

# License To Be Yourself



Laws and advocacy for legal gender recognition of trans people

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# Introduction

## Purpose

*License To Be Yourself* has been produced for multiple audiences. It has been written as a resource for activists working on human rights issues for trans people, drawing on the expertise and experiences of trans activists from across the world. **As the right to be recognized before the law is an important human right**, this report is also intended for human rights activists who may not have previously engaged on the issue. Lastly, the report can be a useful source of comparative information for policy makers who are considering developing laws, policies, or regulations on legal gender recognition that uphold the rights of trans people.

*License To Be Yourself* documents some of the most progressive and rights-based laws and policies from around the world—as of March 2014—that enable trans people to change their sex / gender on official documents. In addition this resource shares the strategies that activists have used to achieve this progress, in different global and legal contexts. The resource does not suggest that one size fits all, but highlights common barriers and emerging opportunities. The aim is to support local communities to identify the best possible laws and policies for their own countries.

## Scope

This resource focuses primarily on changing sex / gender details on formal legal documents such as a birth certificate, passport, citizenship certificate, government-issued identification (ID) card, driver licence or voter-registration card. The relative importance of various documents varies between countries. In some it is very difficult for trans people to change their name to reflect their gender identity. Therefore many of the laws and provisions in this resource specifically stipulate the right to change these details too. In other countries the processes are quite separate.

Often official documents, issued by the state, are required to change other important private sector documents such as bank records and educational certificates. For brevity reasons, these non-state documents are largely outside the scope of this report. However it is hoped some of the strategies highlighted could be useful for activists seeking to improve the processes for amending these documents too.

Legal recognition is distinct from social recognition. Recognition of sex / gender on legal documents aids wider acceptance of that identity in everyday interactions. However it should never be a mandatory step in order for someone to assert their sex, gender identity or gender expression and have that respected (and protected under relevant anti-discrimination laws).

The primary focus of material in this resource is on legal gender recognition for trans and gender-diverse people. Some laws or policies apply to intersex people too. This resource gives examples of activists' approaches that are intersex-inclusive, including where intersex and trans people have jointly developed campaigns. However intersex-specific policies fall outside the scope of this report.

This resource does not provide advice on how to draft a gender recognition law, as that would require technical understanding of a country's laws and legal tradition. However it does provide information about the types of issues activists need to consider if they are campaigning for legal gender recognition. Many are about core principles, such as whether a law should be open to all trans people, based on human rights standards, with a simple process that is free. Activists interviewed for this resource frequently stressed the importance of agreeing on legislative priorities, ideally with some form of community mandate, before approaching a legal drafter or politicians for their support.

# Executive Summary

“Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basis aspects of self-determination, dignity and freedom. No 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. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”

### — Yogyakarta Principle 3<sup>1</sup>

Identification is required for most activities in daily life. When trans people’s official documentation does not reflect their gender identity it typically causes significant impediments, often marginalizing them in the societies in which they live. Incongruent documentation and personal records can potentially exclude trans people from health services, rations, and basic citizenship rights such as the right to vote and freedom of movement. In addition, documents that disclose that someone is trans often lead to discrimination in vital interactions such as enrolling at school, applying for jobs, renting accommodation, or opening a bank account.

The vast majority of trans people around the world cannot obtain official documents under their appropriate name and sex that match their gender identity. The minority who do have access to legal gender recognition still typically face significant challenges. Countries that do not allow legal gender recognition or have highly restrictive laws or regulations for changing name and sex violate fundamental human rights obligations. Such restrictions may involve excluding trans people who are married or have children and stipulating compulsory medical diagnoses or interventions, including those that result in sterilization. These violate the right to recognition before the law, the right to non-discrimination and equality, the right to privacy, the right to health, and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment.

The issue of legal gender recognition is gaining increased attention by international human rights mechanisms. In 2013 the Human Rights Committee made detailed recommendations critiquing the current legal gender recognition

process in Ukraine.<sup>2</sup> In the same year, the UN Special Rapporteur on Torture called on States to outlaw the forced or coerced sterilization of trans and intersex people, a requirement for legal gender recognition that still exists in many countries across the world.<sup>3</sup> At the regional level, the European Court of Human Rights (ECtHR) has ruled that Council of Europe Member States must provide for the

“The vast majority of trans people around the world cannot obtain official documents under their appropriate name and sex that match their gender identity.”

possibility of legal gender recognition for someone who has had sex reassignment / gender affirming surgeries (Goodwin and I. v. UK).<sup>4</sup>

There is no “one size fits all” for determining whether a law or regulation on legal gender recognition is rights-based, because political, legal and social contexts play an important role in determining legal possibilities. However, there are key elements that should be considered in pursuing progressive legal gender recognition laws or regulations.



### Ideally, progressive laws and policies will:

- Be based on self-defined gender identity rather than verification by others
- Include more than two sex / gender options for those who identify outside the binary categories of male and female
- Include intersex people
- Apply to all residents, including those born overseas
- Link to broader human rights, particularly access to health services that enable someone to medically transition if that is their choice

### And will not:

- Require a medical diagnosis of gender identity disorder, gender dysphoria, or transsexualism
- Require transition-related medical treatment, such as hormonal therapy or gender affirming surgeries
- Require sterilization, either explicitly or by requiring medical procedures that result in sterilization
- Require living continuously or permanently in one's gender identity
- Require divorce or dissolution of a civil partnership
- Prohibit parenting now or the intention to have children in the future
- Be governed by age restrictions. Options for children and youth should recognize their evolving capacities

The process for changing name and sex in official gender documentation should be simple, timely, low cost or free, transparent rather than discretionary, and confidential—with strong privacy protections.

Activists across the world are advocating for, and achieving, progressive laws or regulations on legal gender recognition. The Gender Identity and Health Comprehensive Care for Transgender People Act of 2012 made Argentina the first country in the world to recognize the right to self-deter-

mination of identity under the law. In Kenya, activists are building pressure for change through strategic litigation and advocacy, while support for changing Ukraine's regressive legal gender recognition regulations has been found at the UN level. Following strategic lobbying by activists, the US implemented a policy that no longer requires any medical treatment as pre-requisite for changing gender in passports. The Australian government adopted similar changes and went further by introducing progressive Government Guidelines on the Recognition of Sex and Gender. In Hong Kong, a campaign has been launched for the introduction of a new Gender Recognition Ordinance.

“Activists across the world are advocating for, and achieving, progressive laws or regulations on legal gender recognition.”

Diverse legal and political strategies are being used by activists advocating for legal gender recognition. In order to ensure support from within a local trans community, it may first be necessary to build the capacity of local trans communities to work together on these issues. This may include generating a commitment to progressive laws or policies that do not exclude trans people because of their age, whether they are married or have children, their gender identity, where they were born or whether they have medically transitioned. Trans activists are forming broad alliances with lesbian, gay, and bisexual, and mainstream human rights groups, as well as medical professionals in some settings. Strategic litigation has been critical in countries in both Europe and Latin America and increasingly these human rights arguments are being reiterated in submissions to United Nations and other human rights mechanisms.

These efforts are enhanced where communities have built an evidence base around the need for change. The power of individual stories can be vital in conveying the pervasive impact of restrictive laws and policies on trans people's everyday lives. Participating in government consultations

and working groups can be an effective way to progress legal gender recognition, particularly if there are clear community priorities from the outset. Similarly, public education campaigns can build significant momentum for legislative or regulatory change, but are not appropriate in every context.

Gender recognition laws around the world reflect the time periods and contexts within which they were developed. The 2012 Argentinean law represents a fundamental shift in international best practice, based solidly on human rights principles.

# Background

## A Note on Terminology

It is an individual's right to define their own gender identity and the terms, if any, that best describe who they are. There is a wide range of terms in different regions to describe gender diversity. This document uses the umbrella term "trans" to encompass this diversity and local terms when referring to specific communities.

The terms "sex" and "gender" are used inconsistently both within and between countries. For the purpose of this document, the distinction being made is between someone's assigned sex at birth and their affirmed or preferred gender. Its focus is on laws and policies that enable someone's sex details (or gender marker) to be amended to match their gender identity.

## Current situation for trans people internationally

Identification is required for most activities in daily life. These include enrolling at school, applying for a welfare benefit or a pension, finding a job, opening a bank account, renting accommodation, accessing health services, voting, and travelling across a border. As a result, the absence of legal gender recognition potentially impinges on many other rights. This can be because trans people are exposed to discrimination and violence, suspected of fraud, or denied access to legitimate entitlements simply because of their sex or gender identity.

The vast majority of trans people around the world cannot obtain official documents under their appropriate name and sex, to match their gender identity. In many parts of the world, including most of Asia and Africa and in all Pacific island countries, the lack of legislation or clear judicial or administrative procedures mean that trans people are legally unable to change sex details on official documents. In other countries where legal gender recognition is possible, many trans people are explicitly excluded because they are married or have children. If they want to change their gender under law, they are often required to get divorced first, thereby having to choose between having their marriage or their affirmed gender recognized and protected under law.

The minority of trans people internationally who do have access to legal gender recognition still typically face significant challenges. In all but a handful of countries they must obtain a diagnosis of Gender Identity Disorder (GID) or gender dysphoria and/or evidence of having undergone

a medical transition. Most countries stipulate this entails "gender reassignment surgery" or sterilization. Yet many trans people do not wish to have such medical treatment, or cannot do so for medical, financial or other reasons. Making medical steps a prerequisite for legal gender recognition also violates fundamental human rights. At the same time, denying trans people access to gender affirming health services undermines their right to health.

**“Making medical steps a prerequisite for legal gender recognition also violates fundamental human rights.”**

## Using international human rights mechanisms

Countries that have ratified UN covenants and treaties are required to regularly report on their compliance with the relevant human rights obligations. Trans groups can make submissions to UN Treaty bodies that are examining their country's record, highlighting the impacts of laws and policies on their human rights. If community concerns are picked up in the relevant UN committee's recommendations, it adds weight to activists' campaigns and legitimizes trans rights as human rights. For example in 2008 the UN Human Rights Committee urged Ireland to "recognize the

right of transgender persons to a change of gender by permitting the issuance of new birth certificates,” citing the rights to privacy, equality, and recognition before the law.<sup>5</sup> In 2013 the Committee made detailed recommendations critiquing the current legal gender recognition process in Ukraine.<sup>6</sup>

The Universal Periodic Review (UPR) is a relatively new UN process. It first took place in 2008 and focuses on a country’s overall human rights record rather than on one specific UN convention or covenant. Other countries question the country under review, making recommendations based partly on submissions to the UPR. Since 2009, activists in Norway, Germany, Sweden, Belgium, Ireland, Australia, and Scotland have made submissions raising legal gender recognition issues.<sup>7</sup> However countries have been slow in recommending that their peers address these concerns. This has limited the UPR’s effectiveness in this area to date.

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity provide guidance to countries on related human rights issues and legal standards. They were developed by human rights experts in 2006 to reflect the existing state of human rights law at that time. While not legally binding, a growing number of countries have endorsed the Yogyakarta Principles in their parliaments or laws.<sup>8</sup>

#### Human rights standards in Europe

The European Court of Human Rights (ECtHR) has ruled that Council of Europe Member States must provide for the possibility of legal gender recognition for someone who has had sex reassignment / gender affirming surgeries (Goodwin and I. v. UK).<sup>9</sup> This includes the right to marry as that sex. As decisions of the ECtHR have played a significant role in improving access to legal gender recognition across Europe, some other key decisions are highlighted in this report.

