

THE TRANS CROSSROADS

TRANS PEOPLE'S EU EMPLOYMENT RIGHTS AND
NATIONAL GENDER RECOGNITION LAWS



Toolkit & Call for Action

Title: The Trans Crossroads: Trans People's EU Employment Rights and National Gender Recognition Laws

Authors: Silvan Agius & Richard Köhler

Editor: Jeremy Pine

Date: December 2014

Copy left: Transgender Europe



Transgender Europe
Kiefholzstr. 2
12435 Berlin
Germany

www.tgeu.org

www.facebook.com/TransRightsEurope

Design & Layout: 123comics & dankegrafik



This publication has been produced with the financial support of the PROGRESS Programme of the European Union. The contents of this publication are the sole responsibility of Transgender Europe and can be in no way be taken to reflect the views of the European Commission.

The present document was produced with the greatest care, but does not claim to be complete. We are aware that aspects of it are bound to become out-dated as changes are registered at the national or European levels. Please send your questions, feedback, or suggestions for its improvement to tgeu@tgeu.org.

While this publication aims to provide information and inspiration regarding legal questions of employment and occupation and their intersection with legal gender recognition, the information contained within it may need further elaboration at national levels to respond to concrete situations.

Find more information on Legal Gender Recognition and what you can do to improve it at www.tgeu.org/AccessAllAreas



THE TRANS CROSSROADS

**TRANS PEOPLE'S EU EMPLOYMENT RIGHTS AND
NATIONAL GENDER RECOGNITION LAWS**

CONTENTS

1. INTRODUCTION	5
2. SITUATION OF TRANS PEOPLE VIS-À-VIS EMPLOYMENT IN THE EU	6
2.1 Situation of trans people vis-à-vis discrimination in employment and income	6
2.2 Reasons for discrimination in access to employment	6
2.3 Impact of invasive/harmful requirements in gender recognition legislation	7
3. EU TRANS EMPLOYMENT EQUALITY LEGISLATION IN A NUTSHELL	8
3.1 Case-law of the Court of Justice of the European Union	8
3.2 The Gender Recast Directive	9
4. EXCEEDING THE MINIMUM REQUIREMENTS FOUND IN EU LAW	11
5. CHECKLIST: MAKING THE GENDER RECAST DIRECTIVE WORK FOR TRANS PEOPLE	12
5.1 Minimum criteria	12
5.2 Good practices	12
5.3 Legal gender recognition	13
6. MONITORING THE IMPLEMENTATION OF GENDER EQUALITY DIRECTIVES	14
6.1 Implementation review of the Gender Recast Directive	14
6.2 Looking ahead	15
7. LEGAL GENDER RECOGNITION: A PREREQUISITE FOR EMPLOYMENT EQUALITY	16
7.1 Applicability of CJEU reasoning to legal gender recognition	16
7.2 Legal gender recognition and freedom of movement	16
7.3 EU external – internal coherence	17
8. CONCLUSION	18
9. RECOMMENDATIONS: 10 THINGS TO DO	19
10 THINGS THE EU CAN DO	19
10 THINGS GOVERNMENTS CAN DO	20
10 THINGS COMPANIES/EMPLOYERS CAN DO	21
10 THINGS TRADE UNIONS CAN DO	22
10 THINGS EQUALITY BODIES/NHRIS CAN DO	23
10 THINGS TRANS RIGHTS ORGANISATIONS CAN DO	24
10. ENDNOTES	25

ACRONYMS

CJEU	Court of Justice of the European Union
COE	Council of Europe
CV	Curriculum Vitae
DG	Directorate-General
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EQUINET	European Network of Equality Bodies
ETUC	European Trade Union Confederation
EU	European Union
FRA	European Union Agency for Fundamental Rights
MS	Member State
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
ID	Identity
IDAHOT	International Day against Homophobia and Transphobia
ILGA-Europe	The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association
LGBT(I)	Lesbian, gay, bisexual, trans and intersex
TDoR	Transgender Day of Remembrance
TFEU	Treaty on the Functioning of the European Union
TGEU	Transgender Europe
UK	United Kingdom

1. INTRODUCTION

Trans people's difficulty in accessing employment and occupation, as well as problems with job retention, is acute across all of the European Union (EU). The EU-wide 2012 *LGBT Survey*¹ conducted by the European Union Agency for Fundamental Rights (FRA) has shown that only 51% of trans respondents were in paid employment (full- and part-time) in comparison with 68.4% in the general population.²

This problem of employment exclusion, as well as discrimination on the work floor, is determined by two key factors:

- (i) Inadequate or no protection against discrimination and a lack of appropriate measures to promote equality for trans people in employment;
- (ii) Legal hindrances towards (or an outright inability to obtain) a change of name and gender on identification documents, as well as on other relevant documents such as educational achievement certificates.

The success of employment equality measures for trans people hinges primarily on the quality of a state's legal gender recognition and the robustness of its equality legislation. Indeed, without quick, transparent, and accessible procedures to change identification documents and other employment relevant documents, trans people's EU employment and citizenship rights are bound to remain inadequate.

In view of the above, this publication makes the case for enhanced EU efforts to address legal gender recognition as a precondition for employment equality for trans people. It is good that the EU is increasingly interested in addressing trans equality issues through legislation and policy, and has included gender identity firmly in its plans for a new EU non-discrimination infrastructure.³

However, in its advocacy, Transgender Europe (TGEU) has repeatedly indicated that trans people will continue to be denied the ability to fully enjoy their EU rights if national legislation regulating gender recognition continues to place hardships on trans people. The lack of just legislation effectively hinders or even eliminates the possibility for a sizable group of trans people to have their documents amended to match their gender identity. Thus, it is important for the EU to adopt comprehensive and specific measures in this regard, and to work closely with civil society and member states on this matter.

This publication builds on TGEU's previous work on anti-discrimination and legal gender recognition in Europe. It provides an overview of current EU employment equality legislation tackling discrimination against trans persons and gives an analysis of how current national legislation regulating the change of names and gender markers on official documents of trans people impacts their enjoyment of employment and citizenship rights. This document also provides a checklist to assess whether member states have adequately implemented EU law as it applies to trans people, and outlines current good practices across the Union. The end of this document also contains six sets of recommendations setting out concrete action items for the EU, governments, companies/employers, trade unions, equality bodies, and trans rights organisations.

2. SITUATION OF TRANS PEOPLE VIS-À-VIS EMPLOYMENT IN THE EU

'Research is still quite limited, but the statistics available show a bleak situation. The Engendered Penalties study found that 23% of the respondents felt the need to change their jobs because of discrimination experienced on grounds of their gender identity. Only about 30% were treated with dignity by co-workers; 10% experienced verbal abuse and 6% were physically assaulted. Forty-two percent of respondents not living in their preferred gender role did so because they were afraid of losing their jobs. In a Scottish study, 37% of the respondents were on unemployment benefits. Research from Finland showed similar findings. Seventy-seven percent of transgender employees did not tell their employers about their gender identity, and about 50% of the respondents found this to be stressful.'

Thomas Hammarberg, Commissioner for Human Rights (2009)⁴

2.1 Situation of trans people vis-à-vis discrimination in employment and income

Since the Commissioner for Human Rights launched the ground-breaking *Human Rights and Gender Identity Issue Paper* in 2009, a number of improvements in some areas were registered. However, the extent of discrimination experienced by trans people, including in the spheres of employment and occupation, remains high, and is unlikely to decrease unless it is systematically addressed.

Indeed, in the *FRA LGBT survey*, one in three trans respondents felt discriminated against because of being trans when looking for a job (37%) or at work (27%). Moreover, '[t]rans respondents were more likely to say they had felt discriminated against because of being trans in the year preceding the survey in employment – particularly when looking for a job – than in any other area of social life covered by the survey.'

The *FRA Trans Report*⁵ shows the extent of employment discrimination against trans respondents and indicates that the number of trans people looking for a job is lower than it should be, 'as discrimination in the labour market may discourage them before they even try to access it.' Furthermore, the analysis of data showed that only 16% of all trans respondents were generally 'out' about being trans at their workplace. The rest of the trans population are either selectively 'out' (40%) or generally 'in the closet' (44%). Cross dressers and gender variant respondents being among those most likely to be generally closeted, due to a concrete fear of discrimination.

