

It is a pivotal moment in Europe, and beyond, when it comes to discussions of gender and gender equality. With the European Commission’s next Gender Equality Strategy on the near horizon, it is vital to ensure that the Strategy and the resulting policies, programmes, and positions are comprehensive and modern, addressing the gender-based needs of all women and girls in Europe and acknowledging the existence of non-binary and third gender European and global citizens. The following are points to remember in these ongoing discussions on inclusive gender equality policies and how to best frame issues impacting LGBTI women, as well as non-binary people, where appropriate.

1. Intersex and trans women and girls are women and girls

First and foremost, it is essential that Europe take a clear position: **intersex and trans women and girls are women and girls**. All too often, language is used that not only marginalises trans and intersex women and girls, but reverts to biological essentialism and creates false categories that are much too limiting.

Furthermore, opponents of the rights of women, LGBTI people, and other minorities have started to dismiss the term “gender” as dangerous, and have thus put in question the long-established terminology of “sex” and “gender”, wherein “sex” refers to the biological reality of a body, and “gender” to the cultural meaning and form that that body acquires, the variable modes of that body’s acculturation. The distinction between sex and gender has been crucial to the long-standing feminist effort to debunk the claim that anatomy is destiny and move forward for more equality. Abandoning the term gender means to fall back on biological determinism (the theory that an individual’s characteristics and behaviour are determined exclusively by biological factors), that is that bodies do destine the different sexes to different functions in society (i.e. the male breadwinner and the woman as a mother providing care).

Neither the presence nor absence of certain body parts nor the enactment of certain gender roles and stereotypes adequately represent and encompass the full diversity of women and girls. To truly ensure equality for all women and girls, gender equality processes must be framed positively (e.g. “women and girls refers to all women and girls, regardless of their race, disability status, age, sexual orientation, gender identity or expression, or sex characteristics”) and **not** as an addendum (e.g. “women and girls includes trans women and girls”), which could imply that unless stated, the phrase does not or should not actually include these groups. The

future gender equality strategy should, in this sense, make active efforts to **indicate that “women and girls” is an inclusive term on the bases of gender identity, gender expression, and sex characteristics.**

2. Non-binary and third gender people exist in Europe

To date, there are two Member States in the European Union (Denmark and Malta) with formalised non-binary gender markers and accessible procedures for citizens to access them. Further, Germany, Austria, the Netherlands, and Belgium have court decisions ordering processes be put in place to secure access to non-binary or other third gender markers. For gender equality policies and actions to be modern and comprehensive, this reality must be taken into account. However, at present the plans for the EC Gender Equality Strategy make no mention of Europeans outside of the gender binary.

It is a common argument that non-binary inclusion is only relevant to a small, fringe group of people. What is important to note is that legally, nearly one fifth of the Member States in the European Union acknowledge the existence of non-binary and third gender people in their frameworks to some degree. As set out in the paragraph above, nearly 100 million Europeans (citizens of Austria, Belgium, Denmark, Germany, Malta, and the Netherlands) have a right to have access to a legal gender category for their documents other than male or female. With an estimated 1.7% of the population having sex characteristics that do not fit the typical definition of male or female¹, and an estimated 0.21% identifying as non-binary (broadly defined)², this accounts for approximately 2 million Europeans who both have the ability and the potential need or desire to register their legal gender as neither male nor female. Taken in this light, it is imperative that **any strategy designed to address gender equality takes into account genders other than male or female in a substantive and integrated manner** and not ignore a segment of EU citizens. Further, international human rights law mechanisms demand the right of individuals to register as a non-binary or third gender.³

Additionally, outside of Europe, there are an ever-growing number of jurisdictions which include legal non-binary or third gender markers, including Canada, Pakistan, Australia, Nepal, New Zealand, India, Argentina, and some states within the USA. International travel documents

¹ United Nations Office of the High Commissioner for Human Rights (2015): Fact Sheet. Intersex. https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf

² USTS 2015 and Flores, Andrew (June 2016). "How Many Adults Identify as Transgender in the United States" (PDF). *Williams Institute UCLA School of Law*. 0.6% of the population as trans, 35% of trans people as non-binary = 0.21% of the population

³ Madrigal-Borloz, V., (2018). Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc. A/73/152.

such as passports, as governed by the International Civil Aviation Organisation, have allowed non-binary gender markers for decades. For the sake of consistency, it is vital that the definitions and conceptions of gender used in Europe are compatible with those States in other regions, and are inclusive of the full lived realities of people across the globe.