In 2009, the former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, published an Issue Paper Human Rights and Gender Identity. Its twelve recommendations included an analysis of changes required to

legal gender recognition laws and policies. In 2010 these conclusions were reflected in a Recommendation of the Council of Europe’s Committee of Ministers,<sup>10</sup> and a resolution from its Parliamentary Assembly.<sup>11</sup>

## Why legal gender recognition is a fundamental human rights issue

When trans people are unable to gain legal recognition, or face significant barriers trying to do so, they are denied fundamental human rights such as:

#### The right to recognition before the law

Recognition before the law is set out in core human rights treaties.<sup>12</sup> The UN High Commissioner for Human Rights has recommended that States “facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.”<sup>13</sup>

#### Non-discrimination and equality before the law

In their jurisprudence, general comments and concluding observations, UN treaty bodies have consistently held that gender identity is a prohibited ground of discrimination under international law. The principle of non-discrimination and the right to be equal before the law are interdependent.

There are three aspects of the right to equality and non-discrimination that are relevant to legal gender recognition. Firstly it encompasses the general vulnerability to discrimination when someone’s sex is disclosed or their gender identity is not respected. Secondly, trans people should not face additional barriers than other groups when trying to obtain official documentation. Thirdly, this right is also breached when specific groups are excluded from legal gender recognition provisions. Examples often include minors, those married or in civil partnerships, and those born overseas.

In 2011, Thomas Hammarberg published a comprehensive study on gender identity and sexual orientation discrimination across the Council of Europe’s 47 member states. Drawing on his 2009 Issue Paper Human Rights and Gen-

der Identity, it recommended that legal gender recognition processes be expeditious and transparent, not require people to be unmarried, and that they recognize trans people's right to marry and to adopt children.<sup>14</sup>

#### Right to privacy

A trans person's gender identity is an intimate aspect of their personality and therefore their private life. When trans people are unable to change their name or sex details to match their gender identity, they are marked as trans in all aspects of daily life. This undermines their right to privacy as set out in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). The right to privacy is spelled out in domestic legislation in many countries too.

In addition, for countries that are members of the Council of Europe this right is guaranteed under the European Convention on Human Rights. Article 8 sets out the right to respect for private and family life which includes many issues related to self-identity, including gender identity.<sup>15</sup> While the right to privacy can be balanced against the public interest, the ECtHR found gender recognition resulted in "no concrete or substantial hardship or detriment to the public interest." It went on to state that "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in the sexual identity chosen by them at great personal cost" (Goodwin v. United Kingdom).

#### Right to health

The right to health requires health services to be accessible, available, acceptable and of good quality. States are required to progressively realize the right to health, to the maximum of their available resources.<sup>16</sup> The reality for trans people around the world routinely falls far short of these requirements, both when attempting to access general health services or when required to medically transition.<sup>17</sup>

Often gender recognition laws or policies require evidence of a mental health diagnosis of Gender Identity Disorder or gender dysphoria, and surgeries or hormone treatment that result in sterilization. This compromises trans people's ability to decide whether to have such procedures based solely on their clinical necessity or desirability, without having to factor in the legal consequences. In many countries trans

**“No person should have to undergo surgery or accept sterilisation as a condition of identity recognition.” -- World Professional Association for Transgender Health**

people typically bear most of the costs of obtaining such a medical diagnosis or undergoing these medical procedures.

The UN Committee on Economic, Social and Cultural Rights has observed with dismay that trans and intersex people are characterized as mentally ill and has also expressed concern at violations of their sexual and reproductive health rights. These undermine the right to the highest attainable standard of health required under article 12 of the International Covenant on Economic, Social and Cultural Rights. In 2011 the UN Committee on Economic, Social and Cultural Rights called on Germany to enact measures to protect the "personal integrity and sexual and reproductive health rights" of transgender and intersex individuals.<sup>18</sup>

Freedom from torture and other cruel, inhuman or degrading treatment or punishment

Torture and other cruel, inhuman or degrading treatment are prohibited not only under the Universal Declaration of Human Rights (Article 5) and the ICCPR (Article 7) but also under a specific 1984 UN Convention against Torture. The UN Special Rapporteur on Torture has highlighted that forced or coerced sterilization is a violation of these rights. He noted that "in many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender." Stressing the importance of safeguarding informed consent of sexual and gender minorities, he called on all States to outlaw forced or coerced sterilization of trans and intersex people.<sup>19</sup>

The UN Committee on the Elimination of All Forms of Discrimination against Women has expressed its “concern at specific health problems experienced by transgender women, in particular the compulsory sterilization they should undergo to get their birth certificates changed.”<sup>20</sup>

As at September 2013, no cases have been judged by the European Court of Human Rights over requirements for mandatory sterilization including hormonal or medical procedures that lead to infertility. However Thomas Hammarberg’s 2009 Issue Paper recommended that sterilization and other compulsory medical treatment should be abolished as a requirement for legal gender recognition.<sup>21</sup> This position was also reflected in his 2011 study and twice by the Council of Europe in 2010 (through a Recommendation of its Committee of Ministers and a resolution from its Parliamentary Assembly).

In 2010 the World Professional Association for Transgender Health’s Board issued an unequivocal Identity Recognition statement that “no person should have to undergo surgery or accept sterilisation as a condition of identity recognition.”<sup>22</sup>

# Progressive National Laws, Policies and Court Decisions



## Summary of Key Features

The best practice examples given below draw on the human rights principles outlined in the previous section. Some provisions, such as the Argentinean law, also include explicit references to international human rights standards or the Yogyakarta Principles.

The primary focus is on existing laws or court decisions, as precedents that may influence developments in other countries. However current laws and policies do not reflect the huge amount of work activists have been doing to support the development of progressive bills and proposed laws internationally. A number of these are mentioned briefly, with some lessons learned from this work included in section D.

The key elements of progressive laws and policies relate to either the scope and eligibility requirements of the provisions, or the process for obtaining legal gender recognition.

## Scope and Eligibility

### Ideally, progressive laws and policies will:

Be based on self-defined gender identity, with no pathologizing diagnosis required

In **Argentina**, the Gender Identity and Health Comprehensive Care for Transgender People Act (“Gender Identity Law”) 2012 gives people the right to request that their recorded sex, first name, and image are amended to match their self-perceived gender identity (Article 3). No medical opinion or evidence is required (Article 4).<sup>23</sup>

A diagnosis is not always required for hijra to change sex details on documents in **India**, or for meties to obtain an “Other” Citizenship Card in **Nepal**. But it is unclear what legal status these documents have for other purposes and who is able to obtain them.<sup>24</sup> Trans people wishing to change sex details from male to female, or vice versa, on an Indian ration card or passport typically require evidence that they have been diagnosed with Gender Identity Disorder.<sup>25</sup>

One concern raised about the Draft Heads of Bill in **Ireland** is that while no diagnosis is required, the applicant’s statutory declaration must be accompanied by a statement from their primary treating physician “which confirms

that the person has transitioned / is transitioning . . . and that they are satisfied that the person fully understands the consequences of their decision to live permanently” in that gender.<sup>26</sup> The Irish Human Rights Commission has critiqued this blanket requirement for medical verification. It says this may intrude excessively into a trans person’s private life and questions “whether gender identity is properly regarded as a matter of self-identification or one of medical diagnosis.”<sup>27</sup> Neither of the proposed private member’s Bills in Ireland requires such medical verification.

Passports details, but not birth certificates can be changed without a diagnosis or any medical information in **New Zealand**. The sole criterion is someone’s self-defined gender identity.

A number of other countries, that still require supporting documentation by a medical professional to change passport details, use general wording in order to avoid a specific diagnosis or medical treatment. In **Australia** and the **United States** the supporting letter refers to “appropriate clinical treatment.”<sup>28</sup> Both governments provide a very similar form letter. It discourages clinicians from providing any further medical information, in order to protect the applicant’s privacy. In November 2013 the Australian Capital Territory was the first Australian state to propose the same legal threshold for changing sex details on birth certificates.<sup>29</sup> Activists have welcomed these changes as effectively removing any requirement for medical interventions.

In the **United Kingdom** it is possible to amend passport details without a diagnosis, by providing a report from a medical practitioner “stating that you have a need to live your life in a different gender.”<sup>30</sup>

In **Denmark**, the government has proposed the introduction of a new law that will allow people to apply for change of legal gender at a civil registration office by providing a declaration that their felt gender is opposite to their registered gender. No third-party verification would be required, and the registration would be changed after a 6-month period, meant to ensure that the application is not based on impulse and to protect against potential abuse or fraud.

### Not require forced sterilization or medical procedures

Article 4 of the **Argentinean** Gender Identity Law explicitly states, “in no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place.”

In **South Africa** the provisions of the Alteration of Sex Description and Sex Status Act No. 49 of 2003 theoretically do not require any specific medical interventions. This is because broad definitions in the legislation encompass those who have altered their gender characteristics or expression without making any physical changes. Medical reports, verifying the steps a trans or intersex person has taken, may be written by any person legally authorized to provide health services. This includes traditional healers.

In practice, however, evidence of surgeries is routinely required in South Africa. After persistent letter-writing and meetings, in 2013 the Home Office promised the organization Gender DynamiX that officials would send a circular reminding people of the law and how it is meant to be implemented. As of this publication, this is yet to happen.<sup>31</sup> Gender DynamiX continues to engage with the Department of Home Affairs to advocate for the correct implementation of the 2003 legislation. Once Gender DynamiX has depleted all other alternatives, the last remaining option will be litigation through the South African Constitutional Court.

In **Botswana** it is also possible to apply to the court for legal gender recognition, based on documented proof of medical transition. This does not require sterilization.<sup>32</sup>

In 2012 the **Swedish** Administrative Court of Appeals ruled that a forced sterilization requirement intrudes on someone’s physical integrity and cannot be seen as voluntary.<sup>33</sup> From 1 July 2013, sterilization requirements were removed from Sweden’s legal gender recognition laws. Between 1930 and 1975, forced sterilization was conducted against other marginalized groups in Sweden, including Roma and disabled people. As a result of a 1999 Swedish law, these groups receive compensation. A complaint from 162 trans people, seeking the same compensation, has been formally registered with the Swedish Chancellor of Justice. A report by the Council of Europe’s Special Rapporteur on Forced Sterilisation and Forced Castration in Sweden and

the Czech Republic was adopted by the Council of Europe in June 2013. It recommends that sterilization must end instantly and compensation be paid.<sup>34</sup>

**Hungary, Portugal, Spain** and the **United Kingdom** also have no sterilization requirements.<sup>35</sup>

In 2009 the Austrian Administrative High Court in **Austria** held that it was unlawful to require gender reassignment as a mandatory condition for legal recognition of gender identity.<sup>36</sup> In **Germany**, a 2011 Federal Constitutional Court judgement overturned the requirements to have undergone gender affirming surgeries and to prove permanent sterility. It found that such surgeries were incompatible with the right to sexual self-determination and physical integrity.<sup>37</sup>

In a number of jurisdictions that still require some form of medical or surgical interventions, court cases have focused on the particularly high threshold “full gender reassignment” poses for trans men. The New Zealand Family Court and the Western Australian High Court have both ruled that trans men may amend the sex details on their birth certificate without having surgery to change their genitals or to remove their reproductive organs.<sup>38</sup>

### Not require living continuously or permanently in one’s gender identity

Historically gender recognition laws have been very closely aligned to the medical process of transitioning. Medical professionals typically required a trans person to live continuously in their preferred sex for a minimum period of time before they were eligible to access hormones or surgeries. This was referred to as a trans person’s “real life experience.” In some countries those time periods became translated into minimum periods before someone could access legal gender recognition.

