



Transgender
Equality
Network
Ireland



Gender Recognition Bill 2014

Executive Summary





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Legislation Based on Human and Civil Rights is Key



LEGISLATION BASED ON HUMAN AND CIVIL RIGHTS IS KEY

Ireland is the only country that does not provide the possibility of legal gender recognition of transgender (herein 'trans') and intersex people in the European Union.

Transgender: Refers to a person whose gender identity and/or gender expression differs from the sex assigned to them at birth.

Intersex: Refers to a variety of conditions in which a person is born with a reproductive or sexual anatomy that does not fit the typical definitions of female or male.

Legal gender recognition provides a process for an individual to change the gender marker on their birth certificate and be legally recognised by the State in their true gender. Birth certificates are a foundational identity document and are often requested for official purposes (such as accessing social welfare, obtaining a Personal Public Service Number to work and getting married). In certain cases, a person may be recognised as one gender on certain documents and another gender on their birth certificate. This puts the individual at risk of being 'outed' (unwanted disclosure of gender identity) when they apply for a job, a new passport or entry to education. It can also lead to a denial of services and restrict an individual's ability to travel domestically and internationally. Forced outing may result in harassment, discrimination and even violence.

The lack of State recognition of trans and intersex identities is a major contributing factor to the marginalisation of these communities and is an urgent health and human rights issue.

DR LYDIA FOY

In March 1993 trans woman Dr Lydia Foy wrote to the Irish Registrar General seeking a new birth certificate showing her female gender. Her request was refused. Twenty years later she is still battling for recognition. This is despite a High Court ruling in 2007 that found the State to be in breach of its positive obligations under Article 8 of the European Convention on Human Rights (ECHR) in failing to recognise Dr Foy in her female gender and provide her with a new birth certificate. This was the first declaration of incompatibility to be made under the ECHR Act. In November 2014, Dr Foy finally settled her case and the Irish Government committed to introducing legislation.

LEGISLATIVE DEVELOPMENTS

In December 2014, the Minister for Social Protection, Joan Burton, published the Gender Recognition Bill 2014 (henceforth GRB2014). In January, GRB2014 entered the Seanad and the Bill was passed in the upper house on 17th February 2015.

During this process the legislation was supported by members of all political parties and there was a robust debate on the content of the legislation. There was also widespread acknowledgement of the restrictive criteria within the proposed legislation. The following issues were highlighted by various Senators as deficiencies within the Bill:

- Pathologising and stigmatising medical criteria.
- Single requirement ('Forced divorce').
- Lack of viable legal recognition for individuals under 18.

Several Senators also raised issues pertaining to intersex and non-binary individuals (people who see themselves as neither exclusively male nor female). Numerous amendments were brought forward to address shortcomings in the legislation, though very few were accepted. Importantly, the Government did agree to remove the phrase 'medical evaluation' from the medical criteria. The Government also introduced a review of the operation of the Act which will be conducted 'not later than 2 years after this section comes into operation,' whereby a report will be made to each House of the Oireachtas 'not later than 12 months after its commencement.' This was a positive development as it institutes a process for reviewing the impact and shortfalls of the legislation. However, this should not be seen as a panacea for the deficiencies in the proposed legislation as it is currently written. These issues have been raised and solutions in the form of amendments have been tabled. **There is still an opportunity to address and fix the legislation to ensure that it adequately protects the rights, dignity and privacy of trans and intersex people now.**

OVERVIEW OF MAIN ISSUES

The introduction of legal gender recognition will improve the lives of trans and intersex people in Ireland. However, the proposed legislation suffers from serious shortcomings that will negatively effect these communities. For instance, GRB2014 contains stigmatising and pathologising medical criteria that will hinder trans and intersex people from being able to access legal recognition. In the Bill a primary treating medical practitioner (defined as 'a person's primary treating endocrinologist or psychiatrist') is required to confirm that the person 'has transitioned or is transitioning'. By defining medical practitioner exclusively as the specialists who

provide a diagnosis (psychiatrists) or medical treatment/ hormones (endocrinologist), this conflates a legal process with a medical treatment pathway. **This criteria also excludes trans people who cannot or choose not to medically transition.** In *Speaking from the Margins*, the largest Irish survey of trans people (N=164), it was found that 26% of trans participants had no intention or desire to undergo any form of transition or gender reassignment. Moreover, there are very few medical practitioners with expertise in this field and trans people widely report having difficulty accessing these services and face long waiting lists. This criteria is restrictive and unnecessary.

