

Human Rights and Gender Identity

Best Practice Catalogue

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December 2011*



Table of Contents

Introduction	7
Chapter 1: Implementing International Human Rights Standards	8
1.1 Endorsement of the Yogyakarta Principles at national level	8
1.2 The United Nations human rights system's recognition of gender identity	9
1.3 Gender identity within the Council of Europe human rights system	10
Chapter 2: Enacting Hate Crime Legislation	13
2.1 European and national legislation	13
2.2 Data collection and LGBT liaison officers	15
2.3 Trans-inclusive policing and public awareness raising	16
Chapter 3: Adopting Expeditious and Transparent Procedures for Change of Name and Sex	18
3.1 Gender identity legislation	18
3.2 Legislation on change of names and gender on civil status documents	20
3.3 Legislation on changes in university diplomas and employment certificates	21
3.4 Germany's alternative identification cards	22
Chapter 4: Abolishing Sterilisation and Other Compulsory Medical Treatment	23
4.1 Removal of the requirement of sterilisation and other medical treatment	23
4.2 Narrow interpretation of the sterilisation requirement	24
Chapter 5: Making Healthcare and Public Health Insurance Coverage Accessible	25
5.1 Legislation on accessible healthcare and non-discriminatory insurance coverage	25
5.2 Policies on high standard of healthcare for trans people	26
5.3 Clinics' informed consent protocols for hormonal therapy	27
Chapter 6: Dissociating Marital Status from the Gender Recognition Process	29
6.1 Removal of 'the divorce requirement' through legislation or litigation	29
6.2 Gender neutral marriage certificate issued by the city of Vienna	32
Chapter 7: Making Equality a Reality in All Spheres of Life	34
7.1 European and national equality legislation	34
7.2 The United Kingdom's Transgender Action Plan	37
7.3 Policies and practices in the labour market	38
7.4 Policies and practices in education	40
7.5 Policies and practices in health services	40
Chapter 8: Involving and Consulting the Trans Community	42
8.1 The Council of Europe's consultative approach with regard to legislative proposals	42
8.2 Policy consultation at regional and national level	43
Chapter 9: Providing Training and Raising Awareness	46
9.1 Awareness raising among Euro-parliamentarians	46
9.2 Awareness raising among professionals	47
9.3 Awareness raising among the general public	48
Chapter 10: Providing Training to Specific Professions	50
10.1 Setting the right framework for provision of training on trans health	50
10.2 Training and materials by trans civil society	52
Chapter 11: Including Gender Identity in the Scope of Equality Bodies	54
11.1 Legislation empowering equality bodies to deal with trans issues	54
11.2 Equality bodies' proactive policy work covering trans people	55
Chapter 12: Collecting Data on the Situation of Trans People	59
12.1 Data collection at the European level	59
12.2 Data collection at the national level	61
12.3 Data collection by civil society	61



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Printer: Corelio Printing, www.corelioprinting.be

ISBN 978-92-95066-08-3



This document is supported by the Directorate-General for Employment, social affairs and equal opportunities of the European Commission. Its funding is provided for under the European Community Programme for Employment and Social Solidarity PROGRESS (2007-2013).

For more information see:
http://ec.europa.eu/employment_social/progress/index_en.html
The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.

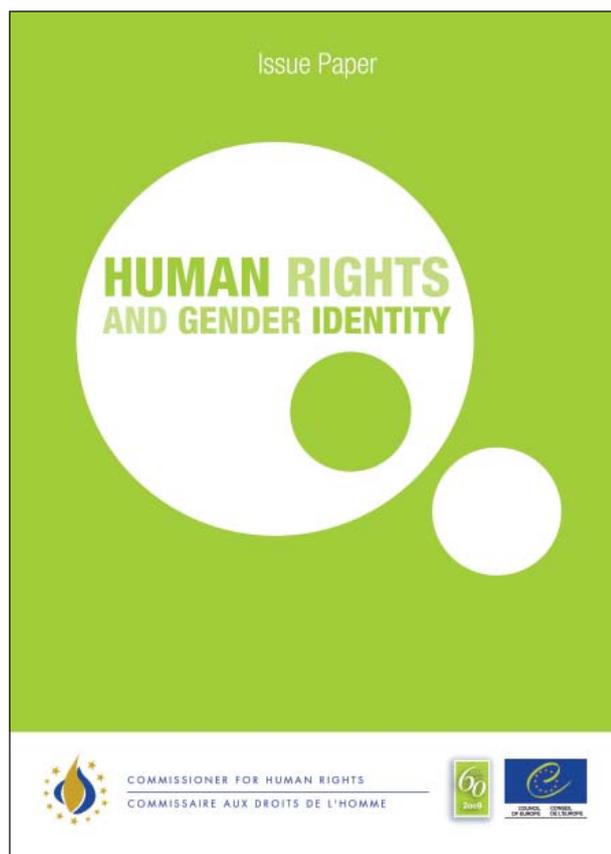


This publication was produced with support from the Belgian Institute for the equality of women and men.

THE CONTENT OF THIS DOCUMENT IS AVAILABLE IN LARGE PRINT ONLINE:
WWW.ILGA-EUROPE.ORG

Introduction

Human Rights and Gender Identity: Best Practice Catalogue is a civil society follow-up to the pioneering work of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, and his 2009 Issue Paper entitled *Human Rights and Gender Identity*. In it, the Commissioner explored the human rights situation of trans people in depth, clearly showing that they remain one of the most vulnerable and discriminated communities due to inadequate legislation and social marginalisation. Through a set of twelve recommendations, the Commissioner called on Council of Europe Member States to respect the human rights of trans people and put in place concrete measures for the social inclusion and emancipation of trans people.



Human Rights and Gender Identity Issue Paper (2009)
wcd.coe.int/ViewDoc.jsp?id=1476365

Policy makers and LGBTI organisations alike, have often asked ILGA-Europe and Transgender Europe to provide advice towards the implementation of these recommendations. We therefore became increasingly aware that it was useful to publish the most complete set of best practices that are known to us, to illustrate how each of the twelve recommendations can be met in legislation, policy and practice. We hope that this publication will inspire legislators, decision makers, equality bodies, and human rights organisations to work towards a world free from discrimination on the ground of gender identity and gender expression that affords trans people the dignity and respect that they deserve.



Chapter 1

Implementing International Human Rights Standards

Recommendation 1:

Implement international human rights standards without discrimination, and prohibit explicitly discrimination on the ground of gender identity in national non-discrimination legislation. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity should be used to provide guidance for national implementation in this field.

Gender identity and gender expression are increasingly recognised as grounds of discrimination on which specific protection is required. Indeed, an increasing number of provisions within European and national legislation refer to gender identity and gender expression and apply expressly to trans people. In addition, some national governments have gone a step further and adopted legislation taking into consideration specific situations that are unique to trans people (e.g. employment protection during gender reassignment).

Unfortunately, despite recent progress, institutionalised transphobia and severe human rights breaches against trans people are still the order of the day across the European continent. In this context, the Yogyakarta Principles and other authoritative human rights documents can guide European institutions and national governments in protecting the fundamental rights of trans people and to tackle discrimination based on gender identity and gender expression.

1.1 Endorsement of the Yogyakarta Principles at national level

The Yogyakarta Principles (2006)
www.yogyakartaprinciples.org/principles_en.htm



The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity are a set of internationally recognised principles intended to address violations of the rights of lesbian, gay, bisexual, trans and intersex (LGBTI) people. They were developed at an experts meeting held by the International Commission of Jurists (ICJ) and human rights experts in 2006 in Indonesia. The twenty-nine principles were adopted unanimously by the experts, along with recommendations to governments, regional intergovernmental institutions, civil society, and the United Nations (UN).

The parliament of the **Netherlands** has endorsed these principles and their respective governments use them as guidance in the context of both their domestic and foreign policy.



The endorsement of the Yogyakarta Principles is a very visible sign of good will towards the respect of LGBTI people's human rights. All national parliaments and governments are urged to endorse and work towards the full implementation of these principles at both the domestic and the international levels.

1.2 The United Nations human rights system's recognition of gender identity

1.2.1 The United Nations resolution on rights of LGBT people

The *Universal Declaration of Human Rights* (UDHR) does not expressly mention gender identity but it provides for an open list of protected grounds. Article 2 states:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In 2009, the Committee on Economic, Social and Cultural Rights (CESCR) underlined that:

“‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”¹

On 15 June 2011, the Human Rights Council adopted a historic resolution expressing its concern regarding violations of human rights and discrimination based on sexual orientation and gender identity. Following the instructions of this resolution,² the United Nations High Commissioner for Human Rights produced a report entitled *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*.³

1.2.2 The recognition of the ground of gender identity by the CEDAW Committee

Some thematic instruments within the UN human rights system make express reference to gender identity as well. This is the case of the *Convention for the Elimination of all forms of Discrimination Against Women* (CEDAW).⁴

¹ UN Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20

² UN Human Rights Council, Seventeenth session, Follow-up and implementation of the Vienna Declaration and Programme of Action, *Human rights, sexual orientation and gender identity*, 15 June 2011, A/HRC/17/L.9/Rev.1

³ UN Human Rights Council, Nineteenth session, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Follow-up and implementation of the Vienna Declaration and Programme of Action, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights*, 17 November 2011, A/HRC/19/41

⁴ Adopted by the United Nations General Assembly in 1979



Two recommendations⁵ have been adopted by the CEDAW Committee in 2010 and both affirmed that “discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as [...] gender identity.” This leads to an obligation for state parties to CEDAW to address discrimination against trans women and to report the progress achieved to the Committee.

1.3 Gender identity within the Council of Europe human rights system

The Council of Europe (CoE) has been a global pioneer in the advancement of the application of human rights to trans people.

1.3.1 Convention for the Protection of Human Rights and Fundamental Freedoms

Article 14 of the *Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms*⁶ (ECHR) guarantees the principle of non-discrimination with regard to the set of rights that are established under the Convention. It states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

While gender identity is not expressly referred to in the list, ‘transsexualism’ has been included within the scope of the ECHR in a decision taken by the European Court of Human Rights (ECtHR) in the case of *P.V. v. Spain*⁷ in 2010.

1.3.2 Case-law of the European Court of Human Rights

Since 1992, the European Court of Human Rights has ruled positively on a series of cases brought forward by transsexual people. These decisions concern:

- the right to gender recognition of post-operative transsexuals (*B v France*);⁸
- the right to marry in accordance with the acquired gender (*Goodwin and I. v UK*)⁹ (see 6.1.2);
- the right to fair and proportionate requirements related to gender reassignment (*van Kück v Germany*);¹⁰
- the right to a pension in accordance with the acquired gender (*Grant v United Kingdom*);¹¹ and
- the right to adequate and clear gender recognition procedure for change of name and legal gender (*L v Lithuania*).¹²

While the ECtHR has been instrumental in advancing the recognition that trans rights are human rights, it is unfortunate that no cases of trans people who are not transsexual have yet reached the Court.

⁵ UN Committee on the Elimination of Discrimination against Women, *General recommendation No. 27 on older women and protection of their human rights*, 16 December 2010, CEDAW/C/GC/27; and *General recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 December 2010, CEDAW/C/GC/28

⁶ Convention CETS No. 005

⁷ *P.V. v Spain*, Application no. 35159/09, judgement of 30 November 2010

⁸ *B v France*, Application no. 13343/87, judgement of 25 March 1992

⁹ *Christine Goodwin & I v United Kingdom*, Applications no. 28957/95 and 25680/94, judgement of 11 July 2002 (Grand Chamber)

¹⁰ *van Kück v Germany*, Application no. 35968/97, judgement of 12 June 2003

¹¹ *Grant v United Kingdom*, Application no. 32570/03, judgment of 23 May 2006

¹² *L v Lithuania*, Application no. 27527/03, judgement of 11 September 2007



For further information on case-law consult the European Court of Human Rights' Factsheet – Transsexual Rights, (2011), online at:

www.echr.coe.int/NR/rdonlyres/6E6BB0DC-A41D-4ADB-94B3-37407490C629/0/FICHES_Identite_genre_EN.pdf

All Member States of the Council of Europe have the political obligation to implement the judgements of the European Court of Human Rights into domestic legislation.

1.3.3 Protocol 12 to the ECHR

Like Article 14 of the ECHR, *Protocol 12*¹³ to the ECHR provides a general prohibition of discrimination on an open list of grounds. However, unlike Article 14, *Protocol 12* applies to the exercise of any legal right and to the actions of public authorities without the need for this general prohibition to be linked to any other right guaranteed under the Convention. Article 1(1) states:

“The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”



Member States that have not yet signed and/or ratified Protocol 12 should follow the example set by the State Parties to the Protocol and accede to it without further delay.



Activists in Turkey protesting against recurrent police harassment against trans people (2010)

1.3.4 Recommendation of the Committee of Ministers on the rights of LGBT people

In March 2010, the CoE Committee of Ministers adopted a *Recommendation on measures to combat discrimination on grounds of sexual orientation and gender identity*.¹⁴ They address many key issues for LGBT people under various headings, namely: (i) right to life, security and protection from violence ((a)“hate crimes” and other hate-motivated incidents and (b) “hate speech”); (ii) freedom of association; (iii) freedom of expression and peaceful assembly; (iv) right to respect for private and family life; (v) employment; (vi) education; (vii) health; (viii) housing; (ix) sports; (x) right to seek asylum; (xi) national human rights structures and (xii) discrimination on multiple grounds.

¹³ Convention CETS No. 117

¹⁴ *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies)





ILGA-Europe has produced a 'Toolkit for promoting implementation of the Recommendation at national level' and a 'Checklist to help assess progress towards the correct implementation of the Recommendation.' CoE Member States and LGBTI organisations alike are encouraged to use these resources to measure progress and identify the areas that require amendments to national legislation and policy. Online at:

www.ilga-europe.org/home/guide/council_of_europe/lgbt_rights/recommendation_of_the_committee_of_ministers_on_lgbt_rights

1.3.5 Resolution and recommendation of the Parliamentary Assembly on discrimination on the basis of sexual orientation and gender identity

A resolution adopted by the Parliamentary Assembly of the Council of Europe (PACE) in April 2010 and recalls that “sexual orientation and gender identity are recognised as prohibited grounds of discrimination.”¹⁵ In addition it recognises specific discriminatory practices and obstacles experienced by trans persons, including in relation to gender reassignment and legal gender recognition.

A set of recommendations¹⁶ were also adopted by the Parliamentary Assembly on the same day, reiterating and enforcing the previous month's Committee of Ministers' Recommendation.

¹⁵ PACE, *Resolution 1728 (2010) Discrimination on the basis of sexual orientation and gender identity*

¹⁶ PACE, *Recommendation 1915 (2010) Discrimination on the basis of sexual orientation and gender identity*

Chapter 2

Enacting Hate Crime Legislation

Recommendation 2:

Enact hate crime legislation which affords specific protection for transgender persons against transphobic crimes and incidents.

Research shows a very high rate of occurrence of violence and hate crime (i.e. criminal offence committed with a bias motivation) against trans people. Indeed, 79% of respondents to a survey on transphobic hate crime conducted within the European Union, reported that they had experienced some form of harassment in public ranging from transphobic comments to physical or sexual abuse.¹⁷ In spite of the prevalence of harassment and violence against the trans community, **Scotland** is the only jurisdiction in Europe where transphobia is expressly defined as an aggravating circumstance.

In its Recommendation, the CoE Committee of Ministers has called for particular attention to hate crime and hate speech and urged Member States to:

“ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.”¹⁸

The UN Human Rights Council also recommended that Member States:

“Investigate promptly all reported killings and other serious incidents of violence perpetrated against individuals because of their actual or perceived sexual orientation or gender identity, whether carried out in public or in private by State or non-State actors, and hold perpetrators accountable, and establish systems for the recording and reporting of such incidents.”¹⁹

2.1 European and national legislation

2.1.1 Convention on Preventing and Combating Violence against Women and Domestic Violence

The *Convention on Preventing and Combating Violence against Women and Domestic Violence*²⁰ was adopted in Istanbul by the Committee of Ministers and opened for signatures in May 2011. While per se it does not specifically address the rights of trans people, it is the first international treaty that expressly refers to the ground of gender identity in Article 4(3) (non-discrimination).

