

## Explanations on the current changes to the “Self-Determination Act” (SBGG)

Amendments to the draft bill of 9 May 2023 (see legal opinion) by the Federal Government's draft bill of 23 August 2023<sup>1</sup> and the amendment request by the SPD, Bündnis 90/Die Grünen and FDP parliamentary groups in the Committee for Family Affairs, Senior Citizens, Women and Youth of 10 April 2024<sup>2</sup>, which were adopted by the Bundestag on 12 April 2024.<sup>3</sup>

### 1. Abuse control (Art. 1, Sections 1, 2, 10, 13)

The amendments made to the draft bill (GE) focus on regulations to control abuse in the fight against crime.

On the one hand, this concerns foreigners who do not have a secure residence status (Section 1 para. (3): unlimited right of residence, renewable residence permit with legal residence in Germany, or EU Blue Card): They are not covered by the scope of application. A declaration on the change of sex entry and first names is also invalid if there is a period of two months or less between the declaration and the expiry of the residence title, i.e. the obligation to leave the country (Section 2 para. (4)). Reason for this is that the home country is likely to refuse entry to the own national who has changed his/her sex entry and first name in accordance with German law.

Furthermore, the applicant may generally request (Section 10 para. (2)) to have entries relating to her/his sex and first names changed in official registers (exception: reasons of public interest). However, the authors of GE clarify that the applicant is not entitled to have the former sex entry and first names deleted from official registers. **This serves to control abuse.**

On the other hand, the authors of GE were concerned with law enforcement and security authorities as well as official bodies with security tasks, whose tasks and working methods had not previously been taken into account. These authorities rely on the retrieval of data from official information systems, which contain, for example, the former and updated entries of the civil status registry offices and residents' registration offices, to fulfil their statutory data processing tasks and also exchange these data with other authorities. The data processing of former entries until the legal change (Section 13 para. (3)), the retrieval and exchange of data between authorities (Section 13 para. (4)) and the information of named security and other authorities (Section 13 para. (5)) were intended as an exception to the prohibition of disclosure. This provision was **cancelled** by the amendment request (ÄA) of the Family Committee. **Abuse through identity concealment is thus possible without further ado.**

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<sup>1</sup> <https://www.bmfsfj.de/resource/blob/229616/b4f835d1a1da28f1ef51552846f1e20a/gesetzentwurf-kabinett-data.pdf> [last accessed: 17 April 2024] [cited: GE], and <https://dserver.bundestag.de/btd/20/090/2009049.pdf> [consolidated version of GE from 1 November 2023, last accessed 17 April 2024].

<sup>2</sup> <https://www.bundestag.de/resource/blob/997492/4d098d87e97a8036f2baee24520b59aa/240410-AeA-KOA.pdf> [last accessed: 17.04.2024] [cited: ÄA].

<sup>3</sup> <https://dserver.bundestag.de/btd/20/110/2011004.pdf> [last accessed: 17.04.2024] and <https://www.bmfsfj.de/bmfsfj/service/gesetze/gesetz-ueber-die-selbstbestimmung-in-bezug-auf-den-geschlechtseintrag-sbqq--224546?s=09> [last accessed: 17.04.2024].

*Unless otherwise stated in the text, the regulations described are valid.*

## 2. Linking changes to sex entry and first names (Art. 1, Sections 2, 5)

Another change concerns linking of the change of sex entry and first names: While the old draft bill permitted both a separate and a combined change of sex entry and first names, only a combined change is permitted in GE (Section 2 para. (3)). First names are to be determined that "correspond" to the chosen sex entry. Even in the event of a change back to the original sex entry, the former first names still apply (Sec. 5 para. (2)). **The procedure is thus stereotyped, i.e. simplified.**

## 3. Declarations by minors (Art. 1, Section 3)

According to the amendment by the Family Committee, Section 3 para. (1) states that minors who have reached the age of 14 and wish to have their sex entry changed must provide the civil status registry office with an assurance that they have received counselling. Counsellors may be those with appropriate professional qualifications (medical doctors, psychologists, psychotherapists) or public and independent child and youth welfare organizations; it may therefore include translobby organizations as well. The prerequisite for a change of sex entry is therefore not a medical-psychiatric report; **counselling is, therefore, merely a "fig leaf".**