The proposed legislation also requires that trans people be single in order to have their gender legally recognised. Happily married trans people will be forced to make the impossible choice between their families and their right to legal recognition. This will have severely negative effects on the spouse and children and leaves the family in legal limbo.

In GRB2014, there is a lack of viable legal gender recognition for young trans and intersex people. For instance, the proposed pathway for 16 and 17 year olds to access legal recognition is extremely onerous as it requires parental consent, letters from two medical practitioners and a court order. Moreover, it excludes trans and intersex individuals under the age of 16. These individuals are particularly vulnerable and need the protection of legal recognition.





Ireland has an opportunity to introduce legislation that protects Irish families and promotes the self-determination of trans and intersex people. **This legislation must reflect the lived realities of our community and enshrine the privacy, dignity and human rights of all trans and intersex people.** This Executive Summary highlights the main issues in the Gender Recognition Bill and makes the case for Ireland to introduce inclusive and human rights based legislation.

(1) MEDICAL CRITERIA: THE IMPORTANCE OF SELF-DETERMINATION

In GRB2014, an applicant will be required to submit a statutory declaration, which includes ‘a settled and solemn intention of living in the preferred gender for the rest of his or her life,’ and a certificate in writing of a medical practitioner certifying:

- (i) that he or she is the applicant’s primary treating medical practitioner,
- (ii) that in the professional medical opinion of the medical practitioner—
 - (I) the applicant has transitioned or is transitioning to his or her preferred gender, and
 - (II) the medical practitioner is satisfied that the applicant fully understands the consequences of his or her decision to live permanently in his or her preferred gender.

In GRB2014, a primary treating medical practitioner is defined as ‘a person’s primary treating endocrinologist or psychiatrist’. There is a clear necessity to separate medical interventions for trans and intersex individuals from a legal gender recognition pathway. The current criteria undermines the self-determination of trans and intersex persons and pathologises these individuals by turning legal gender identity into a medical condition.

MEDICALISING GENDER IDENTITY

Tánaiste and Minister for Social Protection, Joan Burton’s Second Stage speech in the Seanad clearly outlined the Government’s approach to legal recognition:

‘The application process will consist of:

A statutory declaration by the applicant that they intend to live permanently in the new gender; and
A supporting statement by their primary treating medical practitioner that the person has transitioned or is transitioning to the preferred gender.

The process will not require details of care including medical history or confirmation of a diagnosis, nor will the person have to confirm he or she has been living in their preferred gender for a specific period of time prior to their application.’

The explicit assertion that the process will not require a diagnosis or details of care is very welcomed. However, there is a certain amount of inconsistency with this assertion and the contents of the legislation.

The language of ‘transition’ infers medical treatment of hormones or surgery, and thus may be even more restrictive than a criteria of ‘diagnosis’, which would not require any physical intervention. Not all trans people medically transition. In certain cases, age or other medical circumstances may prevent an individual from medically transitioning. In other cases, an individual may choose not to medically transition for personal, family or societal reasons. The medical practitioner requirement conditions access to a gender recognition certificate on intervention by medical professionals. The uncoupling of medical interventions and legal rights is being called for in human rights discourse in Europe and beyond.

Appearing before the Oireachtas Joint Committee on Health and Children in July, 2013, Dr Philip Crowley, HSE National Director of Quality & Patient Safety, stated:

'The HSE endorses a gender recognition process which places the responsibility for self-declaration on the applicant rather than on the details of a medical certificate/diagnosis. In doing so the emphasis is placed on the process of legal recognition of that self-declaration as opposed to the legal recognition of the medical certificate and/or diagnosis. The HSE considers this process to be simpler, fairer, pragmatic and may be easier to legislate for as it takes account of both transgender and intersex people with differing backgrounds and contexts.'