Importantly, the Explanatory Report of the Convention elaborated gender identity as follows:

¹⁷ Turner, Louis; Whittle, Stephen & Combs, Ryan (2009), *Transphobic Hate Crime in the European Union*, London: Press for Change

¹⁸ Supra note 14

¹⁹ Supra note 3, para 84(a)

²⁰ Convention CETS No. 210



“Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to ‘male’ or ‘female’ categories.”²¹

For information on the Convention’s consultative drafting process refer to 8.1.2.



Member States that ratify the Convention on Preventing and Combating Violence against Women and Domestic Violence should ensure that they take due account of the scope of the Convention with regards to trans people.

2.1.2 Scottish hate crime legislation

As stated above, **Scotland** is the only jurisdiction in Europe that has already expressly extended legal protection from bias violence and hate crime to trans people.

The Offences (Aggravation by prejudice) (Scotland) Act 2009 (asp 8) was passed by the Scottish Parliament in June 2009, and entered into force in March 2010. This Act extended the protection that was already in place for victims of prejudice crime motivated by their racial or religious characteristics to victims of prejudice crime motivated by sexual orientation, transgender identity or disability. The Act makes it clear that when determining sentences, courts must take into account offences motivated by malice or ill-will based on the victim’s actual or perceived sexual orientation or transgender identity.²²

It is noteworthy that the definition of transgender identity found in this Act is inclusive of all trans identities, expressly covering:

- “a) transvestitism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or
- b) any other gender identity which is not standard male or female gender identity.”²³

This broad definition of transgender identity was due to a productive collaboration between the Scottish Parliament and the Scottish Transgender Alliance (STA) and other equality groups that were consulted during the drafting of the Act.²⁴

For information on the partnership between the Scottish Government and STA refer to 8.2.3.



Public administrations that are in the process of adopting/extending domestic hate crime legislation should ensure to include sexual orientation, gender identity and gender expression. During the drafting of such laws, it is important that LGBTI civil society organisations are consulted, and their suggestions are taken into account.

²¹ Ministers’ Deputies, *Council of Europe Convention on preventing and combating violence against women and domestic violence (Explanatory report)*, 7 April 2011, CM(2011)49 addfinal, para 53

²² Article 2(2)(a)

²³ Article 2(8)

²⁴ ‘Good Practice 17: Institutionalised co-operation between public authorities and LGBT communities in Scotland’, in Polacek, Richard & Le Déroff, Joël (2010), *Joining forces to combat homophobic and transphobic hate crime. Cooperation between police forces and LGBT organisations in Europe*, Brussels: ILGA-Europe, p 64-66

2.2 Data collection and LGBT liaison officers

2.2.1 Data collection on transphobic hate crime

Currently, only **Finland**, **Sweden**, and the **United Kingdom** collect segregated data on bias-crimes committed against trans people. This fact signals a huge gap in knowledge on the occurrences and motivations of transphobic hate crime across the vast majority of European countries.

In this poor landscape, some good practices can still be highlighted though. In 2008, the London Metropolitan Police Service has launched a survey to assess women's experience of homophobia and transphobia.²⁵ The survey was aimed at assessing violence experienced by women and therefore cannot be considered as official data collection. However, this survey reports an alarming figure regarding under-reporting of hate crime incidents. In fact, 83% of the incidents mentioned by the women surveyed went unreported to the police.²⁶ This shows that a better system of data collection will not be enough if there is no engagement with the LGBTI and trans community to encourage reporting of hate crime incidents.

For more information on hate crime data collection in Sweden and Finland refer to 12.2.1.

2.2.2 LGBT community liaison officers and LGBT guidelines

In **Sweden** and the **United Kingdom**, an increasing number of police forces are appointing specific LGBT liaison officers to improve the dialogue with LGBT communities. Those officers act as spokesperson for the police forces and as focal point for members of the LGBT communities.

On top of the diversity training received by all police officers in **Scotland**, liaison officers expand their knowledge on LGBT issues through seminars provided by LGBT organisations. As a result, they are better equipped to identify priorities and concerns related to LGBT issues and facilitating contacts in case of an emergency.

Moreover, guidelines on care of trans people in police custody²⁷ have been recently produced, while training sessions were provided on the right application of these guidelines.²⁸



The National Trans Police Association's stall at a Pride event

²⁵ Paterson, Susan; Kielinger, Vicky & Fletcher, Hazel (2008), *Women's Experience of Homophobia and Transphobia: Survey Report*, London: Metropolitan Police Service

²⁶ Ibid, p 27

²⁷ Association of Chief Police Officers in Scotland, *Transgender People in Custody Guidance*, online at: www.acpos.police.uk/Documents/Policies/ED_TransgenderPeopleCustodyGuidanceV2.pdf

²⁸ 'Good Practice 16: The role of LGBT community liaison officers in the combat against LGBT-phobic hate crime', in *Supra* note 24, p 59-61



A different model, yet inspired by the same principles is found in **Catalonia** in Spain. The police decided to engage with all the communities that are vulnerable to hate crimes, including the trans community. This is implemented by the Oficinas de Relación con la Comunidad (Community relations offices) and the neighbourhood police, and includes the dissemination of targeted safety recommendations, as well as the presence of the police at all public LGBT events. The police have also developed internal protocols on how to handle LGBT-related hate crimes, where the trans dimension has been made explicit.²⁹

2.3 Trans-inclusive policing and public awareness raising

2.3.1 Police associations covering trans issues



The emblem of the National Trans Police Association www.ntpa.org.uk

In some instances, trans people's interests are also supported by associations founded by police officers. Such organisations vary. Some of them are larger umbrella LGBT organisations while others, such as the National Trans Police Association (NTPA) in the **United Kingdom**, work specifically on trans issues. The latter provides support to trans and intersex police officers and to police officers dealing with trans and intersex people (among family members, friends, and the general public), including through online means. Such police associations have a key role to play in restoring the trust of trans people in police forces and hence, in encouraging them to report hate crime.

2.3.2 Symbolic support to the Transgender Day of Remembrance



The transgender flag flown on top of the Brighton & Hove Council building on TDOR (2009)

The Transgender Day of Remembrance (TDOR)³⁰ was first commemorated in 1999 in the United States following the murder of a black trans woman, Rita Hester. Since then, it has been commemorated annually by trans activists on 20 November in a number of countries, making it clear that hate crimes against trans people should be a public concern.

Public authorities have also organised activities on some occasions. In 2009, a gathering was organised at the **Town Hall of Schöneberg** in Berlin to commemorate the TDOR. More than one hundred murdered trans people were commemorated and a representative of the Town Hall delivered a speech. On the same day, **Brighton & Hove Council** raised the transgender flag from both its town hall buildings and held an exhibition at the public library.³¹

²⁹ 'Good Practice 18: Efficiently addressing underreporting – the Catalonian police protocol against homophobic and transphobic hate violence', in Supra note 24, p 67-71

³⁰ See www.transgenderdor.org

³¹ Against Homophobia, European Local Administration Devices (AHEAD) (2011), *Combating homophobia, local policies for equality on the grounds of sexual orientation and gender identity, a European White Paper*, p 156

Official endorsements by city councils help raise awareness on the situation of trans people and have positive repercussions in the respective institution as well as in society at large.

In 2010, the **United Kingdom Equalities Minister** made a public statement on TDOR, stating clearly that equality is for all, and the UK government's commitment to launch a *Transgender Action Plan* that tackles discrimination and hatred towards transgender people with a hope of a "future free from ignorance and intolerance."³² (see 7.2)

In some cases, the commemoration of this day was used as an opportunity to raise awareness on other difficulties experienced by trans people. For instance, the **Secretary of Labor** in the **United States**, issued a statement in 2011 affirming her support to the transgender community and condemning discrimination based on gender identity and gender expression in the field of employment.³³



Public administrations are encouraged to promote positive attitudes towards trans people by publicly extending their support to the trans community through the commemoration of the Transgender Day of Remembrance, held annually on 20 November.

³² Equalities Minister in United Kingdom (2010), *Public statement on the Transgender day of Remembrance*, online at: www.youtube.com/watch?v=bXTH6w27t94

³³ Unites States Department of Labour (2011), *Statement by Secretary of Labor Hilda L. Solis on Transgender Day of Remembrance, 11-1679-NAT*, online at: www.dol.gov/opa/media/press/opa/OPA20111679.htm



Chapter 3

Adopting Expeditious and Transparent Procedures for Change of Name and Sex

Recommendation 3:

Develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents.

No laws, policies or practices that are currently in force in Europe fully match the standards required in Recommendation 3. Thus, while the European best practices that are already in place and that are referred to in this Chapter can serve as good benchmarks for progress, governments and human rights organisations should also refer to legislative projects that have not yet been enacted.

3.1 Gender identity legislation

3.1.1 Argentinean gender identity law



A poster calling for the adoption of the gender identity law stating 'My identity, My right'

During 2012, the Senate of **Argentina** will take a vote on whether to enact or not *Ley de identidad de género* (Gender identity law),³⁴ which the Lower House has already passed with a great majority in November 2011.

This law has been hailed by human rights organisations as the best gender identity law to date and a model for others to follow. This is because applications to change the name and sex in the birth registry and the demand of a new identity card can be made by all trans people without any need to provide proof of any incurred medical, psychological interventions or status (Article 3).

The law includes a broad, non-medical definition of gender identity and gender expression (Article 2) and recognises everybody's right to their appropriate gender identity while stressing the right to be treated accordingly; the freedom to develop one's personality in line with one's gender identity; and have the appropriate identification documents (Article 1). A change of name and/or gender is open for everyone above the age of eighteen who does not agree with the way their sex was recorded at birth (Article 4).

Once the minimum conditions are met, the Civil Registry will issue a new birth certificate and identity card incorporating the required changes. No reference to the law can be made visible on these documents to avoid any involuntary outings of their carriers. Moreover, no-one other than those authorised by the document holder or those provided with a written and well-founded judicial authorisation can have access to the original birth certificate (Article 9).

To read more about this law refer to 5.1.1 & 6.1.1.

³⁴ Online at: <http://www1.hcdn.gov.ar/dependencias/dsecretaria/Periodo2011/PDF2011/SANCIONES/7243-D-2010.pdf> (in Spanish)

3.1.2 National gender identity legislation in Europe (in force)

The European laws that provide the most expeditious and transparent procedures for change of name and sex of a trans person are currently found in **Portugal**,³⁵ **Spain**³⁶ and the **United Kingdom**.³⁷ The Portuguese *Lei nº 7/2011* is the most recent and contains the most expeditious and transparent procedures. It establishes that a decision for a change in name and gender has to be granted within a maximum of eight days following the submission of a complete application that meets the requirements set by law. However, while the speedy procedure established in the law is a very good standard, the legal requirement for an opinion of a Gender Identity Disorder (GID) issued by a multidisciplinary team of medical experts is known to be causing problems due to the rarity of such teams.

For more detail about these laws refer to 4.1.1.

3.1.3 National gender identity legislation in Europe (proposed)

The *Draft Law on the Changing of Forenames and the Determination of Gender Identity*³⁸ that in 2009 was presented by Bündnis 90/Die Grünen (the Greens) in the **German Bundestag** (Lower House of Parliament) is a very good example of a law that meets the standards set in international and European human rights frameworks. This draft law proposes change of name (Article 1) and legal gender recognition (Article 3) in a quick and transparent manner. It also sets strict privacy protection measures (Article 2); ensures the continuity of existing parent-child relationships (Article 5); and guarantees equal pensions and other employment benefits (Article 6).

To qualify for a change of name and/or change of legal gender, trans people would have to file an application with the Civil Registry. Importantly, such an application would not require any supporting evidence through medical or other third party opinion, and could only be rejected if it contains an intention to mislead. In the case of a name change the applicant would need to state that the previous name/s did not match her/his current gender identity. Likewise, a change of the entry of the person's birth sex could be changed following a declaration by the registry that the recorded birth sex is not in accordance with the person's gender identity. Once a change of name and/or gender would be affected, the previously used first names and registered gender would not be made public or searchable, unless there would be a plausible legal interest or special reasons pursuant to the public interest.

The trans person may request that the new first names be used in official documents and registers. Other gender-specific data, especially the form of address, gendered service, professional designations and information on kinship relationships are to be adapted to the current gender identity. The protection of privacy would go as far as to require the reissuance employment certificates from previous employers under the new first names. This is done to ensure that trans people are not vulnerable to employment discrimination due to the changes affected to their name and legal gender.

If adopted, the procedure would be open to national citizens as well as residents, including stateless persons, refugees and foreigner whose country of origin provides for similar rules.

For more detail about this draft law refer to 6.1.4.

³⁵ *Lei nº 7/2011 - Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil*, online at: www.dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf (in Portuguese)

³⁶ *Ley 3/2007, de 15 de marzo (RCL 2007\524)*, reguladora de la rectificación de la mención relativa al sexo de las personas

³⁷ *Gender Recognition Act 2004*, online at: www.legislation.gov.uk/ukpga/2004/7/contents

³⁸ *Entwurf eines Gesetzes über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit (ÄVFGG)*, online at: dip21.bundestag.de/dip21/btd/16/131/1613154.pdf (in German)





The law that is expected to be adopted in Argentina, and the Bündnis 90/Die Grünen legislative proposal in Germany form very good models for gender identity laws elsewhere, as they cater for the different needs of the diverse trans community, ensure privacy and guarantee access to healthcare. The law in Portugal is particularly interesting in view of the eight-day-time-window for the administration of the request, which protects trans people against unnecessary vulnerability to discrimination while they wait for their change of name and legal gender on their civil status documents.

3.2 Legislation on change of names and gender on civil status documents

3.2.1 Name change legislation following the common law tradition

In many countries following the common law tradition, everyone is able to change one's name through a deed of name change (often referred to as 'deed poll'). In the **United Kingdom** it is not necessary to register a deed of change of document. Instead, a standard legal document duly filled in by the person making the deed poll and signed in the presence of a witness carries the necessary legal authority to be recognised. The changed name is then accepted by various institutions including, amongst others, the passport office and banks. A name change through a deed poll does not amend the name on the birth certificate.

In the **Republic of Ireland** a deed poll of change of name (*Athrú Ainm de réir Gníomhais Aonpháirtí*) is obtainable from the Central Office of the Four Courts in Dublin at the current cost of €32.³⁹ In **Australia**, a change of name can be affected through following an application to the respective State or Territory Births Registrar. Applicants are required to provide a reason to support their name change but are not required to provide any medical evidence in relation to sexual anatomy or sex identity in cases when the gender of the name changes.

3.2.2 Sweden's application of general name-change legislation to trans people

Similar to several other countries, **Sweden** has a general name-change law (not trans-specific), to regulate change of personal names. Until 2009, all first names were linked to a particular gender, and thus a change of name was allowed as long as another name from the same gender register was chosen. However, in 2009, the Supreme Administrative Court decided that a person who is over 18 years has the autonomous right to determine the first name regardless of the biological or legal sex. All adults can now freely choose any name that they deem fit, irrespective of whether it was traditionally linked to their gender or not. This decision allows trans people to change their names to match their gender identity more closely.⁴⁰



When feasible, the scope of general name change legislation should be interpreted widely to enable trans people to change their name to another one that correspond better with their gender identity.

