required for Belgium to acknowledge the sex change on a birth certificate.

The procedure is as follows:

**(1) First appearance and written declaration**

- i) The person wanting to change their sex will make a written declaration at the registry office. They will have to come in person and assisted by their parent or legal guardian if they are minors;
- ii) The civil servant at the registry office will take note of the declaration and will provide a note acknowledging reception, indicating the period within which they will have to come back to make a second declaration. The civil servant has no discretionary competence and will provide the person wanting to change their sex with the following information:
  - a. The civil servant points out the irrevocable character of the adaptation of the sex registration in the birth certificate – however, do note that the constitutional court has decided that the irrevocable character of the change is unconstitutional;
  - b. The civil servant will inform the concerned person of the further course of the procedure, the administrative and legal consequences and provides the concerned person with the information brochure drafted by royal decree and contact details of transgender organisations;
- iii) Furthermore, the civil servant will inform the concerned person that they will have to make a new declaration between 3 and 6 months following the original declaration (i.e. after the so-called reflection period, in accordance with the Danish model), such period will be specified in the note acknowledging reception;
- iv) The civil servant will notify the Attorney General within 3 days after reception of the declaration; and
- v) The Attorney General can render negative advice within 3 months if they believe the request is against the public order. As self-determination is the most important rationale of the law, the Attorney General cannot invoke any other reasons to render a negative advice. The advice is not mandatory, but if the advice is negative, the civil servant has to refuse the adaptation of the sex in the registry.

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<sup>11</sup> Belgian Constitutional Court, 19 June 2019, nr. 99/2019, point B.2.2

## (2) Second appearance and written declaration

At the second appearance, the concerned person will hand over a signed declaration stating that:

- i) They are still convinced that the sex mentioned in the birth certificate does not correspond with their inner experienced gender identity;
- ii) They are aware of the administrative and legal consequences of the change of registration of the sex in the birth certificate; and
- iii) They are aware of the – in principle – irrevocable character of the change (although this has been nullified by the constitutional court). Unlike during the first appearance, the minor does not have to be assisted at the second appearance by parents or legal representative.

## (3) Change in the registry

If the procedure has been followed correctly and no negative advice has been rendered, the civil servant immediately needs to draft the act changing the registration.

## CANADA

### Federal: Immigration/citizenship documents

The Government of Canada provides 3 gender identification options for immigration/citizen documents and passports:

- (1) F–female;
- (2) M–male; and
- (3) X–another gender.

The following immigration and citizen documents may be changed by submitting a "Request for a Change of Sex or Gender Identifier" form with an application:<sup>12</sup>

- (1) Work permit, study permit, or visa;
- (2) Refugee claimant documents;
- (3) Permanent Resident Card; and
- (4) Application for citizenship.

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<sup>12</sup> "How do I change the sex or gender identifier on my application or document?" (last modified 16 March 2021), online: *Government of Canada, Immigration and Citizenship* <[cic.gc.ca/english/helpcentre/answer.asp?qnum=1253&top=32](http://cic.gc.ca/english/helpcentre/answer.asp?qnum=1253&top=32)> ; "Choose or update the gender identifier on your passport or travel document" (last modified 17 September 2020), online: *Government of Canada, Immigration, Refugees and Citizenship Canada* <[canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html](http://canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html)>.

Documents supporting a change of gender are not required.<sup>13</sup>

## Passports

Under the Canadian Passport Order<sup>14</sup>, applicants for a Canadian passport may be asked to provide information related to their sex. If the sex indicated in an application for a passport is not the same as that set out in that applicant's birth certificate, the applicant may be requested to provide an explanation. Further, where an application for a passport indicates that a change of sex of the applicant has already taken place, the applicant may be requested to submit a certificate from a medical practitioner to substantiate the statement.<sup>15</sup>

The process for choosing a gender identifier on your passport application depends on whether the person's supporting documents (proof of citizenship, proof of immigration status, or a previous passport) show the gender identifier they want to have on their new passport.

If the supporting documents show the gender identifier an applicant wants on their new passport, the person does not need to provide any other documentation provided that:

- (1) their previous passport or their verification of status document has the "X" observation sticker; or
- (2) their proof of citizenship, proof of immigration status or previous passport has the same gender identifier an applicant wants on their new passport.<sup>16</sup>

If a person's supporting documents do not show the gender identifier they want, they will need to complete a Gender Identifier Request Form with their application. There is a separate Gender Identifier Request Form for adults 16 years of age or older and a Gender Identifier Request Form for children under 16 years of age (as discussed in page 19 of this report).<sup>17</sup>

## Provinces

Apart from the federal law, different provinces in Canada have specific conditions for gender self-determination. In **British Columbia**, section 27 of the Vital Statistics Act<sup>18</sup> requires that individuals who seek to change their gender designation on their birth certificate submit the following documents to the Vital Statistics Agency ("**Agency**"):

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<sup>13</sup> "How do I change the sex or gender identifier on my application or document?" (last modified 16 March 2021), online: *Government of Canada, Immigration and Citizenship* <[cic.gc.ca/english/helpcentre/answer.asp?qnum=1253&top=32](http://cic.gc.ca/english/helpcentre/answer.asp?qnum=1253&top=32)>

<sup>14</sup> *Canadian Passport Order*, SI/81-86.

<sup>15</sup> *Canadian Passport Order*, SI/81-86, sch 1, s 4.

<sup>16</sup> "Choose or update the gender identifier on your passport or travel document" (last modified 17 September 2020), online: *Government of Canada, Immigration, Refugees and Citizenship Canada* <[canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html](http://canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html)>.

<sup>17</sup> "Choose or update the gender identifier on your passport or travel document" (last modified 17 September 2020), online: *Government of Canada, Immigration, Refugees and Citizenship Canada* <[canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html](http://canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html)>.

<sup>18</sup> *Vital Statistics Act*, RSBC 1996, c 479, s 27.

- (1) A completed application including a declaration made by the applicant stating that the applicant has assumed, identifies with and intends to maintain the gender identity that corresponds with the desired sex designation;
- (2) A physician or psychologist's confirmation of change of gender designation;
- (3) Any previously issued BC birth certificates; and
- (4) Payment of the \$27 fee.

Any of these requirements may be modified/waived by the Minister upon application by the applicant and if it is determined that doing so is in the applicant's best interests.<sup>19</sup> At this time, there is no judicial or publicly available policy guidance on what would be considered in a "best interests" analysis. However, it is likely a context-specific multi-factorial analysis.

Once the change is approved by the Agency, the applicant can submit their former ID and the approval letter from the Agency to BC Services to change the gender designation on their provincially-issued ID (e.g. healthcare card, drivers license). A birth certificate with a changed gender will be required for this process, and if the applicant was not born in British Columbia, then the gender change on the birth certificate will have to take place in the province where the applicant was born, or in the other country where the applicant was born.

Where an applicant was born in a country that does not allow changes to gender designations, one set of documents required under section 27 of the Vital Statistics Act<sup>20</sup> will need to be submitted to the Health Insurance BC and another to BC Services together with a confirmation letter from Health Insurance BC confirming the gender designation change.

Similarly, in **Alberta**, under the Vital Statistics Act<sup>21</sup>, ("**AB VSA**") and the Vital Statistics Regulation,<sup>22</sup> an individual who seeks to change their sex designation on their birth certificate must submit to Alberta Vital Statistics<sup>23</sup>:

- (1) A Request to Amend a Vital Statistics Registration;
- (2) An affidavit regarding the amendment and have it notarized;
- (3) Any existing birth certificates; and
- (4) A \$20 fee.

Section 30 of the AB VSA contains the following language with regards to requirements for sex indicator changes on birth certificates: "When a person's anatomical sex structure has been changed to the opposite sex from that which appears on the person's birth registration document".<sup>24</sup> However, in *CF v Alberta (Director of Vital Statistics)*,<sup>25</sup> the court found the surgery requirement to be unconstitutional and of no force and effect.

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<sup>19</sup> *Vital Statistics Act*, RSBC 1996, c 479, s 27(3).

<sup>20</sup> *Vital Statistics Act*, RSBC 1996, c 479, s 27.

<sup>21</sup> *Vital Statistics Act*, RSA 2007, c. V-4.1.

<sup>22</sup> *Vital Statistics Regulation*, Alta Reg 108-2018.

<sup>23</sup> "Sex indicator amendment on an Alberta Birth Record" (last modified 2021), online: Alberta Vital Statistics <[alberta.ca/birth-record-sex-amendment.aspx](http://alberta.ca/birth-record-sex-amendment.aspx)>.

<sup>24</sup> *Vital Statistics Act*, RSA 2007, c. V-4.1, s 30.

<sup>25</sup> *CF v Alberta (Director of Vital Statistics)*, 2014 ABQB 237.

Upon receipt of the amended birth certificate, the applicant can apply to Alberta Services to update their provincially-issued identification (e.g. Licenses which are governed by the Operator Licensing and Vehicle Control Regulation<sup>26</sup>).

In **Ontario**, section 36(1) of the Vital Statistics Act<sup>27</sup> states that a person who has changed their anatomical sex structure to a sex other than that which appears on the registration of birth may apply to have the designation of sex on the registration of birth changed so that the designation will be consistent with the results of the "trans sexual surgery."<sup>28</sup> Despite the above, similar to Alberta, Ontario no longer requires transgender persons to have "transsexual surgery" in order to obtain a change in sex designation on their registration of birth.<sup>29</sup>

Anyone with an Ontario birth registration may apply to change their sex designation on their birth registration so it matches with their gender identity. With supporting documents (discussed below), a request may be made to change sex designation to F-female, M-male, or X-non-binary. A birth certificate that displays your updated sex designation (F, M, or X) can also be requested.<sup>30</sup>

The application to change the sex designation on your birth registration must be submitted with the following documents:

- (1) Application for change of Sex Designation on a Birth Registration of an Adult form;
- (2) Statutory Declaration for a Change of Sex Designation on a Birth Registration of an Adult;
- (3) A letter signed by a practicing physician or psychologist (including a psychological associate) authorized to practice in Canada, that includes the statements necessary to support the applicant's request;
- (4) all previously issued birth certificates, birth certificates with parental information and certified copies of the applicant's birth registration; and
- (5) a completed Application form for a birth certificate, along with the applicable fees.<sup>31</sup>

A person who changes their sex designation to X-non-binary may order a new birth certificate displaying 'X' in the sex designation field by submitting the Request for a birth certificate form, along with applicable fees by mail or fax.<sup>32</sup>

Service Ontario allows persons to change the sex designation displayed on their driver's license or Ontario Photo Card. Persons may change their sex designation on these IDs from M-male to F-

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<sup>26</sup> *Operator Licensing and Vehicle Control Regulation*, Alta Reg 320/2002.

<sup>27</sup> *Vital Statistics Act*, RSO 1990, c V4.

<sup>28</sup> *Vital Statistics Act*, RSO 1990, c V4, s 36(1).

<sup>29</sup> *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726, para 300.

<sup>30</sup> "Choose or update the gender identifier on your passport or travel document" (last modified 17 September 2020), online: *Government of Canada, Immigration, Refugees and Citizenship Canada* <[canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html](https://canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html)>.

<sup>31</sup> "Changing your sex designation on your birth registration and birth certificate" (last modified 1 September 2020), online: *Service Ontario* <[ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate](https://ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate)>.