The European Court of Human Rights has ruled that states have a margin of appreciation around legal gender recognition procedures. However since 1986 it has “emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments” (Goodwin v. UK, 2002). Two such developments are relevant here. Firstly, more gender recognition laws and policies are being developed with no

reference to the medical process of transitioning. Secondly, the World Professional Association for Transgender Health's Standards of Care have moved away from a focus on "real life experience."<sup>39</sup> Therefore any such focus is not appropriate in gender recognition laws.

The **Argentinean** Gender Identity Law does not require that someone has "real life experience" living continuously in a gender role matching their gender identity. Nor does the law require someone to state that the decision to amend their sex details is permanent. It is possible for the recorded sex details to be amended again in the future (Article 8).

While the gender identity law No. 7/2011 in **Portugal** requires a diagnosis of GID, it does not stipulate any specific medical interventions or "real life experience." The latter may be implied in a diagnosis, depending on the standards of care used by the multi-disciplinary clinical team providing the necessary diagnosis.

Not require divorce or dissolution a civil partnership

**Argentina, Uruguay, the United States, New Zealand** and 15 European countries (**Austria, Belgium, Denmark, Estonia, Georgia, Germany, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Romania, Spain, Sweden** and **Switzerland**) do not require a trans person to end their marriage as a pre-condition to legal gender recognition.<sup>40</sup> In January 2014, the Scottish Parliament's Equal Opportunities Committee voted unanimously to remove the spousal veto from the Marriage and Civil Partnership (Scotland) Bill. Under this proposal, married trans people in **Scotland** will no longer be forced to obtain written consent from their spouse in order to gain legal gender recognition.<sup>41</sup>

Marriage equality legislation in New Zealand explicitly addresses the position of trans people. The Marriage (Definition of Marriage) Amendment Act 2013 which came into force in August 2013, defines marriage as "the union of two people, regardless of their sex, sexual orientation, or gender identity." On the same date, the previous provision prohibiting married people from changing sex details on a birth certificate was repealed.<sup>42</sup>

In the **United States**, no state has a law requiring a trans person to be single or get divorced in order to obtain legal

gender recognition. The law is clear that when one spouse in a valid different-sex marriage undergoes gender transition, their marriage remains valid.<sup>43</sup> This holds true even in the many states that do not recognize same-sex marriages.

In **South Africa** the Alteration of Sex Description and Sex Status Act 2003 No. 49 states that previous rights and obligations "are not adversely affected by the alteration of sex details" (section 3(3)). However, in practice the Home Office requires previously married applicants to divorce.<sup>44</sup>

In 2006 the **Austrian** Constitutional Court ruled that a regulation prohibiting a trans woman from legally transitioning while she remained married to her wife lacked any basis in Austrian law.<sup>45</sup> In 2008 the **German** Constitutional Court similarly invalidated section 8(1)(2) of the federal Transsexual Law which required someone applying for legal gender recognition to be unmarried or divorced. The judges found this created a conflict between a person's right to marry and their privacy, which included their self-determined gender identity.<sup>46</sup> Neither Austria nor Germany have legislated this right to stay in an existing marriage, though it was an element of the Bill proposed by the Green Party in 2009.

In 2002 the European Court of Human Rights Europe (ECtHR) recognized that trans people who had gender affirming surgeries had the right to marry as that sex (Goodwin and I. v UK). Only recently has the Court heard a case about the right to stay married. In November 2012, the ECtHR dismissed a complaint by a trans woman that the compulsory divorce requirement in Finnish law was in breach of her rights under the Convention (H v. Finland). The case was heard by the Grand Chamber of the ECtHR in October 2013 (Hämäläinen v Finland), with a decision expected in 2014.

Not prohibit existing or prospective parenting

The 2009 **Uruguay** law explicitly states that someone applying for gender recognition does not have to be childless.<sup>47</sup> Many other laws, including the Gender Identity law in Argentina, are silent on this issue and do not exclude existing or prospective parents from obtaining legal gender recognition.

### Be available to children and young people

In **Argentina**, the 2012 Gender Identity Law enables applicants under the age of 18 to change their recorded sex to match their gender identity (Article 5). This request must be made through their legal guardian. The child or young person's explicit agreement is required, taking into account the evolving capacities and the best interests of the child. This requirement explicitly references both the United Nations Convention on the Rights of the Child and domestic legislation. The child must be assisted by their own lawyer.<sup>48</sup> If the legal guardian's consent is denied or impossible to obtain, summary proceedings can be taken before a Judge whose decision will be also be guided by the child's evolving capacities and best interests.

In **Germany**, the minimum age restriction was removed from its Transsexual Law (Transsexuellengesetz) as a result of a 1982 Federal Constitutional Court decision (Bundesverfassungsgericht -16.3.82).<sup>49</sup> This means a trans person under the age of 18 can apply to the court for legal gender recognition. Such applications are treated on the same basis as other legal cases by a minor. This means that from the age of 12, a trans person would have the right to be heard in their case.

In **New Zealand**, the Births, Deaths, Marriages and Relationships Registration Act 1995 has separate provisions for adults (section 28) and minors (section 29). Both require applications to the Family Court. A legal guardian makes the application for someone under the age of 18, and there is no minimum age restriction. Someone aged 16 or 17 who is, or has been, in a marriage, civil union or a de facto relationship is an adult for the purpose of these provisions (section 27A). The New Zealand legislation remains focused on expert medical evidence of interventions taken to produce "physical conformation" with the applicant's gender identity. However, for minors, the evidence can be of medical treatment that the child will have if the Family Court grants a declaration changing the child's sex.

In December 2013 the Dutch Senate in the **Netherlands** voted in favor of a new gender recognition law that is available to anyone age 16 years or older.<sup>50</sup> The law will take effect in July 2014.

### Include third gender / sex options

Since the 1990s it has been possible for trans people in **New Zealand** to have the sex on their passport listed as "indeterminate / unspecified" once they started transitioning. By filling out a statutory declaration, a trans person could request their sex to be recorded as X, the third option available under the International Civil Aviation Organisation guidelines.<sup>51</sup>

New Zealand's statutory declaration process was simplified and extended in November 2012. Now any New Zealand citizen is able to choose whether they want M, F, or X on their passport, based solely on self-defined gender identity.<sup>52</sup> In June 2012, New Zealand driver licences also adopted this approach, though sex details are only held on a database and do not appear on the licence itself.<sup>53</sup> No medical or other evidence is required for trans adults under either process.<sup>54</sup> However, for those under the age of 18, two supporting letters are required (from one legal guardian and from a counsellor or medical professional).<sup>55</sup>

In **Australia** it has been possible since at least 2003 for intersex people to have the sex details recorded on their passport as X if they could present a birth certificate that noted their sex as indeterminate.<sup>56</sup> In 2011, the Australian passports policy was simplified and extended so that any trans or intersex person is able to record their gender as male (M), female (F) or indeterminate / unspecified / intersex (X). The only requirement is a supporting letter from a medical practitioner confirming that the person is either intersex or "has had or is receiving appropriate clinical treatment for gender transition."<sup>57</sup>

**Nepal** issues a Citizenship Card to adult men and women that gives access to many entitlements.<sup>58</sup> With rare exceptions, this card had been denied to those meties who wished to register as a third gender and not as male or female.<sup>59</sup> That policy was challenged and struck down in a 2007 Supreme Court case.<sup>60</sup> The court legally established a "third gender" category (teshro Lingi).<sup>61</sup> Progress implementing the court's decision has been slow. It was only in 2013 that the first meties received Citizenship Cards with their gender marked as "Other." Barriers remain, as only meties who do not already have a Citizenship Card are eligible to

be recorded as “third gender.” Those who had already been issued a male or female card, based on assigned sex at birth, are not eligible. The Blue Diamond society is advocating for all gender minorities to have the right to record their gender as “Other” and for a third sex option on passports.<sup>62</sup>

In 2008 Tamil Nadu was the first state in **India** to recognize “transgender” on official documents, as an option for trans women (aravani) on ration cards.<sup>63</sup> This was important because ration cards are also used as identification, for example to open a bank account or apply for a passport. Nationally, India now uses a third gender category in several administrative documents. In 2011, India’s new aadhaar ID numbering system introduced “transgender” as a third gender option.<sup>64</sup> There is now a case before the Supreme Court seeking a direction to India’s central and state governments to include transgender as a third category on passports, voter ID cards, driver licences, ration cards and educational admission forms.<sup>65</sup> In October 2013, the Supreme Court reserved its judgment in this case.<sup>66</sup>

There are outstanding issues to be resolved in India. The push for recognition of a third gender has seen affirmative action for some groups, such as hijra and aravani, whose identities have a strong basis in cultural traditions. However unless all laws are modified to reflect a third gender, there are significant risks that third gender people could fall outside the protection of current laws that are based on only two gender options.<sup>67</sup>

In some cases where a third gender is recognized, trans people who identify as male or female may face higher legal thresholds before their gender identity is recognized. For example, while it has been possible to change the sex / gender marker from male to female (or vice versa) on a passport since at least 2005, this has required evidence of gender affirming medical procedures. There are currently no laws or policies addressing the needs of trans men or other trans masculine people in India.<sup>68</sup>

From a rights-based perspective, third sex / gender options should be voluntary, providing trans people with a third choice about how to define their gender identity. Those identifying as a third sex / gender should have the same rights as those identifying as male or female. This would not preclude special measures or affirmative action for

third gender groups, designed to combat historical marginalization, such as those introduced for aravani and hijra in India or meties in Nepal.<sup>69</sup> As Mauro Cabral, co-director of Global Action for Trans\* Equality, notes:

“People tend to identify a third sex with freedom from the gender binary, but that is not necessarily the case. If only trans and/or intersex people can access that third category, or if they are compulsively assigned to a third sex, then the gender binary gets stronger, not weaker.”

Finally a single third sex / gender option may not sufficiently encompass the full range of gender and sex diversity, including specific regional and cultural identities. A more inclusive approach would be to increase options for people to self-define their sex and gender identity.

#### Include Intersex People

A number of countries have separate legal or policy provisions for intersex people to change sex or gender details on official documents. While detailed discussion about these is outside the scope of this resource, which focuses on legal gender recognition for trans people, there are opportunities for progress on legal gender recognition for trans people that are inclusive of intersex people. Some examples are outlined below.

The official title for the third gender option in **Australia** is “indeterminate / unspecified / intersex.” This option is available on passports and will now be required on all administrative records kept by government departments and agencies, including employee records. The government guidelines clarify that intersex people are free to choose this option or to identify as male or female on documents. The Australian passport policy recognizes it is inappropriate to require intersex people to provide supporting evidence of “clinical treatment for gender transition.” Instead a medical practitioner completes a statutory declaration confirming the person is intersex and that either their new gender is male or female, or that they are of indeterminate sex.