³⁹ Supreme Administrative Court, Case 2893-09, 28.09.2009

⁴⁰ Court Services (2008), *Change Of Name By Deed Poll Information Leaflet*, online at: [www.courts.ie/courts.ie/library3.nsf/%28WebFiles%29/D14EEC0B6D326D0F802578A1004DDBDD/\\$file/Change%20of%20name%20by%20deed%20poll.pdf](http://www.courts.ie/courts.ie/library3.nsf/%28WebFiles%29/D14EEC0B6D326D0F802578A1004DDBDD/$file/Change%20of%20name%20by%20deed%20poll.pdf)

3.2.3 Germany's passport gender marker change

In **Germany**, under the *Transsexuellengesetz*⁴¹ (Transsexual law) a change of name ('small solution') and change of the gender marker ('big solution') are carried out in two separate processes and had different requirements until the recent Federal Constitutional Court judgement⁴² (overview at 4.1.2). A change of name could be affected without the undergoing of a gender reassignment surgery whereas a change of gender marker needed the applicant to undergo a gender reassignment surgery and to prove permanent sterility. However, a change of name was and remains enough for a trans person to have the right to be addressed in the corresponding gender in official oral and written communication.

Importantly, Article 4 of *Paßgesetz*⁴³ (Passport law) states that the gender marker in the passport can be adjusted to match the gender of a first name changed under the 'small solution' of the *Transsexuellengesetz* but does not require a change in the officially registered sex. This means that those trans people who cannot or do not wish to submit to the requirements attached with legal gender recognition can still travel outside of Germany without a mismatch between their gender presentation, their gendered name/s and the gender marker on their passport. Clearly, this protects them against suspicion of fraud or unpleasant situations at border control and during their stay in another country. The above provision does not affect the officially registered sex though, as the applicant is obliged to confirm in writing that the gender marker in the passport has no authority to determine the person's official sex.

3.3 Legislation on changes in university diplomas and employment certificates

3.3.1 Name change on university diplomas in the Netherlands

In the **Netherlands**, a transman took a case to the equality body after the University of Amsterdam refused to change his old female name on his diploma. In a response to a parliamentary question regarding this case, the Minister of Education, Culture and Science, clarified that it was indeed possible and encouraged to change the name and gender on university diplomas in line with the Recommendation of the CoE Committee of Ministers (see 1.3.4).⁴⁴

3.3.2 Name change on education certificates in the Russian Federation

In the **Russian Federation**, the Ministry of Education and Science issues orders that regulate basic, secondary and higher professional educational institutions. Such orders also regulate "change of surname, name, and patronymic name for medical reasons," that is accessible to trans persons after their legal gender recognition.⁴⁵ Educational institutions must then issue new documents containing the new name and withdraw and destroy all previous documents containing the former name (name, surname and patronymic name).

3.3.3 Entitlement to a revised employment certificate in Germany

In **Germany**, the Superior Court of Justice of Hamm (Westphalia) was presented with the question of whether a trans person has the right to changes on previous records on the employment certificate after a change of name or gender. In its

⁴¹ *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*

⁴² *Bundesverfassungsgericht* [Federal Constitutional Court], BVerfG, 1 BvR 3295/07, 28.01.2011

⁴³ Online at: http://www.gesetze-im-internet.de/pa_g_1986/index.html (in German)

⁴⁴ *Response of Minister van Bijsterveldt-Vliegthart to questions the refusal to adjust to a diploma after gender reassignment*, 1 December 2010, 2010Z14479

⁴⁵ Ministry of Education and Science, *Orders No. 80*, 9 March 2007; *No. 92*, 23 March 2007; and *No. 65*, 10 March 2005, in ed. from 1 April 2008



ruling,⁴⁶ the Court stressed that every person has a right to an employment certificate, and that in the case of a trans person lost or destroyed files may not constitute a strong enough reason to refuse the rectification. In reality, even if the personnel file of the trans employee was destroyed due to a time lapse, the employer is still expected to provide a rectified employment certificate. The original testimony remains valid and the employer can adjust the name and undertake suitable grammatical and spelling adjustments as necessary, as long as no substantive changes are carried out.

3.4 Germany's alternative identification cards

In **Germany**, Deutsche Gesellschaft für Transidentität und Intersexualität e.V. (dgti), in agreement with the Ministry of Interior, issues *Ersatzausweise* (alternative identification cards) for trans people who have not changed name and/or gender in accordance with existing legal gender recognition procedures. To qualify for such an ID card, trans people need to: (i) submit an application to dgti, and (ii) provide an initial Gender Identity Disorder diagnosis or proof of commencement of cross-hormonal treatment.

The *Ersatzausweis* has a standard credit card size and comes in three languages (German, English and French). It contains a picture of the cardholder, and relevant personal data including the chosen name. Interestingly, since German ID cards do not feature a gender marker, the *Ersatzausweis* does not make a reference to the person's gender either. The validity of the ID card is ensured through a reference to the official identification number and is valid for the same time period as the official card. The text of the *Ersatzausweis* briefly explains the purpose and reasons for this alternative ID card.

A template of an identity card (front and back) issued by DGTI www.dgti.org

The designated person undergoes a sexual development of biologically man to woman. In the context of the laws of the Federal Republic of Germany and caused by the applied medical-psychological treatments it is necessary that the designated person appears in public as a woman. This contains among other things also a wearing of female clothing, as a necessary measure in the context of socialization process. All authorities and organizations within and outside of the Federal Republic of Germany are asked to support this treatment within boundaries of their authority while respecting the desired gender of the bearer. This document is intended as a supplement to existing passports. It is only valid in combination with a valid identity card. It has been issued by the Deutsche Gesellschaft für Transidentität und Intersexualität.

La personne indiquée passe un développement sexuel biologiquement d'homme en femme. Dans le contexte des lois de la République Fédérale d'Allemagne ainsi que par les nécessités des traitements médicaux-psychologiques il est nécessaire que la personne indiquée apparaisse en public en tant que femme. Ceci contient entre autres également porter de l'habillement féminin, comme mesure nécessaire dans le contexte de socialisation. Toutes les autorités et organismes en dedans et dehors de la République Fédérale d'Allemagne sont invités à supporter dans le contexte de leurs possibilités la manipulation par un comportement approprié. Ce document représente un supplément à des passeports existants. Il ne possède pas la validité sans carte d'identité valide. Il a été fourni par la Deutsche Gesellschaft für Transidentität und Intersexualität.

Public administrations considering the introduction of a similar alternative ID card system are encouraged to refrain from using medicalised terminology on alternative ID cards and instead aim to use language that better reflects the diversity of the human experience of gender identity.

⁴⁶ *Landesarbeitsgericht Hamm (Westfalen)* [Superior Court of Justice of Hamm (Westphalia)], 4 Sa 1337/98, 17.12.1998

Chapter 4

Abolishing Sterilisation and Other Compulsory Medical Treatment

Recommendation 4:

Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change.

Within the Council of Europe, the vast majority of Member States require proof of permanent sterility or operations that inevitably lead to sterility prior to legal gender recognition.⁴⁷ This usually includes compulsory gender reassignment surgery.

These provisions unjustifiably link a legal procedure (gender recognition) with medical procedures (sterilisation and gender reassignment surgery). Such a link clearly violates trans people's right to physical integrity and their right to form and found a family. Compulsory medical procedures run counter to trans people's right to self-determination with regard to medical interventions and often leave them with the dreadful choice between their continued ability to procreate on the one hand, or their rectified official papers reflecting their identity on the other.

4.1 Removal of the requirement of sterilisation and other medical treatment

Among the European countries that do not require sterilisation the laws in Portugal and Germany are the closest to meeting human rights standards but still fail to fully embrace trans people's human rights or this recommendation as they still require a medical diagnosis of Gender Identity Disorder.

4.1.1 Through legislation

In Europe, **Portugal, Spain** and the **United Kingdom** have legislation that does not require sterilisation surgery prior to legal gender recognition. In these countries though, applicants are still expected to provide evidence of their Gender Identity Disorder. In the case of Spain, this comes along with an additional requirement of compulsory hormonal treatment. Thus, while the lack of requirement of invasive sterilisation surgery is an important step in the right direction, the required diagnosis of a mental disorder runs counter to the human rights standards required by Recommendation 4.

The legislative provisions that fully meet the standards indicated are found in **Argentina's** proposed Ley de identidad de género (discussed in detail in 3.1.1, 5.1.1 & 6.1.1). Interestingly, **Uruguay's** *Ley N° 18.620 Derecho a la Identidad de Género y al Cambio de Nombre y Sexo en Documentos Identificatorios*⁴⁸ goes as far as to explicitly prohibit a requirement of a gender reassignment surgery for the purpose of legal gender recognition (Article 3).

⁴⁷ Commissioner for Human Rights (2011), *Discrimination on grounds of sexual orientation and gender identity in Europe – Background Document*, Strasbourg: Council of Europe

⁴⁸ Online at: <http://sip.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18620&Anchor=> (in Spanish)



4.1.2 Through case-law

In addition to the above laws, **Austria's** Higher Administrative Court⁴⁹ and **Germany's** Federal Supreme Court⁵⁰ ruled that mandatory surgery cannot be a prerequisite for legal gender recognition. The Austrian Higher Administrative Court overruled the sterilisation requirement in April 2009, when it followed the claimant's argument that the required genital surgery would lead to a longer period of sick-leave that could result in a potential job-loss. In 2011, the German Federal Supreme Court found the requirements for: (i) an inability to procreate, and (ii) the approximation of one's appearance to that of the preferred gender through the undergoing of medical procedures, incompatible with the right to self-determination and private life enshrined in the Constitution.

4.2 Narrow interpretation of the sterilisation requirement



Stop the pathologisation of transgender people!



Once more, while the two examples highlighted below do not meet the human rights standards required by Recommendation 4, they do shed light on how the sterilisation requirement can be narrowed down to lesser invasive medical procedures.

Finland's *Laki transseksuaalin sukupuolen vahvistamisesta 563/2002* (Act on the Recognition of the Sex of a Transsexual Person) prescribes inter alia that the person needs to be "sterilised, or [is] for any other reason [...] infertile." However, it is de facto interpreted to mean that the undergoing of cross-hormonal treatment is sufficient to meet this requirement. Similarly, following a decision by the High Court, trans people in the **Canton of Zurich** are able to change their name on the basis that they started cross-hormonal treatment, which is understood to be enough to meet the sterilisation requirement in the law.⁵¹

ILGA-Europe's poster raising awareness on the human rights breaches of trans people due to obligatory medical and psychiatric procedures for the purpose of gender recognition

Legislators should meet the standard set in Yogyakarta Principle 3 which states that: "Everyone has the right to recognition everywhere as a person before the law." and that "[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity."

⁴⁹ *Verwaltungsgerichtshof* [Administrative Court], 2008/17/0054, 27.02.2009; and *Verfassungsgerichtshof* [Administrative Court], B 1973/08-13, 03.12.2009

⁵⁰ Supra note 42

⁵¹ *Obergericht ZH* [High Court Zurich Canton], NC090012/U, 01.02.2011

Chapter 5

Accessible Healthcare and Public Health Insurance Coverage

Recommendation 5:

Make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible for transgender persons, and ensure that they are reimbursed by public health insurance schemes.

Throughout Europe, trans people's access to healthcare, especially to medical gender reassignment procedures, is severely impaired due to the fact that a number of doctors do not approve of trans people's transitioning or are simply unwilling to help.⁵² Moreover, the cost of the procedures is often uncovered (or only partially covered) by the appropriate public or private health insurance schemes, effectively leaving a significant bracket of trans people without access to the required procedures.

Without a doubt, medical reassignment procedures are crucial for many trans people in order to be able to live a dignified life. World Professional Organisation for Transgender Health (WPATH) has recognised this need as well as the need to have trans related medical measures covered by public and private health insurances, and stated:

"The WPATH Board of Directors urges state healthcare providers and insurers throughout the world to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients including the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialized) is readily accessible."⁵³

5.1 Legislation on accessible healthcare and non-discriminatory insurance coverage

5.1.1 The Argentinean gender identity bill

Beyond its being a good practice in terms of change of name and legal gender (discussed in detail in 3.1.1), **Argentina's** proposed *Ley de identidad de género* is also a good practice on access to trans-related health services on the basis of informed consent and coverage under the state's Obligatory Healthcare Plan. Indeed, should the law be adopted, it would be the first law in the world to fully respect trans people's right to self-determination and physical integrity. It would also be the first law to acknowledge that legal procedures in relation to gender recognition and medical procedures consist of two separate processes that should not be linked or made to interfere with one another.

Article 11 (right to free personal development) states that all persons above the age of eighteen may enjoy their overall health, through access to full and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, and to their self-perceived gender identity, without any requirement of a judicial or administrative authorisation. The law further specifies that there will not be a need to prove one's will to have a total or partial reassignment surgery in order to access comprehensive hormonal treatment. Instead, in both circumstances the

⁵² Whittle, Stephen; Turner, Louis; Combs, Ryan; & Rhodes, Stephenne (2008), *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Healthcare*, Brussels: ILGA-Europe

⁵³ WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide, online at: www.wpath.org/medical_necessity_statement.cfm



only requirement will be the informed consent of the individual concerned. These provisions along with coverage of all medical procedures under the state-funded Obligatory Healthcare Plan will make hormonal treatment and/or surgical interventions available to all trans people.

5.1.2 California's insurance non-discrimination act covering trans people

AB 1586 Insurance Gender Non-Discrimination Act⁵⁴ was adopted in **California** in 2005 and took effect in 2006, protecting trans people against discrimination in access to healthcare services. This Act clarifies that trans people are protected under the existing prohibition of discrimination based on the ground of 'sex', as it follows *Penal Code Section 422.56* which express links the meaning of the grounds of 'sex' and 'gender' as follows:

"'Gender' means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."

This Act is a very good example of a law that provides clarity of coverage for trans people, whereby discriminatory decisions by insurance companies with regard to trans people's access to healthcare are undoubtedly outlawed.



Legislators should always take trans people's healthcare needs into account when regulating public or private health insurance cost coverage related to gender reassignment and related therapy. In this regard, the law proposal in Argentina is an excellent example for countries where public health is covered by national insurance, while the law in California is an excellent model for countries where healthcare is covered through private health insurance schemes.

5.2. Policies on high standard of healthcare for trans people

5.2.1 Healthcare in the United Kingdom's Transgender Action Plan

Section 3: *Opening up public services and empowering individuals and communities* of the **United Kingdom's** transgender action plan⁵⁵ (see 7.2) contains a subsection on healthcare. Among the various actions that are laid out, the plan requires the National Healthcare Service (NHS) to:

"Commission and publish a clear and concise guide for health practitioners, including GPs and Primary Care Trusts, and the transgender community on care pathways and available treatments. This includes information on the health of transgender young people and general healthcare issues post transition."⁵⁶

Such a publication should on the one hand help trans people to access trans related healthcare and on the other hand help medical practitioners to be fully able to inform and advise on the range of available measures. Moreover the provision does not only include the period of medical gender reassignment treatment but takes a more holistic approach and includes general and post transition healthcare.

⁵⁴ Online at: www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1551-1600/ab_1586_bill_20050929_chaptered.pdf

⁵⁵ HM Government (2011), *Advancing transgender equality: a plan for action*, online at: www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/transgender-action-plan

⁵⁶ Ibid, p 11

5.2.2 Greater Glasgow and Clyde NHS' trans-specific equality policy



Canadian poster campaign promoting sexual health among trans men
www.checkitoutguys.ca

Greater Glasgow and Clyde NHS Board decided to create a trans equality policy⁵⁷ as one of its single equality scheme actions. It thus approached both local and national trans organisations and invited them to participate in a working group bringing together trans representatives and NHS health board staff with the aim of designing the trans equality policy. Early on, Greater Glasgow and Clyde NHS Board established its commitment for the policy to incorporate a human rights approach and to recognise the full diversity of gender identities. During this process, they found out that most existing trans guidance only considered equality issues for people undergoing gender reassignment. They therefore arranged a very successful training day for their corporate inequalities team and other managers specifically on the lives and the human rights issues of trans people who do not intend to undergo gender reassignment.

To enable the best possible understanding of their human rights obligations with regard to gender identity, they proactively sought legal advice to inform development. The resulting guidance addressed single-sex ward placement, rights to respect for gender identity in the absence of a Gender Recognition Certificate, and the rights of trans and intersex young people.