Two examples – healthcare and equal representation measures

- a. One specific barrier related to the invisibility of legally non-binary or third gender people in Europe is access to healthcare and public services, for example for cancer prevention and treatment, which is a clear focus on the European Commission’s health portfolio. People who are registered non-binary will not fit the binary boxes of ‘female’ and ‘male’ bodies, meaning that the required prevention, screening, and treatment procedures also do not fit into gendered health insurance categories and coverage systems (e.g. that “women require mammograms” and “men require prostate screenings”). In reality, the gender marker on a person’s legal document cannot and should not be linked to the services they can receive, but instead **access to health services should be dictated by which body parts the person has and what services those organs require** to remain healthy.⁴

Problems for non-binary people within the EU become especially clear in the context of cross-border access. When an EU citizen from Malta, for example, holding a non-binary gender marker travels to another EU Member State that does not have the marker, basic problems such as how to complete required demographic information on a hospital intake form can arise. **Efforts should be made to adjust systems to accommodate the growing number of non-binary people on the continent.**

- b. When it comes to creating systems to increase representation of women, the best way to make space for non-binary and third gender people is speak to **minimum or maximum representation** (such as “a board should be comprised of a minimum of 50% women” or “leadership positions should be occupied by no more than 50% men”). It is important to **avoid creating quotas that add up to 100% with the summation of only men and women** (such as “the committee should be comprised of 50% women and 50% men”), because these leave no additional space for people outside of the binary, and in fact actively exclude their participation.

⁴ Even if registered male or female and not identifying as non-binary, many trans and intersex people have body parts that do not easily align with binary ideas of bodies, and medical prevention and care services should in general move away from such generalisations and consider the individual concerned.

3. Internal cohesion with the LGBTI strategy and a comprehensive approach to intersectionality

“If we aren’t intersectional, some of us, the most vulnerable, are going to fall through the cracks.” - Kimberlé Williams Crenshaw

With the introduction of the focused portfolio of the Commissioner for Equality as well as increased attention paid to intersectionality, there is a clear opportunity to ensure that the Gender Equality and LGBTI Strategies – as well as the other equality-focused instruments – truly work together and complement one another, create synergies, and form the foundation of a stronger policy framework to protect the fundamental rights of the most marginalised Europeans and ensure that no one is left behind.

One clear goal of the equality framework in the Commission is to address intersectional discrimination and oppression. Commitment to intersectionality requires active integration in a thorough and comprehensive way; put another way, intersectionality is not accomplished as a framework when the issues of multiply marginalised people are only dealt with in silos. Rather, clear and crosscutting intersectional analysis deepens understanding not only of the struggles of those most marginalised, but encourages an intersectional understanding of identities and experiences more generally.

Applying an intersectional lens to actions in the gender equality strategy means that in developing initiatives we are asking ourselves who we are actually listening too in designing these policies and who is not in the room and thus their reality is not taken into consideration. Are we sure that the designed actions reach all women? Do for example policies equally take into account the specific discrimination trans women face when trying to access the labour market or will they continue to fail them? Do programmes combatting domestic violence only address male perpetrators and thus from the beginning fail to address domestic violence amongst lesbian couples?

Both the EU Gender Equality Strategy and the EU LGBTI Strategy would benefit to make clear and directed mention of how an intersectional lens will be applied, how increasingly the EC will seek to ensure the perspectives of all women are taken into account when designing equality measures (and as well as mentions of LGBTI people of colour, Roma LGBTI people, and LGBTI people with disabilities within the LGBTI strategy, for example).

4. Cohesive LGBTI and Gender Equality Strategies create a stronger foundation against the rise of the “anti-gender movement” and the far-right

Ensuring coherence between LGBTI policies and gender equality policies (as well as other equality measures aiming to reach black women and women of colour, disabled women, and Roma women, for example) is particularly salient in the context of growing attacks against women’s rights, sexual and reproductive health and rights, and the rights of LGBTI people. The values at the heart of the Treaty of the European Union and thus the EC Strategic engagement on gender equality – namely justice, equality, tolerance, non-discrimination, and solidarity – are at present at great risk of degradation with the growth of far-right movements in Europe. This is not only seen in more outspoken opposition by some Member States to women’s rights and LGBTI rights in the Council and overall rise in hate, online and in real life against women and LGBTI people, but most clearly in very harmful and successful campaign against the ratification of the Istanbul Convention. As extensive research has shown⁵, far-right, extremist, and religious fundamentalist efforts in Europe are highly coordinated, well-funded, and integrated into institutions, mechanisms and organisations in Europe. These EU entities are designed to protect fundamental human rights; however, neutral engagement with organisations classified as “hate groups”⁶ is antithetical to this goal.