<sup>32</sup> "Changing your sex designation on your birth registration and birth certificate" (last modified 1 September 2020), online: *Service Ontario* <[ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate](https://ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate)>.

female and vice versa, or change their sex designation to X-gender neutral.<sup>33</sup> If this change is from M-male to F-female and vice versa, an applicant must bring an original and valid document that indicates their sex designation (for example, a birth certificate). If this is not available, the applicant needs a letter from a licensed doctor or psychologist that states the doctor has examined or treated the applicant and the change in sex designation on the driver's license is appropriate, as well as a supporting letter from the applicant that includes, among other things, the requested change and the name of the doctor or psychologist who supports the change.<sup>34</sup> However, if the change is to an X-gender neutral, applicants do not have to bring any supporting documents.<sup>35</sup>

In **Quebec**, until this year, Quebec required applicants to be Canadian citizens in order to apply for a change of sex designation. However, following the decision *Center for Gender Advocacy c Attorney General of Quebec*,<sup>36</sup> Quebec residents who are non-citizens are now allowed to change their sex designation on legal documentation provided they have lived in Quebec for at least one year.<sup>37</sup> If the applicant was born in Quebec but lives elsewhere, the applicant may also qualify to change the sex designation if the applicant shows that such an amendment is not possible in the province or country in which the applicant lives.<sup>38</sup>

The application requirements are:

- (1) If the applicant is 18 or older, the applicant must complete an Application to Change the Sex Designation of a Person 18 Years of Age and Over;
- (2) An affidavit by another adult who has known the applicant for at least 1 year, and who confirms that the applicant is fully aware of the seriousness of the application; and<sup>39</sup>
- (3) Payment of an administrative fee.<sup>40</sup>

If the application is accepted (note that, in case of refusal, the registrar of civil status shall give reason which may be subject to appeal), the changes are applied to the act of birth and act of marriage or civil union, in the register of civil status (if applicable). Additionally, the designation as "father", "mother" or "parent" can be changed on the individual's minor children's act of birth, meaning that transgender parents or non-binary parents now have the right to change a parental sex designation on a child's birth certificate. (This is one of the changes made by the *Centre for Gender Advocacy Decision*.<sup>41</sup>) The individual is responsible for obtaining the updated identity documents, such as a new health insurance card, driver's license or passport.

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<sup>33</sup> "Change the sex designation on your government IDs" (last modified 14 June 2020), online: *Government of Ontario* <[ontario.ca/page/change-sex-designation-your-government-ids](https://ontario.ca/page/change-sex-designation-your-government-ids)>.

<sup>34</sup> "Change the sex designation on your government IDs" (last modified 14 June 2020), online: *Government of Ontario* <[ontario.ca/page/change-sex-designation-your-government-ids](https://ontario.ca/page/change-sex-designation-your-government-ids)>.

<sup>35</sup> "Change the sex designation on your government IDs" (last modified 14 June 2020), online: *Government of Ontario* <[ontario.ca/page/change-sex-designation-your-government-ids](https://ontario.ca/page/change-sex-designation-your-government-ids)>.

<sup>36</sup> *Center for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191.

<sup>37</sup> *Civil Code of Quebec*, CQLR c CCQ-1991, s 71.

<sup>38</sup> *Civil Code of Quebec*, CQLR c CCQ-1991, s 3084.1.

<sup>39</sup> *Regulation respecting change of name and of other particulars of civil status*, CQLR c CCQ, r 4, s 23.2.

<sup>40</sup> *Regulation respecting change of name and of other particulars of civil status*, CQLR c CCQ, r 4, s 23.

<sup>41</sup> *Center for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191.



## DENMARK

In Denmark, the requirements for legal gender change (i.e. for changing a person's CPR-number which identifies a person and the person's gender) are that the applicant must:<sup>42</sup>

- (1) Send a reasoned, written application to the relevant authority (the Ministry for Women and Equalities), stating that the applicant identifies as another gender than registered, and that they want to change the CPR-number;
- (2) Be 18 years of age when applying; and
- (3) After a 6-months' reflection period starting from submitting the application, confirm their application.

Further, as from 2009, transgenders that have not yet gone through clinical sex change, but are assessed to be transgenders (or treated as such) by a sexological clinic, may change their gender in their passports from "male"/"female" to "X" (provided that they are at the age of 18 or above).<sup>43</sup>

## FRANCE

On 12 October 2016, the French National Assembly adopted a new legislation regarding legal gender recognition pursuant to which transgender individuals who wish to change the gender designation on their birth certificate and other official records (état civil) will no longer be required to have gone through any surgical operation or other medical treatment beforehand. Nevertheless, the new procedure is still based on judicial intervention: the judges in the tribunal de grande instance have the power to determine and accept the validity of an applicant's gender identity. Judicial courts are the one generally competent to alter official civil records (état civil).

Pursuant to the current legal provisions in this regard, the applicant, being either an adult (from 18 years old) or an emancipated child (i.e. a minor of at least 16 years<sup>1</sup> old who has been declared emancipated from parental authority by a court and can decide in all areas of civil law like a person of majority) must show to the judge that the sex indicated on their marital status does not correspond to that of their social life. For example, the applicant:

- (1) Presents themselves publicly as such gender;
- (2) Is known by their relatives and colleagues as this gender;
- (3) Has changed their first name to match this gender; or
- (4) Can provide proof by any means: testimonials from relatives, photographs, documents, medical certificates, etc.

It is worth mentioning that the applicant must provide a variety of evidence to prove that their social sex does not match their legal sex.

The request is made by petition to the court of the applicant's place of residence or birth. The petition must specify whether the applicant wishes to change one or more of their first names. The judge will make the decision based on each case. The judge may organize a private hearing to hear the applicants and hear any person concerned. The assistance of a lawyer is not compulsory. The applicant will then receive a summons. If the request is refused, the applicant can challenge the decision by appealing. The appeal is made by declaration or registered letter to the registry of the

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<sup>42</sup> See <https://danskelove.dk/cpr-loven>

<sup>43</sup> See <https://www.retsinformation.dk/eli/lta/2010/931>

court which rendered the decision. The assistance of a lawyer is then compulsory. The appeal period is 15 days from the decision.<sup>44</sup>

## LUXEMBOURG

As a preliminary remark, it should be noted that Luxembourg law does not strictly speaking refer to gender self-determination and is rather limited to the right of declaration of the civil status in the public record and notably to update the civil status (état civil).

The above right has been created pursuant to the law dated 10 August 2018 on the modification of the mention of sex and given name(s) in civil status and amending the Civil Code, as amended (the **2018 Law**). It is important to note that the mention of sex in the 2018 Law is by reference to the mention in the Luxembourg Civil Registry (registre d'état civil).

The conditions to access the right to amend the civil status in the Luxembourg Civil Registry (registre d'état civil) are listed in article 1 of the 2018 Law. Article 1 of the 2018 Law provides that:

- (1) Any Luxembourg citizen who has reached the age of majority, who has legal capacity may request that his/her/their sex and/or one or more given names be changed by submitting a request to the Minister of Justice; and
- (2) The interested person would need to demonstrate by a sufficient number of facts that the mention of his/her/their sex in the civil status records does not correspond to the sex in which he/she/it presents himself/herself/themselves and is known.

## NETHERLANDS

The Dutch transgender law outlines that anyone of 16 years of age or older can change their gender from 'man' to 'woman' and vice versa according to article 1:28 Dutch Civil Code (DCC). Section 13 of the DCC governs the legal regime for changing the gender stated on legal documents (articles 1:28, 1:28a, 1:28b, 1:28c DCC).<sup>45</sup>

This process requires four steps:

- (1) Expert Testimony: This testimony cannot be older than 6 months and must include the following:
  - i) The expert has informed the individual about the consequences of changing their gender; and

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<sup>44</sup> See the following for the main legal framework in France: (1) Articles 61-5 to 61-8 of the French Civil Code, Book I, Title II, Section 2 bis "De la modification de la mention du sexe à l'état civil", as amended by law No. 2016-1547 of 18 November 2016 to Modernize XXIst Century Justice (Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle) <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070721/>; (2) Articles 1055-5 to 1055-9 of the French Code of Civil Proceeding, implementing the law. [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006070716/LEGISCTA000034322762/#LEGISCTA000034322762](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070716/LEGISCTA000034322762/#LEGISCTA000034322762)

<sup>45</sup> Section 13 of the Dutch Civil Code

- ii) The expert is convinced that the individual wants to change their gender and that they understand the consequences.

An expert testimony is not required when an individual has a testimony from a doctor or psychologist diagnosing gender dysphoria or transsexuality;

- (2) An appointment with the registry office where the individual is born. If an individual is not born in the Netherlands but has lived in the Netherlands for more than 12 months, this individual can go to the registry office in The Hague. A minimum period of 12 months is required;
- (3) Requesting a new ID-card or passport; and
- (4) Informing organisations such as a bank, insurance, general medical practitioner, dentist, hospital, payroll etc.

It is worth noting that a new law is currently offered for consultation in Parliament where the expert testimony will not be required anymore to change gender registration.

## NORWAY

The conditions are prescribed in the Norwegian law on changes of legal gender, § 2 (took effect on July 1, 2016). The right to have their legal sex changed is available for people of at least 16 years old who (1) are resident in Norway and (2) experience belonging to the sex other than originally registered. People are no longer needed to go through any psychiatric or psychological evaluation, diagnosis or any kind of medical intervention.

In accordance with the regulations on changes of legal gender for Norwegian citizens residing abroad, the same right applies for them, cf. § 1. Applications to change legal gender are processed by the tax office (population register authority).

## PORTUGAL

In Portugal, the legal regime that regulates the right to self-determination of gender identity and gender expression and the right protection of the sexual characteristics of each person, is the Law no 38/2018 (Lei n.º 38/2018, de 7 de agosto). The procedure for changing the indication of sex in civil registration and the consequent change of first name is initiated by means of a request submitted at any civil registry office. The above law determines that the people who may request the change of sex in the civil register and the consequent alteration of their first name are those:

- (1) Of Portuguese nationality;
- (2) Of legal age and not persons of Portuguese nationality; or
- (3) Of legal age and not interdicted or incapacitated by psychological anomaly,

whose gender identity does not correspond to the sex assigned at birth. The request can be made by anyone who is 16 years old or more. After the request is fully submitted, the Conservator has 8 days after the submission to verify the requirements of legitimacy and make the civil changes.<sup>46</sup>

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<sup>46</sup> Link to the legislation: <https://dre.pt/pesquisa/-/search/115933863/details/maximized>

## PART II: What is the legal regime applicable to minors who want to exercise their right to gender self-determination? Does the legal regime change depending on the minor's age? What was the rationale behind this legal regime?

### ARGENTINA

The right of minors to gender self-determination has constitutional tenure under Argentine law. It is also a complicated interplay of different laws and directions which is worth the analysis below.

Section 75(22) of the Argentine National Constitution grants constitutional hierarchy to several human rights treaties to which Argentina is a party, such as the American Convention on Human Rights and the UN Convention on the Rights of the Child ("CRC"). The Argentine National Supreme Court of Justice has interpreted that the judgments and opinions rendered by the organs in charge of overseeing these treaties (i.e. the Inter-American Court of Human Rights and the Committee on the Rights of the Child, respectively) must serve as guidelines to interpret the rights recognized in those instruments.<sup>47</sup>

Articles 7 and 8 of the CRC recognize the right of minors to identity.

In its Advisory Opinion OC 24/17, the Inter-American Court of Human Rights has interpreted "gender identity to be both an integral and a determining component of the personal identity of the individual" (para. 98); and, with regards to the regulation of the procedures for change of name, change of the image and change of gender marker, that "children are holders of the same rights as adults" (para. 149). On its part, the Committee on the Rights of the Child has emphasized "the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy" (para. 34).

On this basis, the Gender Identity Law provides minors the same gender-related rights as adults (please refer to page 4 of this report), but it subjects their exercise to the requirements set forth in Articles 5 and 11, which are briefly explained below.

#### Articles 5 and 11 of the Gender Identity Law

Regarding the procedure for requesting the gender, name and image change, Article 5 of the Gender Identity Law provides that, for individuals under the age of eighteen (18), "the procedure detailed in Article 4 must be requested by their legal representatives and have the explicit consent of the minor, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child and in Law 26,061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents." Likewise, the minor must be assisted by a lawyer as provided by Article 27 of Law 26,061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Article 5 of the Gender Identity Law further states that, "when the consent of any of the minor's legal representatives is denied or cannot be obtained, it will be possible to resort to summary proceedings so that the competent judges issue a decision, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of

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<sup>47</sup> Argentine National Supreme Court, in re: "Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros -causa n° 259," August 24, 2004, para. 31

the Child and in Law 26,061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents."