The corporate inequalities team within Greater Glasgow and Clyde NHS Board significantly increased their understanding of the issues faced by trans and intersex people and have committed to ensure that the human rights principles of dignity and respect underpin their policies. The team has established stronger links with trans groups locally and nationally who will be involved in further consultation and involvement as the policy becomes operational and is subject to review. The range of gender reassignment medical services provided has been expanded in order to better meet the needs of trans service users. For example, access is now provided to electrolysis for hair removal which had previously not been recognised as a need.

5.3 Clinics' informed consent protocols for hormonal therapy

Several clinics in the **United States**, such as the Callen Lorde Community Center in New York, Fenway Health in Boston, and Howard Brown Health Center in Chicago, have developed *Informed Consent Protocols* to provide hormone therapy to trans people. Such clinics have specific trans health policies that govern the full range of their trans-specific healthcare.

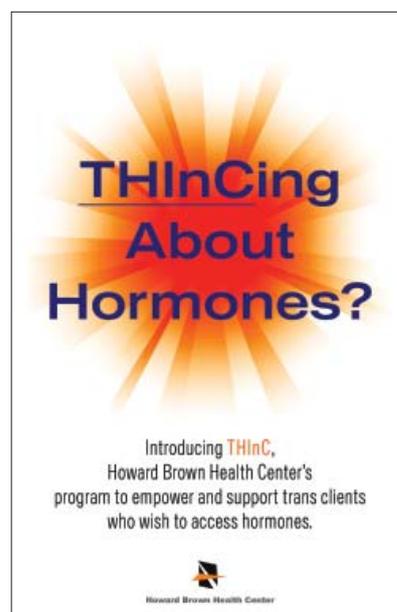
The *Informed Consent Protocols* revolve around trans people's right to self determination and provide hormone treatment in an easy and accessible way. The advantage of these models is that patients are not required to accept a gender identity

⁵⁷ 'Good practice example 2: Creation of a trans-specific equality and human rights policy' in *Equality and Human Rights Commission (2010), Provision of goods, facilities and services to trans people: Guidance for public authorities in meeting your equality duties and human rights obligations*, London: EHRC, p 26



disorder diagnosis and therefore have no reason to provide a false narrative about their identity. This fact also results in better alliances between patients and healthcare providers, as it allows for timely treatment of chief complaint and related symptoms/distress. Thus, hormone-naïve patients can begin hormone care within a month following the initial presentation while hormone-experienced patients do not have to have their treatment interrupted.

Whilst the models employed differ slightly, the clinics still rely on the following pillars: (i) an initial medical assessment, (ii) transgender counselling and education, (iii) a follow-up medical visit, (iv) ongoing engagement of the patient in primary health care, and (v) other available services as necessary.



Brochure of one informed consent model on access to hormones
www.howardbrown.org



Trans people deserve the highest possible level of quality healthcare. Therefore, healthcare providers should devise their treatments around the specific needs of each individual trans person, providing a holistic approach whereby equal attention is provided to the transition process as well as to long term healthcare.

Chapter 6

Dissociating Marital Status from the Gender Recognition Process

Recommendation 6:

Remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender.

The requirement for trans people to be ‘unmarried’ (also referred to as ‘the divorce requirement’) prior to their gender recognition is still very widespread in Europe. When this requirement was first introduced, its purpose was to preserve marriage as an unambiguous heterosexual institution consisting of opposite-sex spouses. It is hence both homophobic and transphobic, since it severely interferes with the privacy of both spouses to have their existing marriage protected and respected. It also acts as a gatekeeper for those trans people who would like to transition but are not willing to divorce their spouse.

Paradoxically, the divorce requirement is frequently overlooked by legislators and often remains present in national legislation even in states that have introduced marriage equality for different-sex and same-sex partners.

6.1 Removal of ‘the divorce requirement’ through legislation or litigation

6.1.1 Portuguese and Argentinean gender identity legislation

Lei n° 7/2011 (see 3.1.2) entered into force in **Portugal** in March 2011. None of the requirements contained in the law for a change of name and legal gender require any changes to one’s marital status. Trans people can thus change their gender marker and remain in existing marriages irrespective of whether they are of the same- or different-sex.

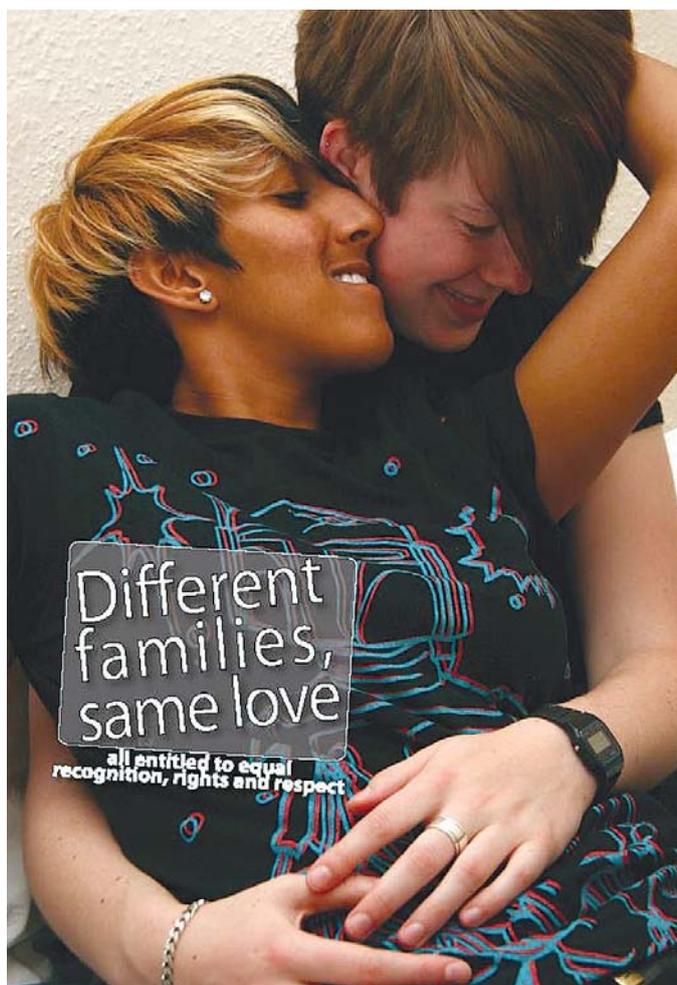
Similarly, should **Argentina** adopt *Ley de identidad de género* (see 3.1.1) all the rights that are held by the person prior to a decision of change of the gender marker under the law would remain unchanged (Article 14). This provision would apply equally to those rights derived from family law, including those regarding parenting and adoption.

6.1.2 Case-law of the European Court of Human Rights

The ECtHR has not yet been presented with the situation of a trans person wishing to remain in an existing marriage or registered partnership and is obliged to divorce prior to her/his change of legal gender. However, it is still relevant to mention the case of **Goodwin & I. v UK**,⁵⁸ concerning the right of transsexual persons to marry in accordance with their acquired gender. In this case, decided in 2002, the ECtHR established that United Kingdom had violated Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the ECHR in precluding Goodwin and I. from marrying a person of their post-operative opposite sex since until that time the United Kingdom did not have a system of changing the legal gender of trans people.

⁵⁸ Supra note 9





ILGA-Europe's *Different Families, Same Love* exhibition featuring an image on trans people's right to marry following ECtHR case-law

Following this decision the **United Kingdom** adopted the *Gender Recognition Act 2004* to rectify its position with regard to its obligations under the ECHR. Moreover, following the entry into force of the *Civil Partnership Act 2004* trans people are able to be in a legally recognised relationship irrespective of whether they are in a same- or different-sex relationship. This said, it is unfortunate that trans people are still required to dissolve their civil marriage/union in order to have their gender recognised. Indeed, while divorce and re-marriage/registration (depending on the sex of their partner) can be carried out on the same day, the presence of the divorce requirement in UK *Gender Recognition Act* is regrettable.

6.1.3 Unconstitutionality of 'the divorce requirement'

The domestic constitutional courts of both **Austria** and **Germany** have ruled that a change of sex on birth certificates should not require a mandatory divorce.

In 2006, the **Austrian Constitutional Court** repealed⁵⁹ the mandatory divorce requirement put in place by the Ministry of Interior through a decree regulating changes on birth certificates of transsexual people. In this case, the complainant was a trans woman who (prior to her transition) had married another woman and had two children with her. Due to the decree's divorce obligation, following her gender reassignment, the trans woman was presented with two unacceptable choices, i.e. (i) continuing her family life while having her identification documents constantly out her, or (ii) change her documents and certificates at the cost of losing her legal ties to her family. The Court ruled that the decree was unlawful as it could not find any law expressly prohibiting a change of birth certificate on the basis that a person is married.

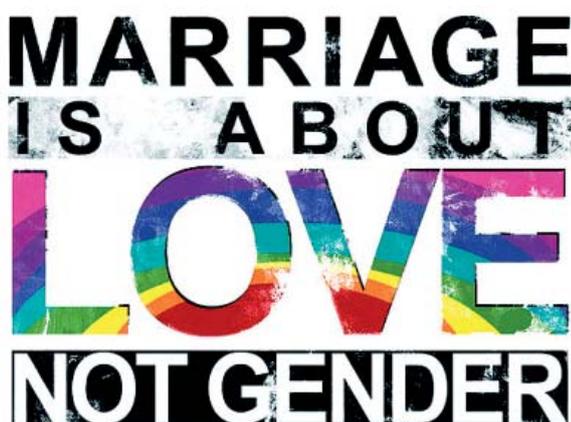
Following this decision, married trans people in Austria no longer need to obtain a divorce prior to getting their documents adapted to their new name and gender. However, marriage certificates have not been adapted, and only trans people residing in Vienna can remain in an existing marriage without disclosing their gender reassignment (discussed in detail in 6.2).

In 2008, the **German Federal Constitutional Court** declared⁶⁰ that prerequisites for the statutory recognition of transsexuals according to Article 8.1 nos. 3 and 4 of the *Transsexuellengesetz* were unconstitutional. This time, the complainant was a sixty-two-year-old trans woman who had requested a registered partnership with her female partner. Following her request, she was denied the ability to enter into a partnership on the basis that she had not yet undergone gender reassignment to change her gender marker to female (see 3.2.3) and that hence she and her partner could not have access to the institution of registered partnership as it was exclusively reserved for same-sex partners. The local court allowed her no other choice than to marry, in spite of the fact that the women argued that she could not undergo gender reassignment surgery (due to her age and the likely negative consequences to her health) and that she wanted to enter into a registered partnership to ensure that her trans identity is not made visible.

Following this decision, she took her complaint to the Constitutional Court, which ruled that forcing a trans women to enter into a marriage as a man, and as a result, to assign her a gender role that contradicts her gender identity was incompatible with the provisions in German Constitutional law protecting people's intimate sphere. In addition, the fact that trans people have to undergo gender reassignment surgery to enter into a registered civil partnership with their same-sex partner was incompatible with their right to sexual self-determination and physical integrity. The Constitutional Court therefore overruled the local court's ruling as it violated the complainant's fundamental rights and invalidated the problematic dispositions of the *Transsexuellengesetz* mentioned above.

In the view of the Commissioner for Human Rights,

"both rulings call on the state to accept that protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages."⁶¹



An image used in LGBTI marriage equality campaigns shifting the focus from gender to love

⁵⁹ *Verfassungsgerichtshof* [Constitutional Court], V 4/06-7, 08.06.2006

⁶⁰ *Bundesverfassungsgericht* [Federal Constitutional Court], BVerfG, 1 BvL 10/05, 27.5.2008

⁶¹ Commissioner for Human Rights (2009), *Gender Identity and Human Rights: Issue Paper*, Strasbourg: Council of Europe, p 23



6.1.4 German draft law on change of names and determination of gender identity

The draft gender identity law presented in the **German Bundestag** by Bündnis 90/Die Grünen (the Greens) in 2009 (discussed in 3.1.3), aims at simplifying procedures while guaranteeing respect of human rights and legal certainty for trans people. Two articles merit a particular mention:

“Section 3(4) – Application for the Determination of Gender Identity

An existing marriage or registered partnership shall remain unaffected by the amendment of the civil status.

Upon the application of both spouses/registered partners, an existing marriage may be converted into a registered partnership or vice versa.

[...]

Section 5 – Parent-Child Relationships

The decision that the applicant shall be considered as belonging to the other gender shall not affect the legal relationship between the applicant and their parents or the relationship between the applicant and their children. The same shall apply in relation to the descendants of these children.”



States are duty bound to protect families and the continuation of family life and to protect their citizens during vulnerable situations. The divorce requirement runs counter to this duty and is hence simply illegitimate. Legislators should follow the Argentinean and Portuguese legal model and remove any need for change in civil status prior to name change and gender recognition.

6.2 Gender neutral marriage certificate issued by the city of Vienna

Following the 2006 Austrian Constitutional Court judgment (covered in detail in 6.1.3), married trans people do not need to obtain a divorce in order to be officially recognised in a new gender and have their civil status documents adapted to their new name and gender role. However, in spite of this judgement, the Ministry of Interior did not adapt Austria’s civil-status-ordinance, and hence the marriage-certificate-forms continued to refer to the married same-sex partners as a ‘man’ and a ‘woman’. Beyond being false, this had the consequence of outing the trans spouse on every occasion that they needed to present a copy of their marriage certificate, especially since in Austrian same-sex partners are not yet able to marry.

In this context, the Austrian Administrative Supreme Court ruled⁶² that the marriage-certificate-forms prescribed by the Minister of Interior were not adequate in such cases. Following this ruling, in January 2010, the Ministry of Interior amended the marriage-certificate-forms. The reference to the sex of the spouses was removed, however, the amendment did not go as far as to address the real problem faced by trans people since they continued to be placed on the certificate in the place reserved for their former sex.

⁶² *Verfassungsgerichtshof* [Administrative Supreme Court], VwGH 2010/17/0042, 29.11.2010

In November 2011, the **City of Vienna** decided to overcome this situation by issuing its own marriage certificates for trans people that alter the gendered positions prescribed by the Minister of Interior. The new certificates are entirely gender neutral and list trans people in the place that is adequate for their gender and the other same-sex partner is displaced instead. This solution is much preferred as it carries the legitimate aim of protecting the privacy of trans people.



Authorities should always handle the privacy of trans people with care. If necessary, temporary or ad hoc solutions should be introduced to mitigate existing legal or administrative oversights that may expose trans people to discrimination.



In 1996, the CJEU ruled on the case of *P. v S. and Cornwall County Council*⁶³ establishing that the principle of equal treatment between women and men enshrined in “Article 5(1) of the directive [76/207/EEC] precludes dismissal of a transsexual for a reason related to a gender reassignment.”⁶⁴ This decision was subsequently confirmed in the cases of *K.B. v National Health Service Pensions Agency and Secretary of State for Health*⁶⁵ and *Sarah Margaret Richards v Secretary of State for Work and Pensions*.⁶⁶

Importantly, this principle was included in the scope of the EU’s directive tackling discrimination in access to goods and services (Directive 2004/113/EC);⁶⁷ and in Recital 3 of the EU’s recast legislation in the field of employment and vocational training (Directive 2006/54/EC).⁶⁸ Unfortunately, a level of ambiguity remains as to whether all trans people are covered by existing legislation or whether protection is only reserved for transsexuals due to the legislation’s reference to ‘gender reassignment’. In examining this issue, the EU Fundamental Rights Agency (FRA) seems to take the position that the law should not be narrowly construed. Indeed, in FRA’s opinion:

“Categorising discrimination on grounds of transgenderism under sex discrimination means, at a minimum, [...] will be fully applicable to any discrimination on grounds of a person intending to undergo, undergoing, or having undergone, gender reassignment. However, such protection from discrimination could easily develop into a broader protection from discrimination on grounds of ‘gender identity’, encompassing not only transsexuals, but also other categories, such as cross dressers and transvestites, people who live permanently in the gender ‘opposite’ to that of their birth certificate without any medical intervention, and all those people who wish to present their gender differently.”⁶⁹

FRA’s opinion has been corroborated by recently recast EU legislation in the field of asylum (Directive 2011/95/EU),⁷⁰ and other legislation that is in the pipeline where gender identity has been systematically included as a ground of anti-discrimination (substituting gender reassignment) and provided with consideration for special protection.