Unemployment and poverty among trans people are of great concern and require urgent attention. Twenty-five percent of trans respondents were not in employment, and another 24% were students. The unemployment rate is even higher among trans women at 38%. The survey also shows that in terms of income, trans respondents are significantly poorer than the general population. In fact, trans people are more likely to fall in the bottom income quartile (36%) and are less likely to report incomes in the top income quartile (19%). Of all trans people, trans men are the most likely to fall in the bottom income quartile (45%) and are less likely to report incomes in the top quartile (10%).

2.2 Reasons for discrimination in access to employment

Importantly, the *FRA Trans Report* identified a statistical correlation between the quality of public policy and legislation, and the levels of discrimination experienced by trans people. In fact, positive trends were recorded within those member states that adopted widespread positive measures to promote and respect the human rights of trans people. In comparison, in those member states where positive measures were rare, trans people were 2.5 times more likely to stay 'in the closet' at their workplace.

Because EU legislation refers specifically to 'gender reassignment' (see Chapter 3), as many as 50% of trans respondents, who cannot or

do not want to undergo medical gender reassignment, are likely not to be covered by current EU law tackling employment discrimination. This figure alone confirms how much remains to be done for equality legislation to fully work for trans people, and the efforts that need to be undertaken to ascertain that future legislation delivers the legal equality that trans people deserve.

In their study about the workplace experience of trans persons before and after their transition, Schilt & Wiswall found that while trans persons ‘have the same human capital after their transitions, their workplace experiences often change radically.’⁶ Particularly trans women may experience a loss of authority and pay, and often harassment and termination. These findings generally illustrate how discrimination against trans people is often multi-dimensional in its nature, where sexism and transphobia intersect, possibly with other forms of discrimination. The Commission and member states need to pay greater attention to the gender identity pay gap and aim to rectify it.

Additionally, similar to women’s experience of a heightened risk of dismissal and employment discrimination during pregnancy and maternity, trans people often experience discrimination during and around their transition process(es). A 56-year-old trans man provided the following testimony to the *FRA LGBT Survey*: ‘The job where I transitioned I was fully out as trans. I was dismissed from my job one week before I had a hysterectomy. [...] In subsequent jobs I have not been out at work because of this experience.’

A reoccurring theme in trans people’s experience of discrimination is how the mismatch in ID documents and lived gender identity becomes a barrier for trans job seekers. A trans woman from Belgium describes her experience: ‘I used to apply for jobs with my female name. I knew I would have to tell my future employers that I was a transgender person at some point but I feared being judged. Even in interviews where the issue was not discussed I still felt pressured because I knew I would have to produce my identity card and my health insurance

card [should I be offered the job]. The situation was particularly dire at the employment centre because they refused to use my female name since it wasn’t on my identity card or my health insurance card. I had to explain everything from the beginning at each meeting with a different counsellor. When I applied for jobs via the employment centre’s Internet website, or when the employment centre sent my CV to potential employers, I had to use my male name. That exposed me to discrimination [because I have a female appearance].’⁷

Similar cases were documented by TGEU and ILGA-Europe and included in their submissions to the European Commission.⁸

2.3 Impact of invasive/harmful requirements in gender recognition legislation

This assessment of discrimination would not be complete without a reflection on how employment and income gaps are further compounded by the invasive/harmful requirements contained in current legislation on gender recognition. TGEU’s *Trans Rights Europe Map 2014* shows that within the EU, as many as seven countries do not have proper procedures in place to recognize trans people’s gender identity. Indeed, no possibility exists in Ireland to change one’s officially registered gender. Furthermore, in Bulgaria, Cyprus, France, Hungary, Lithuania, and Slovenia, the lack of an established legal framework about the change of name and gender marker for trans people leads to legal uncertainty. It means that by and large trans people in these countries are stuck with documents that mismatch their gender identity. Nonetheless, in these, as in the remaining 21 countries, trans people are required to submit to various invasive examinations related to a diagnosis of ‘gender identity disorder’ or an equivalent psychological opinion (23 MS); medical interventions (18 MS); sterility (12 MS), and a single marital status (11 MS). Twenty-one member states also prohibit minors from accessing legal gender recognition.⁹

At the time of their formulation, these requirements may have been acceptable, but they are now regarded as clear violations of trans people’s rights and, thus, pose a barrier to trans

equality in many areas of life, not least their citizenship rights. They leave many trans people trapped in a dilemma of on the one hand, lacking gender-matching identification documents, and, on the other, having to give up physical integrity, the ability to procreate and/or their marriage or registered partnership. A mandatory ‘gender identity disorder’ diagnosis or an equivalent medical opinion is a source of significant distress for many trans people,¹⁰ intensifying stigma and discrimination. In a number of countries, trans people may also be obliged to go through a ‘real-life test,’ meaning that they have to live for a set period of time according to their gender identity before they can request a change of name and gen-

der on official documents, an experience that further increases their vulnerability in employment and other spheres.

Additionally, the change of documents can come at a high financial cost in medical and legal fees, often following long waiting times, without any guarantees that the judge or competent authority presiding over their case will be sympathetic to their request and approve the requested changes.

3. EU TRANS EMPLOYMENT EQUALITY LEGISLATION IN A NUTSHELL

Even though the Treaty on the Functioning of the European Union (TFEU) and the EU Charter of Fundamental Rights do not mention gender identity discrimination explicitly, trans people are included within the EU’s legal protections against discrimination. In fact, in 1996, the CJEU clarified that ‘gender reassignment’ falls under the wider definition of the category of sex. Since then, that judgement has served as a basis for the inclusion of reference to ‘gender reassignment’ in EU gender equality legislation. This also extends to Directive 2004/113/EC¹¹, which establishes the right to equal access for women and men to goods and services.¹² More recently, gender identity (asylum qualification and victims’ rights) and gender expression (victims’ rights) were introduced into EU law explicitly.

3.1 Case-law of the Court of Justice of the European Union

The CJEU was presented with three cases regarding discrimination against trans people, and delivered corresponding preliminary rulings on the interpretation of the Treaty and secondary law provisions on equal treatment of men and women in the field of employment and occupation. These rulings lead the way to the inclusion of ‘gender reassignment’ in the scope of EU gender equality law. In the case of

P v. S and Cornwall County Council the CJEU established the principle of coverage of ‘gender reassignment’ under gender equality legislation for women and men. In the *K.B. v National Health Service Pensions Agency* and in the *Sarah Margaret Richards v. Secretary of State for Work and Pensions* cases, it elaborated that principle and reaffirmed it within the scope of EU sex equality law. So far, all of the cases that reached the court involved trans persons who had undergone gender reassignment treatment. This means that until now the Court remains silent on the rights of those trans people who do not intend to or cannot undergo such treatment.

- (i) *P v. S and Cornwall County Council*¹³ was a watershed case that clarified that Directive 76/207/EEC, which prohibits direct and indirect discrimination based on sex in employment, vocational training and promotion, and working conditions, applies also to trans people.

P (the applicant) was a British educational manager who was dismissed while on sick leave recovering from her gender reassignment surgery. She took a case to court claiming that she was discriminated against on the grounds of sex. The CJEU ruled that the scope of the Directive was not simply limited to ‘discrimi-

nation based on the fact that a person is of one or other sex' and that its purpose and the rights which it seeks to safeguard include discrimination arising 'from the gender reassignment of the person concerned'. The Court recognised that discrimination against trans people 'is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment', concluding that '[t]o tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.'

The Court did not define gender reassignment or what it entails, but instead focused on the implications of transitioning.

- (ii) *K.B. v National Health Service Pensions Agency*¹⁴ concerned a woman living in a long-term relationship with a trans man. She claimed that the UK's denial of widower's pension scheme to her partner in case of her death constituted a breach of the EU principle of equal treatment between women and men (EC Treaty Article 141), and its implementation in the national law of member states (Directive 75/117/EEC). *K.B.* supported her argument by the fact that in the UK, trans persons were not allowed to marry, even following gender reassignment and that therefore the marriage requirement amounted to a form of indirect discrimination.