Concerning access to surgical interventions and/or comprehensive hormonal treatments, Article 11 of the Gender Identity Law grants minors the access to such treatments in so far as informed consent has been obtained following the principles and requirements established in Article 5. Notwithstanding the foregoing, when consent for total or partial surgical intervention is to be obtained, "the competent judicial authorities of the jurisdiction must also express their authorization, considering the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child and in Law 26,061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Judicial authorities must express their views within sixty (60) days from the time the request for authorization is submitted."

### **National Civil and Commercial Code ("NCCC")**

However, Articles 5 and 11 of the Gender Identity Law have been deemed modified as of August 1, 2015 due to the entry into force of the NCCC, which may be interpreted as: (i) reinforcing the concept of minors 'progressive autonomy according to their age and maturity with regards to their consent on actions involving their gender self-determination; and (ii) flexing the requirement for parental consent established in Article 5 of the Gender Identity Law.

On the one hand, whereas Article 26 of the NCCC expressly provides that minors exercise their rights through their legal representatives, it also states that those minors of sufficient age and maturity may take legally authorized actions. Particularly regarding healthcare treatments, this rule provides different regulations depending on the child's age. Adolescents who are over the age of sixteen (16) are considered adults with respect to decisions involving the care of their own physical health. Adolescents between the ages of thirteen (13) and sixteen (16) are presumed to be capable of deciding for themselves any medical procedures that are not invasive, that do not compromise their health or that do not impose a serious risk to their life or physical integrity. "Invasive medical treatments" are defined as those that endanger a minor's health or integrity, or that put their life at risk. In these cases, adolescents between the ages of thirteen (13) and sixteen (16) must provide their consent with the assistance of their parents and "any differences between them are to be resolved considering the adolescent's best interests, based on a medical opinion analyzing the consequences of conducting or not conducting the medical procedure."

On the other hand, Article 645 of the NCCC, which lists actions on the part of children that require the consent of both parents, does not expressly include any action involving gender self-determination.

### **Resolution No. 65/2015**

As a result of this, the regime applicable to minors deriving from the joint construction of the Gender Identity Law and the NCCC is ambiguous. The Secretariat of Community Health of the National Ministry of Health issued Resolution No. 65/2015 which provides guidelines to interpret the current regime. Although these guidelines are not binding on local jurisdictions (i.e. provinces

and the Autonomous City of Buenos Aires), they are consistent with the interpretation provided by legal scholars on this matter.<sup>48</sup>

Pursuant to Resolution No. 65/2015, the minors' right to gender self-determination must be interpreted as follows:

Adolescents who are over the age of sixteen (16) are authorized by law to request for themselves total or partial surgical interventions and/or comprehensive hormonal treatments.<sup>49</sup>

Adolescents between the ages of thirteen (13) and sixteen (16) may request surgical interventions provided that they are accompanied by adults that have exercised ordinary care on them, whether formally or informally. Regarding hormonal treatments, Resolution No. 65/2015 calls for further research on the long-term effects of the different available hormonal schemes to determine whether they are "invasive" pursuant to Article 26 of the NCCC.

Legal scholars, as well as public registry agencies, have consistently interpreted that, as adolescents above the age of sixteen (16) are capable of deciding for themselves whether to undergo a surgical intervention, they are also capable a fortiori of deciding for themselves whether to change their gender marker, name and image registered in public records without the consent or assistance of an adult.<sup>50</sup>

Moreover, legal scholars agree that, when the Gender Identity Law requires the consent of parents for the minor to exercise a certain gender-related right, this requirement can be fulfilled with the consent of only one parent following Article 645 of the NCCC.<sup>51</sup>

The rationale behind the regulation of minors' right to gender self-determination is two-folded. On the one hand, the regime aims to recognize the minors' character as right holder as opposed to "object" of protection: the exercise of their right depends on their informed consent and not on

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<sup>48</sup> See Spinelli, G. & Regeuro de Giacomi, I., "Actualizaciones sobre la rectificación registral conforme a la identidad de género de niños, niñas y adolescentes," La Ley, AR/DOC/3033/2018; Krasnow, A. "El derecho a la identidad de género de niños y adolescentes en clave constitucional y convencional," in González, M. et al. (Comp.), Género y Derecho, EdUNLPam, La Pampa, 2019

<sup>49</sup> Note that some local courts have interpreted that Article 26 of the NCCC does not modify the requirement set by Article 11 of Law 26,743 and thus require judicial authorization for surgical interventions in minors notwithstanding their age. See Trial Court of Family Matters No. 3 of the Province of San Juan, in re: "F., P. J. y O., M. C. s/ autorización judicial," 12 February 2019, La Ley, AR/JUR/15742/2019.

<sup>50</sup> See Civil Registry of the Province of Buenos Aires, Resolution No. 11971/2017; Civil Registry of the Province of Mendoza, Administrative File No. 14456/F/17 (W., S.); Spinelli, G. & Regeuro de Giacomi, I., "Actualizaciones sobre la rectificación registral conforme a la identidad de género de niños, niñas y adolescentes," La Ley, AR/DOC/3033/2018

<sup>51</sup> See Spinelli, G. & Regeuro de Giacomi, I., "Actualizaciones sobre la rectificación registral conforme a la identidad de género de niños, niñas y adolescentes" La Ley, AR/DOC/3033/2018; Krasnow, A. "El derecho a la identidad de género de niños y adolescentes en clave constitucional y convencional," in González, M. et al. (Comp.), Género y Derecho, EdUNLPam, La Pampa, 2019

that of their parents.<sup>52</sup> On the other hand, the regulation provided under Argentine law intends to acknowledge their progressive autonomy so that they may exercise their rights for themselves in accordance with their age and maturity.<sup>53</sup> Moreover, the protections stipulated under the Gender Identity Law as a whole aim to circumvent judicial intervention and accelerate gender-related procedures by eliminating unnecessary obstacles to the minors' autonomy.<sup>54</sup>

## BELGIUM

Only minors with "discernment" that are older than 16 can make the declaration and the registration of sex as discussed in page 6 of this report. Until that age no official sex change can be obtained. The rationale behind this minimum age limit lies in the medical practice in Belgium where first gonadotropin-releasing hormone (GnRH) analogues are administered and cross – sex hormones will only be administered as from the age of 16.

The declaration by a minor is moreover subject to two additional conditions:

- (1) A declaration by a child – or youth psychiatrist; and
- (2) Assistance by his parents, legal representative or guardian ad hoc.

## CANADA

### Federal: Immigration/citizenship documents

There appears to be no guidance/rules regarding immigration/citizen documents for children under 16 years of age.

### Passports

Persons who are at least 16 years of age may apply for their own Canadian passport and choose their gender identifier in the manner outlined for adults (please refer to page 8 of this report).<sup>55</sup>

A parent, a custodial parent or a legal guardian may apply for a passport in respect of a child under 16 years of age.<sup>56</sup> Applicants for a Canadian passport for a child under 16 years of age may be asked to provide information related to the child's sex. Specifically, where the sex indicated in an application for a passport is not the same as that set out in that applicant's birth certificate, the applicant may be requested to provide an explanation. Further, where an application for a passport indicates that a change of sex of the applicant has already taken place, the applicant may be requested to submit a certificate from a medical practitioner to substantiate the statement.<sup>57</sup>

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<sup>52</sup> Court of Minor Affairs No. 3 of the Province of Corrientes, Corrientes, in re: "S.A.I. s/ víctima," March 4, 2021, Rubinzal Online: RC J 1965/21

<sup>53</sup> Trial Court of Minority and Family Matters of Juan José Castelli, in re: "F.S.B. s/rectificación de partida," December 13, 2018, La Ley, AR/JUR/91413/2018

<sup>54</sup> Justice of the Peace Court of Lobos (Judicial Department of La Plata), in re: "G, F. s/ protección contra la violencia familiar," December 27, 2019, La Ley, AR/JUR/56905/2019

<sup>55</sup> *Canadian Passport Order*, SI/81-86, s 2.

<sup>56</sup> *Canadian Passport Order*, SI/81-86, s 7.

<sup>57</sup> *Canadian Passport Order*, SI/81-86, sch 1, s 4.

## Provinces

In **British Columbia**, the same requirements discussed in page 10 of this report apply to applicants under 19 years of age. However, the Agency also requires that minor applicants have the consent of all parents and/or guardians. Any of these requirements may be modified/waived by the Minister upon application by the applicant and if it is determined that doing so is in the applicant's best interests.<sup>58</sup>

In **Alberta**, the same requirements discussed in page 10 of this report apply to applicants under 18 years of age. However, the AB VSA also requires that minor applicants have the consent of all parents and/or guardians. Applications for sex indicator changes for youth ages 12-17 must be submitted by their parent/guardian along with a signed consent. For a child 11 years old and younger, the same requirements apply with the additional step of requiring a Professional Statement signed by a physician, registered nurse, social worker or psychiatrist. The above is subject to certain exceptions.<sup>59</sup>

In **Ontario**, the Government of Ontario's Gender Identity Policy provides an avenue for children to change their sex designation on Ontario birth registrations and certificates.<sup>60</sup> Children under 15 years of age need a parent to apply on their behalf. Children 16 or 17 years of age can choose to apply as an adult or as a child. Children 18 years of age or older apply as an adult.<sup>61</sup>

The application to change sex designation on a child's birth registration must be submitted with a number of documents including a statutory declaration completed by a person with legal custody and a letter signed by a practicing physician or psychologist, together with payment of applicable fees.<sup>62</sup>

In **Quebec**, the requirements and the process for adults over the age of 18 described in page 12 in this report also applies to individuals under the age of 18 with some modifications. An application for a change of designation of sex for a minor child may be made by:

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<sup>58</sup> *Vital Statistics Act*, RSBC 1996, c 479, s 27(3). Examples include if the minor is the subject of a court order severing guardianship (in which case only the legal guardian needs to provide their consent), the minor has a youth agreement with the Ministry of Children and Family Development, the minor is married, the minor's parents are deceased or lack capacity, or the minor's parents cannot be located.

<sup>59</sup> The parental consent will not be required if the youth is married, widowed, divorced, in an adult interdependent relationship, the parent of a child, or the guardian of another person. Similarly, the parental consent will not be required if a court order has been granted under section 69 of the AB VSA (RSA 2007, c. V-4.1, s 69) dispensing with the requirement where parental consent cannot be obtained.

<sup>60</sup> "Changing your sex designation on your birth registration and birth certificate" (last modified 1 September 2020), online: *Service Ontario* <[ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate](https://ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate)>.

<sup>61</sup> "Changing your sex designation on your birth registration and birth certificate" (last modified 1 September 2020), online: *Service Ontario* <[ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate](https://ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate)>.

<sup>62</sup> For the documents and payments required, see "changing your sex designation on your birth registration and birth certificate" (last modified 1 September 2020), online: *Service Ontario* <[ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate](https://ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate)>.



- (1) if the minor is 14 or older:
  - a. the minor alone; or
  - b. the minor's guardian with the minor's consent; and
- (2) If the minor is under 14:
  - a. by the minor's guardian or parent.<sup>63</sup>

### Application Requirements (Quebec)

- (1) If the applicant is under 14, the application must be filed by the person's parent or guardian, who must complete an Application to Change the Sex Designation of a Person Under 14 Years of Age;
- (2) If the applicant is between 14 and 17, the application must be filed by either the applicant (who must complete an Application to Change the Sex Designation of a Person between 14 and 17 Years of Age Filed by that Person) or by the applicant's parent or guardian (who must complete an Application to Change the Sex Designation of a Person between 14 and 17 Years of Age Filed by his Parent or Guardian).
  - a. If an applicant's required affidavit is in support of an application made by a person 14 years of age or over, the affidavit must include the same information as is required for adults.
  - b. If a guardian's affidavit is in support of an application made by the guardian for a child under the age of 18, the affidavit must also attest that:
    - the designation of sex requested for the child is the designation that best corresponds to the child's gender identity;
    - the child assumes that gender identity;
    - the guardian understands the seriousness of the child's undertaking; and
    - the guardian's undertaking for the child is voluntary and his or her consent is given in a free and enlightened manner;<sup>64</sup>
- (3) An application for a change of the designation of sex for a minor under the age of 18 must be accompanied by a letter from a physician, a psychologist, a psychiatrist, a sexologist or a social worker who declares having evaluated or followed the child and is of the opinion that the change of designation is appropriate.<sup>65</sup> Note that this requirement for minor children aged 14-17 was declared as invalid by the Centre for Gender Advocacy Decision,<sup>66</sup> however, Quebec intends to appeal this conclusion. Currently, the declaration of invalidity is suspended until December 31st, 2021, when the changes to the Civil Code must be into place;

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<sup>63</sup> Note that the change of designation of sex by a guardian for a minor under 14 will not be granted, except with a compelling reason, if the other guardian or parent has not been notified of the application, or objects to it. In this case, the applicant guardian may submit the application to the court. See *Civil Code of Quebec*, CQLR c CCQ-1991, ss 71.1 and 73.1

<sup>64</sup> *Civil Code of Quebec*, CQLR c CCQ-1991, s 72; *Regulation respecting change of name and of other particulars of civil status*, CQLR c CCQ, r 4, s 23.1.