In August 2014, the Equality Authority – in its published observations on the Revised Scheme – recommended that 'applicants for gender recognition should not be required to produce supporting evidence specifically from a medical professional' and that a failure to satisfy the physician's statement requirement should not 'conclusively preclude' an individual from legal gender recognition.¹

INTERNATIONAL MOVEMENTS AWAY FROM PATHOLOGISATION

There is evidence that EU Member states that are reconsidering their gender recognition laws are increasingly moving away from the pathologisation model.² On September 1, 2014, Denmark's amended gender identity recognition procedures came into force.³ Under the new regime, **Denmark no longer requires medical evidence or support as part of its gender recognition process. Instead, applicants for gender recognition in Denmark must simply complete an administrative process whereby they lodge their request for gender recognition and observe a six-month waiting period, at the end of which their application – based solely on self-identification – is processed.**

In Malta, the Minister for Social Dialogue, Consumer Affairs and Civil Liberties introduced into Parliament, on October 29, 2014, a new Gender Identity Bill⁴. Under s. 3 (4) of the Bill, entitled 'Right to Gender Identity', applicants for recognition **'shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity'** [Emphasis added]. Section 4 (1) goes on to ensure that 'it shall be the right of every person who is a Maltese citizen to request the Director to change the recorded gender and, or first name in order to reflect that person's self-determined gender identity' [Emphasis added]. Under Malta's proposed regime – which, unlike the Danish model, would be inclusive of minors – in order to access gender recognition, **applicants would simply be required to make a statutory declaration, affirming that their birth-assigned gender does not correspond with their preferred gender.** Within fifteen days of receiving the request, the Director of the Public Register is obliged to grant legal gender recognition to the applicant.

The developments in Denmark and Malta form part of a wider, unmistakeable trend – within human rights law and discourse – away from the medicalisation of legal gender recognition. In 2006, a group of distinguished human rights experts – including former Irish President, Mary Robinson, and the former Chief Commissioner of the Northern Irish Human Rights Commission, Prof Michael O Flaherty – adopted the Yogyakarta Principles. These principles set out guidelines for the application of international human rights law to the issues of sexual orientation and gender identity. Principle 3 unequivocally states that countries should, **'fully respect and legally recognise each person's self-defined gender identity'** and 'ensure that procedures exist whereby all state-issued identity papers...reflect the person's profound self-defined gender identity' [Emphasis added]⁵. For those who drafted the Yogyakarta Principles, therefore, what matters is an individual's self-identification with their preferred gender, and this identification must be prioritised during the recognition process, irrespective of whether the individual can access an expert medical opinion.

¹ Equality Authority (2014) 'Observations on the Revised General Scheme of Gender Recognition 2014', August 7, 2014, p. 36 [Accessed September 10, 2014] at <http://www.equality.ie/Files/Observations-on-the-Gender-Recognition-Bill-2014.pdf>

² See generally Dunne, Peter (2014) 'The Physicians Statement Model in Ireland's Gender Recognition Bill 2013', European Human Rights Law Review 1.

³ TGEU, 'Historic Danish Gender Recognition Law comes into Force' [Accessed March 1, 2015] at <http://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>

⁴ Malta's Gender Identity Bill 2014 [Accessed March 1, 2015] at

https://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/GIGESC/70%20-%202014%20-%20GIGESC%20-%20EN.pdf

⁵ Yogyakarta Principles No. 3 (accessible at http://www.yogyakartaprinciples.org/principles_en.pdf).

In May 2012, the Argentine Congress passed the Gender Identity Act 2012.⁶ The statute, which has been described as the ‘most progressive gender identity law in history’⁷, **permits individuals to amend the gender marker on all their official documents by simply submitting an affidavit which confirms their desire for the change.**⁸ The Argentine law does not mandate the intervention of a medical officer nor does it require that an individual be first diagnosed with gender dysphoria. All that matters is the expressed self-identification of the trans person involved.⁹

EXPANDING THE DEFINITION OF MEDICAL PRACTITIONERS

Best practice gender recognition legislation would provide for the self-determination of trans and intersex people. However, if decision-makers cannot be swayed to remove the medical criteria entirely, it would be critical to expand the definition of medical practitioner to include general practitioners (GPs). This would allow GPs to provide a certificate for legal gender recognition alongside psychiatrists and endocrinologists. This would be a practical move as GPs are most often the primary treating medical practitioner who knows a trans or intersex person best. Moreover, it would ease the pressure on specialist services and would shorten wait times.