In the work to secure gender equality, the European Union must actively acknowledge and respond to far-right forces, known among human rights organisations as the “anti-gender movement”, and build robust strategies to ensure that those organisations and movements dedicated to the curtailing of fundamental human rights are effectively countered. It is not possible to achieve the strategic priorities of the Commission on gender equality without thorough integration of this response. Instead, in the context of integration of LGBTI women’s issues in the Gender Equality Strategy, active inclusion makes a strong statement: when the European Union discusses equality between women and men, it means between all women and men. And when the European Union seeks to protect women and girls from gender-based violence, this includes LGBTI women. As such, it is vital **to reference and integrate LGBTI women throughout the Gender Equality Strategy** to clarify that Europe takes a modern and inclusive view of gender.

⁵ E.g. Datta, N. “Restoring the Natural Order”: The religious extremists’ vision to mobilize European societies against human rights on sexuality and reproduction. Available from: <https://www.epfweb.org/node/690>

⁶ See the Southern Poverty Law Center’s classifications:

<https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>

5. Exposure to hate, violence, and socioeconomic consequences of LGBTI women

LGBTI women - women at the intersection of oppression on the bases of gender and of sexual orientation, gender identity and expression, and/or sex characteristics – experience heightened and unique marginalisation as a result. This includes, but is not limited to:

- (1) over-exposure to homophobic, transphobic⁷, and interphobic hate speech, hate crime, and violence, and in particular sexualised hate and violence⁸: for example, research has shown that patterns of experienced violence for lesbian women vary from heterosexual women in that, amongst others, there are a higher share of perpetrators that are known (or even a household member) and that LGBTI women experience higher levels of domestic and/or intimate partner violence than cisgender, endosex⁹, heterosexual women;¹⁰
- (2) enhanced socioeconomic consequences as a result of having women-headed or single households¹¹: for example, a lesbian couple experiences the double impact of the gender pay gap, as both women in the household earn on average less than their male colleagues;
- (3) under-protection from existing systems working on violence against women and girls (for example, with the presumption of a male assailant in the context of domestic violence, lesbian and bisexual women in relationships with women may be less likely to report or seek help when their assailant is a woman)¹².

Incorporation of these issues into gender equality work depends on **addressing the intersection** head-on and **acknowledging the increased and varying marginalisations** experienced by these communities. It is vital, when working on violence against women and girls, to thoroughly **consider how programmes and policies will address the full variety of intersectional experiences of women and girls.**

⁷ In the EU, one in three transgender people has experienced physical or sexual violence or the threat of violence. European Union Fundamental Rights Agency (2014), European Union lesbian, gay, bisexual and transgender survey. Main results, Publications Office of the European Union, Luxembourg.

⁸ European Union Fundamental Rights Agency (2014), European Union lesbian, gay, bisexual and transgender survey. Main results, Publications Office of the European Union, Luxembourg.

⁹ "Endosex" is a term for people who are not intersex.

¹⁰ Badenes-Ribera et al., 2015, 2016; Cramer, McNeil, Holley, Shumway, & Boccellari, 2012; De Graaf, Bakker, & Wijsen, 2015; Fundamental Rights Agency, 2014a, 2014b, World Bank, 2017; LGBT in Britain, 2017

¹¹ One in 5 LGBTI people report experiencing discrimination in the workplace. European Union Fundamental Rights Agency (2013). European Union lesbian, gay, bisexual and transgender survey. Results at a glance. Retrieved from https://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf

¹² Miller, Diane Helene; Greene, Kathryn; Causby, Vickie; White, Barbara W.; Lockhart, Lettie L. (October 2001). "Domestic violence in lesbian relationships". *Women & Therapy*. 23 (3): 107–127. doi:10.1300/J015v23n03_08.

6. Access to sexual and reproductive health and rights for all

One important component of gender equality work is access to the highest standard of health, including sexual and reproductive health (SRH). A reality for trans men and non-binary people assigned female at birth is the continued need for access to SRH, including access to contraception, gynaecological care, HIV and STI prevention, treatment, and testing, and abortion and termination services. It is vital that discussions of SRH are inclusive enough to incorporate the needs of these populations.

One way to do this is to add language on **“pregnant people”** or **“people with the capacity to become pregnant”** when referring to women’s access to these services. It is important not to remove references to women in these contexts, as gender-based barriers to services are real for all women, so it is **not encouraged to remove or replace this language**, but rather to append additional breadth of the relevant categories of people.