<sup>65</sup> *Regulation respecting change of name and of other particulars of civil status*, CQLR c CCQ, r 4, s 23.2.

<sup>66</sup> *Center for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191.

- (4) Payment of an administrative fee; and<sup>67</sup>
- (5) Notification and Consent Requirements: A change of designation of sex for a child under 14 will not be granted, except for a compelling reason, if the other parent or guardian has not been notified of the application or objects to it. Furthermore, a change of designation of sex for a child between 14 and 17 cannot be granted without his or her consent. The applicant must notify the child's father and mother, the child's guardian (where applicable) and the child (if 14 or older) of the notice of application to change the designation of sex of a minor child, and must append to the notice a copy of the application. Generally, the applicant must provide the registrar with proof that the notification required has been made.

## DENMARK

Minors in Denmark do not have the right to apply for a legal change of gender. However, minors can be referred to elucidation and hormone therapy via the Danish health services. Further, minors may change their first name to a gender-neutral or "not gender correct" name.<sup>68</sup>

Despite the above, on 8 March 2021, the Danish council of Ethics has, in an official statement ordered by the Danish government, recommended that the age limit for legal gender change should be changed to between 10-12 years of age (provided that for children under the age of 15, the parent(s) of the applicant for gender change shall consent to the gender change). It is (at the moment) to be expected that the age limit for legal gender change will be abolished completely, subject to the aforesaid condition for children under the age of 15.

On the basis of the statement of the Danish council of Ethics, it is to be expected that the relevant legislation discussed in page 13 will be eased substantially. The 6-months' reflection period may be abolished completely.

## FRANCE

In France, minors (under 18 years old) are not entitled to request for a change of legal gender, except in case of emancipated (children) minors. An emancipated minor means a minor who has been declared emancipated from parental authority by a judge and can decide in all areas of civil law like a person of majority. A minor can be emancipated at 16 years old, although there are very few emancipated minors in France.

## LUXEMBOURG

In Luxembourg, the legal regime applicable to minors who want to exercise their right to gender self-determination has been created pursuant the 2018 Law.

The conditions which are applicable in this respect, are listed in article 3 and article 4 of the 2018 Law. A distinction is made based on the age of the minor who wants to apply for the right to gender self-determination.

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<sup>67</sup> Regulation respecting change of name and of other particulars of civil status, CQLR c CCQ, r 4, s 23.

<sup>68</sup> <https://www.retsinformation.dk/eli/lta/2015/1816>

If the minor is older than 5 years old at the time of filing of the application, the provisions of article 3 of the 2018 Law (described below) would apply. In this respect, article 3 provides that:

- (1) The legal representative of a minor who has reached the age of 5 and who meets the requirements of article 1 of the 2018 Law may submit a request to the Minister of Justice to change the sex and/or one or more first name(s) of the minor concerned; and
- (2) The request shall state the agreement of either the holders of parental authority, or of the legal representative.

The minor who has reached the age of 12 must give his/her/their consent to the change of the sex and the forename(s) requested at the time of submission to the Ministry of Justice as provided for in article 12 paragraph 2 of the 2018 Law.

In case of disagreement between the parents (or the holders of parental authority), the more diligent parent shall refer the matter to the competent District Court (Tribunal d'Arrondissement), which shall decide in the interest of the child.

As mentioned above, the consent of the minor is not requested if the minor has not reached the age of twelve (12).

This provision has been inspired by article 60, paragraph 2 of the French Civil Code, which provides that a child over the age of 13 must consent to a change of name requested by his/her/their legal representative. However, the age of 12 has been chosen for consent, in order to be in line with the age referred to in Article 49 of the law of 8 March 2017 on Luxembourg nationality, which provides, *inter alia*, that a person who obtains Luxembourg nationality may transpose the forenames of his/her/their minor child, provided that the latter expresses his/her/their consent if the child has reached the age of 12.

With regard to minors under the age of 5, the Luxembourg Government has considered that it is important to provide for the possibility of changing the sex and/or one or more first names in cases where it is obvious at a very early stage of childhood that the minor does not feel comfortable with the sex registered on the birth certificate. It was mentioned in the draft of the bill of law that the Luxembourg Government considers that this is especially true for intersex children who may have physical characteristics that are neither exclusively male nor exclusively female or not clearly defined as one or the other at birth and are assigned a sex at birth that does not correspond to their gender identity and subjective perception.

In this respect, if the minor is younger than five (5) years, the provisions of article 4 of the 2018 Law would apply. Article 4 of the 2018 Law provides that the holders of parental authority or the legal representative of a minor under 5 years old may file a petition with the competent District Court (Tribunal d'Arrondissement) to have the minor's sex and/or one or more first name(s) changed. The District Court (Tribunal d'Arrondissement) shall rule considering the best interest of the child.

It should also be mentioned that the distinction which exists for adults regarding the citizenship of the applicant also exist for the minors. In this respect, the 2018 Law provides in article 6 that:

The holders of parental authority or the legal representative of a foreign minor who is at least 5 years old may submit a request to the Minister of Justice to change the minor's sex and given name(s), provided that:

- (1) the minor meets the conditions provided for in article 1 of the 2018 Law;
- (2) the minor has had a habitual residence and a regular stay in the Grand Duchy of Luxembourg for at least 12 consecutive months immediately preceding the application;
- (3) in case of foreign parents or legal representatives, at least one of the non-Luxembourg citizenship holders of parental authority or the non-Luxembourg citizenship legal representative has had a habitual residence and a regular stay in the Grand Duchy of Luxembourg for at least 12 consecutive months immediately preceding the application; and
- (4) the application mentions the agreement of both holders of parental authority or of the legal representative.

## NETHERLANDS

Currently it is not possible for minors to exercise their right to gender self-determination. However, a proposal for a new law is currently offered for consultation in Parliament. This new law outlines that minors younger than 16 years of age can self-determine their gender by asking their parent/legal guardian to file a petition with the court.<sup>69</sup> Even though this new law is not yet in effect, a judge decided to change the gender stated on official documents of a minor younger than 16 years of age in *Parents v Civil Servant* (2019).

An unknown portion of transgender minors appears to find it problematic that they cannot change their gender before the age of 16. These individuals experience difficulty when the gender they determined to have does not align with the gender stated on their official documents, especially when identification is required to obtain diplomas. However, experts in gender clinics do advocate for restraint when changing the gender registration of minors that are younger than 16 years of age because gender identity can still be fluid in this age group.

Nevertheless, since some minors experience difficulties, the proposal includes the opportunity for those younger than 16 years of age to change their gender registration. This proposal takes into account that the gender identity of the minor younger than 16 years of age is still fluid in some cases and that an adjustment of the gender registration is a drastic act. The best interests of the minor younger than 16 years of age must come first, also in the long term. Therefore, the cabinet proposes that a request for adjustment at a younger age is assessed by a juvenile judge. In this procedure, the child is represented by a legal representative and can indicate why it is salient that at this time their gender registration must be changed.

Such a judicial intervention ensures a fair balance between the legitimate wish to broaden the options for changing the gender registration of the minor and the due care required by government which must observe the requirements outlined in article 3, second paragraph, in the Convention on the Rights of the Child, Trb 1990,46. See pages 5 and 6 of the Explanatory Memorandum for the original Dutch text.<sup>70</sup>

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<sup>69</sup> Proposal of the new article 1:28 Dutch Civil Code

<sup>70</sup> Explanatory Memorandum of the Proposal of the new article 1:28 Dutch Civil Code.

## NORWAY

As mentioned in page 15 of this report, the right to have legal sex changed, applies for people from the age of 16.

The request for procedure detailed for people under 16 years old, are regulated in Norwegian law on changes of legal gender § 4. According to § 4, children of 6-16 years old must apply with the person or persons who have parental responsibility for the child. The application can be submitted with only one of the parents, if the change of legal gender is in the child's best interests.

Also, children under the age of 6 can change legal gender according to § 4. The application must be submitted by the person or persons who have parental responsibility for the child, and the child must have a congenitally uncertain somatic gender development that can be documented from health personnel. The law also states the importance of children to be informed and given the opportunity to express themselves.

## PORTUGAL

The legal regime in Portugal that establishes the right to self-determination of gender identity and the right protection of the sexual characteristics of each person is the Law no 38/2018 (Lei n.º 38/2018, de 7 de agosto). Minors between 16 and 18 years old can also request for the change of gender identity at the civil registry office through their legal representatives.<sup>71</sup> The applicant should be heard by the registrar of the civil registry office in order to understand if the change is being requested with freedom and informed consent. It is also necessary to produce a report prepared by a doctor registered into the Order of Physicians or a report prepared by a psychologist registered into the Order of Psychologists that attests the will and the minor's capacity to make the decision. A person with less than 16 years of age is not allowed to request for the change of sex in the civil register and the consequent change of first name. The rationale of this specific regime is to allow the younger generation to express their gender identity freely, seeking to diminish stigma and discrimination.

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<sup>71</sup> Link to the legislation: <https://dre.pt/pesquisa/-/search/115933863/details/maximized>

## PART III: If a person wants to rectify their self-determination, what are the limitations, deadlines and procedures to the second and subsequent changes?

### ARGENTINA

The Gender Identity Law provides in Article 13 that "No rule, regulation or procedure may limit, restrict, exclude or suppress the exercise of the right to gender identity." However, there are a few limitations that one may encounter when requesting to rectify one's self-determination.

#### (1) Limitations regarding implementation of the right of self-determination

The first time that an individual rectifies their self-determination, the Gender Identity Law allows them to do so through a fairly simple administrative procedure (please refer to the procedure in page 4 of this report). However, if they wish to rectify their self-determination again, the Gender Identity Law provides in Article 8 that it can only be modified through judicial authorization. Therefore, the right to re-rectify their self-determination is ultimately subject to the interpretation of the different Courts, which is currently not consistent or standardized. In some cases, some rulings recognize more extensive rights than those provided in the administrative procedure. The Supreme Court of Justice has yet to rule on this matter.

#### (2) Deadlines

The Gender Identity Law provides no deadlines for the individuals applying to rectify their self-determination.

#### (3) Procedures for the second and subsequent rectifications

The first time that someone rectifies their self-determination, the Gender Identity Law provides a simple administrative procedure that is free of charge.<sup>72</sup> However, any second and subsequent rectification must be judicially authorized by a Court of Law<sup>73</sup>. This procedure of re-rectification is not standardized and is reviewed on a case-by-case basis.

### BELGIUM

Where the legislation used to mention that subsequent rectifications of gender identities were not possible and that the first change was irrevocable, unless in extraordinary circumstances via a judicial procedure, the constitutional court deemed this unconstitutional and has decided in a groundbreaking decision that people should be able to follow the procedure again when they feel the need to do so.<sup>74</sup>

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<sup>72</sup> Article 6 of Law No. 26,743 and Article 1 of Resolution No. 1795/2012 of the Argentine Directorate of the National Registry of Persons. The latter is available in Spanish here: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/199531/norma.htm>

<sup>73</sup> Article 8 of Law No. 26,743.

<sup>74</sup> Belgian Constitutional Court, 19 June 2019, nr. 99/2019

## CANADA

### Federal

There appears to be no specific protocol for rectification, and no barriers to resubmitting the forms outlined in page 8 of this report with rectified information.