In its judgement, the CJEU ruled that '[b]enefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of Article 141 EC' as does 'a survivor's pension provided for by such a scheme'; and that while '[t]he decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a

matter for the national courts as to the interpretation of domestic legal rules [...] there is inequality of treatment which [...] affects one of the conditions for the [...] necessary precondition for the grant of such a pension: namely, the capacity to marry'.

The significance of this case comes from the fact that, in effect, the Court clarified the separation of competences between the EU and member states. While member states remain free to decide on matters of national competence as established in the Treaty, they cannot use their national legislation or policy to limit protection on the basis of gender reassignment as it emanates out of EU laws.

- (iii) The Court in the subsequent case of *Richardson* adopted the same reasoning. *Sarah Margaret Richards v. Secretary of State for Work and Pensions*¹⁵ regarded a trans woman, who had legally changed her gender marker to female, and who argued that the UK's *Gender Recognition Act 2004* establishing in certain cases a pensionable age based on the birth sex constituted a violation of the EU principle of equal treatment between men and women in social security (Directive 79/7/EC). In her case, the pensionable age was at the age of 65 years (as for men) rather than 60 (as for all other women).

The CJEU ruled that: 'Article 4(1) of Directive 79/7/EC must be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law'.

3.2 The Gender Recast Directive¹⁶

The Gender Recast Directive (2006/54/EC) was adopted and entered into force in 2006. Member states and European Economic Area (EEA) countries had until 15 August 2008 to implement its provisions, which represent a

substantive change, compared with earlier Directives recast into this law. Among the novel aspects of the Directive is its prohibition of discrimination on the ground of gender reassignment.

This Directive is especially significant for trans people as, within the process of recasting CJEU rulings, Recital 3 included a direct reference to trans people through an inclusion of the Court's decisions related to gender reassignment, stating that:

'The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.'

The material scope of this Directive covers:

- Access to employment, self employment and occupation, including promotion; vocational training and retraining; employment including promotion and dismissal; membership of, and involvement in an organisation of workers or employers, or other professional organisations;

- Working conditions, including pay;
- Occupational social security schemes, including pensions, sickness, invalidity, industrial accidents and professional diseases, and unemployment benefits.

This Directive applies to all workers in both the public and private sector, and protects them against discrimination (both direct and indirect), harassment (including sexual harassment), instruction to discriminate, discrimination related to pregnancy and maternity leave, and victimisation. Furthermore, member states are requested to set up an equality body (or bodies) at the national level 'for the promotion, analysis, monitoring, and support of equal treatment of all persons without discrimination on grounds of sex' which must cover gender reassignment.

Like other EU Directives, this law is directly applicable and individuals can refer cases to their national and local courts, even if national law does not include a direct reference to gender reassignment.

4. EXCEEDING THE MINIMUM REQUIREMENTS FOUND IN EU LAW

'Ours is politics of conviction. We are not doing this because the polls say that our support will grow if we champion trans rights. We are doing it because we are committed to ensure a space for all trans people to feel safe, to feel welcome, to be able to exercise their full rights and be themselves without having to think twice about anything, without fear of reprisal, harassment or violence.'

*Helena Dalli, Maltese Minister for Civil Liberties (2014)*¹⁷

A number of member states have shown initiative and have exceeded the minimum requirements of the Gender Recast Directive (2006/54/EC) and are investing in trans people to be more included in society and protected against discrimination, harassment, and violence. Likewise, a number of laws facilitating legal gender recognition have emerged and these should serve as an inspiration for national governments that want to revise their laws. In 2011, ILGA-Europe and TGEU published a *Human Rights and Gender Identity Best Practice Catalogue*¹⁸ containing references to many laws, policies, and practices that can inspire positive change, and which were based on the Commissioner's *Human Rights and Gender Identity Issue Paper's* (2009) 12 recommendations covering the major life course challenges faced by trans people. Since then, a number of additional good practices have emerged and are worth a mention.

- (i) Three major legislative developments took place during 2013-14: Denmark became the first country to drop all invasive and medical requirements in its legal gender recognition procedure and instead bases its procedures on self-determination; Malta became the first country in Europe to enshrine gender identity in its constitution's anti-discrimination article; Norway and Finland adopted far-reaching anti-discrimination legislation on the grounds of gender identity and gender expression, setting a model for other governments regarding anti-discrimination legislation protecting trans people in all spheres of life.¹⁹ Additionally, a *Gender Identity, Gender Expression and Sex Characteristics Bill* was presented in the Maltese parliament. This bill spells out the ways in which governmental institutions are obliged to proactively implement the

'right to gender identity' and simplify the process of changing legal documents in order to enact the protections enshrined in Malta's constitution.²⁰

- (ii) In a global context, several governments have made strides in trans rights. Australia adopted ground-breaking *Sex and Gender Guidelines* regulating how sex and gender are recorded and handled by its departments and agencies. The Office of Human Rights of the District of Columbia mounted a highly visible *Transgender and Gender Identity Respect Campaign*.²¹ Within the EU, the Berlin State Office for Equal Treatment and Against Discrimination implemented a project to improve trans people's access to employment. This project looked at how companies can be attractive employers to trans individuals and identified ways that a company can effectively support transition. It also examined what transgender people require in their professional lives to achieve self-empowerment. The results were published in an accessible reader.²² Furthermore, since 2013, the International Day against Homophobia and Transphobia (IDAHOT) Forum has become an annual event organised by national governments to address policy and legislative issues related to sexual orientation and gender identity, including a member states' call for progress on LGBT issues at the EU level, and pledges for domestic improvements.

A set of recommendations for governments, social partners and civil society is available at the end of this Toolkit, proposing various action points to guarantee greater equality for trans people in the field of employment and occupation.

5. CHECKLIST: MAKING THE GENDER RECAST DIRECTIVE WORK FOR TRANS PEOPLE

The first part of this checklist aims to spell out the minimum criteria that EU member states & EEA countries had to comply with by the implementation date of the Gender Recast Directive (15 August 2008). The second part of the checklist provides a set of current good practices already implemented by some member states, and should serve as a stimulus to exceed the minimum standards required by the Gender Recast Directive. The last section of the checklist enumerates the steps necessary for member states to offer legal gender recognition, a demonstrated prerequisite to ensuring equality for trans persons in employment and occupation.

TGEU strongly recommends that member states and the Commission use this comprehensive checklist to evaluate compliance with the Gender Recast Directive on national level.

5.1 Minimum criteria²³

Trans people are included in the interpretation of employment non-discrimination legislation based on the grounds of sex:

- *Implicitly through interpretation by domestic judges/other administrative institutions; or*
- *Explicitly through an express reference to 'gender reassignment' in legislation.*

Trans people benefit from the full extent of protections established in the Directive, i.e.:

- *The full material scope, namely, conditions for access to employment, self-employment and occupation, including promotion and dismissals; membership and involvement in an organisation of workers or employers or other professional organisations; and working conditions, including pay; and*
- *Against all forms of discrimination, namely, direct or indirect discrimination, harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct; instruction to discriminate against persons on grounds of sex including gender reassignment; any less favourable treatment related to pregnancy or maternity leave; and pay discrimination.*

Trans individuals are included in sick and invalidity schemes and employers make such schemes available.

Where the retirement age for men and women varies, the retirement age for trans individuals is based on their gender identity and not on their birth sex.

Trans individuals and their spouses/partners can avail themselves of occupational social security schemes and pensions schemes; and such schemes cover industrial accidents and professional diseases, and unemployment benefits.

Gender mainstreaming is used as a tool to ensure full gender equality in practice, and such measures are extended to trans people.

Trans people are included within the remit of the national [gender] equality body.

No laws, regulations and/or administrative provisions exist that are contrary to the principle of equal treatment of trans people as stipulated in the Directive.