In **New Zealand**, official media releases about the M, F, and X options on passports and driver licences specifically mention their importance to intersex as well as trans people. They also clarify that all three options are available to anyone eligible for a New Zealand passport or driver licence.

Legal gender recognition laws that require a diagnosis of GID or gender dysphoria, or evidence of a medical transition, are not inclusive of intersex people. Trans organizations in **Ireland** have highlighted this in their critique of the Irish government's Draft Heads of Bill for Gender Recognition and in their support for the Sinn Fein and Zappone Private Members' Bills.<sup>70</sup>

In **Poland**, a Gender Accordance Act proposed by trans politician Anna Grodzka deliberately avoids the terms transgender and intersex and is inclusive of anyone "whose gender assigned at birth differs from their gender identity" (Article 3). This proposed law also prohibits any normalizing genital surgeries on infants, babies, and children. These practices currently occur in Poland and this is the first legal proposal designed to prohibit them.<sup>71</sup>

Apply to all residents, including those born overseas

Governments are unable to amend a birth certificate issued by another country, and only provide passports to their own citizens. However some countries also make their gender recognition laws or policies open to trans people who were born overseas.

In **Argentina**, overseas-born residents can apply for legal gender recognition if it is not possible to do so in their own country.<sup>72</sup> **Sweden** allows applications by all Swedish residents. Similarly, in **Germany** previous court decisions have extended eligibility of its gender recognition law to all German permanent residents including those who are stateless, refugees or have been granted asylum.

From January 2009 it has been possible for **New Zealand** residents born overseas to obtain a declaration from the New Zealand Family Court amending their sex details.<sup>73</sup> That document can be used to change official documents in New Zealand or in countries that recognise New Zealand's legal gender recognition process.

Link to broader human rights

In **Argentina**, Article 11 of the Gender Identity Law guarantees access to trans-related health care on the basis of informed consent, with the costs covered in the national Mandatory Medical Plan. This part of the law has not been regulated by the Ministry of Health, which means that there is no concrete plan for implementation. However,

many people are getting access to hormones and surgery in different hospitals throughout Argentina.<sup>74</sup>

In Tamil Nadu in **India**, recognition of aravani as a third gender is linked to the development of a Transgender Welfare Board that has introduced affirmative action education, health, employment and housing policies for aravani.<sup>75</sup>

Article 12 of the private member's Bill proposed in **Poland** also affirms people's "legal right to specific healthcare, necessary to function according to their gender identity." It notes that this would be covered under existing national insurance or under separate laws and regulations that entitle people to cost-free health care, such as the Act on Healthcare Services Financed by Public Resources.

## Process

Administrative or judicial

The primary distinction between legal gender recognition processes is often whether they are administrative or judicial. An administrative process may involve submitting forms to the government agency responsible for maintaining the relevant records (such as birth registers, or passport or driver licence records). In other instances a separate administrative process is established, such as a gender recognition panel.

In contrast, under a judicial process, applications to change name or sex details require an application to a court and decisions are made by a judge. There are hybrid approaches too, where most applications go through an administrative process but those deemed more complex require a judge's decision.

While generalizations can be made about the pros and cons of each these approaches, they are very much influenced by the details of the relevant gender recognition law or policy. For example, if the law requires proof of sterilization, then it may be less intrusive for a trans person to provide those details to an experienced Judge or gender recognition panel, than to a frontline official at a Registrar's office who may have limited knowledge about trans issues.

In **Portugal**, the 2011 law created an administrative process. However it also required a diagnosis of GID, provided in a clinical report by a multi-disciplinary team from a sexology clinic. Lobbying by doctors has hampered the effective implementation of the law and undermined human rights principles on which it is based. The Institute of Registries and Notaries, the agency responsible for implementing the law, decided that the legally required “clinical report” must meet a standard template and be passed only by doctors and psychologists specified in a list created by a medical organization. This has meant that doctors retain the power to decide who is and is not trans, and therefore whether people may or may not change their name and sex.<sup>76</sup>

Given these complexities, it is helpful to use principled criteria for assessing possible options. The Council of Europe’s Committee of Ministers has recommended that countries “take appropriate measures to make possible the change of name and gender in official documents in a quick, transparent and accessible way.”

Drawing from lessons learned in the implementation of legal gender recognition laws and policies internationally, this section expands on the **three criteria recommended by the Council of Europe’s Committee of Ministers to profile some progressive practices that are:**

#### Simple

In some countries legal gender recognition is done through an administrative process, by submitting forms to a government agency or a gender recognition panel. Typically this is a relatively straight forward option, especially where approval is automatically granted if all the necessary paperwork is supplied.

This is the approach taken in Argentina where the default process is wholly administrative. Summary proceedings before a Judge are used only for applications by those under the age of 18 if a legal guardian’s consent is denied or impossible to obtain (Article 5). A judge’s authorization is also required for any second or subsequent applications (Article 8).

In both Argentina and Spain a simpler process has led to a much higher number of people accessing legal gender recognition. Three years after the adoption of the Spanish

“Trans people’s ability to access legal gender recognition is undermined if they cannot afford the application fee or are required to hire a lawyer to apply on their behalf.”

gender recognition law, there was a 15-fold increase in the number of people changing their sex details.<sup>77</sup> Greater access to legal gender recognition means fewer people have inconsistent or incongruent details on formal documents. This has benefits not only for individual trans people but also for data-matching by governments, including around law enforcement and security. Activists in some countries have chosen to emphasise this latter point, particularly when trying to amend passports policies.

#### Timely

In **Portugal** the process is very efficient and timely. Within 8 days, the registrar must accept the request, ask for further information, or reject the request. Where additional information is provided, a second decision must also be made within 8 days.

In **Argentina** the process is simple and typically takes between two and three weeks to complete. The actual time period varies between provinces and in some areas it has taken up to 2-3 months.<sup>78</sup>

In **Hungary** a trans person has to provide medical evidence from a psychiatrist, a psychologist, and a gynaecologist or urologist. Once these are submitted, the ministry responsible for public health has 30 days to make a decision based on the medical records. The local registrar then has 8 days to amend the birth register following a positive decision. While this appears to be a very timely process, in practice the procedure is far from transparent and accessible. Instead of 30 days sometimes it takes between 3 and 4 months for the ministry to answer requests.<sup>79</sup>

Delays in processing applications for legal gender recognition invariably leave trans people with their lives on hold. It can prevent a trans person being able to apply for a job, travel safely, marry, or be recorded correctly on their child's birth certificate. Even where countries have clear legislative requirements to process applications quickly, these are frequently compromised by those responsible for interpreting the law. A recent article about delays in **South Africa** calls for processing staff to be trained and a fast-track process for those applicants who clearly meet the eligibility criteria in the 2003 law.<sup>80</sup>

#### Low cost

Trans people's ability to access legal gender recognition is undermined if they cannot afford the application fee or are required to hire a lawyer to apply on their behalf. In **Argentina**, the law is affordable and accessible. Procedures are "free, personal and do not require a lawyer" (Article 6).

One of the criticisms of the Portuguese law is the cost (200 €). This is unaffordable for many trans people, particularly given the high unemployment rate within the trans community.<sup>81</sup>

While some states in the USA have administrative procedures for amending sex details, until recently **California** required a court hearing before its Office of Vital Records would change these details on a birth certificate. The court fees were \$435. The Transgender Law Centre has been one of the co-sponsors of Assembly Bill 1121 that allows individuals to bypass the court and these costs. In October 2013 the Bill was signed into law by the Governor, and will be fully implemented by July 2014.<sup>82</sup> This means trans people will be able to apply directly to the Office of Vital Records to amend a birth certificate. Removing the requirement for a court hearing will also reduce the caseloads of overwhelmed courts.

#### Transparent rather than discretionary

The gender recognition process in **Argentina** avoids arbitrary decisions or administrative discretion. Once the required information has been provided, the Civil Register is notified "without any additional legal or administrative procedure required" (Article 6). In its first year of operation, more than 3,000 trans people applied to change their sex entry and name under this law.

Administrative processes that have a check-list of evidence required are more transparent than those that retain an element of discretion. Even where there is no explicit discretion, this may be implied if detailed medical evidence is required, with no strict criteria for assessing what is sufficient. A number of initial administrative hurdles with the Gender Recognition Panel in the **United Kingdom** were due to the panel Chair's interpretation of the medical evidence required.<sup>83</sup>

In **Germany** a 2009 proposal by the Green Party was transparent, allowing no administrative discretion. An application could only be rejected if it was clearly filed with intent to mislead.<sup>84</sup> This proposed law has not gained sufficient parliamentary support to be enacted.

#### Protective of privacy

In the **United Kingdom**, Section 22 of the Gender Recognition Act 2004 provides extensive, but not absolute, privacy protections for trans people. It is a summary offense, punishable by a fine if convicted, for a person who has acquired protected information about a trans person's gender recognition application or previous gender to disclose that information to another person. The provisions cover protected information acquired in an official capacity by civil servants, current and prospective employers and those providing professional services. There is an administrative procedure that enables trans people to be security-vetted by the Criminal Records Bureau, without having to disclose previous names to an employer.

The Gender Identity Law in **Argentina** protects the applicant's confidentiality, with no public disclosure of their recorded sex and change in first name allowed without their consent. Only those authorized by the document holder or with a written, well-founded judicial authorisation can have access to the original birth certificate (Article 9).

In **California**, AB 1121 has made the name change process more private and affordable for trans people. It will exempt them from the general requirement to publish a notice of any intended name change in their local newspaper for four weeks.



## Other factors to consider

There are other practical issues to consider when creating gender recognition laws or policies. Some of these are briefly touched on below.

Will an application by a trans person be sufficient, or is some form of third party verification required, such as a statutory declaration?

While the former approach recognizes the applicant's autonomy, a statutory declaration gives greater legal weight to such statements. This may be necessary in some circumstances or legal traditions.

Should any new laws specify a review after a certain time period?

A review could be specifically designed to assess whether the law needs to be updated to reflect evolving human rights jurisprudence. An open-ended review may be risky if there is any possibility of progressive parts of the law being repealed. Linking a review to research or monitoring on the impacts of the law could build a stronger evidence base for maintaining or improving current provisions.

For example, in the **Netherlands**, activists successfully lobbied for the new gender recognition law, introduced in December 2013, to be evaluated within three years. This creates the opportunity for continued advocacy around parts of the law that do not meet international best practice. Specifically, activists are seeking to follow the example of Argentina and remove the minimum age (set at 16) and the requirement to have a statement from a medical expert supporting a trans person's wish to have their gender marker changed.<sup>85</sup>

Should there be an ability to make regulations under the gender recognition law?

The absence of such powers in **South Africa** has frustrated attempts to provide guidance about how the 2003 law should be implemented in practice. Any such guidance would require an amendment through the South African parliament. However activists are reluctant to open up the law itself for review, in case its progressive elements are repealed.

Should a change in one area automatically flow to all other records?

One example of flow-on effects of legal gender recognition is the requirement that employers in **Germany** retrospectively change name and gender details on employment certificates in order to protect a trans person's privacy.<sup>86</sup> The proposed gender recognition law in **Malta** "seeks to ensure that the legal recognition of a person's gender is a comprehensive one and that, apart from exceptional circumstances, it is reflected in all sectors."<sup>87</sup>

However, having incongruent documents is the norm for many trans people. This reflects the differing thresholds for amending name and sex / gender details on various documents. Even where this is no legal barrier, often there is no clear mechanism for updating secondary documents.