The expansion of the definition of ‘medical practitioner’ to include GPs would also lessen the stigma associated with the medical criteria. This is because GPs are not associated with diagnosis of mental disorders or physical interventions.

This approach has been endorsed by the Irish College of General Practitioners (ICGP), which is the professional body for general practice in Ireland. The ICGP is the recognised body for the accreditation of specialist training in general practice in Ireland and is recognised by the Medical Council as the representative academic body for the specialty of general practice. TENI strongly welcomes the pragmatic approach taken by the ICGP, whereby in a letter addressed to Tánaiste Joan Burton on 17th February 2015, Kieran Ryan, CEO of the ICGP wrote:

‘The ICGP would encourage you to add General Practitioner to the definition of ‘primary treating medical practitioner’ for the purposes of Certification of an individual’s gender transition. GPs are more than capable and qualified to fulfill the certification duties under this piece of legislation. GPs will most likely be familiar with the circumstances of the applicant and are well placed to verify an individual’s medical transition. GPs are often the first point of contact for transgender people seeking healthcare and monitor the medical transition after transgender people have engaged in specialist services. This would be of great benefit to applicants as they are more likely to have had interactions and engagements with a GP in their local area.’¹⁰

(2) SINGLE CRITERIA: THE ‘FORCED DIVORCE’ REQUIREMENT

GRB2014 requires that the applicant ‘is not married or a civil partner’. Thus a married or civilly partnered individual would have to terminate their legal union before being granted formal recognition of their gender identity. The recommendation is based on a belief that permitting currently married applicants to be legally recognised would convert their unions into same-sex marriages and thus violate the presumed constitutional prohibition on such unions in Ireland.

This requirement **fails to acknowledge that trans families exist, and fails to offer their marriage the constitutional protection afforded to every other marriage in Ireland.** This requirement violates the right

⁶ Alejandro Nasif Salum, “Argentina has passed the most progressive gender identity legislation in existence” International Gay and Lesbian Human Rights Commission Blog, 2012 [Accessed April 30, 2013] at <https://iglhc.wordpress.com/2012/05/13/argentina-has-passed-the-most-progressive-gender-identity-legislation-in-existence-how-did-it-happen/> For further discussion, please see Dunne, Peter, ‘The Physicians Statement Model in Ireland’s Gender Recognition Bill 2013’, (2014) European Human Rights Law Review 1.

⁷ Transitioning Africa, ‘Celebrating Argentina’, [Accessed April 30, 2013] at <http://ilga.org/transitioning-africa-s-press-release-on-the-new-gender-identity-law-in-argentina/>

⁸ Gender Identity Act, 2012, Article 4 (accessible, with English translated at <http://tgeu.org/argentina-gender-identity-law/>)

⁹ Ibid.

¹⁰ Letter to Tánaiste Joan Burton Re: Definition of ‘primary treating medical practitioner’ in the Gender Recognition Bill 2014. Feb 17th, 2015.

to private and family life and the right to equality before the law. If the proposed legislation is passed with this criteria, a person would be forced to choose between their family and legal recognition. While many relationships do not survive when one spouse transitions or comes out as trans or intersex, some do. Under the current proposals, these families will be left in a legal limbo. A requirement to divorce, or to dissolve a civil partnership, places an injurious burden on trans individuals and their loved ones. It also **interferes with the rights of the trans person's spouse and children, leaving committed spouses without legal status and depriving children of formal recognition of their families.**