### Provinces

In **British Columbia, Alberta** and **Ontario**, there do not appear to be any specific protocols for a rectifying gender designation and there are no specific barriers to resubmitting forms with rectified information. Whereas in **Quebec**, if the applicant has already obtained a change of the designation of sex that appears in his or her act of birth, in addition to the application requirements described in pages 12 and 21 of this report, the application must also be accompanied by a letter from a physician, a psychologist, a psychiatrist, a sexologist or a social worker authorized to practice in Canada or in the State in which the applicant is domiciled who declares having evaluated or followed the applicant and is of the opinion that the change of the designation is appropriate, having regard to the affidavit made by the applicant in support of the initial application.<sup>75</sup>

## DENMARK

The same procedure as discussed in pages 13 and 22 of this report will apply.

## FRANCE

There are no specific legal provisions in this regard which expressly allow or prohibit such rectifications, although this may remain subject to discretion of judges in practice.

## LUXEMBOURG

If a person wants to rectify his/her/their previous alteration of sex in the Luxembourg Civil Registry (registre d'état civil), article 16 of the 2018 Law specifies the conditions to reverse the alteration of sex in the Luxembourg Civil Registry (registre d'état civil). Article 16 of the 2018 Law provides that:

- (1) An adult who has already obtained a modification of the mention of sex and of one or more first names under the conditions provided for by the 2018 Law may submit a new request for modification of the mention of sex and of one or more first names; and
- (2) This request shall be submitted to the competent District Court (Tribunal d'Arrondissement) sitting in civil matters in the form and under the conditions provided for in article 99-2 of the Civil Code.

It is important to note that the District Court (Tribunal d'Arrondissement) is generally competent to rectify the aforementioned details in the civil registry (état civil). In this respect, article 99-2 of the Civil Code provides the same requirements as article 1 of the 2018 Law. The interested person would need to demonstrate by a sufficient number of facts that the mention of his/her/their sex in the civil status records does not correspond to the sex in which he/she/it presents

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<sup>75</sup> *Regulation respecting change of name and of other particulars of civil status*, CQLR c CCQ, r 4, s 23.3.

himself/herself/themselves and is known. The main facts, which are not cumulative requirements but more indices which can be proven by any means, are:

- (1) to present oneself publicly as belonging to the sex claimed;
- (2) being known by one's family, friends, professional or associative circle as belonging to the sex claimed; or
- (3) to have obtained a change of his/her/their first name to correspond to the sex claimed.

Article 99-2 of the Luxembourg Civil Code also mentions that the fact that the applicant to the right to gender self-determination has not undergone medical treatment, surgery or sterilization cannot be a reason to deny his/her/their application. It should be noted that neither the 2018 Law nor the Luxembourg Civil Code provides for any limitations or deadlines regarding such second rectification of gender identity.

## NETHERLANDS

Currently there is no legal rule outlining the procedure. It is said that it is often not possible because those individuals who repeatedly would like to try to change their gender will not receive an expert testimony. However, the proposal for a new law that is currently offered for consultation in Parliament outlines that a person of 16 years or older can change their gender the first two times at the registry office. A third time the person must file a petition with the court.

## NORWAY

There is no limit to the number of times you can request a change. The same procedure will apply.

## PORTUGAL

In Portugal, if a person wants to rectify their self-determination, they need to do a new request, but this time, that request is subject to a judicial authorization (Article 6, no 3 of the Law no 38/2018).<sup>76</sup> However, since the relevant legal regime in Portugal is still recent (August 2018), there isn't any known specific case of rectification yet. Therefore, the proceeding is not yet known and the law itself does not specify the procedure to be adopted.

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<sup>76</sup> Link to the legislation: <https://dre.pt/pesquisa/-/search/115933863/details/maximized>



## PART IV: Are non-binary people recognized or not? If so, how is it administratively regulated in relation to official documentation?

### ARGENTINA

As of the issuance of Decree No. 476/2021 on July 20, 2021, non-binary people are recognized by the Argentine law.

The standard procedure to rectify one's self-determination is through an administrative process (please refer to the procedure in page 4 of this report). The public entity which oversees registering rectifications to one's ID and passports is the National Registry of Persons ("**ReNaPer**"). The current regulations of the ReNaPer allow for the possibility of rectifying one's self-determined identity beyond the "male" and "female" binary categories.

According to the provisions of the Gender Identity Law (Law No. 26.743) and the Decree No. 476/2021 when an individual applies for a gender rectification they may request that the field corresponding to gender in their ID or passport be filled with an "F" (feminine), "M" (masculine) or "X" ("*non-binary, indeterminate, unspecified, indefinite, not reported, self-perceived (...) or another meaning, which the person who does not feel included in the masculine / feminine binomial may identify with*"<sup>77</sup>).

The Decree acknowledges that the right of non-binary people to be recognized by their self-perceived identity is a right to personal identity, hence a human right <sup>78</sup>.

Before the issuance of the Decree No. 476/2021, the 2012 Gender Identity Law (articles 2, 3 and 13) already provided the possibility of rectifying oneself perceived identity beyond the binary categories. However, until the adoption of the Decree, individuals that identified as non-binary had complications exercising their rights before the ReNaPer. This violation of rights was specifically addressed in the Decree <sup>79</sup>.

Furthermore, prior to the sanction of the referred Decree, there were also few case by case judicial rulings in which the right to rectify a person's ID without limitation to binary categories was recognized <sup>80</sup>. These decisions were based on domestic and international regulations, as well as case law from international courts.

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<sup>77</sup> Article 4 of Decree N° 476/2021.

<sup>78</sup> Please see: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/350000-354999/352187/norma.htm>

<sup>79</sup> Decree N° 476/2021 "*... prior to the issuance of this document, those who have made a rectification of sex and / or first name, may have had their right to gender identity affected by not having the documentary possibility of opting, in the "sex" category, for a non-binary gender option*".

<sup>80</sup> S. B., G. A. S.L. c. ReNaPer. Ushuaia Trial Court of Family and Minority Matters, December 16, 2019. The ruling states that the reasoning behind the ReNaPer (to affirm that the current legal system is based on the binary system) contravenes Advisory Opinion OC-24/17 of the Inter-American Court of Human Rights. Furthermore, the ruling affirms that the position of the National Registry of Persons is at odds with the rights, principles, and constitutional

## BELGIUM

Although the Belgian Constitutional Court decided in the same decision of 19 June 2019<sup>81</sup> that the law is discriminatory where it requires people make a binary choice and does not provide a non – binary option, the court also decided that it could not add a gender identity to the law. At present, several legislative initiatives are being introduced, but the law has not changed yet.

## CANADA

### Federal

There appears to be no guidance/rules specific to non-binary gender identities beyond the 'X'-another gender (please refer to page 10 of this report) and protections provided for all gender identities and expressions under certain protection statutes outlined below.

### Protection statutes

The Canadian Human Rights Act,<sup>82</sup> prohibits discrimination on the basis of sex, gender identity or expression in any context over which the federal government has jurisdiction (e.g. federal works or undertakings).<sup>83</sup> The Human Rights Act thus applies to the government agencies and institutions responsible for processing passport applications, Immigration and Citizenship Canada and the Correctional Service of Canada (i.e. prisons).

The Criminal Code,<sup>84</sup> criminalizes hate propaganda on the basis of sex, gender identity or expression across Canada.<sup>85</sup>

While "gender identity" and "gender expression" are not defined in the legislation, an archived Government of Canada webpage for Questions and Answers on the proposed additions of "gender identity" and "gender expression" to the Canadian Human Rights Act and Criminal Code provides some insight. This webpage stated, "gender diversity" is "an umbrella term that refers to a wide range of gender-related identities and ways of expression. This could include transgender, gender non-conforming, gender fluid, two-spirited, and intersex people, amongst others." This webpage further notes that "gender identity" and "gender expression" are purposively not defined in order to be "as inclusive as possible."<sup>86</sup>

### Provinces

In **British Columbia**, as of November 1, 2018 a non-binary gender marker X is available on provincially-issued identification in British Columbia for people who do not identify as male or

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guarantees of human dignity, equality before the law, non-discrimination, privacy and gender identity.

<sup>81</sup> Belgian Constitutional Court, 19 June 2019, nr. 99/2019, point B.2.2

<sup>82</sup> *Human Rights Act*, RSC 1985, c H-6.

<sup>83</sup> *Human Rights Act*, RSC 1985, c H-6, s 2(1), 3(1).

<sup>84</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>85</sup> *Criminal Code*, RSC 1985, c C-46, s 218(4).

<sup>86</sup> "Gender Identity and Gender Expression: Questions and Answers" (last modified 18 September 2017), online: Canada, Department of Justice <[justice.gc.ca/eng/csjs-jc/pl/identity-identite/faq.html](https://justice.gc.ca/eng/csjs-jc/pl/identity-identite/faq.html)>.

female.<sup>87</sup> When applying to change gender designation, the applicant can pick X as an option. The same applies for provincially-issued identification in **Alberta** (as of June 2018). Section 29.1 of the AB VSA specifically allows the use of non-binary gender identifier X in provincially-issued identification.<sup>88</sup>

In **Ontario**, the Ontario Human Rights Code<sup>89</sup> prohibits discrimination on the basis of sex, gender identity or expression in any context over which the Ontario government has jurisdiction.<sup>90</sup> The Ontario Human Rights Code thus applies to the Ontario Government agencies responsible for processing birth registration and certificates, drivers' licenses, and correctional services. A request may be made to change sex designation to X-non-binary.

In **Quebec**, section 10 of the Quebec Charter, states that "every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference" based on various grounds including gender identity or expression.<sup>91</sup>

In January 2021, from the case *Center for Gender Advocacy v Attorney General of Quebec*,<sup>92</sup> the Quebec Superior Court struck down various legal provisions considered discriminatory towards trans, non-binary and intersex people as being in violation of the Canadian Charter of Rights and Freedoms<sup>93</sup> and Québec's Charter of Human Rights and Freedoms,<sup>94</sup> and has required the province to amend those provisions by December 31st, 2021, with the exception of one which was declared as invalid immediately.

The changes to the Civil Code following the decision allow non-binary people to identify themselves as a "parent" instead of a "mother" or "father" on their children's acts of birth and allow non-binary people to change the designation of sex on their act of birth to correspond to their gender identity and not be restricted to "male" or "female". It is worth noting one provision relating to change of name and of other particulars of civil status<sup>95</sup> was declared as invalid and of no force or effect because it violates the dignity and equality rights of transgender and non-binary people aged fourteen to seventeen, but Quebec intends to appeal this ruling.<sup>96</sup>

## DENMARK

As from 2009, transgenders that have not yet gone through clinical sex change, but are assessed to be transgenders (or treated as such) by a sexological clinic, may change their gender in their

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<sup>87</sup> "X' gender identity now recognized on government ID" (November 2, 2018), online: *BC Government News* <[news.gov.bc.ca/releases/2018HLTH0079-002116](https://news.gov.bc.ca/releases/2018HLTH0079-002116)>.

<sup>88</sup> *Vital Statistics Act*, RSA 2007, c. V-4.1, s 29.1.

<sup>89</sup> *Human Rights Code*, RSO 1990, c H.19.

<sup>90</sup> *Human Rights Code*, RSO 1990, c H.19, s 1.

<sup>91</sup> *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10.

<sup>92</sup> *Center for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191.

<sup>93</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>94</sup> *Charter of Human Rights and Freedoms*, CQLR c C-12.

<sup>95</sup> *Regulation respecting change of name and of other particulars of civil status*, CQLR c CCQ, r 4, s 23.2.

<sup>96</sup> Lia Lévesque, "Quebec to appeal ruling on Civil Code changes relating to transgender people" (5 March 2021), online: *Montreal Gazette* <[montrealgazette.com/news/local-news/quebec-to-appeal-ruling-on-civil-code-changes-relating-to-transgender-people](https://montrealgazette.com/news/local-news/quebec-to-appeal-ruling-on-civil-code-changes-relating-to-transgender-people)>

passports from "male"/" female" to "X" (provided that they are at the age of 18 or above).<sup>97</sup> Please also refer to page 13 of this report.