In a number of countries it has been significantly easier to amend passports and driver licenses than birth certificates. In **New Zealand**, recent electronic identity verification legislation formalizes government agencies' current practice of accepting a passport as proof of identity. This means almost all of a trans or intersex person's records can now reflect their self-defined gender identity, even if they have not yet met the legal threshold for amending those details on a birth certificate.<sup>88</sup>

There may be no transparent policy for updating details on administrative documents held by businesses or government agencies. Public debates around legal gender recognition may create the erroneous perception that such documents are bound by legal requirements for changing a birth certificate. In its lobbying around the Gender Recognition Bill, Press for Change in the **United Kingdom** ensured that easier "grace and favour" solutions that enabled other documents to be amended, would not be jeopardized by the higher threshold introduced for birth certificates.<sup>89</sup>

Should changes to a trans person's records be made on the original register, or should a specific parallel register be established?

In the case of a birth register, it may not be possible to amend or delete original records. Where they are retained, confidentiality around original records is very important. However establishing a new register may also draw attention to

those named on it. It may be useful to look at processes used for other groups where privacy is paramount, such as children who have been adopted. The proposed gender recognition law in **Malta** recommends a register for trans people similar to their current adoption register.

Trans people and their allies from all parts of the world are campaigning for more progressive gender recognition laws and policies. In this section, activists from Argentina, Kenya, Ukraine, the United States, Australia, and Hong Kong share what they are doing and the lessons they have learned.

# Regional Case Studies

Existing laws, policies, and legal  
and administrative decisions

## Argentina

Gender Identity and Health Comprehensive Care for Transgender People Act <sup>90</sup>

Mauro Cabral is the co-director of Global Action for Trans\* Equality and is based in Buenos Aires, Argentina. He talks about the importance of the world leading gender identity law passed in Argentina in May 2012.

What difference has the law made for trans people in Argentina?

It has allowed trans men and trans women to get new birth certificates, IDs and passports in a very easy and fast way. Many have accessed gender affirming procedures such as hormones and surgeries. It has also allowed some trans people to get access to other benefits, such as employment, based on regulations that build upon the law.

To what extent were activists involved in achieving these changes?

Trans activists played a key role in achieving these changes by creating the conceptual framework that challenged prior legal and political understandings of trans issues. They built alliances, predominantly with LGB groups, and a public campaign, using the media to increase visibility. The media campaign included developing a guide for the journalists to understand gender identity issues.<sup>91</sup> Activists also provided technical and political input to politicians and their advisors.

How were you able to achieve these changes?

Change was possible because of the long experience of political mobilization and organization in Argentina. We were also able to identify the right historical momentum. This included the government's commitment to human rights and wider social awareness on LGTB issues.

The right to identity has a particular meaning and significance in Argentina, and an immense normative weight.<sup>92</sup> The campaign for legal gender recognition formulated trans rights as a particular example of the right to identity (including the right to embody that identity). This was hugely significant in achieving this legislative change.

Legislative victories and strategic litigation were important. In mid-2010 Argentina recognized same-sex couples' right to marry. In the absence of any laws on gender recognition, individual people took cases to court. In a 2001 court case, a trans man was granted the right to change his sex and name on his identity documents, but not his birth certificate (In re KFB).<sup>93</sup>

From 2010 onwards, a series of appeals explicitly argued that no medical diagnosis or any other evidence should be required, just the person's self-defined gender identity. Several judges agreed and some individual cases were very visible in the media and had a very important effect. It is very difficult to pass a law that is much more conservative than what the judges themselves are already acknowledging and affirming that the Constitution guarantees.<sup>94</sup>

What, if any, problems or compromises did you face achieving these changes?

Trans people were depicted as victims (of social exclusion, discrimination and violence). It was really difficult to challenge that picture and to be recognized as experts. Even when travestis played a key role in the process, the law only recognizes men and women.

What, if anything, would you do differently today?

I would have included intersex issues more explicitly, and fought to expand gender recognition to other identities.

“There is need to empower judges and legal advocates so that they are sensitive to transgender people and advocates are able to build air tight cases for those of us seeking redress.”

### Kenya:

Building pressure for change through strategic litigation and advocacy <sup>95</sup>

Audrey Mbugua is the Programs Manager for Transgender Education and Advocacy (TEA) in Kenya and a public face of trans activism in her country. TEA was formed in late 2008. Audrey talks about the strategic cases TEA has taken, challenging the barriers trans people in Kenya face trying to change name and gender markers on official documents.

What are the difficulties trying to change your name in Kenya?

In the Kenyan legal system, you need to change your name through a deed poll first before changing it on other documents. The first step, even for those living outside Kenya, requires getting a letter from the head provincial government official in the area where you come from, confirming your identity and that you are from that region. This document, plus a national identity card print-out are used by an advocate who registers a deed poll, and places a gazette notice so that members of the public have the opportunity to make any objection to the name change. If no one objects, it becomes valid and can be used to change other documents.

There are multiple problems with this system. Firstly it is very expensive, costing at least US\$750 per person. This is beyond the reach of transgender people in Kenya. The pro-

cess is bureaucratic, slow and chaotic (based on paper rather than electronic files). The current Kenyan law is silent on the steps needed to change your name or gender marker.<sup>96</sup> However, in practice, people are required to supply a letter from a government medical officer confirming they have had a full surgical transition. This is despite the Attorney General stating there is no obligation on the government to provide these medical services. Officials are insensitive to transgender applicants and display bullying attitudes and practices.

What has Transgender Education & Advocacy done?

To date TEA has successfully supported seven transgender people to change their name details on their passport. We are currently challenging the requirement to have surgeries before gender markers can be changed on a passport.

TEA is taking the Kenya National Examination Council to court over its refusal to change name details on academic certificates. This is despite an earlier commitment it made to develop a policy that would enable trans people to change their name. This court case is on-going.

While the Department of Civil Registration has a policy stating that someone can change their names on their birth certificate, the department has refused to allow a trans person to do so, claiming the Births and Deaths Registration Act does not allow such amendments.

## What have you learned?

Our system does not deal with hypotheticals. It makes decisions based on the demands of the public. As trans activists we need to understand what the law says and then make applications to change our name and gender.

There is need to empower judges and legal advocates so that they are sensitive to transgender people and advocates are able to build air tight cases for those of us seeking redress. It pays to engage in a productive and intelligent way. Write polite and respectful applications and legal correspondence, then use them and the replies you get in your affidavits to the court.

We also have to push for the health services we need to live in our gender identity. Seek help from various individuals and agencies. The medical fraternity (especially psychiatrists) have been very supportive in educating members of the public and government institutions.

Change does not come with flowers. It comes with the ability to persevere despite some very nasty comments. Mental toughness and a firm focus on the prize and why we started this have kept us on track.

## Ukraine:

### Human Rights Committee's recommendation on forced sterilization<sup>97</sup>

Anna Kirey was born in Russia and grew up in Ukraine. She was a founding member of Labrys, an LGBT organization founded in 2004 in Bishkek, Kyrgyzstan. Anna is now a research fellow at Human Rights Watch in New York, focusing on LGBT issues in Eastern Europe and Central Asia. She talks about using the United Nations' treaty body processes to highlight human rights violations against trans people in Ukraine.

In 2013, trans activists from the Ukrainian NGO Insight and Human Rights Watch participated in the UN Human Rights Committee's periodic review of Ukraine's compliance with the International Covenant on Civil and Political Rights (ICCPR). Their submission highlighted the impact of forced sterilization and up to 45 days of psychiatric confinement as part of Ukraine's legal gender recognition process.<sup>98</sup>

In February 2011, the Ukrainian Ministry of Health Protection issued Order No.60 on "Improving medical support for people who need a change (correction) of their sex".

A trans person wishing to legally change their gender must:

- Undergo surgeries to remove all sexual organs, as well as mammary glands for trans men, and possibly other surgeries, as determined by a state medical commission. This requirement is based on an outdated medical classification and effectively requires trans people to undergo involuntary sterilization.
- Stay between 30 and 45 days in a psychiatric institution and
- Not be the parent to children under the age of 18.

These requirements violate trans people's rights to private and family life and to personal autonomy and physical integrity, and deny them the ability to define their own gender identity. In July 2013, activists met informally with the Human Rights Committee members, prior to the Ukrainian delegation's appearance before the Committee. Activists' concerns had not been on the Committee's initial list of issues to raise with the government officials. It was the last question the Committee put to the government delegation.

In its Concluding Observations in August 2013, the Committee noted its concerns about compulsory confinement and mandatory corrective surgery as prerequisites for legal gender recognition. It recommended that these and any other "abusive or disproportionate requirements" should be repealed.<sup>99</sup> This was the first time that the UN Human Rights Committee had made such a specific recommendation about legal gender recognition.

Subsequently activists will be writing to the Ministry of Health Protection in Ukraine, requesting information about its implementation of the concluding observations. This will contribute to an evidence base about the need for change, adding to previous research done with local activists.

Working with allies has been effective for trans activists from Ukraine. Human Rights Watch has prioritized human rights violations experienced by Ukrainian trans people seeking legal gender recognition. It plans to include a chapter in its report on discrimination of LGBT people in

Ukraine, detailing the impact of current laws and practices. Human Rights Watch will also be requesting to meet with the Ukrainian committee that assesses all applications for legal gender recognition.

## United States:

### Passports policy

The National Centre for Transgender Equality (NCTE) was founded in 2003. It is a national social justice organization devoted to ending discrimination and violence against trans people. The NCTE focuses on education and advocacy work around national issues of importance to trans people, including legal gender recognition. In the summary below they highlight what factors made this policy change possible and how it links to other campaigns.

In 2010, the U.S. State Department eliminated the requirement for proof of “sex reassignment surgery” to update gender details on U.S. passports. Trans people whose birth records do not show their preferred gender now have an alternative option for changing those details on their passport by submitting certification from a physician, stating that they have “had appropriate clinical treatment for gender transition.” The Department does not request details of treatment, which may consist of surgery, hormone therapy, or psychotherapy. The policy instructs staff to treat trans applicants with respect, use appropriate pronouns and to not ask unrelated questions. Similar policies have since been adopted for most other records at the federal level.

Reflecting on how this policy change was achieved, the NCTE stressed a number of factors. Firstly, it was important to policymakers to frame this as a medical or scientific issue, rather than a rights-based decision. The Department of State emphasized that the policy change was intended to align with current medical standards, specifically the WPATH standards.

In addition, the new policy was influenced by changes at the state level, and was modelled closely on the birth certificate policy in Washington State. Advocates highlighted that the policy would eliminate confusion, increase efficiency, assist law enforcement, and have profound benefits for individuals. These arguments were supported by the results of a

nationwide survey that documented transgender people’s challenges in updating records and the problems they faced as a result. Advocates viewed the vocal support for LGBT rights from the President and Secretary of State as critical in making the change possible, as well as advocacy by current and former LGBT State Department employees.

Efforts continue to further improve this and other policies in the United States. Advocates, with the support of WPATH, have asked the State Department to accept certifications from mental health providers as well as physicians, to cease issuing only temporary passports if an application states only that someone is “in the process” of transition, and to otherwise simplify the process.