For more information on EU legislation as it is applicable to trans people refer to: Fabeni, Stefano & Agius, Silvan (2009), *Transgender People and the Gender Recast Directive: Implementation Guidelines*, Brussels: ILGA-Europe, online at: www.ilga-europe.org/home/publications/reports_and_other_materials/transgender_people_and_the_gender_recast_directive_implementation_guidelines_december_2009

⁶³ *P. v S. and Cornwall County Council*, Case C-13/94, [1996] ECR I-2143

⁶⁴ *Ibid*, Article 20

⁶⁵ *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, Case C-117/01, [2004] ECR I-541

⁶⁶ *Sarah Margaret Richards v Secretary of State for Work and Pensions*, Case C-423/04, [2006] ECR I-3585

⁶⁷ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [following 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs) held in Luxembourg on 4 October 2004, Draft minutes, Doc. No. 13369/04 of 27 October 2004, p 7]

⁶⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

⁶⁹ EU Agency for Fundamental Rights (2008), *Homophobia and discrimination on grounds of sexual orientation in the EU Member States* : Part 1 – Legal Analysis, Luxembourg: Publications Office of the European Union, p 22

⁷⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)



7.1.2 Swedish anti-discrimination legislation

In 2008, in a major restructuring of its equality legislation and implementation mechanisms, **Sweden** recast its various anti-discrimination and its ombudsman laws into just two mainstream equality acts. One law providing protection against discrimination, *Diskrimineringslag* (2008:567) (Discrimination Act),⁷¹ and another establishing a single multi-ground equality ombudsman (see 11.1.1). The most important aspect of this recast was the fact that all equality grounds were afforded the highest standard of protection in all spheres of life without hierarchy or distinction. Moreover, the ground of 'transgender identity and expression' was included in Swedish law for the first time. Thus, while transsexuals continued to be covered under the existing ground of 'sex' in line with CJEU case-law; transgender, transvestite and other gender variant people are now protected under a new trans-specific ground. Chapter 1 Section 5 of the Discrimination Act defines the ground of 'sex' and 'transgender identity or expression' as follows:

"1. Sex: that someone is a woman or a man.

2. Transgender identity or expression: that someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex."

For more information on Sweden's Act concerning the Equality Ombudsman and how transgender identity and expression were taken on board by the Ombudsman refer to 11.1.1.

7.1.3 Great Britain's equality legislation and public sector equality duty

Great Britain's Equality Act 2010⁷² entered into force in April 2011 and brought together all previous equality legislation into one act of law that expressly includes the ground of 'gender reassignment' for the first time. In the new act, gender reassignment has ceased to be considered as a medical process related to the undergoing of surgical gender reassignment and is instead understood as a personal process and a ground of discrimination. The Act also affords trans people specific protection for periods of absence from work related to gender reassignment. Part 2 Chapter 2 Section 16 of the Act states:

"Gender reassignment discrimination: cases of absence from work

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of gender reassignment.

(2) A person (A) discriminates against a transsexual person (B) if, in relation to an absence of B's that is because of gender reassignment, A treats B less favourably than A would treat B if—

(a) B's absence was because of sickness or injury, or

(b) B's absence was for some other reason and it is not reasonable for B to be treated less favourably.

(3) A person's absence is because of gender reassignment if it is because the person is proposing to undergo, is undergoing or has undergone the process (or part of the process) mentioned in section 7(1)."

Beyond protection from discrimination, the *Equality Act* built on the separate equality duties relating to race, disability and gender equality and set a new mainstream *Public Sector Equality Duty*.⁷³ This duty places an obligation on public bodies to work to eliminate discrimination, harassment and victimisation, advance equality of opportunity and foster good relations between different groups on each protected ground (including the grounds of 'sex' and 'gender reassignment'). Some aspects of the previous *Gender Equality Duty 2007* (referred to in 8.2.3) already covered gender reassignment, however, the new duty provides more robust coverage of trans people.

⁷¹ Online at: www.notisum.se/rnp/sls/lag/20080567.htm (in Swedish)

⁷² Online at: www.homeoffice.gov.uk/equalities/equality-act/

⁷³ Equality and Human Rights Commission (2011), *The essential guide to the public sector equality duty (Vol. 1 of 5)*, United Kingdom: EHRC, online at: www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guidance.pdf

7.1.4 California's transgender anti-discrimination legislation

In October 2011, **California's** trans anti-discrimination bill entitled *AB 887 Gender Nondiscrimination Act*⁷⁴ was signed by the Governor into law. The Act, took existing protections that were applicable to the grounds of gender identity and expression and spelt them out in specified anti-discrimination laws under the grounds of 'gender identity' and 'gender expression'. The express references to the grounds of gender identity and gender expression and the enumeration of the protection afforded made a significant difference as now, California's anti-discrimination laws clearly affirm trans people's rights. Employers, housing authorities and others are expected to work to prevent discrimination and/or respond more effectively and expeditiously at the first indications of discrimination.



National legislators should follow the examples set by Sweden and California and enact robust anti-discrimination legislation that takes trans people's rights fully into account. Gender identity and gender expression should be clearly included as autonomous grounds of discrimination. Anti-discrimination laws should also provide specific protection during gender reassignment related work absences and place positive equality duties on public administration. Furthermore, an equality body should oversee the implementation of the law/s and be able to propose legal amendments as necessary.

7.2 The United Kingdom's Transgender Action Plan

In 2010, the **United Kingdom's** Minister for Equalities acknowledged that while a lot of progress has been achieved in the UK's fight against discrimination, trans people's equality had not yet been adequately addressed and hence trans people still face many discriminatory practices and stigmatisation. Three surveys were thus conducted to gather information about trans people's experience of discrimination in (i) various spheres of life; (ii) healthcare; and (iii) employment and privacy. While an *LGBT Action Plan*⁷⁵ had already been launched in March 2011, following the publication of the survey's results the Minister became convinced that trans issues needed to be addressed more prominently through a specific action plan and in May 2011 a specific *Transgender Action Plan*⁷⁶ was launched.

The *Action Plan* covers a number of issues including education, employment, public services, access to healthcare, gender recognition and hate crime. For each of these areas, reference is made to the findings of the surveys, existing policies and identified good practices. The Action Plan subsequently lists the foreseen actions for the forthcoming three-year period with a clear timeline for each activity. It is noteworthy that the listed actions are rather diverse and range from publication of guidance, to provision of training, to specific information on pensions, taxes and so on. A key asset of the actions proposed is that they also focus on consultation of the trans community and capacity-building of trans organisations.



LGBT people are unlikely to achieve equality in society unless specific LGBT equality action plans are adopted by central government. Governments are urged to refer to the UK 'Transgender Action Plan' as the main reference document for ways of addressing trans issues under mainstream headers or specific actions directed towards the trans community.

⁷⁴ Online at: www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0851-0900/ab_887_bill_20111009_chaptered.pdf

⁷⁵ *Working for Lesbian, Gay, Bisexual and Transgender Equality: Moving Forward*, online at: www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/lgbt-action-plan

⁷⁶ *Supra* note 55



7.3 Policies and practices in the labour market

7.3.1 The European Trade Union Confederation defending the rights of LGBT employees

Across Europe, trade unions are increasingly aware that LGBT issues need to be addressed both as separate equalities concerns and as part of collective bargaining. A lot of work has already taken place at European and national level, to understand the specific workplace issues of LGBT people and to draw the adequate tools to promote equality within trade unions themselves and in workplaces in general. This work is often conducted in partnership with LGBTI civil society.

In 2007, the **European Trade Union Confederation** (ETUC) launched a project entitled *Extending Equality* to gather information on what its members were doing on LGBT equality at national level and to subsequently promote good practices. This project was prepared and conducted in partnership with ILGA-Europe all the way through.

Two surveys were launched, one by ETUC and the other one by ILGA-Europe to gather information on existing LGBT policies and practices in trade unions. The results were then launched at a two-day conference, held in 2008 that brought ETUC and ILGA-Europe's membership together to discuss how trade unions can work with LGBT civil society to address LGBT equality issues better. The conference provided ETUC with a lot of input and showed that the it was time for it to start addressing LGBT issues as a standalone area within its equality work.

A publication was launched later in 2008, highlighting the various good practice models discussed during the conference and laying out a template for trade union work on LGBT issues, also containing a separate trans-specific chapter. At the same time, ETUC launched a leaflet in all EU national languages listing ten things that trade unions can do to promote LGBT equality in the workplace and beyond.

In December 2008, ETUC adopted a resolution entitled *ETUC recommendations on actions and activities promoting equal rights, respect and dignity for workers regardless of their sexual orientation or gender identity* whereby it affirmed LGBT rights as trade union issue and committed its support for further action. Since then, regional trade union LGBT conferences have taken place in Warsaw and Rome during Europride. A week-long training programme was delivered to trade union LGBT officers from across Europe. ETUC has also set up a specific LGBT webpage gathering all of its LGBT resources as well as useful resources produced by some of its members.⁷⁷

7.3.2 UNISON's trans specific equality work

UNISON, the UK's largest public service union, has a very active LGBT section that has actively reached out to and recruited LGBT members at pride events and other LGBT gatherings. The union has made its LGBT equality work very visible and published several documents that are addressed to trans people, trade union representatives and human resource managers. Amongst them, one finds:

- The *Trans recruitment leaflet*⁷⁸ which lays out the benefits of trade union membership for trans employees.
- The *Transgender workers rights*⁷⁹ factsheet which is updated on a regular basis and provides information about the rights of trans people, and good practices for employers and branches of the trade union.

⁷⁷ See www.etuc.org/r/1355

⁷⁸ Online at: www.unison.org.uk/file/A3266.pdf

⁷⁹ Online at: www.unison.org.uk/file/Transgender%20workers%20rights%20-%20April%202011.doc

- The *Gender identity, An introductory guide for trade union reps supporting trans members*⁸⁰ in which UNISON lays out guidelines for trade unions willing to defend the rights of trans people.
- The *Guidance on trans equality in post-school education*⁸¹ which provides information to those working in post-school education on how to deal with gender identity issues in respect of the law.

7.3.3 Corporate social responsibility and equality indexing

In Europe, only a handful of companies have devoted specific attention to ensure that trans employees feel included in their workplaces. Those that do, usually do so within the framework of their LGBT diversity group. For such a framework to work well, however, such diversity groups need to actively reach out to trans employees or at least receive trans sensitivity training.

The *Corporate Equality Index* (CEI) of the **Human Rights Campaign** (HRC) has significantly contributed to raise awareness among large scale employers in the United States. The index rates companies against various objective criteria and subsequently determines how inclusive different corporations are of lesbian, gay, bisexual and trans employees through its percentage score. The information is then published by HRC in its annual CEI report and index, where an in-depth analysis explains the rating of large US employers and their policies and practices pertinent to LGBT employees.

Since 2006, the HRC has asked CEI survey participants to examine their insurance policies and to ensure that at least one of five general categories of insurance was available to trans employees without exclusion: (i) short-term leave; (ii) counselling by a mental health professional; (iii) hormone therapy; (iv) medical visits to monitor hormone therapy; and (v) surgical procedures. Since then, a growing number of corporations have included measures relevant for trans employees in their corporate equality policies while an increasing number of corporations include at least one of those items in their insurance policies.

As of 2007, HRC has also published its *Healthcare Equality Index* assessing healthcare providers and institutions in relation to their policies and practices related to lesbian, gay, bisexual and transgender patients and families. Criteria include “‘Gender Identity” in Patients’ Bill of Rights and/or Non-Discrimination Policy’ and “‘Gender Identity” in Equal Employment Opportunity Policy’ of the institution.



Corporations that meet all the criteria of the CEI receive a badge that can be used freely

⁸⁰ Online at: www.unison.org.uk/file/2010%20-%20STA%20UNISON%20trans%20guide%20for%20union%20reps.pdf

⁸¹ Online at: www.unison.org.uk/file/A7002.pdf



7.4 Policies and practices in education

Trans students may face compounded forms of harassment and discrimination during their studies. Beyond unsolicited comments and stares, trans students may experience difficulties in convincing fellow students, teachers and administrative staff to address them with pronouns that correspond to their appropriate gender role and name. They may also face difficulties in having their name and gendered references changed in all educational records (e.g. student cards, university certificates and other qualifications (see 3.3 above)), or in being able to wear a uniform in conformity with their gender (when uniforms are in use).

7.4.1 Turin University's trans inclusive policy

In 2003, the Equal Opportunity Committee of the **University of Turin** adopted a Code of Conduct that prohibits any discrimination or offensive behaviour based on sexual grounds. In addition, the University made it possible for trans students to have two identical result transcripts whereby one indicates the official name and the other the preferred name. This practice also helps trans students to overcome difficulties while following courses and sitting for exams in the event that their chosen name does not match their official one. This policy was also adopted by the Polytechnic Institute of Turin in 2011.

7.4.2 Sweden's project tackling transphobia in schools

In its effort to tackle homophobia and transphobia in schools, the **Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights** (RFSL) published a guide entitled, *Break the norm: methods for studying norms in general and the heteronorm in particular*.⁸² In simple language and through the use of various visual aides, this guide explains the mechanisms of gender stereotypes and heteronormativity and how they lead to discrimination against LGBT people. This guide was successfully used in school settings and helped teachers to facilitate a discussion on the impact of gender stereotypes. The perspectives employed in such debates have also helped students better understand how certain norms have a disproportionate impact on some communities and thus become more aware of the mechanism of discrimination against LGBT people.

7.5 Policies and practices in health services

7.5.1 World Professional Association for Transgender Health's standards of care

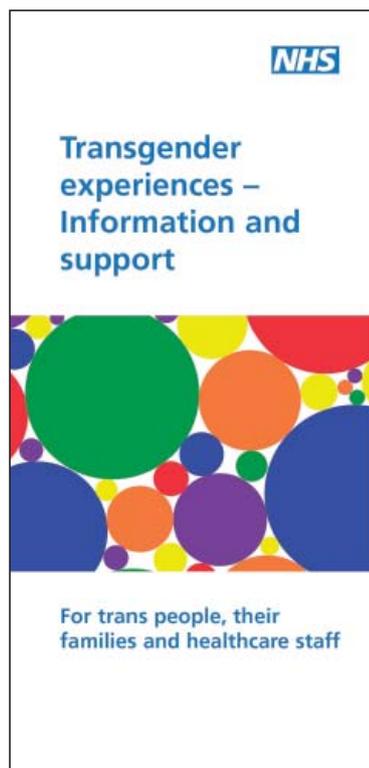
The **World Professional Association for Transgender Health** (WPATH) developed internationally recognised *Standards of Care* (SoC) for the treatment of 'gender dysphoria' and the promotion of health and welfare for trans people. These standards are an important source of reference for any training specifically addressing trans-related healthcare provision. The latest version of the SoC⁸³ has also made strides ahead in focusing on the well-being of a trans people with strong reference to their human rights while moving away from conceiving trans identities as [mental] disorders.

The *International Journal of Transgenderism* (IJT) which are accessible to WPATH members, regularly publishes papers on developments in trans-related healthcare.

⁸² The Living History Forum & RFSL Ungdom (2009), *Break the Norm! methods for studying norms in general and the heteronorm in particular*

⁸³ The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th version)*, online at: www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf

7.5.2 The National Health Service's support to trans people's health



NHS' brochure for trans people, their families and healthcare staff

The **National Health Service** (NHS) has made its trans people's health support visible both through its work and on its website, where a dedicated webpage⁸⁴ was set up. The NHS also developed various guidelines and leaflets that aim to provide support to trans people and their families, and improve the knowledge of healthcare practitioners.