In a government proposal from August 2020, the Danish government has proposed the above legislation to be both eased and extended in scope, entailing that persons of intersex or persons that do not identify with one gender may also change their gender in their passports from "male"/" female" to "X". Further, the age limit of 18 will be removed (in general).

## FRANCE

In France, there are no legal provisions relating to "other gender" or "gender neutral", although there is a possibility to withhold mentioning legal gender on a birth certificate where a child experiences intersex variance, and where it is not possible to assign gender according to the individual's sex characteristics. The child must be assigned a legal gender within two years by a judicial decision (simple proceeding).

On 4 May 2017, the French Court of Cassation refused an individual's application to be acknowledged as "other gender" or "gender neutral", reiterating that French law does not allow the mention of a legal sex other than male or female. The Court highlighted that in official documents, there are only two mentions relating to gender ("masculine" / "feminine"), and the Court considered that this binarity pursues a legitimate aim, for it is necessary for the social and legal organization, of which it constitutes a founding element.<sup>98</sup>

## LUXEMBOURG

In Luxembourg the legal texts only recognize the principle of equality between genders, the principle of equality of all before the law, of individual freedom, of gender equality and of equality of the sexes are all guaranteed in the Constitution and in other legislative provisions.

However, even if it is possible to update the civil status (état civil) of a person in the Luxembourg Civil Registry (registre d'état civil) under and pursuant to the 2018 Law, only a declaration of male or female sex is possible at birth. Nevertheless, references to male and female sex are often made in the Luxembourg legal texts, for instance in Labour law, which prohibit the discrimination between men and women.

## NETHERLANDS

Non-binary people are recognized to some extent. Article 19d (3) DCC outlines that if it is not possible to determine the gender of an infant, the birth certificate can indicate that the gender of the child cannot be determined. This rarely happens because in general the gender of an infant will be determined, which can end up being incorrect. If it is clearly erroneous, a rectification can take place on the basis of article 1:24 DCC.

If an individual decides to be non-binary, there is currently no law that recognises these individuals. However, in two cases, one in 2018 and one in 2020 the judges did offer a non-binary individual the possibility to not have either "M" or "F" stated on their passport. Instead an "X" would be

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<sup>97</sup> See: <https://www.retsinformation.dk/eli/lta/2010/931>

<sup>98</sup> [https://www.courdecassation.fr/communiqués\\_4309/etat\\_civil\\_36682.html](https://www.courdecassation.fr/communiqués_4309/etat_civil_36682.html).

placed where gender is located on the document. The judges realise that society has changed and a third option for gender should be included. The judge of the case in 2020 also refers to new legislation which should codify this. The proposal for the new law that is currently offered for consultation in Parliament does indeed recognise non-binary people and outlines that official documents will refer to "X" where gender is listed, instead of "M" or "F". It will not be necessary to file a petition with the court, except for minors younger than 16 who will be required to change their gender to non-binary by filing a petition with the court.

## NORWAY

Non-binary people are not recognized. When the change of Norwegian law on legal gender took place, many people, for example an expert group from The Norwegian Directorate of Health, recommended a third legal gender alternative. Nevertheless, it is still only possible to change gender on the identity card from male to female or vice versa.

## PORTUGAL

In Portugal, there is no recognition of more than two genders. Thus, although a right to self-determination has been established (Lei n.º 38/2018, de 18 de agosto),<sup>99</sup> it continues to allow this right to be exercised only within the binary framework. In the Civil Register and in the citizen's card the reference is made only to sex and in the above law the notions of gender identity and gender expression are introduced. However, the Law has a problem, since it does not have a preamble and this constitutes another element that makes the interpretation of the concepts more difficult.

## PART V: What is the legal regime applicable to trans people who are in prison or in the sports sector?

### ARGENTINA

#### Prisons

According to Section 12 of the Gender Identity Law, every person must be respected in their gender identity self-determination, regardless of whether they have been convicted to prison.

However, the institutions of the judicial system do not generally respect the right of transgender people to be asked about their accommodations or about their self-perceived gender, which results in discretionary classifications.

In this sense, some penitentiaries have assigned wards exclusively to trans people to accommodate for those cases in which their relocation to facilities for people of the same gender as the prisoner's self-perceived is precluded.

Although national and international regulations recognize and guarantee to trans people the right to serve their sentence in men's or women's prisons depending on their self-perceived gender, the actual exercise of this right is usually tied to legal actions.

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<sup>99</sup> Link to the legislation: <https://dre.pt/pesquisa/-/search/115933863/details/maximized>

## **Sports**

As for trans people in the sports sector, we must also turn to section 12 of the Gender Identity Law, which provides the guiding principle that every person must be respected in their self-determined gender identity. Gender identity must be respected in every citation, registration, record and/or filing before private and public entities. The Gender Identity Law also provides that if addressed in public, the person must be addressed by the name associated with their self-perceived gender.

Furthermore, Section 13 of the Gender Identity Law provides that every piece of legislation, regulation or procedure must also honour the choice of gender identity. That is, no law, regulation, or procedure can restrict, exclude, or suppress the right to gender identity.

Although it is quite clear in the national legislation, a few claims filed with the judiciary (the right to gender identity in sports) have driven local authorities to pass legislation as well. For instance, the Province and the City of Buenos Aires incorporated the provisions of the Gender Identity Law by passing Law No. 15,100 (in 2018) and Law No. 6,341 (in 2020), respectively. Province of Buenos Aires Law No. 15,100 clearly states that every person has the right to be involved in sports activities according to their gender identity (Section 1) and that for the purpose of registration, participation, and competition in sports at a league or association, amateur or at a professional level, the athlete's gender is that with which they self-identify. Sports clubs, leagues and sport associations that exclude athletes or register them with a gender other than the one with which they self-identify may be sanctioned by the enforcing authority (Section 2).

On the other hand, City of Buenos Aires Law No. 6,341 intends to promote equality and participation of all gender identities in sports and to ensure full access and involvement of all persons.

## **BELGIUM**

### **Prisons**

People will be imprisoned in a facility corresponding to the sex as registered on the birth certificate. If changed in accordance with the procedure, the changed sex will determine where that person will be imprisoned.

### **Sports**

The situation differs from recreational to professional sports. Professional sports are ruled by International Olympic Committee and World Anti-Doping Agency (hormones etc.) regulations, where the general rule is that one can play in a team that corresponds to the sex to which one has changed within 2 years after the physical change. In that respect, there are however several issues from a medical point of view, as many of the drugs that are related to sex change feature on lists of forbidden substances, which de facto limits trans people to perform at the highest level. With recreational sports, it is the rule that once a sex change is officially registered, the concerned person can play sports in the teams of the gender to which his/her/their sex has changed. If not, it will depend on how the teams deal with these situations. In that respect, there are voluntary guidelines that promote sports for everyone in the way they want to play it.

## CANADA

### Federal

#### Prisons

The Correctional Service of Canada (CSC) has a duty to accommodate based on gender identity or expression, regardless of the person's anatomy (i.e. sex) or the gender marker on identification documents.<sup>100</sup>

This includes placing offenders according to their gender identity in a men's or women's institution, Community Correctional Centre or Community-Based Residential Facility, if that is their preference, unless there are overriding health or safety concerns which cannot be resolved.<sup>101</sup>

Offenders may also choose whether strip and frisk searches and urinalysis testing are conducted by a male or a female staff member. As well, CSC staff must use offenders' preferred name and pronoun in oral interaction and written documentation.<sup>102</sup>

As new or updated policy documents, communication products and offender programs are implemented, they will reflect gender-inclusive language rather than binary language.<sup>103</sup>

#### Sports

Sports Canada's 2019 Report entitled 'policy and program considerations for increasing sport participation among members of underrepresented groups in Canada' (the "**SportsCan Policy Report**") notes the barriers to sport participation by people who identify outside of cisgender and heterosexual paradigms. The SportsCan Policy Report notes that the sport community is increasingly taking an interest in policies regarding transgender persons 'participation in sport. The SportsCan Policy Report also states that, "at the recreational level, transgender individuals should be able to participate in the gender with which they identify".<sup>104</sup>

Until the Government of Canada publishes an official policy or passes a law, national sports organizations' policies will dictate the inclusion of trans people in sports. For example, Golf Canada's Transgender Persons Participating Policy outlines Golf Canada's approach to creating opportunity for transgender golfers to participate in accordance with their gender identity while maintaining the relative balance of competitive equity within their events. The Policy currently allows for individuals who have undergone sexual reassignment surgery to participate in golf events in line with their gender identity, depending on certain factors. However, any transgender golfer

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<sup>100</sup> *Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)*, Correctional Service Canada (13 December 2017).

<sup>101</sup> *Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)*, Correctional Service Canada (13 December 2017).

<sup>102</sup> *Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)*, Correctional Service Canada (13 December 2017).

<sup>103</sup> *Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)*, Correctional Service Canada (13 December 2017).

<sup>104</sup> Sport Canada, *Policy and program considerations for increasing sport participation among members of underrepresented groups in Canada*, 2nd ed, (Ottawa: Sport Canada, 2019) at 29.

who is not taking hormone treatment related to gender reassignment may participate in sex-separated events in accordance with their assigned birth gender.<sup>105</sup>

Rugby Canada's Trans Inclusion Policy, on the other hand, adopts the recommendations outlined in *Creating Inclusive Environments for Trans Participants in Canadian Sport*, which was supported by the Government of Canada. In particular, at both recreational and competitive levels, an individual may participate in their expressed and identified gender category. An individual will, at the time of registration, identify their gender category for the playing season and may request a change in gender category at anytime during a playing season and such request will be considered by Rugby Canada.<sup>106</sup>

## British Columbia

The BC Human Rights Code,<sup>107</sup> includes "gender identity" and "gender expression" as prohibited grounds of discrimination.

## Prisons

Under the BC Corrections Adult Custody Policy, transgender inmates are housed in a space that aligns with their gender, subject to review by a "multi-disciplinary team" of corrections staff with input from the inmate and consideration of safety and security concerns.<sup>108</sup> Preferred names and pronouns are recorded upon in-take and used at all times unless absolutely necessary to refer to a legal name (in case the current name does not match the legal name).<sup>109</sup>

## Sports

There is no specific legislation. However, several sports organizations in BC have adopted policies regarding transgender athletes. For example, BC School Sports, an organization dedicated to organizing sporting events between schools, allows transgender students to play on a team that matches their gender identity if an application is made and approved<sup>110</sup>; the BC Amateur Softball Association allows transgender athletes to play on a sport that matches their gender identity, with the exception of post-pubescent male-to-female athletes who may be required to provide a doctor's note regarding their testosterone levels<sup>111</sup>; the BC Lacrosse association allows athletes to

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<sup>105</sup> "Transgender Persons Participating Policy" (last modified August 2020), online: *Golf Canada* <d340o5x54o72bd.cloudfront.net/app/uploads/2021/02/Transgender-Persons-Participating-Policy.pdf>.

<sup>106</sup> "Trans Inclusion Policy" (last modified 1 January 2019), online: *Rugby Canada* <rugby.ca/uploads/Documents/TransInclusionPolicyEN\_DEV\_POL\_20190101\_FINAL.pdf>.

<sup>107</sup> *Human Rights Code*, RSBC 1996, c 210.

<sup>108</sup> *Lovado v Surrey Pretrial Services Centre (Warden)*, 2019 BCSC 1917.

<sup>109</sup> Adult Custody Policy is not publicly available and must be requested from BC Corrections.

<sup>110</sup> "BC School Sports Handbook 2020-2021", online: *BC School Sports* <bcschoolsports.ca/sites/default/files/2020-2021%20Handbook%20Final%20%28PDF%29.pdf>.

<sup>111</sup> "Inclusion Policy" (last modified April 2018), online: *BC Amateur Softball Association* <softball.nldiamondsports.ca/wp-content/uploads/sites/2154/2020/02/Inclusion-Policy.pdf>



participate in teams that match their gender identity without having to disclose any personal or medical information with the exception of events or teams that are subject to doping control.<sup>112</sup>

## Alberta

In 2015, the Alberta Human Rights Act,<sup>113</sup> was amended to include "gender identity" and "gender expression" as prohibited grounds of discrimination.