5.2 Good practices

Equality legislation implementing the Directive into national law and/or consolidated national anti-discrimination legislation includes an express reference to:

- *The right to self determined gender identity;*
- *The right to gender expression; and*
- *Intersectional or multiple discrimination.*

Equality legislation makes an express reference to the periods of gender reassignment and:

- *Prohibits discrimination and dismissal relating to an absence from work due to gender reassignment;*
- *Prohibits discrimination against someone based on the fact that this a person intends to undergo, is undergoing, or has undergone the process (or part of the process) of gender reassignment; and*
- *Covers absences from work in order to undergo and recover from gender reassignment within the scope of sick leave.*

The collection of information about an applicant's gender identity, gender expression and/or gender reassignment during the selection process, whether during the application or interview stage is prohibited (unless such information is solely used for employment equality monitoring purposes and follows strict rules against data disclosure and discrimination).

The unconsented disclosure of personal details related to the person's gender identity, gender expression or gender reassignment, as well as the disclosure of the gender history or former name to employers, fellow employees and/or clients is prohibited.

The national [gender] equality body has a wide mandate ensuring that:

- *Discrimination does not occur in any area of life in society;*
- *Equal rights and opportunities for trans people are actively promoted; and*
- *It is able to provide advice and other support so as to help enable anyone who was subjected to discrimination to claim their rights.*

Dialogue between trans organisations and other entities, such as public bodies, trade unions, and any other organisations focusing on combating discrimination on the basis of gender identity and gender expression is encouraged.

The right to gender identity and gender expression are included in public awareness raising campaigns explaining the provisions of the law.

Specific attention is paid to ensure that trans people are reached through targeted awareness raising campaigns.

Any policies and practices that may directly or indirectly discriminate against or disadvantage trans people are considered contrary to equality legislation and public policy.

Proactive statutory duties to ensure trans equality mainstreaming across the government are introduced.

Public authorities make active, targeted, and systematic efforts to promote equality irrespective of gender identity and/or gender expression.

An equality policy framework covering the right of gender identity and gender expression is adopted and it contains measurable targets on employment inclusion of trans people.

5.3 Legal gender recognition

Legal gender recognition procedures, based on the right to self-determination, are quick, transparent and accessible and meet the criteria established in TGEU's Legal Gender Recognition in Europe (2013) Checklist Gender Recognition Legislation.²⁴

Changes to employment and educational related documents reflecting a change of name and gendered information are possible without legal gender recognition.

Change of name and gendered information on documents issued by public or private institutions/organisations extends also retroactively to:

- *Birth certificates;*
- *Identification documents (including ID Cards, Driver's Licences and Passports);*
- *Social security numbers (in countries where they are gendered);*
- *Educational certificates;*
- *Employment certificates/documentation; and*
- *Other documentation that may be relevant for the purposes of employment and occupation.*

6. MONITORING THE IMPLEMENTATION OF GENDER EQUALITY DIRECTIVES

The *Commission Staff Working Document* (2010) outlines Commission actions for the implementation of the *Strategy for Equality between Women and Men 2010-2015*. It acknowledges the need to give due attention to gender identity, and mandates that the Commission take the following actions:²⁵

Key Actions

- Monitor the correct implementation of EU equal treatment laws with a particular focus on Directives 2004/113/EC and 2006/54/EC.
- Monitor the extent to which gender has been taken into account in applying the non-discrimination directives.

Outcomes

- In line with the jurisprudence of the European Court of Justice on gender identity and gender discrimination, the Commission will pay particular attention to this aspect in the overall monitoring of the implementation of the relevant Directives and notably in the reporting on the application of Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services.
- Present a report on application of Directive 2006/54/EC.

In view of the above, TGEU and ILGA-Europe have submitted thorough documentation to the European Commission detailing the experience of discrimination of trans people in ways that contradict both Directives.²⁶ The Commission has failed to publish its report regarding Directive 2004/113/EC. In the report's absence, on 16 April 2013 the European Parliament adopted a resolution on Directive 2004/113/EC which acknowledged that 'in line with Court of Justice of the European Union jurisprudence, discrimination against transgender people and discrimination on grounds of gender identity may amount to discrimination on grounds of sex in policy and legislation in the field of equality between women and men' and called on the Commission to: 'take into consideration [...] access to medical goods and services, in

particular access to [...] gender reassignment treatment;' and 'in line with Court of Justice case-law, fully to include discrimination on grounds of gender identity in future policy and legislation in the field of equality between women and men'.²⁷

6.1 Implementation review of the Gender Recast Directive

With regard to the Gender Recast Directive (2006/54/EC), member states had until 15 February 2011 to communicate to the Commission all the information necessary for it to draw up a report. Following its analysis, the Commission published its first report on 6 December 2013.²⁸ In its assessment of the newly introduced protections afforded to trans people, the Commission acknowledges that '[v]ery few member states have explicitly transposed this novelty', even though it does not clearly indicate the minimum threshold of implementation that it is expecting. The Commission did not reflect on the submissions by TGEU and ILGA-Europe²⁹ and has limited its assessment to whether 'gender reassignment' is referred to in the legislation, without clarity as to how far it intends to look into other areas of implementation (if at all). As it indicates in the report, the Commission will continue to seek clarifications and to demand detailed information about the transposition, thus ensuring the implementation of all the Checklist's minimum criteria.

The 2011 *Trans and Intersex People Report*, commissioned by the European Commission, found that nine equality bodies self-assessed that they were not adequately mandated to tackle discrimination on the grounds of 'gender reassignment,' a minimum criteria of the Directive.³⁰ This translates directly into a lack of awareness about existing protections, especially since as many as 58% of trans respondents to the FRA LGBT survey did not know that trans-related employment protection existed in their country.³¹ The Commission needs to

look into this issue and ensure that all member states have a mandated equality body to ensure the rights related to gender reassignment.

Current invasive/harmful requirements needed to obtain legal gender recognition have a clear impact on the employment prospects and experience of discrimination by trans people (see Chapter 2). In light of this, the European Commission must ensure that member states' laws cease to require invasive/harmful burdens on trans people, based on the principle of equal treatment of trans people as stipulated in the Directive. Similarly, in view of the findings of the *FRA LGBT Survey* with regard to trans people's risk of poverty even when employed, it would be opportune for the Commission to extend its assessment on pay discrimination to gender reassignment, ensuring that trans people are not subject to direct or indirect discrimination in this regard.

6.2 Looking ahead

The EU needs to review its own language and approaches to the equality of trans people. It should broaden its interpretation of the concept of gender reassignment so as to include protection for trans people who cannot or choose not to undergo gender reassignment. It should also adopt standard language around gender identity and gender expression. This would remove ambiguity around who is or is not included within the scope of the legislation, and also respond to requests from EU member states in the *Call for Comprehensive Approach* (2013)³² and the *Declaration of Intent* (2014)³³, from the FRA in its *LGBT Legal Analysis* (2008)³⁴, and from LGBTI civil society.

Such a revision would also ensure coherence between the EU's external and internal policy. Indeed in 2013, the EU adopted far-reaching *LGBTI External Action Guidelines*,³⁵ which clearly commit it to protecting transgender persons against discrimination, based on the EU founding principles of equality.

In its *Orientation Paper on the High Level Group on Non-Discrimination, Equality, and Diversity* from November 2014, the Commission includes gender identity in its mission to combat discrimination on the grounds of gender.³⁶ This approach must become the new standard.

The work of the High Level Group, as well as the successor to the *Strategy for Equality between Women and Men 2010-2015*, shall demonstrate how to transpose these ideas into a concrete inclusion of a trans perspective in employment and other areas. This should translate into the issuance of guidelines specifying how trans people are covered under 'sex' discrimination according to the Gender Recast Directive, as called for by the European Parliament.³⁷ It should also include a set of specific measures to ensure that gender recognition regulations in member states do not undermine such protection but enable trans people's equal access to employment.