There are also a wide variety of SRH needs among trans and intersex people more generally, due to the realities of their bodies. As described in part 2 of this paper, the common misconception, that a person’s sex characteristics determine their gender, has a practical consequence related to **cancer prevention and treatment**. Many trans, non-binary, and intersex people have body parts which do not easily align with binary medical boxes of “female bodies” and “male bodies”, meaning that the required prevention, screening, and treatment procedures also do not fit into gendered health insurance categories and coverage systems (e.g. that “women require mammograms” and “men require prostate screenings”). The gender marker on a person’s legal document cannot and should not be linked to the services they can receive, but instead **access to health services should be dictated by which body parts the person has and what services those organs require** to remain healthy. **Moving away from gendered language to refer to specific body parts is encouraged**; for example, it is more inclusive and clear to refer to the “uterus and ovaries” than to “women’s internal reproductive organs”. The latter language not only obscures the needs of trans and intersex bodies, but also implies that one must have these body parts to be women, or that only women have them, which is biological essentialism and is legally and socially false.

7. Incorporation of intersex genital mutilation into the scope of violence against women and girls alongside female genital mutilation

One component of work under the gender equality stream of prevention of violence against women and girls is combatting female genital mutilation (FGM). In order to also address the human rights violations that intersex infants and children face, the future gender equality strategy should also include intersex genital mutilation (IGM) as a key focus.

Intersex genital mutilation¹³ (IGM) functions in a very similar way to FGM, but has yet to receive the same broad attention and clear condemnation. These practices are similar in that they (1) are both framed in terms of the need for social acceptance, (2) are both motivated by beliefs about what is considered acceptable sexual behaviours, (3) are both motivated by the notion that body parts that are not considered female (or male) enough should be removed or altered, and (4) are both impactful on the person's life and health.¹⁴

IGM happens to intersex infants and children at alarming rates; for example research into public records in France showed 5,000 surgeries on children under the age of 12 during one calendar year, 2017.¹⁵ However, while all EU Member States criminalise FGM, only 2 criminalise IGM (Malta and Portugal).¹⁶ It is clearly difficult to overestimate the magnitude of these practices in Europe.

As such, it is recommended to **refer to IGM as well when discussing FGM**, and to **provide access for survivors of intersex genital mutilation to reparative treatments on the same coverage terms as those provided for survivors of female genital mutilation**.

TRIGGER WARNING: The following two paragraphs make mention of specific IGM procedures and childhood sexual violence

There is also a significant gendered component of how IGM functions. Included in these practices are interventions such as vaginoplasties, sometimes performed on infants younger before their first birthday. The impact does not end at this surgery, though: a vaginoplasty requires ongoing, sometimes lifelong, maintenance in the form of dilations to maintain the neo-

¹³ "Intersex individuals are born with sex characteristics (sexual anatomy, reproductive organs, hormonal structure and/or levels and/or chromosomal patterns) that do not fit the typical definition of male or female. The term "intersex" is an umbrella term for the spectrum of variations of sex characteristics that naturally occur within the human species." OII Europe, ILGA-Europe (2019). *Protecting Intersex People in Europe: A toolkit for law and policymakers*. Available from: https://oiieurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf

¹⁴ Ibid., p12.

¹⁵ Moron-Puech Benjamin, *Notes relatives à l'audition au Sénat sur l'article 21 bis du projet de loi relatif à la bioéthique adopté par l'Assemblée Nationale en première lecture*, Communication au Sénat, Audition du 12 décembre 2019, Paris.

¹⁶ Ibid., p18.

vagina. When a vaginoplasty is performed on an infant, the child's parents are then often put in the position of performing dilations, sometimes throughout the child's entire childhood. For some intersex people, these dilations are so painful that they can only be performed under general anaesthesia. When one considers that this surgery is performed solely for the purpose of creating a body that can have penetrative heterosexual sex, the gendered element of the practice becomes very apparent.

Another specifically gendered example comes in the treatment of people born with complete androgen insensitivity syndrome (CAIS). Due to the body's inability to process androgens (masculinising hormones), intersex people with this condition are routinely assigned female at birth, and their testes are removed solely because "women should not have testes" – there is no evidence of a physiological risk to retention of testes in people with CAIS, so the surgery is entirely based on how a woman's body "should be" or "should not be". However, this surgery results in blood hormone levels later in life that are too low, often then requiring life-long hormone therapy to maintain bone health and avoid osteoporosis. As these examples indicate, **not only is IGM generally a grave human rights violation on its face, but it also represents a clear example of systemic violence against women and girls.**

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This policy brief was financially supported by the European Union's Justice Programme, 2014 - 2020