### Prisons

Under the Alberta Correctional Services' Adult Centre Operations Branch Policies and Procedures, transgender inmates must be housed according to their gender identity unless there are overriding health and/or safety concerns.<sup>114</sup> Their placement is done with the involvement of a multi-disciplinary team of health care officers, placement officers, casework staff, supervisors, and managers.<sup>115</sup>

### Sports

There is no specific legislation. However, the Alberta Schools Athletic Association Hand Book allows transgender athletes to participate in teams that match their gender identity.<sup>116</sup> Various sports organizations in Alberta have also adopted similar policies regarding transgender athletes. For example, Volleyball Alberta allows transgender athletes to participate in teams that match their gender identity without the need to disclose private medical information.<sup>117</sup>

## Ontario

### Prisons

Ontario's Correctional Services establishes, maintains, operates and monitors adult correctional institutions and probation and parole offices. The Ontario Correction Services has a Transgender inmate management policy, which aims to ensure that all inmates are treated with the same dignity

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<sup>112</sup> "2018-2019 BCLA Operating Policy" (last modified 2019), online: *BC Lacrosse Association* <[bclacrosse.com/Policies/2018-2019/2018-2019%20BCLA%20Operating%20Polciy%20-%20REGULATION%2013%20Transgender%20Policy.pdf](http://bclacrosse.com/Policies/2018-2019/2018-2019%20BCLA%20Operating%20Polciy%20-%20REGULATION%2013%20Transgender%20Policy.pdf)>

<sup>113</sup> *Alberta Human Rights Act*, RSA 2000, c A-25.5.

<sup>114</sup> Alberta Correctional Services Division, *Adult Centre Operations Branch Policies and Procedures* (9 April 2018) at Policy 4-2.7.

<sup>115</sup> Alberta Correctional Services' Adult Centre Operations Branch Policies and Procedures are not publicly available and must be requested from Alberta Corrections.

<sup>116</sup> "2020-2021 Policy Handbook" (last modified 2020), online: *Alberta Schools Athletic Association Handbook* <[asaa.ca/sites/default/files/uploads/basic/attachments/policy\\_handbook\\_2020-21\\_0.pdf](http://asaa.ca/sites/default/files/uploads/basic/attachments/policy_handbook_2020-21_0.pdf)>

<sup>117</sup> "Volleyball Alberta Transgender Inclusion Policy" (last modified 2018), online: *Volleyball Alberta* <[volleyballalberta.ca/sites/default/files/sites/About/Who\\_We\\_Are/Policies/Transgender%20Inclusion%20Policy\\_2018.pdf](http://volleyballalberta.ca/sites/default/files/sites/About/Who_We_Are/Policies/Transgender%20Inclusion%20Policy_2018.pdf)>

and respect, regardless of their gender expression or gender identity.<sup>118</sup> In particular, to align with the policy, Ontario's Correctional Services are required to:

- (1) give inmates the opportunity as to who will perform any searches;
- (2) protect the privacy of information about an inmate's gender identity or gender history;
- (3) create individualized case management plans in consultation with the inmate;
- (4) respect inmate self-identification regardless of official identity documents;
- (5) provide inmates with their preferred institutional clothing and underclothing;
- (6) permit inmates to retain personal items necessary to express their gender; and
- (7) provide inmates with appropriate safety and privacy options regarding shower and toilet access as well as access to general population.<sup>119</sup>

## Sports

There is no specific legislation. Until the Government of Ontario publishes an official policy or passes a law, Ontario sports organizations' policies will dictate the inclusion of trans people in sports. For example, the Ontario Volleyball Association's (OVA) Trans Inclusion Policy states that OVA believes in equal opportunity for all people to participate in the sport of volleyball. Where a transgendered individual wishes to compete at a National Championships, OVA will consider the eligibility guidelines set out in this policy and the Volleyball Canada Trans Inclusion Policy in order to ensure a fair and level playing field for all participants.<sup>120</sup> Under this policy, individuals have the right to be recognized as the gender with which they identify, unless there is evidence to support other reasonable and bona fide requirements.<sup>121</sup>

Ringette Canada's Trans-Inclusion Policy adopts the following eligibility guidelines as established in *Creating Inclusive Environments for Trans Participants in Canadian Sport*: "Based on this background and available evidence, the Expert Working Group felt that trans athletes should be able to participate in the gender with which they identify, regardless of whether or not they have undergone hormone therapy. Exceptions could be made if a sport organization is able to provide evidence that demonstrates hormone therapy is a reasonable and bona fide requirement (i.e., a necessary response to a legitimate need) to create a fair playing field at the high-performance level."<sup>122</sup>

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<sup>118</sup> "Transgender inmate management highlights" (last modified 15 June 2020), online: *Ontario Ministry of the Solicitor General* <[mcses.jus.gov.on.ca/english/corr\\_serv/PoliciesandGuidelines/CS\\_trans.html](https://mcses.jus.gov.on.ca/english/corr_serv/PoliciesandGuidelines/CS_trans.html)>.

<sup>119</sup> *Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)*, Correctional Service Canada (13 December 2017).

<sup>120</sup> "Trans Inclusion Policy" (last modified 15 April 2021), online: *Ontario Volleyball Association* <[cdn4.sportngin.com/attachments/document/3fb8-1571273/Trans\\_Inclusion\\_Policy\\_April\\_2021\\_Approved.pdf](https://cdn4.sportngin.com/attachments/document/3fb8-1571273/Trans_Inclusion_Policy_April_2021_Approved.pdf)> at 1.

<sup>121</sup> "Trans Inclusion Policy" (last modified 15 April 2021), online: *Ontario Volleyball Association* <[cdn4.sportngin.com/attachments/document/3fb8-1571273/Trans\\_Inclusion\\_Policy\\_April\\_2021\\_Approved.pdf](https://cdn4.sportngin.com/attachments/document/3fb8-1571273/Trans_Inclusion_Policy_April_2021_Approved.pdf)> at 2.

<sup>122</sup> "Trans-Inclusion Policy" (last modified May 2020), online: *Ringette Canada* <[ringette.ca/wp-content/uploads/policies/Trans-Inclusion-Policy.pdf](https://ringette.ca/wp-content/uploads/policies/Trans-Inclusion-Policy.pdf)> at 3.

The Policy also states that at both recreational and competitive levels, a participant is able to participate in the gender category in which they identify and are not required to disclose their transgender identity to the Association or Association representatives.<sup>123</sup>

## Quebec

### Prisons

The legal regime regarding trans people who are in prisons located in Quebec is governed by federal laws and policies. Correctional Services Canada assesses the requests from inmates on a case-by-case basis<sup>124</sup> based on various factors such as the inmate's needs for security, the physical and mental states, the need for protection and the inmate's opinion regarding the location and the measures for protection.<sup>125</sup>

### Sports

In Quebec, there is no regulatory framework for trans and non-binary individuals in sports. However, many sports associations have implemented policies regarding inclusivity. For example, USports, the governing body at the national level for university student-athletes revised its equity policy to include gender considerations.<sup>126</sup> Ultimate Canada and Boxing Canada have also amended their policies to include considerations of gender identity for athletes.<sup>127</sup> Some associations, such as Soccer Quebec, require proof of one's gender in order to assign a player to a team. The association requires that the person is assigned to a team of the same gender, however, upon showing the provincial health card or with a letter from the provincial health insurance authority, the individual may be assigned to a team of the new gender.<sup>128</sup>

## DENMARK

There is no specific legislation in Denmark on trans people's rights as prisoners or in sports. Hence, both in sports and in prisons, any "dispute" is solved on a case-by-case basis.

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<sup>123</sup> "Trans-Inclusion Policy" (last modified May 2020), online: *Ringette Canada* <ringette.ca/wp-content/uploads/policies/Trans-Inclusion-Policy.pdf> at 3.

<sup>124</sup> House of Commons, Standing Committee on Public Safety and National Security, "Offenders with Gender Considerations", Committee Notes (21 June 2020); *Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)*, Correctional Service Canada (13 December 2017).

<sup>125</sup> « Des détenus trans incarcérés dans la mauvaise prison » (last modified 13 July 2016), online: *Journal Metro*, <journalmetro.com/actualites/national/992507/detenus-trans-dans-la-mauvaise-prison>.

<sup>126</sup> "Policy 80.80 - Equity Policy" (last modified September 2018), online: *USports* <usports.ca/uploads/hq/By\_Laws-Policies-Procedures/2018/EN/Policy\_80.50\_to\_80.100\_Administration\_%282018-2019%29\_2.pdf>.

<sup>127</sup> "Ultimate Canada Inclusion Policy" (last modified November 2017), online: *Ultimate Canada* <d36m266ykvepgv.cloudfront.net/uploads/media/btOVZ5LmRw/o/2017-inclusion-policy-1.pdf>; "Boxing Canada Transgender Policy" (last modified November 2020), online: *Boxing Canada* <boxingcanada.org/wp-content/uploads/2020/11/Transgender-Policy.pdf>.

<sup>128</sup> "Règles de fonctionnement, section 1.5.2" (last modified 23 November 2018), online: *Soccer Québec* <soccerquebec.org/wp-content/uploads/2019/02/regles-de-fonctionnement-nov-2018.pdf>.

## FRANCE

### Prison

Pursuant to Articles R57-6-18 of the French criminal procedure code, men and women are to be incarcerated in separate establishments or in different zones in a same establishment. There are no specific legal provisions relating to transgender people.

This being said, the French Ombudsman (Défenseur des droits)<sup>129</sup> has published on 18 June 2020 a framework decision<sup>130</sup> relating to respect for the gender identity of transgender people. In this decision, the French Ombudsman underlined that if some people are deprived of their freedom to come and go, they cannot be deprived of all their rights. The prison administration guarantees all detained persons respect for their dignity and rights. The French Ombudsman notes that the gender identity and rights of transgender people deprived of their liberty are not always respected by the prison administration.

First, some people are deprived of their medical treatment when the article 46 of the penitentiary law of 24 November 2009 provides that "the quality and continuity of care is guaranteed to persons detained under conditions equivalent to those from which the entire population benefits". It is therefore essential that the administration of a prison ensures the continuity of medical treatment for transgender people throughout incarceration.

Second, placement of transgender people does not always take place in an adequate manner. The French Ombudsman recalls that the choice of cell assignment is the responsibility of head of establishment and that this decision must be taken taking into account the elements relating to the personality of the detainee (age, sexual orientation, gender identity, medical situation etc.). For example, the French Ombudsman recently heard a case of a transgender woman foreigner who was incarcerated in the men's ward for 2 years while she had obtained a change in the registration of sex in the marital status in her country of origin. This resulted in her being exposed to bullying and being searched by male guards throughout her detention.

The French Ombudsman welcomes the interministerial instruction of 19 December 2017 relating to the publication of the methodological guide relating to health of people placed in the hands of justice. Book 2 of this guide devotes a fact sheet on "Rights applicable to persons with gender dysphoria". However, this sheet contains few operational recommendations as regards the management of detention and the medical care of transgender people. Prison staff need to be sensitized and trained in transidentity. The solutions provided which consist in locking up transgender people solitary confinement constitute an infringement of rights since, placed in

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<sup>129</sup> The Défenseur des droits is a Constitutional independent authority competent in 4 different areas: the Rights of the users of public services, the Defense of Children's Rights, the non-discrimination and promotion of Equality, and the issue of ethics in security services. Moreover, the Défenseur des droits has a protection responsibility and a promotional activity in order to address the improvement of access to rights and promote Equality. The Défenseur des droits also can decide to intervene on their own initiative and may recommend legislative modifications and be consulted by the Prime Minister on any draft laws concerning his/her areas of competence.

<sup>130</sup> Décision-cadre du Défenseur des droits no.2020-136.  
Link: <https://www.defenseurdesdroits.fr/fr/guides/decision-cadre-relative-a-lidentite-de-genre>

solitary confinement, the detainee cannot attend collective activities, canteen and suffers aggravation.