7. LEGAL GENDER RECOGNITION: A PREREQUISITE FOR EMPLOYMENT EQUALITY

'As the survey has shown, obtaining identity documents matching their gender identity and expression is a problem that hinders normal social life for many trans respondents. EU Member States should ensure the full legal recognition of a person's preferred gender, including the change of first name, social security number and other gender indicators on identity documents. [...] EU Member States should fully recognise documents and decisions issued by other EU Member States in the area of legal gender recognition, to facilitate the enjoyment of trans persons' right to freedom of movement in the EU.'

European Union Agency for Fundamental Rights (2014)³⁸

The *FRA Trans Report* clearly demonstrates that the lack of identity documents that conform to one's gender identity or gender expression can be one of the main reasons for the occurrence of discrimination in the first place. Indeed '[o]ne in three trans respondents felt discriminated against when showing their identification card or other official document that identifies their sex' while 'almost nine in 10 (87%) say that easier legal procedures for gender recognition in their preferred gender would help them to live a more comfortable life.' Invasive/harmful requirements for gender recognition in legislation are, therefore, a source of structural discrimination towards trans people's employment rights and freedom of movement within the EU.

Until now, the Commission has taken the view that the EU is not competent to address the civil status of trans persons and the requirements for legal gender recognition at the member state level. On its own merits, this position may be justified, but the bleak reality trans people face calls for proactive measures.

7.1 Applicability of CJEU reasoning to legal gender recognition

In the case of *K.B.*, the CJEU adopted a similar view to the Commission, limiting the scope of its decision to the question at hand. It merely referred to the impossibility for the plaintiff to marry (as UK law at the time only allowed for the marriage of persons of a different sex) due to the fact that the sex on a person's birth certificate could not be rectified other than in very exceptional cases. Admittedly, in that case the

CJEU did not request the UK to amend national gender recognition legislation, but instead limited itself to request that EU laws apply to this and similar cases irrespective of the fact that trans people could not meet the requirements at stake.

Paraphrasing CJEU Advocate General Ruiz-Jarabo Colomer's reasoning in *K.B.* to the issue of legal gender recognition, one could argue that: until member states adopt the necessary legislation enabling trans people to rectify their legal documents to match their gender identity, the national court – which is also a Community court – must ensure, in accordance with national law, that the discrimination to which trans people are subject does not have any repercussions for the rights which they derive from the Treaty.³⁹

7.2 Legal gender recognition and freedom of movement

Trans people are also workers, students, and family members of persons moving across the Union. Access to adequate legal gender recognition is also an issue of EU citizenship and free movement rights. There are a number of precedents concerning civil status documents, the principles of which could be relied upon when arguing for the existence of an EU right to proper documentation, in particular, and for the right to legal recognition of gender identity in general.

The CJEU clearly set out that the Treaty articles on citizenship preclude 'national measures which have the effect of depriving Union cit-

izens of the genuine enjoyment of the substance of the rights conferred by virtue of that status'.⁴⁰ Such measures may, for instance, be national rules on how a person's name is recorded in civil status documents. After all, 'a person's name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter [...] and in Article 8 of the [ECHR]'. The latter can be claimed also with regard to gender identity.⁴¹ In this vein, the European Parliament called on the 'Commission and Member States [...] [to] study whether restrictions in place for the change of civil status and identity documents for transgender people harm their ability to enjoy their right to free movement'.⁴²

The European Commission could also take a bolder step, and explore the possibility of recasting existing legislation regarding citizenship and freedom of movement in the EU. This recast should take into account CJEU decisions regarding the right to recognition of one's name and personal characteristics, and their adequate registration (non-trans specific). In doing so, trans people's rights should be protected in that process.

7.3 EU external – internal coherence

In 2013, the EU adopted far reaching *LGBTI External Action Guidelines*, which state that, '[t]he EU aims to promote and protect all human rights of LGBTI persons on the basis of existing international legal standards in this area, including those set by the United Nations and the Council of Europe'.⁴³ It also recognises that: 'The EU's founding principle of equal treatment also protects transgender persons against discrimination.'

Within the guidelines, there are several specific references to legal recognition of trans persons, including an unequivocal statement that: '[a]ppropriate identity documents are a pre-requisite to effective enjoyment of many human rights. Transgender persons who do not have identity documentation in their preferred gender may as a result be exposed to arbitrary treatment and discrimination at the hands of individuals and institutions. No provision is made in some countries for legal recognition

of preferred gender. In other countries, the requirements for legal gender recognition may be excessive, such as requiring proof of sterility or infertility, gender reassignment surgery, hormonal treatment, a mental health diagnosis and/or having lived in the preferred gender for a specified time period (the so-called 'real life experience')'. The guidelines then ask for a proper assessment of the country's situation: '[a]re there procedures in place to recognise a transgender [...] person's gender identity in official documents? Does the law and/or administrative regulation permit this? Are these procedures accessible, transparent, quick and free from abusive medical and social requirements? Do they ensure privacy is protected by prohibiting disclosure of the person's legal gender history? Do they legally provide for state and non-state actors to change gender on job references, certifications and similar?'

The Commission should take the incongruence between external and internal policy as an opportunity to upscale the EU's internal policy in this field. It should creatively explore how to best work with member states, using the open method of coordination where the European Commission leads a process of guidelines and indicators, benchmarking and sharing of best practice. Additionally, it should use the newly founded High Level Group on Non-Discrimination, Equality and Diversity to prevent the continued discrimination against trans people. As a number of member states have willingly declared their interest in enhancing trans rights domestically,⁴⁴ this process would appear to be feasible.

8. CONCLUSION

'I know that many of you have been calling for a framework and initiatives in the LGBTI area for a long time. Just a few weeks ago, Ms. Jourová stated that she intends to work with the incoming Vice-President Frans Timmermans on an action plan with the Member States. And I think the time has come for such a partnership.'

Martine Reicherts, EU Commissioner for Justice, Fundamental Rights and Citizenship (2014)⁴⁵

In the past years, a lot of effort has gone into building the case for giving greater attention to the plight of trans people. However, trans people remain systematically worse off in their employment and economic experience than the general population. Robust equality measures covering all trans people and forward looking gender recognition procedures need to be swiftly enacted. TGEU and its member organisations have been indicating that, as with other minorities, equality for trans people requires particular attention and specific measures. Following the various public calls made by member states and the European Parliament, as well as the recent European Commission commitment to adopt an LGBTI action plan, it would appear that there is currently a good moment for concerted effort on trans rights.

The European Commission should take the opportunity and adopt a holistic approach to problems affecting trans people, ranging from employment equality issues to EU citizenship rights and gender recognition legislation. In doing so, it should work closely with the Parliament, member states and civil society to ensure that, at a minimum, its internal policy standards (and those of member states)

match its external standards on trans rights. In view of the fact that the *FRA Trans Report* has clearly indicated that a lack of or inadequate legal gender recognition of trans people negatively impacts their lives and their economic prospects, it would stand to reason that legal gender recognition is included in such measures as a domestic economic issue.

For their parts, member states should enact measures to ensure employment non-discrimination by meeting the criteria outlined in the Checklist, and adopt gender recognition legislation based on the right to self-determination.

Equality bodies should upscale their efforts and collaborate with employers and trans civil society to enhance the trans employment experience. They are in a key position to instigate and support reforms leading to quick, accessible, and transparent gender recognition procedures that are based on self-determination.

9. RECOMMENDATIONS: 10 THINGS TO DO

These sets of recommendations target the main players that can ensure equality for trans people in the sphere of employment, namely the EU, national governments, companies/employers, trade unions, equality bodies/NHRIs, and trans rights organisations. They refer back to the issues explored throughout the first part of this document and aim to foster cooperation and mutual support in the best interest of trans workers within the EU.