For minors under the age of 14, only the legal representative is entitled to apply for change of sex entry in accordance with Section 3 para. (2). According to the amendment request of the Family Committee, minors who are at least five(!) years old must give their consent to the change of sex entry. **It is questionable whether five-year-old children have the capacity to judge what the sex entry in the civil status register is all about.**

## 4. Registration and declaration (Art. 1, Section 4)

The procedure surrounding the actual "declaration" for changing sex entry and first names has been changed by the authors of GE: Whereas in the draft bill (see legal opinion), there was an "effectiveness period" of three months after the declaration, the actual "declaration" will now be preceded by a three-month registration period as a "period for consideration and reflection" at the civil status registry office. If a period of six months elapses after the registration without a corresponding "declaration" having been made, the registration is invalid (Section 4). Advantage for the administrative procedure: registration with a cancellation period makes a subsequent withdrawal of the "declaration", as was still provided for in the abovementioned draft bill, superfluous. As a result of the amendment request by the Family Committee, **it will be possible to submit the declaration to the relevant civil status registry office as early as 1 August 2024, i.e. three months before the SBGG comes into force on 1 November 2024** (Art. 13 paras. (1), (2)).

## 5. Consequences of changing sex entry (Art. 1, Section 6)

As consequences of change of sex entry and first names for the persons concerned with regard to access to facilities and rooms and participation in events, the authors of GE add "freedom of contract", which in turn finds its limits in the General Equal Treatment Act (AGG), to "domiciliary rights of the respective owner or proprietor" and the "right of legal entities to regulate their affairs by statute".

This “clarification” means nothing else than that the legislator is deferring possible “cases of discrimination” to the judiciary and fails to make the necessary regulations itself (it also leaves this decision to third parties when assessing sporting performance, see Section 6 para. (3)). However, the legislative power would be obliged to do so for reasons of the rule of law and democracy, because minority rights and women's rights are about balancing fundamental rights.<sup>4</sup>

## 6. Parent-child relationship (Art. 1, Section 11)

According to the ÄA of the Family Committee, partners of the mother who are men with a female gender identity whose sex entry at birth of the child is “female” can instead have their former (male) sex entry revived in order to be entered as “father” on the child's birth certificate (Section 11 para. (1) sentence 2). **This puts them in a better position than partners of the mother who are women with a male gender identity (who have not changed their sex entry before birth of the child).**<sup>5</sup>

## 7. Prohibition of disclosure (Art. 1, Section 13)

With its amendment request, the Family Committee has also subjected close relatives, such as the parents and children of the person concerned, to the prohibition of disclosure and investigation, which is subject to fines, insofar as they act “with intent to cause harm”. **The draconian deterrent effect of a State measure has been stretched into the inner circle of families, thereby inflating the unreasonableness of the whole provision.**

## 8. Biological sex and gender identity (Art. 1, Sections 6, 8, 9, 11)

In Sections 6 para. (4) and 8 para. (1) of GE, the biological sex of persons concerned is taken into account more clearly than in the draft bill (see legal opinion), disregarding sex entry when utilizing medical services and the applicability of legal provisions relating to reproduction. Together with Section 9 (cases of tension and defense) and (to a limited extent) Section 11 (parent-child relationship), GE thus contains **four central provisions that are based on biological sex of the persons concerned** and not on legal sex entry. A distinction is also made between sex and gender identity, at least linguistically, in the case of sporting achievements (Section 6 para. (3)).

As far as women's and girls' rights are concerned, however, **minority rights are prioritized over women's/girls' rights:**

- Section 6 (effects of changing sex entry and first names) for access to sex-specific rooms and events (para. 2) and
- Section 7 (quota regulations), in particular for the election of equal opportunities officers, their deputies and women of confidence.

## Conclusion

The **objective** and the **main key points** of the law (SBGG) are the **same** in regard to the draft bill (see legal opinion). This applies in particular to

<sup>4</sup> See item 8 below, and Legal Opinion II. Sec. 6 (p. 12), III., Conclusion (p. 24f.).

<sup>5</sup> Lesbian partners of the mother are disadvantaged anyway (see legal opinion, text to footnote 108).