The French Ombudsman recommends that incarcerated transgender people be assigned to an establishment or a zone corresponding to their gender identity as soon as they express their will and are engaged in a transition process without waiting for the change of marital status to take place. The visual inspections should then be carried out by agents of the same gender, previously sensitized to transidentity. Finally, the French Ombudsman recalls that detainees who express their feeling of belonging to the other sex must be able to benefit from appropriate medical care and that the prison administration must guarantee the continuity and regularity of medical treatments to people already engaged in a treatment process. We understand that there are units being tested in different prisons in France without specific regulations for the time being.

## Sport

On March 19, 2021, the French National Assembly passed a bill aimed at "democratizing sport in France" (this bill is then sent to the Senate for a second reading and is therefore not a law yet)<sup>131</sup>, pursuant to which "the law promotes equal access to physical and sporting activities, without discrimination based on sex, gender identity, sexual orientation, age, disability, membership, real or assumed, to a nation or to ethnicity, religion, language, social condition, political or philosophical opinions or any other status."

Among the amendments adopted in this bill, there is that of the deputy Raphaël Gérard aiming to "enshrine the principle of sports equality of trans people in the practice of sport" and replacing the word "gender" by the expression "gender identity" in the bill.<sup>132</sup>

According to deputy Raphaël Gérard: "Gender is part of a more general framework of real equality between men and women, while gender identity refers to discrimination against transgender people", and "this amendment aims to offer the same guarantees of protection to transgender people in access to sport as those already offered to women and to other categories of the population explicitly identified within the legislative framework of non-discrimination".<sup>133</sup>

Although the adoption of this bill has been questioned by people who find it a potential aggression against women's sport given the physical advantage transgender women can enjoy in women's sports competitions, Raphaël Gérard considered that his proposition does not refer to professional or amateur sports competitions: "It is intended to remind people that sport is a fundamental right. It is a text that speaks of sports practice and not of sports competition. The regulation of the conditions of access remains in the hands of the federations."<sup>134</sup>

Therefore, the matter is being treated differently by the federation of the relevant kind of sport. Recently in May 2021, The French rugby federation has voted unanimously in favor of allowing transgender women to play women's rugby as of next season, going against governing body World

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<sup>131</sup> See <http://www.senat.fr/tableau-historique/ppl20-465.html>

<sup>132</sup> [https://www.assemblee-nationale.fr/dyn/15/amendements\\_alt/3980/AN/451](https://www.assemblee-nationale.fr/dyn/15/amendements_alt/3980/AN/451)

<sup>133</sup> Ditto

<sup>134</sup> [https://www.francetvinfo.fr/societe/lgbt/desintox-non-l-amendement-permettant-aux-femmes-trans-de-participer-aux-entraitements-sportifs-ne-va-pas-signer-l-arret-de-mort-du-sport-feminin\\_4355385.html](https://www.francetvinfo.fr/societe/lgbt/desintox-non-l-amendement-permettant-aux-femmes-trans-de-participer-aux-entraitements-sportifs-ne-va-pas-signer-l-arret-de-mort-du-sport-feminin_4355385.html)

Rugby who concluded that safety and fairness cannot presently be assured for women competing against transgender women in contact rugby, however allowing national federations to implement grassroots policies.

The FFR said that transgender women "must certify that they have been on hormonal treatment for at least 12 months" and "must not exceed the testosterone threshold of 5 nanomole/litre", meaning transgender women still transitioning can also be allowed to play women's rugby. The FFR thus becomes the first national federation in France to allow transgender women to take part in elite sport.<sup>135</sup>

## LUXEMBOURG

### Prison

We are not aware of any Luxembourg case law which would provide for a specific regime different than the one provided by the 2018 Law, and which would be applicable to trans people who are in prison.

### Sport

Regarding the sport sector, Luxembourg law also does not provide for any specific regime which would be applicable to trans people. As the Grand Duchy of Luxembourg is a small country, it is very likely that this question has not arisen in practice.

That being said, as organizing the practice of each sport is under the responsibility of each federation, the existence of any specific regime which would be applicable to trans people should be assessed at the level of each federation.

Moreover, we understand that the International Olympic Committee's applicable guidance should be followed.

## NETHERLANDS

No legal regime applicable. However, case law provides some insight on how Dutch law deals with certain cases.

For instance, a transgender woman was placed in a male detention center and, even after complaining about the fact that she is a woman and cannot use the hygiene products she wishes, the management of the detention center still did not take the opportunity to consult with her about her situation. The judge decided that management should have known that this transgender woman wanted to be treated as a woman, even though the passport said she is a man. All other documentation indicated she is a woman and she, therefore, received compensation for having to stay in the male detention center (2.960 euro).<sup>136</sup>

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<sup>135</sup> <https://www.reuters.com/lifestyle/sports/transgender-women-allowed-play-womens-rugby-france-federation-2021-05-17/>

<sup>136</sup> V vs State Secretary for Justice and Security (2019)

## NORWAY

### Prison

In 2018, the Norwegian Prison and Probation Service made guidelines for trans people in custody or during imprisonment. The main rule is that legal gender must be used for allocation. However, exceptions are allowed in cases where the accused or convicted person has changed legal gender, and there may be a "danger to his or her or other prisoners' safety", or if placement based on legal gender appears to be "obviously unfortunate". Exception can be made after an individual overall evaluation.

The Norwegian Correctional services practice must also comply with equality and discrimination legislation. The practice for placement of prisoners must be proportionate and necessary on the basis of a factual purpose, cf. the Norwegian Gender Equality and Discrimination Act § 6 first sentence.

### Sport

There is no regulation in Norwegian law about trans people in the sport section. However, the Norwegian Sports Confederation recommend that everyone can participate in the gender category they identify as in recreational sports. For top level athletics the advice is to follow the International Olympic Committee regulations, which are currently:

- (1) Those who transition from female to male are eligible to compete in the male category without restriction;
- (2) Those who transition from male to female are eligible to compete in the female category under the following conditions:
  - a. The athlete has declared that her gender identity is female. The declaration cannot be changed, for sporting purposes, for a minimum of four years;
  - b. The athlete must demonstrate that her total testosterone level in serum has been below 10 nmol/L for at least 12 months prior to her first competition (with the requirement for any longer period to be based on a confidential case-by-case evaluation, considering women's competition);
  - c. The athlete's total testosterone level in serum must remain below 10 nmol/L throughout the period of desired eligibility to compete in the female category; and
  - d. Compliance with these conditions may be monitored by testing. In the event of noncompliance, the athlete's eligibility for female competition will be suspended for 12 months.

## PORTUGAL

### Sport

In Portugal, trans people who are in the sports sector do not have a specific and direct legal regime applicable to them. However, they are covered by the Physical Activity and Sport's Basic Law (Lei n.º 5/2007, de 16 de janeiro). This Basic Law, provides in its Article no 2 the following : "all have the right to physical and sporting activity, regardless of ancestry, gender, race, ethnicity, language, place of origin, religion, political or ideological beliefs, education, economic situation, social status or sexual orientation."

Further, in Portugal, there is a Law (Lei n.º 39/2009, de 30 de julho) which states the legal framework for security and fight against racism, xenophobia and intolerance at sports events. According to this Law, any act or incitement to violence, racism, xenophobia or intolerance at sporting events shall be punished with an administrative offence and a fine between € 1.000 and € 10.000.<sup>137</sup>

## Prisons

Regarding the legal regime applicable to trans people who are in prison, Portugal, again, does not have a specific legal regime applicable to them. However, there is the Code of Enforcement of prison sentences and imprisonment measures (Lei n.º 115/2009) states in Article no 3 "Execution shall be impartial and shall not favour, benefit, prejudice, deprive of any right or exempt from any duty any prisoner, in particular on grounds of sex, race, language, territory of origin, nationality, ethnic origin, religion, political or ideological beliefs, education, economic situation, social condition or sexual orientation."<sup>138</sup>

In Portugal, there are no specific prisons for trans people. Therefore, the prison services do not have a written rule to follow. The Directorate-General of Reintegration and Prison Services says that the allocation of prisoners is made according to gender. Thus, any person who has had a sex change is treated in accordance with their new sex. The Directorate-General also states that, above all, even though there is no written rule, the common sense and the protection of the trans people is most important.

## Concluding remarks

A legislative reform to guarantee the gender self-determination of trans people in Spain has begun its parliamentary process. This follows months of negotiations and years of struggle for the Spanish LGTBI movement. The bill for the effective equality of trans people and for the guarantee of the rights of LGTBI people has now commenced its legislative journey. This process works to advance the right to free gender self-determination, and the right of a person to change their name and sex in the civil registry. This being done on the basis of their will, without medical intervention, evidence, witnesses, or third party validations. With these changes, Spain would become the 16<sup>th</sup> country that regulates gender self-determination.

The pre-project of the legislation plans to eliminate the need for medical reports to change the DNI, since they require years of hormonal treatment. In return, the draft proposes a system in which the person can request the change in the Civil Registry and after 3 months of administrative period, return to confirm their request. This would make it effective without guardianship or witnesses, or evidence, nor decisions on the identity of the person by doctors, judges or officials. FELGTBI+ considers the approval of the pre-project as a necessary first step to unblock the legislation and guarantee trans rights by law, ending the pathologization trans people currently suffer.

This procedure for registral rectification also extends to minors, although with limits. People over 16 years of age may request the registration change by themselves. Requests from people over 14 years of age will be allowed with the assistance of parents or guardians. From 12 to 14 years of

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<sup>137</sup> Link to the legislation: <https://dre.pt/pesquisa/-/search/493201/details/maximized>

<sup>138</sup> Link to the legislation: <https://dre.pt/pesquisa/-/search/491690/details/maximized>



age, a voluntary process involving the decision of a judge has been established in the draft and, below that age, name (not gender) change is allowed. The treatment of minors in public administration is guaranteed based on their gender identity.

As can be seen through this study, the procedure provided is similar to the self-determination procedures approved in Europe, being somewhat more reassuring for trans people than that developed by 10 of the 15 countries that recognize the right to free self-determination of the gender, since it does not require proof, witnesses or third-party decisions for people over 14 years of age. These countries, Argentina, Brazil, Canada, Costa Rica, Denmark, Ecuador, Greece, Ireland, Luxembourg, Malta, Mexico (only in the capital of the country), Norway, Portugal and Uruguay, have made the relevant legislation for years. At the moment, Spain is trying to catch up. Thus, the right to free self-determination of gender in Spain should be exercised without the need for third parties, third party decisions, the requirement of tests, pathologizing or considering trans realities as a disease - which only 4 countries in Europe have included in their legislation.

The pre-project of the legislation is a comprehensive proposal. This includes rights for the entire LGTBI community, such as the prohibition of conversion therapies, the guarantees of assisted reproductive techniques for transgender people and their female partners, the right of filiation of infants born to women without a male partner and also contains an important regime of infractions and administrative sanctions, among many other things.

Despite the progress that this unblocking of the law implies and the possibility of advancing rights in the future, the pre-project has, from our perspective, room for substantial improvement in some fundamental aspects including:

- (1) **Rights for trans migrants:** It is necessary to guarantee simple, accessible procedures, without complex administrative requirements and guarantees for migrants, including people in an irregular administrative situation. The current draft must be clarified so that it is clear that any migrant person, with habitual residence in Spain, can change the documentation that Spain recognizes and grants him/her/them.
- (2) **Rights for non-binary trans people:** Although previous drafts included the possibility of, at least, eliminating the mention of sex in the DNI, the current draft does not recognize non-binary people in any way. This is a clear weakness of this draft law, since the legislative evolution in our societies is clearly advancing towards the recognition of the non-binary identity of people who do not identify themselves as men or women.
- (3) **Rights for trans people under 14 years of age:** In fact, there is already in Spain a Constitutional Court ruling, Sentence 99/2019, of July 18, 2019, which recognizes the rights of minors to rectification registry, a right that is part of the free development of the personality and guarantees their privacy and protection. The right to self-determination must be extended to all minors.

Understanding the situation of legislation at the international level has been a continuous source of inspiration and guarantees to nourish the political debate and recommend concrete legislative proposals. This report has been one of the tools that has been used by FELGTBI+ to advocate for trans rights, with the knowledge and the guarantee that Spain will advance in line with the legislation of other countries.

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