10 THINGS THE EU CAN DO⁴⁶

1. Ensure that the current legal protection granted by EU law to those who intend to undergo, are undergoing, or have undergone gender reassignment is extended to all trans persons in all EU member states, including through a harmonised implementation of the cases *P v. S and Cornwall County Council*, *K.B. v National Health Service Pensions Agency*, and *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, as well as the Gender Recast Directive (2006/54/EC).
2. Consider gender identity and gender expression as protected sub-categories of the rights regarding sex (with a status equivalent to pregnancy and maternity) and name them expressly in legislation, strategies, policies, action plans, and awareness-raising campaigns. This should be extended to any future legislation tackling employment equality between women and men, follow-up strategies to the Strategy for Equality between Women and Men 2010-2015, and any other gender equality measure, including those combating gender stereotypes.
3. Adopt specific measures to tackle transphobia and discrimination on the grounds of gender identity and gender expression in order to mitigate the high levels of discrimination suffered by trans people, as repeatedly confirmed by the reports published by FRA, most notably: *Being Trans in the European Union - Comparative analysis of the EU LGBT survey data (2014)*.
4. Adopt an LGBTI equality strategy with a strong commitment to trans equality, including specific measures and targets in line with the Call for a Comprehensive Policy Approach at European Union Level and across the European Union on LGBT Issues, which was signed by several member states.
5. Take up the request of the Call for adequate 'follow up [of] the Council of Europe Ministers' Recommendations on measures to combat discrimination on grounds of sexual orientation and gender identity', the Recommendations of which include a commitment to:
 - i. A review of national gender recognition legislation 'in order to remove abusive requirements'; and
 - ii. The possibility of a 'change of name and gender in official documents in a quick, transparent and accessible way' including with regard to documents issued by non-state actors such as 'educational or work certificates'.
6. Ensure that member states do not impede the freedom of movement of their trans nationals due to direct or indirect discriminatory provisions in access to identity cards or passport, including due to a misrepresentation of their true identity.
7. Ensure that member states fully recognise documents and decisions issued by other EU member states legally recognising gender identity to facilitate the enjoyment of trans persons' right to freedom of movement in the EU.
8. Issue guidelines indicating how EU employment rights and the principle of freedom of movement need to be guaranteed for trans people irrespective of national gender recognition legislation; and use the open method of coordination or other available methods, to facilitate a process intended to assist member states to align their national gender recognition legislation with current human rights standards.
9. Show leadership by including the grounds of gender identity and gender expression in the Staff Regulations' non-discrimination article, as well as the privacy clause.
10. Issue calls for proposals under the Rights, Equality and Citizenship Programme 2014-2020 that include trans equality initiatives within their scope, including express reference to the field of employment and/or legal gender recognition.

10 THINGS GOVERNMENTS CAN DO⁴⁷

1. Implement international human rights standards without discrimination, explicitly prohibiting discrimination on the grounds of gender identity and gender expression, as well as multiple discrimination, either within the framework of the domestic transposition of the Gender Recast Directive or the consolidation of national anti-discrimination legislation. Such laws should cover conditions for access to employment, self-employment and occupation, including: promotion and dismissals, membership of and involvement in an organisation of workers or employers or other professional organisations, and working conditions including pay.
2. Extend sick and invalidity schemes to trans people and ensure that employers make such schemes available. Recognise the age of retirement of trans individuals based on their preferred gender and not the birth sex. Make available occupational social security schemes and pension schemes to trans individuals and their spouses/partners in line with the jurisprudence of the CJEU as well as schemes covering industrial accidents and professional diseases, and unemployment benefits.
3. Include the human rights concerns of trans people in the scope of activities of equality bodies and/or NHRIs.
4. Introduce legislative or policy measures that provide access to change of name and/or gender on official educational and employment certificates, and related documentation. Provide effective protection of the right to privacy of trans people in the context of employment, in particular regarding employment applications, to prevent disclosure of their gender history or former name to their current employer, fellow employees, and/or clients.
5. Ensure the establishment and implementation of appropriate strategies to prevent discrimination on grounds of gender identity and gender expression in employment and occupation in both the public and the private sector. These strategies should address identified concerns, and be periodically assessed against indicators of equality.
6. Address the human rights of trans people, particularly the right to equality at the workplace, through specific human rights education training programmes and in-service courses, as well as awareness-raising campaigns for the general public.
7. Involve and consult trans people and their organisations when developing and implementing legislation and policies that concern them.
8. Develop research projects to collect and analyse data on the human rights situation of trans people including discrimination and intolerance they encounter with due regard to the right to privacy of the persons concerned.
9. Abolish any legal provisions, regulations, and administrative procedures that are contrary to the principle of equal treatment of trans people.
10. Introduce proactive statutory duties to ensure equality mainstreaming across government and review policies and practices that may directly or indirectly discriminate against or disadvantage trans people.

10 THINGS COMPANIES/EMPLOYERS CAN DO⁴⁸

1. Adopt a clear policy on diversity and non-discrimination, with clear reference to gender identity and gender expression; and covering all aspects related to the activities of the company. Such a policy should:
 - i. Cover recruitment, employment, promotions, salary, leave, sick leave, family related benefits and other relevant benefits;
 - ii. Contain a detailed definition of non-discrimination and diversity, specifically covering harassment and victimisation;
 - iii. Apply to employees, service providers and customers alike; and
 - iv. Detail the internal procedure in place enforcing the provisions of the policy.
2. Review the recruitment and promotional processes of the company to ensure that the focus rests on the competences and skills of the prospective employee and not their personal characteristics. It is suggested that anonymous recruitment procedures be used. References to the policy should be clearly indicated in the call for applications, and the job advert should be formulated in a language that is non-gender specific and non-binary.
3. Adopt guidelines on matters that apply to trans people's wellbeing at the workplace covering:
 - i. Transition on the job;
 - ii. Self-determined coming out;
 - iii. Use of toilet, bathroom, changing room and other gendered facilities;
 - iv. Work clothes and dress code; and
 - v. Privacy and protection against being outed.
4. Train human resource managers and other key personnel in diversity with an emphasis on trans issues, so that they:
 - i. Are aware of the particular aspects of trans people's experiences;
 - ii. Can conduct interviews, and manage employment relations in an informed and competent way; and
 - iii. Develop awareness that trans people, like others, have wide and diverse capabilities and talents.
5. Make the company policy known internally and externally through visibility on the website, inclusion in newsletters, and in any other way that is appropriate.
6. Support the establishment of an employee resource group dealing with diversity issues, or [depending on the size of the company] an LGBTI specific group encouraging the participation of trans employees, and making sure that all trans employees know who their contact person is.
7. Work closely with and benefit from the knowledge of other entities (trans or LGBTI employee networks from other companies and NGOs) dealing with trans workplace issues to exchange information, ensure that the policies remain up-to-date, and to have access to current best practices.
8. Review and, where unnecessary, reduce usage of gender markers, binary categories, gendered uniforms and/or gender segregation. Where gender segregated facilities are necessary, an option should be provided to all individuals to make use of individual or collective facilities as preferred, no questions asked.
9. Encourage trans employees to be visible at work and collaborate with their employers on diversity and inclusion, leading the way for other employees.
10. Encourage trans employees to guide their employers to implement best practices.

10 THINGS TRADE UNIONS CAN DO⁴⁹

1. Raise awareness within the trade union and ensure that in line with the Gender Recast Directive, gender reassignment (which is increasingly understood as referring to gender identity and gender expression) is included in the definition of sex. Trans rights must be explicitly addressed in the framework of the trade union's equality agenda.
2. Ensure that there is a clear commitment at all levels of the trade union on trans equality, and ideally have a committee that is tasked with developing policy on trans equality and inclusion.
3. Draw up specific policies on trans workplace rights and ensure that trans issues are explicit and visible within the trade union's equality policies. This could include specific policies on addressing recruitment discrimination, workplace bullying and harassment, gender reassignment, and gender recognition.
4. Make it a goal to organise and recruit trans people into the trade union. This also means increasing the visibility and participation of trans members at all levels of the trade union.
5. Set up an LGBTI trade union network (or include trans within the scope of the gender equality network) to bring together trans members so that they can help the trade union to develop policies, procedures, and practices on equality.
6. Provide resources for a newsletter, email list, and web site to raise awareness of the trade union's role in promoting trans equality. Hold seminars, workshops, and conferences on trans issues to give visibility to the trade union's work in this area.
7. Mainstream trans equality issues into all areas of the trade union's work so that it is progressed through the decision-making bodies and in collective bargaining.
8. Ensure that trans rights and equality are included in the trade union's education and training programmes, and that trade union representatives and negotiators are trained on trans people's rights.
9. Make trans workplace issues a part of equality policies that can be discussed with employers. Improving the working lives of trans workers can only be achieved by working with employers to tackle discrimination and harassment in the workplace.
10. Work in partnership with trans community organisations and NGOs and hold joint campaigns and community-based events, marking trans specific days such as Transgender Day of Remembrance (TDoR), and participating in public events such as Pride Parades.