Both at the international and European level, human rights discourse affirms that divorce should not play a role in the legal recognition of gender identity. Yogyakarta Principle No. 3 provides that **'no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity'**.¹¹ The former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, has specifically recommended that Member States 'remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender.' In a letter to the Minister for Social Protection in 2012, the current Commissioner, Nils Muižnieks, reiterated that 'divorce should not be a necessary condition for gender recognition as it can have a disproportionate effect on the right to family life.'¹²



The more recent countries to enact legal recognition have ensured that it does not interfere with existing relationships. Portugal, Belgium, Georgia, the Netherlands, Romania and Spain all respect existing partnerships and marriages. Countries whose gender recognition legislation does not respect trans families are being challenged: both the Austrian and German Constitutional Courts (in 2006 and 2008 respectively) have held that trans people cannot automatically lose all their legal rights associated with marriage simply because they access legal gender recognition. In 2009, a Court of First Instance in Luxembourg City permitted a married trans woman to rectify the gender marker and first name on her birth certificate. In 2012 a court in Rennes, France refused to enforce a divorce requirement, on the basis that the marriage remained valid post-transition.

Under Ireland's Constitution, this requirement is particularly injurious: someone who is not a party to a marriage (i.e. the State) is prompting the dissolution of that marriage, the very thing that Article 41 is supposed to guard against. This criteria interferes with the civil rights not only of the trans person but also the rights of their spouse and children.

WOULD A REFERENDUM ON SAME SEX MARRIAGE RESOLVE THIS ISSUE?

It has been suggested that the upcoming referendum on civil marriage equality would effectively resolve this issue. However, the civil and human rights of trans people to be recognised should not be contingent upon the right to marry. Secondly, although the polls favour the passage of marriage equality, the outcome of the referendum is not assured.

Furthermore, it should not be presumed that attaining marriage equality in Ireland would, in itself, lead to the automatic repeal of a single requirement for legal recognition. In 1972, Sweden became the first country in the world to offer formal legal recognition of an individual's gender identity. Under the terms of the 1972 law, an applicant for legal recognition had to be single. In 2009, the Swedish parliament introduced marriage equality for same-sex couples. However, trans individuals were not specifically included in the new law and, consequently, remained under an obligation to divorce until 2012. In the United Kingdom, although the Marriage (Same-Sex Couples) Act 2013 has introduced equal marital rights, trans individuals cannot automatically maintain their union when seeking legal gender recognition. Rather, a trans individual will have to obtain consent from their partner to convert an existing heterosexual marriage into a same gender marriage.

¹¹ Yogyakarta Principles No. 3 (accessible at http://www.yogyakartaprinciples.org/principles_en.pdf)

¹² Letter to Tánaiste Joan Burton Re: Gender Recognition Legislation. Nov 16th 2012. Available: http://www.tgeu.org/sites/default/files/2012_11_16_letter_Commissioner_HR_to_Burton.pdf



Sweden and the United Kingdom are both cautionary tales for policy-makers in Ireland. It would be wise not to view a single requirement as a temporary injustice which will be swept away by the promise of future legal change. During the Seanad debate, the Government indicated its intention to remove the single criteria if the marriage equality referendum is passed in May. However, this issue must be at the forefront of discussions on this legislation.

(3) AGE CRITERIA: INCLUDING TRANS AND INTERSEX YOUNG PEOPLE

In GRB2014 there is a legal pathway for individuals who are aged 16 or 17 who have obtained an order from the Circuit Family Court exempting them from the minimum age requirement. In order to obtain the exemption, the applicant must provide documentary evidence showing that:

1. Parental/guardian consent has been obtained.
2. In the professional medical opinion of the medical practitioner that (a) the child has a sufficient degree of maturity to make the decision to apply for gender recognition (b) has considered and fully understands the consequences of that decision and (c) the decision is freely and independently made without duress or undue influence from another person.

3. An endocrinologist or psychiatrist, who has no connection to the child, furnishes to the court a certificate in writing certifying that his or her medical opinion concurs with the medical opinion of the above medical practitioner.