## Australia:

### Government’s sex and gender guidelines<sup>100</sup>

Sally Goldner is the longstanding spokesperson and newly appointed Executive Director of Transgender Victoria in Melbourne, Australia. She is active in national trans community discussions about legal gender recognition and health priorities. Sally talks about how recent progress has been made in Australia.

In 2011, Australia changed its passports policy, allowing a trans or intersex person to record their sex as male (M), female (F) or indeterminate / unspecified / intersex (X).<sup>101</sup> In July 2013, this approach was extended to all Australian government departments and agencies, with the publication of the Australian Government Guidelines on the Recognition of Sex and Gender.<sup>102</sup> Furthermore, agencies are now required to closely examine when sex and/or gender information is not necessary and could be removed from forms or documents.

All government department and agencies have three years, until July 2016, to progressively align their existing and future business practices with the guidelines. This includes:

- Reviewing current laws, regulations, and policies
- Redesigning forms and systems, and retraining staff on their use
- Training front-line staff on terminology, definitions,

and sensitivities associated with intersex, transgender, and gender diverse communities

- Providing clear and accessible information on how sex and gender information can be changed on personal records
- Building relationships with intersex, transgender, and gender diverse communities.

What role did the passport policy changes play?

Complaints about how the surgery requirement in the previous passport policy affected individual trans people's lives were really important. Trans people had been complaining to the passport office, the Human Rights Commission, or their local politician. It meant that when the Minister asked for advice from his officials, they were already aware of these issues. At that later stage, the fact that the US had recently changed their policy was helpful.

The passport policy change was a toe in the water. The guidelines were based on the same theory: self-defined, affirmed gender dignity. Introducing the passports policy in 2011 was like a medium-size pilot of this type of approach.

How did you achieve the Guidelines?

All of these policy changes depended on the basic groundwork we did with politicians. It had to start with "Trans 101," explaining our lives, before we could begin to propose any policy changes. We worked with a cross-party group of politicians called the Federal Parliamentary Friends of LGBTI. Rainbow Labour [an LGBTI organization affiliated with the Australian Labour Party] pushed hard for these changes too. Our main community allies were from LGBTI organizations such as the National LGBTI Health Alliance and the Australian Coalition for Equality.

The guidelines were also a response to the 2009 Sex Files Report from the Australian Human Rights Commission. It had recommended that the Australian Government consider developing national guidelines about collecting sex and gender information.

Transgender, gender-diverse, and intersex activists worked really well together. One of the best things we did was a June 2012 roundtable organized by the National LGBTI Health Alliance, with some federal government funding.

The key outcome of the roundtable was the Diversity in Health Report which was published in November 2012.<sup>103</sup> Identity recognition was one of the report's priority areas.

What we stated in the report is pretty much what we got in the guidelines:

Consistency across all Commonwealth and State agencies in relation to the way sex and gender information is collected, changed, and used. The criteria for changing legal sex should be no more onerous than the current Passport policy requirements.

## Hong Kong:

Building a campaign for a Gender Recognition Ordinance<sup>104</sup>

In August 2013, activists in Hong Kong launched a campaign for a Gender Recognition Ordinance (GRO). Its aim is to provide all trans people in Hong Kong with legal recognition of their experienced gender, in all areas of their life.

What was the impetus for this campaign?

The recent 2013 Hong Kong Court of Final Appeal decision in the case of 'W' is a watershed moment for the local trans community. This legal challenge took five years. 'W' did not want to speak out publically, so increasingly other trans people did so, in support of her case. 'W' had already undergone full gender affirmation surgery allowing her to carry a female ID card. However this was of uncertain legal status for the purpose of marriage. Indeed, the Government argued that she should not be recognized as female for that purpose. The Court of Final Appeal judgment disagreed.<sup>105</sup> However the 'W' decision is a very narrow one. It only provides gender recognition in regard to marriage for those who have undergone full gender affirmation surgery.

The campaign is pressing the Hong Kong government to enact a Gender Recognition Ordinance modeled on the UK Gender Recognition Act. This is a pragmatic compromise as many of us would ideally like to discard all requirements and have something like the Argentinian Law.

What strategies have activists used around the campaign?

The campaign has done public speaking, developed our background paper, held media interviews, and met with



government officials and the Equal Opportunity Commission. The campaign and the background paper make frequent references to international human rights standards. The Convention against Torture is very relevant as we are pushing to remove the current requirement to have had surgeries.

The campaign is putting together a research proposal to examine the impact barriers to accessing gender recognition have on the Hong Kong trans community. We are trying to reach as many legislators as possible through the Professional Commons, an independent think tank in Hong Kong. The Facebook page is our main public campaign right now.<sup>106</sup>

Seven key themes emerged from interviews with activists and the material they provided, reflecting on lessons learnt through their legal gender recognition work. They stressed the importance of:

- building the capacity of local trans communities to work on these issues
- broad alliances
- strategic litigation
- using the United Nations and other human rights processes
- building an evidence base around the need for change
- participating in government consultations and working groups; and
- public education

# Learning From Activists' Strategies

## Capacity building

In all parts of the world, trans people are standing up for their right to be legally recognized as who they are. This has required building understanding within trans communities themselves about human rights generally and legal gender recognition issues and strategies specifically.

The potential for misunderstanding or conflict is high in these discussions. Historically legal gender recognition laws, and the medical standards of care and practices they reflected, divided trans people from each other. Those deemed “true transsexuals” were able to medically transition. Where legal gender recognition was possible, this was often limited to those who had completed “full sex reassignment” and were eligible as “post-operative” transsexuals.

Many trans people have undertaken medical steps to physically transition, often at significant personal cost. They may be comfortable with current or proposed laws that require evidence of such steps. In countries where there is no existing ability to change name or sex details, governments may assume that any progress will be acceptable or preferable to the status quo. One initial strategy involves building understanding within trans communities about how current barriers to gender recognition—and possible solutions—have very different impacts on specific groups. Whether proposed changes are deemed progressive may depend on someone’s age, if they are married or have children, their gender identity, and whether they can afford to medically transition. Legal gender recognition demands have grown to encompass the needs of increasingly diverse trans communities, including, for example, trans families and trans migrants, refugees, and asylum seekers. Communities that have looked for solutions that meet the needs of as many trans people as possible have invariably been stronger in the face of government’s attempts to pick and choose which rights are more valid.

In addition to these community complexities, many legal gender recognition laws and policies are not straightforward. Increasingly trans activists are sharing strategies regionally and internationally. This brings an added need to understand whether changes introduced in one legal and political context are feasible or appropriate in another. Activists are also well-placed to identify potential problems

in proposed laws or policies, based on experiences in other countries.

This level of strategic discussion requires dedicated time. Yet most trans activists around the world are volunteers and there are limited opportunities for activists to learn from each other, across geographic and language barriers. Where community leaders have been able to come together to plan their gender recognition priorities, it has been inspiring and effective.

For example, in July 2013 the Global Fund for Women funded a meeting in Ukraine of 32 activists working on trans human rights. This was a unique opportunity for activists to focus on trans human rights issues, and to do so in the Russian language. It resulted in the forming of a Trans\* Coalition, consolidating trans activists from post-soviet states. Currently it has members from Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, and Ukraine. Legal gender recognition is one of its goals and its initial focus will be on **Armenia, Kazakhstan, and Ukraine**. The Trans\* Coalition plans to raise concerns about involuntary sterilisation in Ukraine and Kazakhstan with the UN Special Rapporteur on the Right to Health.<sup>107</sup>

## Broad alliances

Particularly in smaller communities, broad alliances are vital to get sufficient attention to trans human rights issues. Often, but not always, LGB communities and human rights organizations are natural allies. For example, in **Australia** a broader LGBTI coalition committed dedicated resources to trans issues. Mainstream international human rights organizations Human Rights Watch and Amnesty International have supported national-level legal gender recognition campaigns in a number of countries including **Ukraine, Norway, the Netherlands, and Ireland**.

The pathologization of gender identity means governments typically privilege the views of medical experts over those of trans people themselves. Forging connections with supportive health professionals, and engaging them in debates framed around community perspectives and priorities, can be vital in shifting that power imbalance. Human rights arguments, particularly self-determination and freedom from forced sterilization, have been particularly effective in

Europe as a way to counter reliance on the views of medical experts.

The WPATH Board has explicitly supported the approach taken in the Argentinean law. It has provided advice to courts and governments in **Ontario in Canada, South Korea and Ireland** arguing that legal gender recognition should not require a diagnosis, medical treatments, or that a trans person has lived for a set period in their preferred gender role.<sup>108</sup>

In a number of countries activists established a legal experts group early on to help develop alternative legal proposals. This became a chance to give basic Trans 101 education to a group that was in a strong position to influence future debates. It has also enabled activists to adapt progressive overseas initiatives to their domestic legal framework. In **Ireland**, the Public Interest Law Alliance provided such pro bono legal drafting expertise.

## Strategic litigation

**“The Gender Recognition Act would never have happened without the European Court of Human Rights”<sup>109</sup>**

— Christine Burns, trans activist and health advisor

Strategic litigation has been important in many countries, and pivotal in some including the **United Kingdom, Germany, Sweden, Argentina, and Ireland**. Critical decisions, including by the European Court of Human Rights, have played a role in forcing governments to act. However, more than 20 years after the landmark *Goodwin* decision, the ECtHR's blanket limitation of legal gender recognition rights to “post-operative transsexuals” is increasingly problematic. In addition the margin of appreciation, or flexibility, the Court currently gives to individual countries means it has refused to critically scrutinize forced divorce or sterilization requirements. An October 2013 analysis of relevant ECtHR decisions provides some suggested litiga-

tion strategies, particularly to narrow down this margin of appreciation. These include focusing on the emergence of gender identity more broadly as a prohibited ground of discrimination and the values of human dignity and personal autonomy underpinning the European Convention on Human Rights.<sup>110</sup>

In some countries court cases have chipped away at current gender recognition laws. In **Sweden** successful strategic litigation removed restrictions on name changes and the divorce and sterilization requirements for changing sex details. “The only reform that the government made without losing a court battle was the removal of the requirement of being a Swedish citizen.”<sup>111</sup>

Typically litigation is a long term strategy and requires on-going persistence in the face of unfavorable court decisions, appeals, and slow government responses. For example, in **Ireland** Dr. Lydia Foy first requested a female birth certificate in 1993. Her legal challenges started in 1997. In October 2007, Justice McKechnie found in her favor, expressing frustration at the failure of the Irish Government to take any action following his urgent plea in 2002. “Ireland as of now is very much isolated within the Member States of the Council of Europe ... [and] must be even further disconnected from mainstream thinking.”<sup>112</sup>

The then-Government appealed Justice McKechnie's ruling, finally withdrawing their appeal in June 2010. It established the inter-departmental Gender Recognition Advisory Group (GRAG) in May 2010, which published its recommendations for Gender Recognition legislation in July 2011. With no further progress, in February 2013 Dr. Foy announced a return to court to challenge the government's failure to produce a legislative proposal. In May and June 2013 two Private Members' Bill were launched. Both draw on the Argentinean law, adapting it to Ireland's common law legal system.