10 THINGS EQUALITY BODIES/NHRIS CAN DO⁵⁰

1. Identify the inequality and discrimination experienced by trans people as a priority issue and address them in the organisation's strategic plan and corresponding annual work programmes. Human and financial resources need to be committed to developing this focus in the work of the institution, and to mainstream it throughout its work.
2. Take an inclusive perspective on trans people that encompasses sex, gender identity, and gender expression, including the potential for multiple discrimination faced by trans people.
3. Engage with trans people by meeting with and talking to their organisations (as well as individuals) to discuss their situation and experience, and to explore how to make existing equality legislation work for them. This would form the basis of the crucial mutual education that ensures equality legislation can contribute to addressing the issues of trans people.
4. Develop in-house capacity to address trans issues through staff training to enhance awareness, knowledge, and understanding of trans people and their issues. It would be useful for equality bodies to develop and provide this training in partnership with trans people and their organisations.
5. Support, and encourage support for, organisations of trans people, thus empowering the voice of trans people in society and ensuring a point of contact for all those that need it.
6. Conduct or commission research on the experience and situation of trans people. This work develops a visibility for trans people, builds a knowledge and understanding of their experience and situation, and stimulates a broader commitment to responding to trans people and their issues.
7. Target trans people specifically when raising awareness of their rights under equality legislation and on how best to exercise such rights. Communication strategies and materials need to be developed that are specific to the particular situation and needs of trans people.
8. Be strategic in developing casework on trans issues and identify methods to tackle underreporting. Successful casework should stimulate trans people to be more confident in asserting their rights and will encourage employers and service providers to address the rights of trans people in their practices and procedures. More broadly, casework could be pursued to test and clarify the extent to which equality legislation covers all trans people.
9. Address the complex and varied issues facing trans people with other stakeholders, thus championing equality for trans people and in supporting good practice in promoting equality for and preventing discrimination against trans people.
10. Build public awareness of and commitment to addressing trans equality issues.

10 THINGS TRANS RIGHTS ORGANISATIONS CAN DO⁵¹

1. Inform trans people about their rights; covering both the Gender Recast Directive and reference to its national transposition as well as any other applicable anti-discrimination provisions regarding:
 - i. Access to employment and self-employment including promotion and to vocational training;
 - ii. Working conditions including pay; and
 - iii. Occupational social security schemes.
2. Monitor your country's transposition of minimum EU anti-discrimination standards in employment regarding sex, including coverage of gender reassignment (which is increasingly understood as referring to gender identity and gender expression), and contribute to European level periodic monitoring reports compiled by TGEU, ILGA-Europe and others.
3. Raise institutional and public awareness about the systematic discrimination experienced by trans people in the sphere of employment, citing the 2012 *FRA LGBT Survey (Being Trans in the European Union: Comparative analysis of the EU LGBT survey data (2014))* and other European-level human rights reports, Eurobarometers covering discrimination on the basis of gender identity, and similar relevant and authoritative domestic studies. Where possible, make sure to illustrate your advocacy with reference to genuine individual cases that show the extent and severity of the discrimination suffered.
4. Identify gaps in national law with regard to employment protection and gender recognition and draw strategies for improvement as necessary (e.g. address the relevant ministries for human rights/justice/employment/other; lobby parliamentarians; rally support from other NGOs, trade unions, equality bodies and/or NHRIs).
5. Publicise individual cases where trans people's employment is negatively affected by the lack of legal protection against discrimination and/or insufficient gender recognition procedures. Seek legal advice on possible remedies with reference to the Gender Recast Directive.
6. In cases of discrimination, encourage and support trans people to seek redress (e.g. through referrals to equality bodies or pro-bono lawyers), and make use of administrative and judicial remedies, referring both to the Gender Recast Directive and the jurisprudence of the CJEU and ECtHR that judges must apply in their decisions.
7. Make specific reference to the Gender Recast Directive and/or the CJEU jurisprudence in any document, public statement and letters to government and elected officials you send regarding the issue of trans equality in employment and occupation as well as gender recognition legislation.
8. Bring your concerns to the attention of the European Commission. [The relevant offices are: Unit D.1 'Equal Treatment Legislation', D.2 'Gender Equality', and D.4. 'Non-discrimination policies and Roma coordination', all within Directorate D Equality, DG Justice, European Commission.]
9. Keep TGEU updated about the state of implementation of the Gender Recast Directive and gender recognition legislation in your country and let us know how we can support your actions.
10. Document, publish, and circulate cases of good practices that can be useful to trans rights organisations and advocates elsewhere. Explain what the good practice consists of, what makes it so useful, the impact it has already had, any testimonials from trans people themselves, and who to contact should one request further information.

10. ENDNOTES

- 1 FRA** (2013), EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Results at a glance, Vienna: FRA http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf
- 2 Eurostat** <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=de&pcode=tsdec420&plugin=1&tableSelection=1>
- 3 European Commission** (2014), Orientation paper - High Level Group on Non-Discrimination, Equality and Diversity: Renewing the European Non-Discrimination Infrastructure http://ec.europa.eu/justice/events/hle-2014/files/hle2014_orientation_en.pdf
- 4 Commissioner for Human Rights** (2009), Human Rights and Gender Identity, Strasbourg: COE <https://wcd.coe.int/ViewDoc.jsp?id=1476365>
- 5 FRA** (2014), Being Trans in the European Union: Comparative analysis of the EU LGBT survey data, Vienna: FRA http://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative_en.pdf
- 6 Kristen Schilt & Matthew Wiswall** (2008), Before and After: Gender Transition, Human Capital, and Workplace Experiences, The B.E. Journal of Economic Analysis & Policy: Vol. 8(1) http://www.econ.nyu.edu/user/wiswall/research/schilt_wiswall_transsexual.pdf
- 7 Amnesty International** (2014), The State Decides Who I Am: Lack of legal gender recognition for transgender people in Europe, London: Amnesty International <http://www.amnesty.org/en/library/asset/EUR01/001/2014/en/13af83a1-85f5-476f-9fe9-b931f2b2a9f3/eur010012014en.pdf>
- 8 ILGA-Europe & TGEU** (2011), Joint contribution by ILGA-Europe and Transgender Europe towards the European Commission's monitoring of the implementation of the Gender Goods and Services Directive (Dir 2004/113/EC) and the Gender 'Recast' Directive (Dir 2006/54/EC) in the EU Member States http://www.tgeu.org/sites/default/files/Report_on_gender_discrimination_in_employment_and_access_to_goods_and_services_June2011.pdf
- 9 TGEU** (2014), Trans Rights Europe Map & Index 2014, Berlin: TGEU http://www.tgeu.org/trans_rights_europe_map
- 10 LesMigras** (2012), "... nicht so greifbar und doch real" quantitative und qualitative Studie zu Gewalt und (Mehrfach-) Diskriminierungserfahrungen von lesbischen bisexuellen Frauen und Trans* in Deutschland. www.lesmigras.de/ergebnisse.html (in German)
- 11 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 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:EN:HTML>
- 12 2606th meeting of the Council of the European Union** (EMPLOYMENT, SOCIAL POLICY, HEALTH AND CONSUMER AFFAIRS), held in Luxembourg on 4 October 2004, Page 7 http://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=MING&DOC_ID=ST-13369-2004-INIT
- 13 Case C-13/94** [decided on 30 April 1996] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994CJ0013>
- 14 Case C-117/01** [decided on 7 January 2004] <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1417974186309&uri=CELEX:62001CJ0117>
- 15 Case C-423/04** [decided on 27 April 2006] <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1417980597815&uri=CELEX:62004CJ0423>
- 16 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) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:EN:PDF>
- 17 Minister Helena Dalli** (2014), Keynote Address, Budapest: 5th European Transgender Council http://tgeu.org/sites/default/files/Helena_Dalli_TGEU_Council.pdf
- 18 Silvan Agius, Richard Köhler, Sophie Aujean & Julia Ehart** (2011), Human Rights and Gender Identity: Best Practice Catalogue, Brussels: ILGA-Europe & TGEU http://www.tgeu.org/sites/default/files/best_practice_catalogue_human_rights_gender_identity.pdf
- 19 Lov om Ændring af Lov om Det Centrale Personregister** [Amendment of the Act of the Civil Registration System] http://www.ft.dk/samling/20131/lovforslag/1182/html_som_vedtaget.htm (in Danish); **Norwegian Act** relating to a prohibition against discrimination on the basis of sexual orientation, gender identity and gender expression (the Sexual Orientation Anti-Discrimination Act) (2014), <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf>,
Act amending the Finnish Equality Act (2014), <http://www.finlex.fi/fi/laki/alkup/2014/20141329>,
Constitution of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1>;
- 20 Bill No. 70 – Gender Identity, Gender Expression and Sex Characteristics Bill** <http://www.parlament.mt/file.aspx?f=48866>