While there are many guidelines and leaflets on health issues produced by trans organisations (see 10.3.2), it has been quite seldom that a public institution has taken the initiative to make such information available themselves. Amongst these materials, the NHS produced a brochure entitled *Transgender experience, information and support*.⁸⁵ The leaflet is packed with accessible information for trans people and their family. It also recommends that healthcare practitioners use inclusive language and pay attention to trans people's privacy. Finally, the brochure provides an extensive list of useful contacts.

7.5.3 The Sexual Orientation and Gender Identity Advisory Group within the NHS

The United Kingdom's Transgender Action Plan (see 7.2) stresses the need for on-going dialogue between the trans community, the medical profession and National Health Service (NHS) commissioners, to share best practice and review how trans people can feed into health policy.

The **Sexual Orientation and Gender Identity Advisory Group** is composed of stakeholder individuals and organisations that advise the United Kingdom Department of Health on ways of tackling LGBT discrimination in access to health and social care. The Advisory Group assists in policy making with regards to reduction of health inequalities, better employment practices, service improvement and trans health amongst others.

7.5.4 Training and awareness raising on trans health

For more information on various initiatives on training and awareness raising on trans health refer to Chapter 10.

⁸⁴ See www.nhs.uk/Livewell/Transhealth/Pages/Transhealthhome.aspx

⁸⁵ Online at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_097168.pdf



Chapter 8

Implementing International Human Rights Standards

Recommendation 8:

Involve and consult transgender persons and their organisations when developing and implementing policy and legal measures which concern them.

‘Nothing about us without us’ has been one of the recurrent rallying calls of marginalised groups, including trans communities. In spite of this, until a few years ago trans communities have hardly been consulted about matters that affect their daily lives beyond in a handful of cases. On a positive note, an increasingly visible trans movement with a strong collaboration with LGBTI organisations is fast filling in the gap. The emergence of the trans movement at regional and international level has meant that work is increasingly coordinated and the argumentation well researched and articulated.

8.1 The Council of Europe’s consultative approach with regard to legislative proposals

8.1.1 Consultation in preparation of the Committee of Ministers’ Recommendation

The CoE Committee of Ministers’ Recommendation was developed by the Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT).⁸⁶ ILGA-Europe and Transgender Europe were included as observers to the drafting process.

This was the first time that a regional non-governmental network focusing on the rights of trans people was officially part of such a high-level process with the goal of producing a soft-law mechanism. The adopted Recommendation mainstreamed trans issue and trans sensitive language throughout following the input provided by Transgender Europe and ILGA-Europe.

For an overview of the Committee of Ministers’ Recommendation see 1.3.4.

8.1.2 ILGA-Europe’s Observer Status at the CAHVIO Expert Committee

Similarly, when the Council of Europe set up the Ad Hoc Committee on preventing and combating violence against women and domestic violence (CAHVIO)⁸⁷ for the drafting of a convention tackling gender-based violence, ILGA-Europe applied for and received Observer Status at the Committee. It then prepared a submission on violence against LBT women⁸⁸ explaining that such violence is essentially gender-based and that it should be covered by the Convention. Through its Observer Status, ILGA-Europe was able to brief Member States representatives on the need to have sexual orientation and gender identity expressly included in the scope of the anti-discrimination article.

For an overview of this Convention see 2.1.1.

⁸⁶ See www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/dh-lgbt_committee_EN.asp

⁸⁷ See www.coe.int/t/dghl/standardsetting/violence/general_en.asp

⁸⁸ ILGA-Europe (2009), *Submission to the Council of Europe Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence: The need to ensure that the Convention on violence against women addresses effectively the obligation of member states to prevent and combat violence against lesbian, bisexual and transgender women*, online at: www.coe.int/t/dghl/standardsetting/violence/ILGA-Europe%20VAW%20Convention%20submission%208%2009%2009.pdf



Public administrations should always include trans communities in consultations in the drafting process towards the adoption of new legislation and policies that directly or indirectly impinge on trans people's quality of life and wellbeing.

8.2 Policy consultation at regional and national level

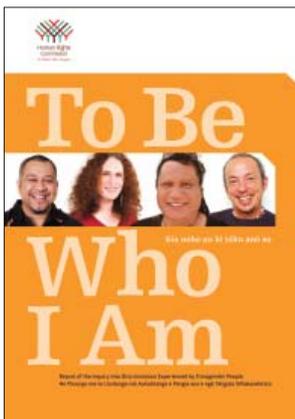
8.2.1 Commissioner for Human Rights' consultation on trans issues



Group picture of the participants of the trans experts meeting with Commissioner Hammarberg

In November 2008, the CoE Commissioner for Human Rights, Thomas Hammarberg, organised an expert meeting under the title *Human Rights Situation of Transgender People and Discrimination Based on Gender Identity*, to which he invited representatives of national and European trans organisations. The key areas of concern and experiences of discrimination that were highlighted during this meeting were subsequently reflected in the Commissioner's *Human Rights And Gender Identity Issue Paper*⁸⁹ (published the following year) as well as in other publications and statements by the Commissioner. This was the first time that European trans activists were invited as key experts to share their experiences and knowledge and directly input towards the work of an international human rights institution.

8.2.2 New Zealand Human Rights Commission's 'To Be Who I Am' inquiry



To Be Who I Am (2006) www.hrc.co.nz/hrc_new/hrc/cms/files/documents/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf

In **New Zealand** a consultation was conducted among over 5000 people in 2005, in preparation towards the country's *Action Plan for Human Rights*. This consultation revealed that the trans community constituted one of the most marginalised groups and recommended that another trans-specific inquiry is conducted to gather a nuanced understanding of their experience of discrimination.

⁸⁹ Supra note 61



In response to this recommendation, in 2006, the **New Zealand Human Rights Commission** (HRC) launched an inquiry among a diverse group of 200 trans and intersex people whose age ranged between eleven and seventy years. The participants of this inquiry, recounted their personal stories of discrimination in employment, and access to services and housing; harassment in public and private spaces; as well as their experiences as victims of violence. The inquiry gathered a lot of information through face-to-face interviews and group discussions as well as through written submissions. Additionally, input was proactively sought from diverse settings ranging from the offices of a sex workers' organisation to a large meeting among Maori trans people.

Following this inquiry, the Commission published a report entitled *To Be Who I Am/ Kia noho au ki tōku anō ao*.⁹⁰ Through a set of recommendations, the report called for immediate action by: (i) increasing the participation of trans people in decisions that affect them; (ii) strengthening the legal protections to ban discrimination on the ground of gender identity; (iii) improving access to health services, including gender reassignment services; and (iv) simplifying requirements for change of sex on official identification documents.

Since the publication of the report, the Commission has worked with other institutions to implement these recommendations. For instance, workshops on awareness raising on trans rights, and consultation on trans issues have been organised to increase the participation of the trans community. The HRC has liaised with the Ministry of Education in an effort to end discrimination against trans pupils. Progress has also been made in the field of legal gender recognition as a prior gender reassignment is no longer a requirement, while all adult persons can freely choose their gender marker on their passport to match their gender identity as either 'M' (male) or 'F' (female), or a neutral 'X' category for those who do not wish to identify as either.⁹¹ When it comes to access to public health, the Ministry of Health has published a guide of good practices for healthcare professionals.

8.2.3 Scottish Government's work in partnership with trans organisations

In the **United Kingdom**, the *Gender Equality Duty* (GED) came into force in April 2007 and required all UK public authorities to carry out their functions in due regard of the need to: (i) eliminate unlawful discrimination and harassment on the grounds of sex, and (ii) promote equality of opportunity between women and men.

The GED expressly included transsexual people by stating that:

"[...] authorities also have an obligation to eliminate discrimination and harassment towards current and potential transsexual staff and to transsexual service users."⁹²

Policy makers in **Scotland** realised that the needs of trans citizens were not adequately addressed by the existing public structures and that they did not have sufficient expertise to redress this problem. Thus, they understood that in order to improve trans people's living experiences, trans communities needed to be considered as key stakeholders to any policy making process that was likely to affect their lives. Through a pilot project, the Scottish Transgender Alliance (STA) was provided with public funding for one year, to provide training sessions on trans issues to the Scottish Parliament, government and public authorities; and to develop trans related policies and function as a partner for other equality NGOs.

⁹⁰ Human Rights Commission (2007), *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People*, Auckland: HRC

⁹¹ See www.passports.govt.nz/Transgender-applicants

⁹² UK Gender Equality Duty (2006), *Overview of the gender equality duty*, p 3

The success of the approach led to an extension of the funding in order to coordinate the input towards policy making from the different trans communities of Scotland.

The continuous willingness of the Scottish Government to engage with the trans community lead to various discussions on policy and legislation. Following input provided by STA regarding the Scottish trans people's experience of bias-crime and violence, the Scottish Parliament progressed the hate crime legislation expressly covering gender identity (see 2.1.2).



The above examples highlight that the best consultation processes are those that run the full cycle of (i) identifying trans exclusion as a problem that requires redress; (ii) consult trans communities; (iii) develop an adequate action plan with clear targets; and (iv) implement the action plan in consultation and along with trans communities.

More information for civil servants and trans communities on how to engage in fruitful partnerships can be found in “...and Others!” toolkit, online at www.tgeu.org/argumentation_toolkit



Chapter 9

Providing Training and Raising Awareness

Recommendation 9:

Address the human rights of transgender persons and discrimination based on gender identity through human rights education and training programmes, as well as awareness-raising campaigns.

There is lack of awareness on trans issues among wide sectors of society including decision makers, educators, lawyers and medical practitioners amongst others. In addition, trans people themselves are not always aware of their rights and the redress mechanisms at their disposal. Thus, it is important that awareness is raised among as many people as possible, while training is provided to professionals and to the trans community itself.

9.1 Awareness raising among Euro-parliamentarians

(TRANS)GENDER EQUALITY?

Conference

hosted by
Marije Cornelissen,
FEMM Coordinator (Greens/EFA)

and co-organised by
Eva-Britt Svensson,
FEMM Chair (GUE/NGL),
Britta Thomsen,
FEMM Coordinator (S&D)
Antonya Parvanova,
FEMM Coordinator (ALDE)
and the Intergroup on LGBT Rights

Wednesday
1 September 2010
9.00-13.00

Followed by a networking lunch
Room ASP 1G3,
European Parliament, Brussels

Among guest speakers:
Belinda Pyke Director of Equality between Women and Men, Action Against Discrimination, and Civil Society, European Commission
Ben Baks Member, DH LGBT working group, Council of Europe
Prof. Christa Tobler Professor of European Law, Leiden University
Silvan Agius Policy Director, ILGA-Europe
Transgender activists from European, Belgian and Spanish organisations

Online registration (by Thursday 26.08 at noon) on
<http://greens-efa-service.org/event/transgender>
Programme and information on www.greens-efa.eu

Simultaneous interpretation will be provided in DE,EN,ES,FR,SV

The Greens | EFA
in the European Parliament

THE EUROPEAN PARLIAMENT'S
INTERGROUP ON
LGBT RIGHTS

The *(Trans)gender Equality? Conference* was held at the European Parliament in September 2010, co-hosted by the Greens/EFA Group and the Intergroup on LGBT Rights. Academic and civil society experts from both the European and national levels explored: (i) the situation of trans rights in Europe; (ii) the coverage of trans people under the existing EU legal framework; and (iii) how trans people can be afforded better protection in the future.⁹³

The conference was well attended and reached the goal of increasing the level of trans sensitivity among the Member of the European Parliament as can be witnessed through the increased number of references that the Parliament makes to trans issues in its reports and debates.

Promotional poster of the (Trans)gender Equality? Conference

⁹³ Summary of the proceedings, online at: www.lgbt-ep.eu/intergroup-documents/summary-transgender-rights-conference-european-parliament/



Politicians and members of parliament should be informed about the social and legal situation of trans people so that they are able to distinguish between facts and misconceptions when debating new laws, budgets or policies that have direct or indirect impact on trans people.

9.2 Awareness raising among professionals

9.2.1 Training of human resource managers

In 2007, the **Malta Gay Rights Movement** (MGRM) conducted research on the situation of trans people in the labour market through face-to-face interviews. It also conducted parallel research to identify good practice models for trans people's access to the labour market from around Europe.

Following the initial round of data collection, MGRM organised tailor-made training sessions for human resources managers on a one-on-one basis. The training outlined the difficulties experienced by trans people in accessing and staying in employment due to discrimination, and provided recommendations for workplaces that are trans inclusive. A leaflet of guidance for employers⁹⁴ was delivered in conjunction with the training, providing human resource managers with a concise resource containing a set of definitions of key concepts, various recommendations, contacts of support groups and trade unions, and a reminder of the duties under domestic and European legislation.

9.2.2 Training and provision of resources for media professionals

Trans Media Watch (TMW) is a media watchdog based in the United Kingdom that focuses its attention on the quality of representation of trans people in the media. TMW's pioneering research⁹⁵ showed that stereotypical representation of trans people directly impacts trans people in their daily life in the form of harassment and stigmatisation. They therefore offer training sessions and web-based tools to media professionals on accurate representation of trans people. They also guide media professionals through frequently met problems such as inadequate approaches and common misunderstandings about the experiences of trans identified people, while assisting them with practical suggestions and advice.

The *Memorandum of Understanding*⁹⁶ prepared by TMW with several major media organisations who share the basic principle that trans people are to be treated with accuracy, dignity and respect is most remarkable. The document focuses on: (i) eliminating transphobia in the media; (ii) ending misinformation about trans issues in the media; (iii) increasing positive, well-informed representations of trans people in the media; and (iv) ensuring that trans people working in or with the media are treated with the same respect as cisgender (non-trans) people. The memorandum of understanding has been well received as a very useful resource and has already been endorsed by Channel 4 and Women in Journalism.

⁹⁴ Malta Gay Rights Movement (2007), *Transgender issues in the workplace, guidelines for employer*

⁹⁵ Trans Media Watch (2010), *How Transgender People Experience the Media: Conclusions from research November 2009-February 2010*

⁹⁶ Online at: <http://www.transmediawatch.org/Documents/Memorandum%20of%20Understanding.pdf>



9.3 Awareness raising among the general public

Some of the preferred mediums to reach out to the general public are the use of billboards adjacent to main roads and public service announcements on television. The cities of **Sao Paulo** (Brasil) and **Bogota** (Colombia) have both used mass media to promote equality for LGBTI people, providing adequate coverage of trans issues, and trans people's visibility.

9.3.1 Sao Paulo's campaign challenging stereotypes against transvestites



São Paulo's campaign to combat transphobia entitled: 'Look, look again, and see beyond prejudice'

In **Sao Paulo** and other Brazilian cities, trans people (especially transvestites) are subject to recurrent harassment, discriminatory violence and murders. In 2011, a campaign⁹⁷ was put together to challenge stereotypes against them through posters, brochures and other media, and to promote human rights and prevent HIV infections.

This campaign was designed and produced by transvestite people themselves, under the campaign slogan, 'I'm a transvestite. I have a right to be who I am.' This approach allowed transvestites to portray themselves through their own eyes and to recount their own stories without any external filters.

As stated, the goal of the campaign was twofold: (i) on the one hand, it wanted to promote social inclusion and a positive image of transvestites, while combating violence and discrimination; and (ii) on the other hand, it wanted to disseminate knowledge about ways of preventing the spread of HIV and other sexually transmitted diseases. While these two goals may appear to be unrelated, the Sao Paulo Department of Sexual Health supported the dual approach chosen for this campaign as the Department is well aware of the increased vulnerability to HIV infections amongst victims of violence and discriminated communities. This campaign was co-sponsored by the Brazilian State of São Paulo in partnership with the São Paulo City Metro.