Finally, in July 2013 the Irish government published a Draft Heads of Bill for Gender Recognition; twenty years after Lydia Foy first requested a female birth certificate. It contains a divorce requirement (despite concerns raised by two Council of Europe Commissioners for Human Rights), requires a supporting statement from a physician (contrary to advice from WPATH's Board) and excludes applications

by those younger than age 18. While the government has moved away from previous proposals to require a GID diagnosis, activists have been concerned that this may remain the default practice, particularly if physicians routinely provide such evidence. In January 2014, the parliamentary Committee reporting on Ireland's proposed gender recognition legislation recommended some significant improvements. These included expanding access to Gender Recognition Certificates to 16 and 17 year olds and to people who are married or in a civil partnership.<sup>113</sup> The Minister has committed to introduce legislation in 2014.

In **Malta** a 2013 change of government finally resolved strategic litigation brought by a trans woman, who had undergone gender affirming surgery but was still denied the right to marry as a woman. It has also seen government support for a progressive Gender Identity Bill, drafted by a newly established Consultative Council on LGBTI Rights. The Bill draws on a December 2010 proposal published by the Malta Gay Rights Movement, that would replace the 2004 court process with a simple administrative one, based on self-defined gender identity, and remove current restrictions on being married or marrying.<sup>114</sup> In October 2013, when Malta appeared before the Human Rights Council for its second Universal Periodic Review, the government delegation stated that the Gender Identity Bill would be published in the coming weeks. In a linked development, the Ministry for Health has founded a working group with the aim of launching a gender clinic within Malta's public hospital.<sup>115</sup>

## Using UN and other human rights processes

Trans activists in **Hong Kong, Ireland, New Zealand** and some **post-Soviet countries**, for example, have used the UN Treaty body reports and the Universal Periodic Review process to focus on legal gender recognition. Recent comments by Special Rapporteurs against forced or coerced sterilization as a requirement for legal gender recognition are increasingly relevant to the work of a range of UN Treaty bodies. Across Europe, the Council of Europe processes also offer strategic opportunities.

There have been at least two UPR recommendations about legal gender recognition. In 2009, **Germany** accepted New Zealand's recommendation that the divorce requirement

in its gender recognition law be modified promptly, in line with the decision of the Constitutional Court.<sup>116</sup> In the same year, **Costa Rica** accepted Spain's recommendation "to facilitate documentation for transsexual people in line with their identity."<sup>117</sup>

Increasingly NGOs making UPR submissions have focused on the right to self-defined gender identity. In the case of **Australia** in 2011 this was supported by the submission of the Australian Human Rights Commission. The peer review aspect of the UPR process is very different from the treaty body process where UN Committee members, not other countries, are the focus of NGOs' lobbying. In order for the UPR to become a more effective tool for trans activists, it will require more countries taking leadership role on legal gender recognition, so they are prepared to question others' laws and policies. Better coordination between activists internationally may encourage activists to lobby their own governments to make relevant recommendations when other countries appear before the UN Human Rights Council.

## Building an evidence base around the need for change

Trans communities are invisible to most of the wider community, or perceived through narrow stereotypes that do little to reflect the realities of their lives. In this context, building and maintaining an evidence base of human rights violations can be hugely powerful.

Around the world this evidence base has ranged from individual complaints and community forums where trans people share their stories, through to large scale inquiries and reports. This research has been done by trans communities and academics, as well as human rights bodies.

Activists interviewed for this project repeatedly highlighted the power of individual stories.

In the last two years the visibility of trans children, young people and their parents, including the group TransParent-CI, has had a marked impact on community debates. This has heightened understanding about the impacts on these families if minors are unable to gain legal gender recognition. Mothers have been particularly influential in creating public empathy for these issues by describing the daily

challenges their trans children face. It also gives Transgender Equality Network Ireland (TENI) a much more powerful mandate to take a position opposing any age restrictions around access to legal gender recognition.<sup>118</sup>

Across **Europe**, the European Union Agency for Fundamental Rights has conducted extensive LGBT research over the last five years. In 2012, it published an EU-wide survey of 93,000 LGBT people. Over 7,000 trans people participated in the study, making it the largest trans survey in Europe.<sup>119</sup> It recommends that EU Member States should ensure trans people enjoy full legal recognition of their preferred gender identity.

National human rights institutions have played a role in documenting complaints and recommending changes to legal gender recognition laws. Examples include the **Austrian** Human Rights Commission's Sex Files report and the **New Zealand** Human Rights Commission's Transgender Inquiry.<sup>120</sup> In June 2013, the French National Consultative Commission on Human Rights (CNCDH) formally called for a non-pathologising legal gender recognition process.<sup>121</sup>

## Working Groups or other consultation involving trans people

Trans activists described the level of persistence required to build links with politicians and government officials. Many have attempted to work with a range of political parties, sometimes through a cross-party LGBT group. This could be incredibly time-consuming and frustrating, as activists are dependent on political developments outside their control.

A number emphasized the importance of establishing clear, community priorities before becoming part of a governmental working party. A human rights approach can be ideal starting point—with its focus on human rights standards, participation, empowerment and accountability.

Some government-initiated working groups have been a very effective way to progress legal gender recognition. Others have been ineffective or their scope has been limited by the specific court decision that had led to them being established.

Consultation has been most productive where activists are

trusted to be involved early in discussions. This can raise tensions for activists if they are bound by confidentiality requirements and therefore unable to report back to their local communities. It can be useful to emphasise to governments that in most circumstances consultation with the wider community should also occur. Advocates are more likely to have a mandate from their local community if there is a transparent process indicating when such broader consultation will take place.

On the other hand, inadequate government consultation has also been an impetus for community activism, for example in the **United Kingdom** and **Ireland**. When trans people's views have been ignored, it has helped to galvanize a strong community response and mandate for action.

Working Groups that have grown out of advocacy campaigns may be more tightly focused on the main areas of concern to local trans people. One such example is **Norway**. In the spring and early summer of 2012, Norwegian trans, queer, and human rights activists started collecting signatures, campaigning against the sterilization requirements for trans persons who want legal gender recognition. Signatures were delivered to the Minister for Children, Equality and Social Inclusion during the pride week in Oslo in June 2012.

When previous consultation had produced little change, activists raised their frustrations including in a meeting with the state secretary Kjell Erik Øie at the Ministry of Health and Care Services. In September 2013, Norway's Royal Ministry of Health and Care announced an experts group. The Directorate of Health will appoint and lead a multidisciplinary group of experts who will consider whether Norway's current sterilization requirement should be removed. Organizations representing trans people are to be included in the group of experts, which is due to report back by the end of 2014.

The Council of Europe's LGBT pilot project is another example of effective collaboration with trans activists. Four of the six countries involved in the project (**Albania, Serbia, Latvia, and Poland**) committed to developing "ideal draft laws" by the end of 2013 and these are now ready to be introduced to their respective parliamentary processes.

For example, in December 2013 representatives of the Council of Europe and Albania's Ombudsman, Government,

opposition and LGBT organizations attended a conference in Albania to discuss legislative reform, including legal gender recognition. After studying the entire legislation of Albania, contracted experts concluded that introducing a gender recognition law is consistent with the general spirit of the Albanian legislation. This recognizes that someone's gender, like their name, is as an element that can be changed. However currently there is no clear procedure to do that.<sup>122</sup>

In many countries this is often the first time their government has looked into the issue, engaged with trans activists and considered a draft law. European activists point out that an institutionalized LGBT unit at the Council of Europe would help to consolidate advancement of trans rights on the continent.<sup>123</sup>

Ultimately local activists are best placed to maintain pressure on their own governments. Therefore ideally regional initiatives such as this include opportunities for local activists to be informed about progress being made and to be involved.

## Public education

Public education, in order to build momentum for change, is a priority in many but not all regions.

It has not typically been used by activists in post-soviet states. Instead, in the absence of wider community support, they have chosen to keep a low profile and engage primarily with decision-makers. Similarly, trans activists in the United States worked behind the scenes to remove the requirement for gender affirming surgeries in order to change details on federal passports or identity records in California.

Media have been a powerful support for some legal gender recognition campaigns. Two examples, from fourteen years apart, are described below.

In 1998, the producers of the long-running British soap opera *Coronation Street* created a trans character, Hayley. Trans activists in *Press for Change* applauded the move but criticized the original scripts for depicting clichéd and ill-informed stereotypes of trans women. Activists' offer to provide background advice was accepted and a trans

community member went on to create a back story for Hayley and her partner Roy. During the gender recognition campaign this brought important timely debates, such as Hayley and Roy being unable to marry, into millions of people's homes.

In January 2012, after a media report that the Swedish government was to retain sterilisation as a requirement for legal gender recognition, activists initiated an *ALLOut* social media campaign. The pressure on LGBT-friendly politicians in governing parties over the next few days was enormous. It forced three parties to publish statements confirming their opposition to forced sterilization. Trans activists were interviewed on national morning television, with the very popular host unable to fathom why any party would want to retain forced sterilization. Hundreds of organizations from all around the world supported the *ALLOut* campaign. It was a powerful way to link the reality of forced sterilization to the often technical debates around legal gender recognition.

# Conclusion



Gender recognition laws around the world reflect the time periods and local contexts within which they were developed. When the Gender Recognition Act was passed in the United Kingdom in 2004, the Spanish Gender Identity Law in 2007 or even the Portuguese law in 2011, each was considered landmark legislation to some extent.

Today that context has shifted. It includes stronger demands for depathologization of gender identity and a human rights based approach that fully recognizes trans people's rights, including to define their own gender identity. As section B of this resource shows, an increasing number of countries have chipped away at some of the human rights violations trans people face in order to gain gender recognition.

Argentina's 2012 law stands out as the only legislation that comprehensively addresses almost all of the human rights principles analyzed in this resource.<sup>124</sup> It is the benchmark for activists and policy makers wishing to develop progressive gender recognition laws.

Since 2012 the Argentinean Law has inspired activists internationally and is held up as a best practice law in their submissions to the UN. Regionally there are proposals being developed in **Chile** and **Ecuador** that are based on self-perceived gender identity.<sup>125</sup> The proposed gender identity law in Chile is part of the incoming government's work programme since the President-elect Michelle Bachelet returned to power in December 2013.<sup>126</sup> For activists working to achieve reform in other parts of the world, the Argentinean law marks a fundamental shift in what seems possible. The example below is just one illustration of how change in one region of the world supports activists in another.

From late 2011, Irish activists started working with a group of lawyers on a more progressive legal gender recognition bill. Initially they were guided very much by responding to the government's Gender Recognition Advisory Group's report which had published its recommendations in July 2011. The government's proposed approach was based largely on the 2004 UK Gender Recognition Act. However over time the Board of Transgender Equality Network Ireland (TENI) returned its focus to the key principles underpinning an ideal bill. These were self-determination, inclusion, no medical diagnosis, and no requirement for a married person to divorce. These priorities were identified before the

Argentinean Law was proposed. When the Argentinean Bill was announced it heartened the resolve of TENI members.

In 2013, the two Irish Private Member's Bills that emerged had adapted the Argentinean law to fit within Ireland's legal and policy traditions. Locally, these provide counter proposals to the subsequently published government position, a Heads of Government Bill. Internationally it has increased the relevancy of the Argentinean law to countries with either a civil law tradition (such as Argentina) or a common law tradition (such as Ireland).