- conflation of “sex” and “gender identity” which violates the constitutional principles of determination and clarity of norms (Article 20 (3) of the Basic Law (GG)),
- loss of the evidentiary function of sex entry and the resulting consequences for the enforcement of the sex-based rights of lesbians/women and girls under Article 3 paras. (2) and (3) GG,
- violation of parental rights under Article 6 para. (2) sentence 1 GG and the best interests of the child,
- the ban on disclosure, which is subject to fines and curtails freedom of opinion and freedom of the press (Article 5 para. (1) sentences 1 and 2 GG), violates the constitutional principle of truth and clarity of norms through incomprehensible exceptions in the private sphere and factual ambiguities (visual evidence?), and perpetrates an attack on our democracy through the “chilling effect” of a draconian “deterrent” (€10,000).

The consequences for women and girls are serious:

By conflating sex and gender identity and disregarding the constitutionally guaranteed equal rights under Article 3 paras. (2) and (3) GG, the door is opened for the male sex to undermine rights of women and girls to their hard-won autonomous spaces and protected areas as well as their participation in society.

### Recommendation

It would be necessary to balance the fundamental rights<sup>6</sup> of persons with a different gender identity under Art. 2 para. (1) in conjunction with Art. 1 para. (1) GG on the one hand with the fundamental rights of women and girls under Art. 3 para. (2) and para. (3) GG on the other hand. Competing fundamental rights must - in accordance with the principle of practical concordance - be harmonized in such a way that they can each achieve their maximum effect (principle of constitutional unity).<sup>7</sup> The fundamental rights of Article 3 paras. (2) and (3) GG must be observed in the same way as the provisions on compulsory military service under Article 12a GG. No more, but also no less.

In order to maximize the effect of Article 3 paras. (2) and (3) GG, it would be necessary to maintain the validity of sex entry for the protection of women and girls by retaining the legal procedure under Section 4 para. (3) of the Transsexuals Act (TSG) and to create guaranteed and appropriate exceptions for women to ensure autonomous spaces and safe spaces, professional advancement and social participation. A similar decision has also been made in another Western industrialized country, Great Britain.<sup>8</sup>

The following sentence from the general part of the explanatory memorandum proves that the authors of GE do not have the slightest insight into this constitutional

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<sup>6</sup>Cf. *statement by Prof. Dr U. Lembke at the public hearing in the Bundestag Committee on Internal Affairs on 2 November 2020 on the draft laws by Bündnis 90/Die Grünen, FDP and Die Linke: "Protection against discrimination on the basis of deviations from the heterosexual norm must not be at the expense of protecting women from discrimination and violence within the logic of binary sex relations and vice versa. This is a major challenge for the legislator..."*, <https://www.bundestag.de/resource/blob/803586/b14cbe365e87aa7ffbe6b288abb180fc/A-Drs-19-4-626-E-neu-data.pdf> [last accessed: 17 April 2024].

<sup>7</sup> Konrad Hesse: Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland. C.F. Müller GmbH, 1999, edge digit 72; Martin Morlok, Lothar Michael, Staatsorganisationsrecht, Nomos, Baden-Baden, 4th edition 2019, Sec. 3, edge digit 94.

<sup>8</sup> House of Commons, Gender Recognition Act Reform, Consultation and Outcome, 17 February 2022, <https://researchbriefings.files.parliament.uk/documents/CBP-9079/CBP-9079.pdf> [last accessed: 17 April 2024].

imbalance: *“The draft law does not contain any provisions relevant to equality”*.<sup>9</sup> And in the special section of the explanatory memorandum, Section 7 states: *“It cannot be assumed that other groups of people will be disadvantaged by basing the law on the criterion of sex entered in the civil status register. On the one hand, people whose gender identity differs from their sex entry and who have changed their sex entry and first names in accordance with Section 2 SBGG experience discrimination and disadvantage in everyday and professional life, so that their promotion in professional life is a social concern. On the other hand, a change of civil status should not be carried out lightly and only for the purpose of utilizing the supposed advantage of a quota regulation...”*<sup>10</sup>

This law can therefore justifiably be described as an unconstitutional “men's rights bill”. This must be countered with suitable legal measures.

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Gunda Schumann ©, Attorney-at-Law, M.C.J., LL.M.

Member of the Board

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<sup>9</sup> GE (footnote 1), Explanatory Memorandum, General Part, I. Initial legal situation, objectives and necessity of the regulations, 6. Further legal consequences, p. 34.

<sup>10</sup> Ibid., Explanatory Memorandum, Special Part, Re Sec. 7 (Quota regulations), p. 50.