Despite these onerous requirements, the reduction of the minimum age requirement from 18 to 16 years in GRB2014 is a welcome development on principle. However, the Bill retains the blanket exclusion preventing children under the age of 16 from obtaining legal recognition. **This represents a failure on the part of the State to acknowledge both the existence of trans and intersex young people and the extremely high levels of prejudice that they may encounter because of their gender.** For children, large aspects of their education, sports and activities are gendered, therefore **it is important that trans and intersex young people are able to participate fully in school life and activities.**

‘Gender Recognition is not an abstract concept; it’s not just about a birth certificate. It’s about real people and real lives. For me it’s not about a piece of paper, it’s about Mr. Sam Blanckensee legally existing in the Irish State. I am an active participant in my community; I’m a scouter and a student leader. But in the eyes of my state, the man I have become doesn’t exist.’

- Sam Blanckensee, young trans man

ADVICE OF THE OMBUDSMAN FOR CHILDREN

The Minister for Social Protection sought the Ombudsman for Children’s views on the issue of making provision for young people under the age of 18 within the scope of gender recognition legislation. In October 2013, this advice¹³ was published and the Ombudsman for Children made the following recommendations:

1. The Gender Recognition Bill should make provision for children and young people by removing the criterion relating to minimum age in Head 5 of the General Scheme that prevents them being able to obtain legal recognition of their preferred gender.
2. Parents or guardians should be enabled to make an application for a Gender Recognition Certificate on behalf of their children.
3. In the interest of consistency between the Gender Recognition Bill and the Non-Fatal Offences Against the Person Act, young people who have reached the age of 16 should be enabled to apply for legal recognition of their preferred gender on their own initiative.

Despite these recommendations, GRB2014 provides no legal recognition for children and young people under 16 years of age. Furthermore, the criteria for legal recognition of 16 and 17 years olds is onerous and restrictive. Legal Gender Recognition will increase young people’s wellbeing and their safety. It is important that young people can apply for these rights and that parents and guardians can apply for rights on behalf of their child.

CONCLUSION

Trans and intersex people are among the most vulnerable members of Irish society and experience high levels of stigmatisation and marginalisation. Research shows high rates of suicidality¹⁴ and regular experiences of harassment and violence.¹⁵ The lack of State recognition of trans and intersex identities is a major contributing factor to the marginalisation of these communities and is an urgent health and human rights issue. International best practice highlights the clear movement in countries such as Denmark, Malta and Argentina towards legislation based on self-determination. These provide viable and human rights compliant legal recognition models. **Ireland has an opportunity to enact gender recognition legislation that affirms an individual’s preferred gender, while protecting their right to privacy, personal dignity and family life, through a process that is efficient, fair and non-discriminatory.**

HOW MANY PEOPLE DOES THIS LEGISLATION AFFECT?

The Gender Identity Research and Education Society (GIRES, UK) estimate prevalence of gender variance at 1%. In an Irish context, this would equate to 45,882 people (approximating the Census 2011 figures for Waterford City of 46,732). GIRES advises that ‘organisations should assume that 1% of their employees and service users may be experiencing some degree of gender variance. At some stage, about 0.2% may undergo a medical transition.’¹⁶ Intersex conditions are common. Existing research suggests that intersex births constitute 1.9% of the population.¹⁷ This could mean that being intersex is as common as being red-haired (1-2% of the human population).



¹³ Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013: <http://www.oco.ie/wp-content/uploads/2014/03/OCOAdviceonGenderRecognitionBill2013.pdf>

¹⁴ TENI (2015) Suicide and Self-harm in the Transgender Community. TENI, Dublin.

¹⁵ TENI (2015) Violence and Harassment in the Transgender Community. TENI, Dublin.

¹⁶ GIRES (2011) The Number of Gender Variant People in the UK - Update 2011: <http://www.gires.org.uk/assets/Research-Assets/Prevalence2011.pdf>

¹⁷ OII-USA (2012). "Brief Guidelines for Intersex Activism": <http://oii-usa.org/wp-content/uploads/2012/10/Brief-Guidelines-for-Intersex-Allies.pdf>



‘For gender recognition, an individual’s opinion and experience as to their own gender identity must be given priority’

- Thomas Hammarberg, former
Council of Europe Commissioner
on Human Rights



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