The Argentinean approach may not be feasible or appropriate in all parts of the world, at this point in time. However, as a best practice law that is based on strong human rights standards, it provides a checklist against which other approaches can be compared. It is hoped this resource will increase understanding about where current laws or proposals fall short of such human rights obligations. Some of these shortfalls require urgent attention, particularly those that amount to discrimination or cruel, inhuman or degrading treatment (including forced sterilization). Others, such as access to health services linked to gender transition, require progressive realization to the maximum of a country's available resources.

“Argentina’s 2012 law stands out as the only legislation that comprehensively addresses almost all of the human rights principles analyzed in this resource. It is the benchmark for activists and policy makers wishing to develop progressive gender recognition laws.”

# Appendix:

## Best Practice Laws and Policies

## Laws

### Argentina

The Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act (Decree No. 773/12, of Gender Identity Act No. 26.743):

In Spanish: <http://www.infoleg.gov.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>

In English: <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>

### **English Translation of Argentina’s Gender Identity Law as approved by the Senate of Argentina on May 8, 2012**

Gender Identity Law - Buenos Aires, November 30th.

#### Article 1

Right to gender identity. All persons have the right,

- a) To the recognition of their gender identity;
- b) To the free development of their person according to their gender identity;
- c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there.

#### Article 2 – Definition

Gender identity is understood as the internal and individual way in which gender is perceived by persons, that can correspond or not to the gender assigned at birth, including the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological, surgical or other means, provided it is freely chosen. It also includes other expressions of gender such as dress, ways of speaking and gestures.

#### Article 3 – Exercise

All persons can request that the recorded sex be amended, along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity.

#### Article 4 – Requirements

All persons requesting that their recorded sex be amended and their first name and images changed invoking the current law, must comply with the following requirements:

1. Prove that they have reached the minimum age of eighteen (18) years, with the exception established in Article 5 of the current law.
2. To submit to the National Bureau of Vital Statistics or their corresponding district offices, a request stating that they fall under the protection of the current law and requesting the amendment of their birth certificate in the records and a new national identity card, with the same number as the original one.
3. To provide the new first name with which they want to be registered.

In no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place.

#### Article 5 – Minors

In relation to those persons younger than eighteen (18) years old, the request for the procedure detailed in Article 4 must be made through their legal representatives and with explicit agreement by the minor, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Likewise, the minor must be assisted by a children’s lawyer as prescribed by Article 27 of Law 26061.

When the consent of any of the minor’s legal representatives is denied or impossible to be obtained, it will be possible to resort to summary proceedings so the corresponding judges will decide, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents.

#### Article 6 — Procedure

Once the requirements stated in Articles 4 and 5 are met, the public officer will proceed – without any additional legal or administrative procedure required - to notify the amendment of the sex and the change of first name to the Civil Register corresponding to the jurisdiction where the birth certificate was filed so it will issue a new birth certificate incorporating the said changes, and to issue a new national identity card reflecting the amended sex and the new first name as now recorded. Any reference to the current law in the amended birth certificate and in the new national identity document issued as a result of it is forbidden.

The procedures for amending the records as described in the current law are free, personal and do not require the intervention of any agent or lawyer.

#### Article 7 — Effects

The effects of the amendment of the sex and recording a new first name/s according to the current law will create rights against third parties since the record is first made.

The amendment in the records will not change the legal entitlements to rights and legal obligations that could have corresponded to the persons before the recording of the amendments, nor those derived from the relationships consecrated by family law at all levels and degrees, that will remain unchanged, including adoption.

In all cases, the number in the persons' national identity document will be relevant over the first name or morphological appearance of the persons, for identification purposes.

#### Article 8

The record amendments prescribed by the current law, once completed, can only be modified again with judicial authorization.

#### Article 9— Confidentiality

Only those authorized by the document holder or provided with a written and well-founded judicial authorization can have access to the original birth certificate.

The amendment of the recorded sex and the change in first name will never be given to publicity, except with the authorization of the document holder. The publication in newspapers prescribed by Article 17 of the Law 18248 will be omitted in these cases.

#### Article 10 — Notifications

The National Bureau of Vital Statistics will provide information about the change of national identity document to the National Registry of Criminal Records, to the corresponding Electoral Registry for correction of electoral rolls and to other bodies as determined in the regulation of this law, including those that might have information on existing precautionary measures involving the interested party.

#### Article 11 — Right to free personal development

All persons older than eighteen (18) years, according to Article 1 of the current law and with the aim of ensuring the holistic enjoyment of their health, will be able to access total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorization.

There will be no need to prove the will to have a total or partial reassignment surgery in order to access comprehensive hormonal treatment. The only requirement will be, in both cases, informed consent by the individual concerned. In the case of minors, the informed consent will be obtained following the principles and requirements established in Article 5. Without prejudice to the former, when consent for total or partial surgical intervention is to be obtained, the competent judicial authorities for the jurisdiction must also express their agreement, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Judicial authorities must express their views within sixty (60) days from the time they were required to provide their agreement.

Public health officials, be they from the state, private or trade union-run health insurance systems, must guarantee

in an on-going way the rights recognized by this law. All medical procedures contemplated in this article are included in the Compulsory Medical Plan (that is, they are not subjected to additional costs for those having private or trade union-run insurance plans), or in whatever system replaces it, as decided by the enforcing authority.

#### Article 12 – Dignified treatment

The gender identity adopted by the individual must be respected, particularly in the case of girls, boys and adolescents using a first name that is different from the one recorded in their national identity documents. Whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.

When the nature of the procedure makes it necessary to register information in the national identity document, a system will be employed that combines the initials of the first name, the surname in full, date and year of birth, and the number of the document, adding the first name chosen by the individuals on the ground of their gender identity if so required by them.

In those circumstances in which the person must be named in public, only the chosen first name respecting the adopted gender identity will be used.

#### Article 13 – Enforcement

Every norm, regulation or procedure must respect the human right to gender identity. No norm, regulation or procedure must limit, restrict, exclude or annul the exercise of the right to gender identity, and all norms must always be interpreted and enforced in a manner that favours access to this right.

#### Article 14

Section 4 of Article 19 in Law 17132 is repealed. (This 1967 law regulates the practice of Medicine, Dentistry and their auxiliary professions. The repealed section forbade doctors to carry on “surgical interventions modifying the sex of the sick person, unless they are performed after judicial authorization has been provided.”)

#### Article 15

The passing of this law is to be communicated to the Executive Power.

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Translingua- Traducciones feministas multigenéricas

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# Glossary of Terms

## Assigned sex

The sex assigned to an individual by medical, legal, or other social authorities. Assigned sex is often determined to be either male or female based solely on a child's genitalia at birth, and it may not align with gender identity.

## Gender

The socially constructed roles, behaviors, and personal characteristics that a given society considers appropriate for men, women, and others. People whose gender is neither man nor woman may describe themselves as being in an intermediate state between man and woman, being both man and woman, being neither, or belonging to another gender altogether. Some examples of genders aside from man and woman include two-spirit among Native North Americans, muxe in southern Mexico, hijra in South Asia, genderqueer in North America and Europe, and many others in societies around the world.

## Gender expression

An individual's personal traits, mannerisms, and other manifestations of gender identity.

## Gender identity

An individual's deeply-rooted internal sense of gender. This resource uses the term "trans" to include a diverse range of people whose gender identity is different from the sex they were assigned at birth.

## Intersex

An adjective referring to a person whose sexual anatomy, reproductive organs and/or chromosome patterns do not fit the typical definition of male or female. These anatomical differences are often perceived to be both male and female at the same time; not quite male or female; or neither male or female. These congenital differences in anatomical sex often result in physical differences in secondary sex characteristics such as muscle mass, hair distribution, breast development and stature.

## LGBT

A blanket term that stands for lesbian, gay, bisexual, and/or trans. It includes three sexual orientation terms (lesbian, gay, and bisexual) and one gender identity term (trans).

## Transition

The process that a trans person undergoes to live in their gender identity. It may include social gender recognition (e.g. changing one's appearance), legal gender recognition (e.g. changing one's name and sex / gender details on documents) and/or medical transition (e.g. hormones or surgeries that result in physical changes to a trans person's body).

## Sex

The classification of people as male, female or as "indeterminate sex" or intersex. Most individuals are assigned a sex at birth based on a combination of bodily characteristics such as genitals and internal reproductive organs, and less frequently based on their chromosomes.

## Gender affirming health services

The full range of medical services that trans people may require in order to medically transition including counselling, psychotherapy, hormone treatment, hair removal, initial surgeries such as a mastectomy, hysterectomy or orchidectomy, and a range of genital reconstruction surgeries. The terms "gender affirming," "gender affirmation" or "gender confirmation" surgeries" are often considered to be a more accurate description of the transition process than the older term "sex reassignment surgeries".

## Trans

An umbrella term used by many people who do not identify with their assigned sex; frequently understood to include both transgender and transsexual people.

## Trans woman

A trans individual who identifies as a woman.



## Trans man

A trans individual who identifies as a man.

## Transgender

An adjective referring to a person whose gender identity or expression is different from their assigned sex.

## Transsexual

Another term for transgender that is more likely to be used by people who have undergone or want to undergo transition-related medical procedures such as gender affirming surgeries.

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- 94 Salum, AN (2012) "Argentina has passed the most progressive gender identity legislation in existence", International Gay and Lesbian Human Rights Commission Blog 13 May 2012, accessed 21 September 2013 at: <http://iglhrc.wordpress.com/2012/05/13/argentina-has-passed-the-most-progressive-gender-identity-legisla->

tion-in-existence-how-did-it-happen/

95 Based on personal communication with Audrey Mbugua (September 2013)

96 The only official document that explicitly mentions gender reassignment is a brief section in the Code of Ethics of Medical Practitioners in Kenya. In 2012 a Technical Committee of the Kenyan Medical Practitioners and Dentists Board included TEA in consultation about developing National Guidelines for the Management of Gender Identity Disorder. TEA is concerned that these guidelines are yet to be finalised and is considering its legal options to progress these issues.

97 Based on cited sources and personal communication with Anna Kirey (September 2013)

98 Human Rights Watch (2013) Submission on Ukraine to the UN Human Rights Committee, 20 June 2013, accessed 25 September 2013 at: <http://www.hrw.org/news/2013/06/20/submission-ukraine-un-human-rights-committee>

99 Human Rights Committee (2013) Concluding Observations on the seventh periodic report of Ukraine (CCPR/C/UPR/CO/7), para 10. Accessed 25 September 2013 at: [http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-UKR-CO-7\\_en.doc](http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-UKR-CO-7_en.doc)

100 Based on cited sources and personal communications with Sally Goldner and Aram Hosie (September 2013)

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104 Based on cited sources and personal communication with Sam Winter (September 2013)

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111 Personal communication with Maria Sundin, Board Member RFSL Swedish Federation for LGBTQ Rights (September 2013)

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123 Personal communication with Transgender Europe, September 2013. Further details about the Council of Europe LGBT Project are at: [http://www.coe.int/t/dg4/lgbt/Unit/Unit\\_EN.asp](http://www.coe.int/t/dg4/lgbt/Unit/Unit_EN.asp)

124 The main area where it could be improved is around recognition of those who do not identify as male or female, and of the specific needs of intersex people.

125 Though, in Ecuador, this will only change details on passports and other documents, not the original birth certificate. Personal communication with Tamara Adrián (September 2013)

126 Email on 27 December 2013 from Andrés River, Director of Organización de Transexuales por la Dignidad de la Diversidad (OTD), in Rancagua, Chile

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