- 21 Australian Government** (2013), Australian Government Guidelines on the Recognition of Sex and Gender <http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>
- Office of Human Rights District of Columbia** (2012), Transgender and Gender Identity Respect Campaign <http://ohr.dc.gov/transrespect>
- 22 Senate Department for Labour, Integration, and Women's Issues** (undated), Transgender on the job: First it was taboo. But what about now? A Reader on transgender as a topic in the work environment http://www.berlin.de/imperia/md/content/lb_ads/gglw/tia/_transgender_at_work_reader_recommendations_bf.pdf?start&ts=1416489460&file=_transgender_at_work_reader_recommendations_bf.pdf
- 23 Checklist builds on 'Do national legislation, policies and practices comply with the Directive' in Stefano Fabeni & Silvan Agius** (2009), Transgender People and the Gender Recast Directive: Implementation Guidelines, Brussels: ILGA-Europe http://www.ilga-europe.org/home/publications/reports_and_other_materials/transgender_people_and_the_gender_recast_directive_implementation_guidelines_december_2009
- 24 Richard Köhler, Alecs Recher & Julia Ehr** (2013), Legal Gender Recognition in Europe: Toolkit, Berlin: TGEU http://www.tgeu.org/sites/default/files/Toolkit_web.pdf
- 25 European Commission** (2010), Strategy for equality between women and men 2010-2015, Luxembourg: Publications Office of the European Union http://ec.europa.eu/justice/gender-equality/files/strategy_equality_women_men_en.pdf,
Commission Staff Working Document: Actions to implement the Strategy for Equality between Women and Men 2010-2015 www.ec.europa.eu/social/BlobServlet?docId=5776&langId=en
- 26 Supra Note No. 8, ILGA-Europe & TGEU** (2011); **TGEU** (2014), Trans People vis-à-vis the Goods & Services Directive http://www.tgeu.org/sites/default/files/TGEU_Submission_Trans_People_and_the_Goods_and_Services_Directive.pdf
- 27 European Parliament resolution of 16 April 2013** on transposition and application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (2010/2043(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0118&language=EN&ring=A7-2013-0044>
- 28 Report on the application of 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) http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/com-2013-861-final_en.pdf
- 29 Supra Note No. 8, ILGA-Europe & TGEU** (2011)
- 30 Silvan Agius & Christa Tobler** (2012), Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression, Brussels: European Commission http://ec.europa.eu/justice/discrimination/files/trans_and_intersex_people_web3_en.pdf
- 31 FRA** (2012), LGBT Data Explorer <http://fra.europa.eu/DVS/DVT/lgbt.php?locale=EN&dataSource=LGBT&media=png&width=740&plot=euBars&topic=4.+Rights+Awareness&question=d2&superSubset=1&subset=AllSubset&subsetValue=01--All>
- 32 Rome Declaration on Non Discrimination, Diversity and Equality** (2014) http://ec.europa.eu/justice/events/hle-2014/files/hle2014_romedeclaration_en.pdf
- 33 Declaration of Intent** (2014) <http://www.idaho2014forum.org/images/prs/IDAHO%20declaration%20of%20Intent%20Final.pdf>
- 34 European Union Agency for Fundamental Rights** (2008), **Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States**, Part I – Legal Analysis, page 20 <http://fra.europa.eu/en/publication/2010/homophobia-and-discrimination-grounds-sexual-orientation-eu-member-states-part-i>
- 35 Council of the European Union** (2013), Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, Luxembourg: Foreign Affairs Council meeting http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137584.pdf
- 36 European Commission** (2014) High Level Group on Non-Discrimination, Equality and Diversity: Renewing the European Non-Discrimination Infrastructure Orientation paper http://ec.europa.eu/justice/events/hle-2014/files/hle2014_orientation_en.pdf
- 37 European Parliament resolution of 4 February 2014** on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0062&language=EN&ring=A7-2014-0009>
- 38 Supra Note No. 5, FRA Trans Report** (2014)
- 39 Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 10 June 2003**, Case C-117/01 K.B. v The National Health Service Pensions Agency and the Secretary of State for Health <http://curia.europa.eu/juris/document/document.jsf?docid=47913&doclang=EN>
- 40 C-34/09** [decided on 8 March 2011] <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-34/09>

- 41 Marleen van Kerckhove, Tiiu Iverson, Jeanette Grune** (2013), Recognition of transgender persons in Europe – Possibilities to increase awareness of the EU
- 42 Supra Note No. 37, European Parliament Resolution** (2014)
- 43 Supra Note No. 35, Council of the European Union** (2013)
- 44 Supra Note No. 32** (2014), **Supra Note No. 33, Declaration of Intent** (2014), **Call for a comprehensive policy approach at European Union level and across the European Union on LGBT issues** (2013)
<http://www.ambafrance-nl.org/IMG/pdf/IDAHOsignedCall-pdf.pdf>
- 45 Martine Reicherts**, EU Commissioner for Justice, Fundamental Rights and Citizenship (28 October 2014), Change and continuity: what lies ahead for LGBTI rights in the EU?, during the conference organised by FRA under the title 'Tackling sexual orientation and gender identity discrimination', http://europa.eu/rapid/press-release_SPEECH-14-727_en.htm
- 46 Recommendations include the opinions expressed by in Supra Note No. 5, FRA Trans Report** (2014); and **Supra Note No. 45 the Call for a comprehensive policy approach at European Union level and across the European Union on LGBT issues** (2013) signed by fourteen EU member states [as of December 2014]
- 47 Inspired by recommendations found in Supra Note No. 4, Commissioner for Human Rights** (2009); 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 <https://wcd.coe.int/ViewDoc.jsp?id=1606669>
- 48 Inspired by recommendations found in Supra Note No. 22, Senate Department for Labour, Integration and Women's Issues** (2014)
- 49 Recommendations based on an adaptation of the ETUC leaflet: Extending equality – Trade unions in action!** (2008)
 [Available in 22 European languages]:
http://www.etuc.org/publications/etuc-leaflet-extending-equality-%E2%80%93-trade-unions-action#.VGUns_QfIV;
 and **ETUC** (2008), Extending equality: Trade union actions to organise and promote equal rights, respect and dignity for workers regardless of their sexual orientation or gender identity, Brussels
http://www.etuc.org/publications/extending-equality-0#.VH5Zve_wvIU
- 50 Based on recommendations found in EQUINET** (2010), Making Equality Legislation Work for Trans People, Brussels
http://www.equineteurope.org/IMG/pdf/trans_opinion_english.pdf, and **EQUINET** (2013), Equality Bodies Promoting Equality & Non-Discrimination for LGBTI People, Brussels http://www.equineteurope.org/IMG/pdf/lgbti_perspective_english_.pdf
- 51 Recommendations based on an adaptation of 'What if national legislation does not meet this checklist' in Supra Note No. 23, Stefano Fabeni & Silvan Agius** (2009)