⁹⁷ Summary of the proceedings, online at: www.aids.gov.br/travestis

9.3.2 Bogota's campaign promoting equality and inclusion for LGBT people



Bogotá's Planning District Department's trans specific poster of an LGBT equality publicity campaign stating: 'In Bogota one can be transgender'

In Bogota a large scale equality campaign was launched in 2011 to promote equality for LGBT people and their visibility in society. The theme of the campaign is 'In Bogota you can be...'⁹⁸ The campaign material has appeared on bus stops and elsewhere around the city, and have been promoted both by official institutions and by activists alike. The campaign is funded by the city of Bogota.



Public authorities are urged to liaise with trans civil society and professional organisations to identify the most pressing training needs and ways of promoting a positive image of trans people in society at large.

⁹⁸ Campaign videos, online at: www.youtube.com/user/DIRDIVERSEXUAL



Chapter 10

Providing Training to Specific Professions

Recommendation 10:

Provide training to health service professionals, including psychologists, psychiatrists and general practitioners, with regard to the needs and rights of transgender persons and the requirement to respect their dignity.

Access to adequate healthcare services is paramount for trans people. This means access to well-trained professionals in the pertinent specialisations who are competent to work with gender variant clients. For such a standard to be met, professionals in the field need to be trained both in terms of trans specific healthcare needs; and in gender diversity and the diversity within the trans community itself.

10.1 Setting the right framework for provision of training on trans health

10.1.1 General Medical Council's provision of training to medical practitioners

Great Britain's *Equality Act 2010* (see 7.1.3) extends an equality duty on healthcare service providers to actively pursue equality for both their trans employees and clients, while the *Transgender Action Plan* (see 7.2) supports the equality duty through staff training and other healthcare specific actions. In view of the above, a concise guide on care pathways and available treatments is expected to be published in 2012 for health practitioners, targeting general practitioners, primary care trusts, and the trans community. This guide should cover information on health of young trans people and post-transition general healthcare issues.

The **General Medical Council** (GMC) is the lead institution fostering good medical practice and regulating all stages of medical practitioners' training and professional development including undergraduate, postgraduate education and training and continuing professional development. Its recent equality impact assessment took into account trans needs and has shown that there are a number of gaps in training and care provision that require redress. In this respect, *General Medical Council Equality and Diversity Scheme 2011-2014*⁹⁹ defines measurable actions targeted at trans people as patients, doctors and employees. GMC also identified the following training measures: (i) all Medical General Council staff should complete diversity awareness training (inclusive of gender identity); (ii) all associates need to complete tailor made diversity awareness training depending on their role; (iii) a diverse range of trainers will be made available; (iv) there will be regularly reviews and action will be taken on delegate feedback; and (v) emphasis will be placed on the building of confidence, tackling of prejudice and ensuring fairness, transparency and non-discrimination. The identified measures are set to be implemented as of the beginning of 2012, and will be subject to annual equality assessments.

⁹⁹ Online at: www.gmc-uk.org/about/equality_scheme.asp



Public authorities and training providers are encouraged to assess whether existing professional education training enables health professionals to meet the health needs of trans people. They are also encouraged to enter in dialogue with trans civil society organisations to ensure that they update and improve the contents of training curricula in the most appropriate manner.

10.1.2 Greater Glasgow and Clyde NHS Board's trans awareness training

Following findings that showed that more needed to be done to provide trans clients with access to adequate healthcare, **Greater Glasgow and Clyde NHS Board** organised a training day on trans awareness for its corporate inequalities team and other managers. This training specifically looked at trans people's lived experience as well as the human rights issues of those trans people who do not intend to undergo gender reassignment. The training provided: (i) concrete recommendations and guidance on the appropriate single-sex ward placement; (ii) duty to respect the gender identity in the absence of a Gender Recognition Certificate; and (iii) the rights of trans and intersex young people. This training was greatly appreciated by the participants as they felt that they gained a well rounded understanding of the sort of issues that trans people face and they were better equipped to work in the field.

To learn more about the approach of Greater Glasgow and Clyde NHS Board's work on trans issues refer to 5.2.2.

10.1.3 TransMedicine online discussion group

Ongoing professional exchange is very important for all medical practitioners who want to remain up-to-date with evolving techniques and standards of healthcare provision. One way of maintaining such an exchange is through online discussion groups.

The **TransMedicine** online discussion group¹⁰⁰ is a restricted forum for health professionals primarily consisting of physicians. Members of the group discuss aspects of transgender medicine focusing on hormone therapy, transgender primary care, research, and access to care. This discussion group welcomes all interested healthcare professionals to apply for membership and join the discussion.

10.1.4 Center of Excellence for Transgender Health

The **Center of Excellence for Transgender Health** is based in San Francisco and associated with the University of California, and is global leader in training provision on trans-related health care. The Center consciously incorporates trans participation to ensure that all steps and measures are taken along with the community.

All programmes are developed in response to community-identified needs and a national advisory body made of fourteen trans-identified community leaders from across the United States is actively engaged. For health practitioners the Center offers an online learning centre¹⁰¹ that contains a great range of resources (professional literature, guidelines and best practices, materials from conferences, lectures and online training) on topics such as primary and routine care, HIV prevention, cultural competency, mental health and policy formation.

¹⁰⁰ Join at: groups.yahoo.com/group/transmedicine/

¹⁰¹ Online at: transhealth.ucsf.edu/trans?page=lib-providers





Training and policy institutions stand to benefit from a structured engagement with the trans community whether it is through formal advisory groups or otherwise. Such institutions should always ensure that they seek interlocutors that adequately reflect the diversity within trans community itself.

10.2 Training and materials by trans civil society

Trans issues tend to be inadequately addressed in current educational curricula for health professionals. In this gap, trans civil society organisations in many countries have developed their own expertise on the subject and provide voluntary training to medical professionals.

10.2.1 Trans sensitisation training for medical professionals in Kyrgyzstan

Since 2006, Kyrgyz NGO **Labrys** has raised awareness about specific healthcare concerns of LGBT people and provided training sessions to sensitize medical professionals working with the LGBT community. In 2008, one such training session was provided over a whole week to fourteen doctors and nurses. It covered the healthcare needs of LGBT people, while providing a two-day session focussing on trans-specific health needs. The training dealt with stereotypes affecting the LGBT community and the appropriate terms and definitions with which LGBT people should be addressed. For the purpose of this training session, Labrys invited international trans trainers to provide an introductory overview on transgender issues and to show that trans people exist everywhere.

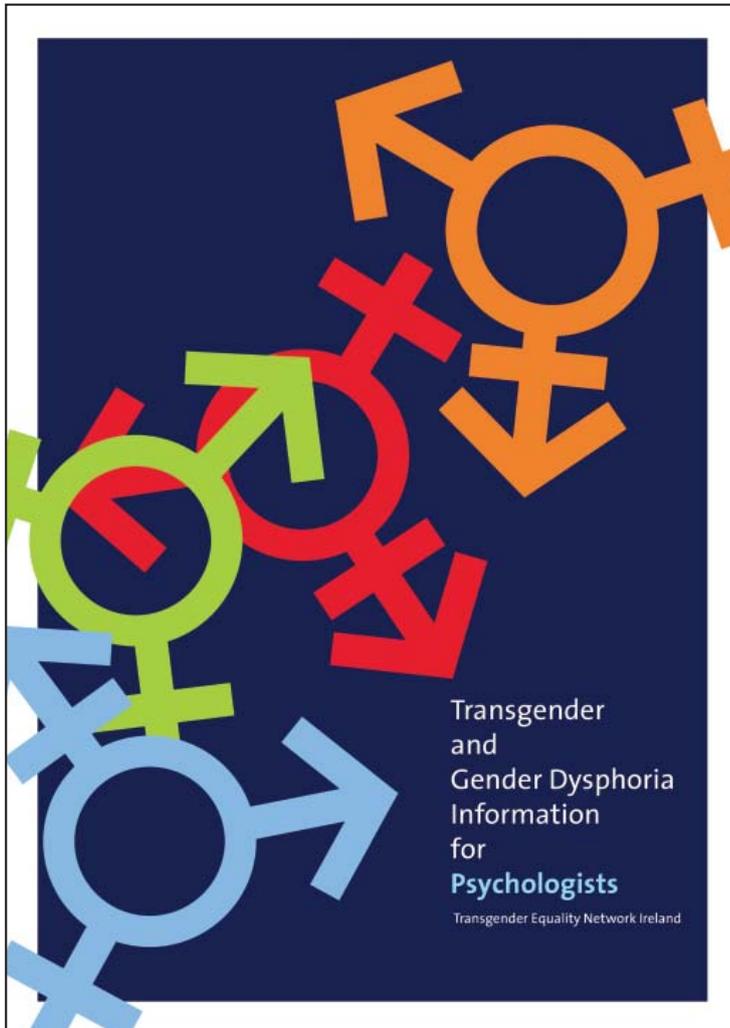
Labrys also produced a series of five Russian language brochures on trans issues for psychiatrists, urologists, gynaecologists, endocrinologists, psycho-therapists and family councillors. An LGBT guide in Russian and Kyrgyz entitled *Doctor, this for You!* was also produced. Labrys continues the collaboration with medical professionals and provides information to requests (e.g. medical protocols on working with transgender patients) based on responses received from WPATH medical specialists.



Doctor, this for You! (2009)
labrys.kg/files/DoctorForYou_2009.pdf

10.2.2 Brochures for medical professionals

Given the lack of materials on trans-related health, many trans civil society organisations have developed and circulated their own educational materials for healthcare professionals. These publications are often inspired by recurrent problems experienced by trans patients and address specific ethical questions and provide templates for codes of conduct.



Transgender and Gender Dysphoria Information (2007)
www.teni.ie/page.aspx?contentid=78

In 2007, Transgender **Equality Network Ireland** (TENI) produced a series of guidelines aimed at improving the knowledge of certain categories of health professionals. These guidelines under the title *Transgender and Gender Dysphoria Information* were published for psychiatrists, psychologists, and guidance counsellors respectively, and include (i) definitions of key concepts, such as 'gender identity', 'gender variant' and 'transphobia'; (ii) a set of questions that professionals may consider thinking about (e.g. are you comfortable with these issues? what is your approach to gender?); and (iii) a series of recommendations specific for each category of health professionals.



Health professionals, especially those who deal with trans patients infrequently, are encouraged to familiarise themselves with trans health brochures and other publication as these can help them to refresh their knowledge and guide them to other adequate sources.



Chapter 11

Including Gender Identity in the Scope of Equality Bodies

Recommendation 11:

Include the human rights concerns of transgender persons in the scope of activities of equality bodies and national human rights structures.

The United Nations' *Principles relating to the Status of National Institutions (The Paris Principles)*¹⁰² define the responsibilities of national human rights institutions (including equality bodies) and their ability to submit opinions and recommendations on any issues related to the promotion and protection of human rights.

Furthermore, in Article 45 of its Recommendation (see 1.3.4), the CoE Committee of Ministers calls on Member States to:

“ensure that national human rights structures are clearly mandated to address discrimination on grounds of sexual orientation or gender identity; in particular, they should be able to make recommendations on legislation and policies, raise awareness amongst the general public, as well as – as far as national law so provides – examine individual complaints regarding both the private and public sector and initiate or participate in court proceedings.”

11.1 Legislation empowering equality bodies to deal with trans issues

While gender reassignment is clearly included in the coverage and scope of EU legislation (discussed in 7.1.1); it is still unclear whether the *Gender Goods and Services Directive 2004/113/EC* and the *Gender Recast Directive 2006/54/EC* oblige Member States to provide their gender equality bodies with the remit to cover discrimination against trans people as well. This lack of clarity is manifested through the fact that, to date, only slightly more than half of [gender] equality bodies within the EU have undertaken some work to promote equality for trans people.

11.1.1 Sweden's equality body law

As discussed in 7.1.2, in 2008, in a major restructuring of its equality legislation and implementation mechanisms, **Sweden** recast its various anti-discrimination and its ombudsman laws into just two mainstream equality acts. *Lag (2008:568) om Diskrimineringsombudsmannen*¹⁰³ (Act concerning the Equality Ombudsman) brought the previous four single strand equality bodies into one institution, covering all of Sweden's seven equality grounds, which amongst others include 'gender', 'transgender identity and expression', and 'sexual orientation'.

The Act provides the Equality Ombudsman (DO) with a wide remit to tackle existing discrimination and ensure that equality is mainstreamed in all area of life. Since, transgender identity and expression was only added as a ground of

¹⁰² Adopted by General Assembly resolution 48/134 of 20 December 1993

¹⁰³ Online at: www.notisum.se/rnp/sls/lag/20080568.htm (in Swedish)

anti-discrimination in Swedish legislation in the 2008 recast, the Equality Ombudsman has taken a particular focus on transgender identity and expression to raise awareness on the ground, and to ensure that trans people build confidence in the institution and refer to it in the event that they are discriminated. Specifically, the Ombudsman has set up an internal working group tasked with devising strategies for effective work towards transgender identity and expression; called for a change in the two laws from 'transgender identity or expression' to the more appropriate ground of 'gender identity and gender expression', and developing tools to raise rights awareness among the trans community.

The Swedish Equality Ombudsman has also adopted a norm critical perspective in its work on LGBT issues which proves to be a very useful approach. This approach underlines that people do not simply have a fundamental right to be different, but rather a right to be 'themselves'. This means that the Ombudsman moved away from a discussion on what is normal/deviant and majority/minority. Instead it focused on the issues of discrimination themselves. To achieve this goal, the Ombudsman's office provided internal training in norm critical thinking from an LGBTI perspective to its entire staff.



When setting up or widening the scope of existing national equality bodies, national administrations should refer to Sweden's Act concerning the Equality Ombudsman as it serves as an excellent model for proactive equality bodies that fully meet the recommendations of the CoE Committee of Ministers and Commissioner for Human Rights.

11.2 Equality bodies' proactive policy work covering trans people

11.2.1 EQUINET's work to increase national equality bodies' coverage of gender identity



EQUINET's roundtable on trans issues at the European Parliament (2010)
www.equineteurope.org

The **European Network of Equality Bodies** (EQUINET) acts as a platform at European level and supports its member's work through the sharing of good practices and the provision of training.

In 2009, EQUINET conducted a survey to assess its members' work on trans issues and to raise awareness on how equality bodies can address discrimination against trans people. The findings have shown that while some equality bodies were already undertaking various activities (such as research, cooperation with trans organisations, or providing training on trans issues) there was still a lot of room for improvement.

EQUINET thus followed this survey with a review of what equality bodies could do to enhance trans people's equality. In 2010, EQUINET published *Making Equality Legislation work for Trans People*¹⁰⁴ which provides various recommendations to its members and to the European institutions.

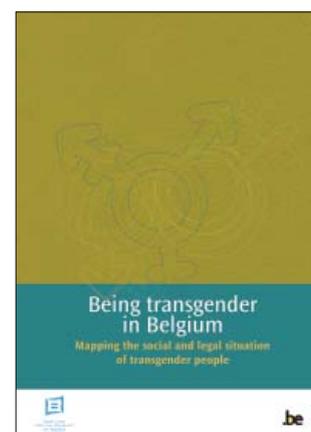
The ten recommendations for member equality bodies revolve around firstly making trans issues a concern and taking the time to understand them; secondly the internalisation of the knowledge into the equality body's work and make trans issues visible; and thirdly the development of an outwardly approach through strategic casework, engagement with other stakeholders and direct communication with trans people.

EQUINET also provides three recommendations to the European Union: (i) "Name trans people in the equal treatment Directives," (ii) "Proactively advance the situation of trans people through implementation of the new strategy for equality between women and men," and (iii) "Support advocacy initiatives by trans people at Member State level."¹⁰⁵

Following the launch of this publication, EQUINET organised a roundtable at the European Parliament which brought together representatives of the European Commission, European Parliament, EU Agency for Fundamental Rights, European Institute for Gender Equality (EIGE), member equality bodies, civil society, and other stakeholders to discuss the implementation of the document particularly with regard to ways of making equality legislation work for trans people. Subsequently, EQUINET also provided training sessions to its members on ways of implementing existing gender equality legislation taking into account gender identity dimensions.

11.2.2 Research report on the situation of trans people in Belgium

In 2009, following a number of complaints of discrimination received from trans people, **Belgium's** Institute for the Equality of Women and Men took the proactive step to commission comprehensive nationwide research on the situation of trans people. The findings were then published in 2010 in a report entitled, *Being transgender in Belgium: Mapping the social and legal situation of transgender people in Belgium*.¹⁰⁶ The main recommendations of the report referred to: (i) the need of reviewing the criteria for



Being Transgender in Belgium (2009)
igvm-iefh.belgium.be/fr/binaries/34%20-%20Transgender_ENG_tcm337-99783.pdf

¹⁰⁴ EQUINET (2010), *Making equality legislation work for trans people*, Brussels: EQUINET

¹⁰⁵ Ibid, p 11-12

¹⁰⁶ Motmans, Joz (2009), *Being transgender in Belgium: Mapping the social and legal situation of transgender people in Belgium*, Brussels: Institute for the Equality of Women and Men

legal gender recognition; (ii) the importance of expressly including the grounds of gender identity and gender expression in the Belgian legislation; (iii) the protection of the right to family life; and (iv) the need for the provision of training to healthcare professionals.

The report was presented during a seminar held in November 2010, and the key concerns raised by the report (healthcare, employment and legal aspects) were later explored in workshops where a debate took place between the key experts, decision-makers and the trans community itself.

Following the launch of the study, the Institute worked closely with two trans organisations to ensure that trans people are aware of the existing mechanisms against discrimination. Moreover, the Institute commissioned further research on how Belgian gender equality legislation can be amended to better protect trans people in employment, and how the existing trans law can be improved for the benefit of all trans people in Belgium. This research is now informing the legislative review process that is currently underway.

11.2.3 Guidelines by the Finnish Ombudsman for Equality

Finland's Ombudsman for Equality interpreted the *Equality Act* to also cover trans and intersex people in its scope before there was a clear reference to gender identity in the Act. In addition, it took steps to protect trans people from discriminatory practices, for example through the publication of guidelines that clarify how the *Act on Equality of Men and Women* is applicable to trans and intersex people.¹⁰⁷

Throughout 2011, trans issues have constituted an area of focus for the Ombudsman. In this context, in May 2011, it organised a seminar on *Equality and Human Rights of Gender Minorities*. The Ombudsman has also called for an amendment of the *Equality Act* so as to include provisions on the protection of gender minorities against discrimination. It liaises and works closely with LGBTI, trans and intersex associations, and also has a representative in the Finnish intersectional LGBT working group.

11.2.4 Guidelines by the United Kingdom's Equality and Human Rights Commission

The **United Kingdom's** Equality and Human Rights Commission (EHRC) is very proactive in relation to the rights of trans people. It has published several documents on the subject and has even called on the European Commission to propose gender equality legislation that is fully responsive to the needs and experiences of discrimination of trans people.

One of the highlights of the work of the EHRC is the publication of various guidelines¹⁰⁸ that aim to guide public officials and service providers to provide inclusive and respectful services to trans people no matter the field that they operate in. Among other, the EHRC has published guidance on the *Equality Act 2010* and the new public sector equality duty, but also guidelines exploring the rights of trans people in relation to access to goods and services, access to healthcare, to employment, and name change amongst others.

¹⁰⁷ Online at: www.tasa-arvo.fi/en/discrimination/gender_minorities

¹⁰⁸ Online at: www.equalityhumanrights.com/about-us/vision-and-mission/our-business-plan/transgender-equality





A gender equality poster by the German equality body stating: 'No human being fits in a box'

11.2.5 Beyond Europe

Refer to 8.2.2 to read about the exceptional work conducted by the **New Zealand Human Rights Commission** with regard to its *To Be Who I Am* inquiry.



National equality bodies that do not yet have a clear legal remit to cover the ground of gender identity are encouraged to be proactive. They should base their actions on the principle that discrimination against trans people is gender-based. They should also follow the examples elaborated in this chapter with regard to the conduction of research and awareness raising.

Chapter 12

Collecting Data on the Situation of Trans People

Recommendation 12:

Develop research projects to collect and analyse data on the human rights situation of transgender persons including the discrimination and intolerance they encounter with due regard to the right to privacy of the persons concerned.

While the volume of research on the situation of trans people at the European level is growing, the scarcity of information at most national and local contexts remains a major obstacle for the tackling of discrimination and human rights breaches against trans people.

In its Recommendation (see 1.3.4), the CoE Committee of Ministers asks Member States to:

“examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity.”¹⁰⁹

A review of the implementation of the Recommendation is due in 2013. Comprehensive and up-to-date data collection is expected to be carried out on the situation in all Member States.

12.1 Data collection at the European level

Regional collection of information has been particularly important in highlighting emerging trends and existing gaps in legislation. European LGBT reports have also been extensively referred to by the United Nations in its first global LGBT report, and other key human rights reports. (see 1.2.1).

12.1.1 Data collection by the EU Fundamental Rights Agency

Until the mid-2000s, there were no comprehensive European reports on the situation of LGBT people. The European Parliament became aware of this knowledge gap while debating equality legislative initiatives,¹¹⁰ and in 2007 it commissioned the EU Fundamental Rights Agency to “develop a comprehensive comparative report covering all EU Member States on the situation regarding homophobia and sexual orientation discrimination.”¹¹¹ In response to the request of the Parliament, FRA carried out two large scale legal and social research projects during 2007 and 2008. The Agency noted the need of research on the situation of trans people and widened the original scope of the European Parliament’s call to also include the ground of gender identity.

Noteworthy elements of the reports specifically dealing with the situation of trans people include:

- Part 1 – Legal Situation, explored the legal situation under the legislation of the EU and its Member States regarding anti-discrimination provisions; gender reassignment and legal recognition; availability of gender

¹⁰⁹ Supra note 14, Recommendation 1

¹¹⁰ Supra note 69

¹¹¹ Ibid, p 3



reassignment surgeries; and the legal consequences of gender reassignment (i.e. recognition of the acquired gender and right to change one's forename in accordance with the acquired gender),¹¹² while

- Part 2 – Social Situation, explored the lived experiences of trans persons in EU Member States.¹¹³

Based on the findings FRA published various fact sheets, including one specifically addressing trans people's rights.¹¹⁴ Moreover, FRA continued to monitor the situation and published the *2010 Update – Comparative legal analysis*¹¹⁵ and the *Summary of findings and trends, challenges and promising practices*.¹¹⁶ The updated country thematic reports of the EU-27 are also available on FRA's website.

In 2010, Viviane Reding, Vice President of the European Commissioner took another important decision and commissioned FRA to conduct a large scale quantitative study on discrimination, harassment and violence against LGBT people within the EU and Croatia. This survey will be conducted during 2012, and is expected to be the biggest European quantitative research on the situation of LGBT people to date. The results are expected to be made public during 2013 and are likely to inform future EU measures on LGBT equality.

12.1.2 Data collection by the CoE Commissioner for Human Rights

Building on the data collection model put in place by FRA, the Commissioner for Human Rights conducted a study that took into account the legal and social situation of LGBT people in all forty-seven Member States of the Council of Europe.¹¹⁷ It should be highlighted that this report mainstreams trans issues throughout the document as trans organisations' input was taken into account during the conceptualisation, data collection and writing stages of the report.

The study is the first comprehensive data collection and analysis on the legal and social situation of LGBT people in all Member States of the Council of Europe. The reporting format is similar to the FRA reports (see 12.1.1) and makes available both the background analysis¹¹⁸ as well as the background country reports of the CoE-47. Based on the study's findings, the Commissioner provided thirty-six concrete measures that Member States could implement to effectively address discrimination on grounds of sexual orientation and gender identity.



National governments and human rights organisations should take note of the findings of FRA and the Commissioner for Human Rights and address the identified gaps in national legislation and policy. The recommendations found in the reports of both institutions are a very useful resource as are the national reports, online at: www.coe.int/t/commissioner/activities/Themes/LGBT/nationalreports_en.asp

¹¹² Ibid, p 129-135

¹¹³ European Union Agency for Fundamental Rights (2009), *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation*, Luxembourg: Publications Office of the European Union

¹¹⁴ Ibid (2009), *Challenges Facing Transgender Persons*, online at: fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-transgender_EN.pdf

¹¹⁵ Ibid (2010), *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis*

¹¹⁶ Ibid (2011), *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States - Summary of findings, trends, challenges and promising practices*

¹¹⁷ Commissioner for Human Rights (2011), *Discrimination on grounds of sexual orientation and gender identity in Europe*, Strasbourg: Council of Europe

¹¹⁸ Ibid (2011), *Discrimination on grounds of sexual orientation and gender identity in Europe – Background Document*

12.2 Data collection at the national level

12.2.1 Trans hate crime statistics

The **Swedish National Council for Crime Prevention (Brå)** publishes statistical data on crimes in Sweden, amongst which the *Swedish Crime Barometer*. Brå also publishes data specifically on hate crime, including of a separate category for trans people/ gender identity. Importantly, Brå published data on hate crimes by using key word searches in police reports before Swedish hate crime legislation was interpreted to also cover trans persons and even before the police had a specific trans hate crime tick box in their hate crime report sheet.

Homophobic and transphobic hate crimes are collected separately and presented in different chapters of Brå's report.¹¹⁹ A list of search terms is a key component in the collection of data from the incident descriptions included in reports of an offence in order to establish the motivation for the crime. Data has been collected on hate crime committed against sexual orientation and gender identity minorities using search terms such as 'gay', 'lesbian', 'tranny' and others.

A similar key word search analysis in police records is done by the **Police College of Finland** in its hate crime report.¹²⁰ For more information on hate crime data collection refer to 2.2.1.

12.2.2 Trans research review

In 2009, the United Kingdom's **Equality and Human Rights Commission (EHRC)** published the *Trans Research Review*.¹²¹ The review covers methodological questions on how to map the trans community and issues arising from researching trans populations. The review thoroughly reflects available English-language research literature with regards to attitudes; crime and criminal justice system; housing needs and homelessness; education; economic status and employment; health and social care; media, leisure and sport; community and citizenship, families and relationships. Conclusions, based on the review's findings, identify further fields of research and action.

12.3 Data collection by civil society

12.3.1 The United States' transgender discrimination survey

In the United States, the **National Center for Transgender Equality (NCTE)** together with the **National Gay & Lesbian Task Force** produced the first *National Transgender Discrimination Survey*¹²² in 2009. In February 2011, they published their first academically rigorous national survey of transgender discrimination in the United States, entitled *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*.¹²³ This report collected information from nearly 6,500 interviews

¹¹⁹ Brå (2011), *Hate crimes 2010: Statistics relating to offences reported to the police with an identified hate crime motive (A summary of report 2011:8)*, Stockholm: Brå

¹²⁰ Peutere, Laura (2010), *Hate Crimes Reported to the Police in Finland*, Reports of the Police College of Finland 85/2009, Tampere: Police College of Finland

¹²¹ Mitchell, Martin & Howarth, Charlie (2009), *Trans Research Review*, London: Equality and Human Rights Commission

¹²² National Centre for Transgender Equality & National Gay and Lesbian Task Force (2009), *National Transgender Discrimination Survey*, online at: transequality.org/Resources/index.html

¹²³ Ibid (2011), *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*



with trans and gender nonconforming people around the country, making it the largest trans specific survey to date. The research provided a clear picture of the prevalence of discrimination against trans people in the United States.



Injustice at Every Turn (2011)
endtransdiscrimination.org/report.html



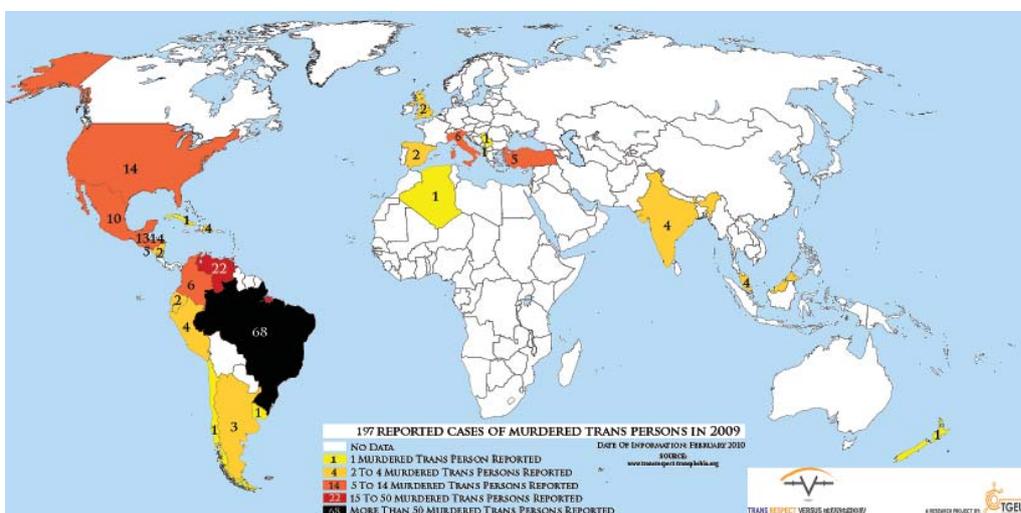
Researchers that intend to conduct large scale studies on this situation of trans people in their respective society should refer to the *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* as one of their key resources.

12.3.2 Transrespect versus Transphobia Worldwide

Transrespect versus Transphobia Worldwide (TvT)¹²⁴ is an ongoing worldwide comparative, qualitative and quantitative research project conducted by **Transgender Europe** in close cooperation with regional partner organisations. The project provides an overview of the human rights situation of trans persons and collates useful data and prepares advocacy tools for the use of international institutions, human rights organisations, and the trans movement.

TvT provides an ongoing monitoring of reported cases of murders of trans people in its *Trans Murder Monitoring Project*. The legal and social situation of trans people is mapped out with regard to various indicators including, (i) gender recognition and anti-discrimination legislation; (ii) hate crime and asylum legislation; (iii) criminalisation, prosecution and state-sponsored discrimination; and (iv) trans-specific health care, including access to hormones and hormone therapy, gender reassignment treatment and body modifications.

A *Global Survey* on trans people's social experiences regarding transrespect and transphobia, conducted in a peer research combines data collection with empowerment of local trans communities.



The TvT Research Project's map of the reported murders of trans people in 2009

¹²⁴ TvT Research Project (2011), *Transrespect versus Transphobia Worldwide*, www.transrespect-transphobia.org

12.3.3 ILGA-Europe's Rainbow Europe Map & Index (trans edition)

In May 2011, **ILGA-Europe** published its third edition of its *Rainbow Europe Map and Index* which for the first time took into account key human rights concerns of trans people related to anti-discrimination legislation and legal gender recognition. A trans specific map and index of Europe ranking countries according to the respective legal situation for trans people was also produced.¹²⁵ In future editions, the map is expected to refine and increase the number of indicators related to trans people.



Rainbow Europe map on the legal situation of trans people in Europe (2011)

12.3.4 Ukraine's national study on the situation of trans people

In 2010, **Insight** published a study on the situation of trans people in Ukraine, mapping the living situation of trans people and assessing their needs.¹²⁶ Thirty-seven trans people throughout the country were interviewed on their experiences and views with regards to access to trans-related healthcare, experiences of discrimination, and legal gender recognition. The interview extracts that were published illustrate the hardship that trans people in Ukraine experience due to the legal and social realities that they live in. The report also contains concrete recommendations for the diverse audiences of the study.

¹²⁵ ILGA-Europe (2011), *Rainbow Europe Map & Index: Gender Identity*, online at: www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_map_and_index_2011_2012

¹²⁶ Insight (2010), *Situation of Transgender Persons in Ukraine - Research Report*, Kiev: Insight, online at: www.insight-ukraine.org.ua/media/TRP_report_engl.pdf



