

Observations on the Revised General Scheme of the Gender Recognition Bill 2014



**Equality Authority
2014**

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Introduction

Update on Observations on the Revised General Scheme of the Gender Recognition Bill 2014

On 18 June 2014, after going to press but prior to the publication of this report, the Minister for Social Protection published a Revised General Scheme of the Gender Recognition Bill 2014.¹ While the majority of the provisions in the original and revised schemes are identical, a small number of significant changes were made to the original scheme.

While the numbering of some of the provisions of the Scheme has changed, the vast majority of Heads remain the same. Nonetheless, there are a number of key changes that the Authority wishes to highlight and address.

1. Comments of the Minister

In publishing the revised Scheme, the Minister observes that: “the application process will be administrative, which I believe will be a streamlined and dignified process which protects all concerned and ensures that the registration process will be robust.”² The Minister also provides reassurance that:

“The process will not require details of care including medical history or confirmation of a diagnosis. Nor will it require that the person has lived in the acquired gender for a specific period of time after their transition. I believe this is a compassionate and understanding approach and central to the spirit of the Bill.”

This commitment addresses some of the concerns expressed in this report in relation to Head 6 and is to be welcomed. It is important to note however, that the applicant’s treating physician will still be required to certify the applicant’s transition. Medical practitioners thus retain considerable discretion in relation to the application for gender recognition.

2. Age – Heads 5 and 7

The Scheme as originally drafted required that all applicants for gender recognition had to be at least 18 years of age. In its submission to the Joint Oireachtas Committee on Education and Social Protection, the Equality Authority recommended that the age limit should be removed or at least dropped to at least 16 years of age. The Committee itself also recommended as follows:

“The age at which a person is entitled to apply for a Gender Recognition Certificate should be reduced from 18 years to 16 years. Measures should

¹ <http://www.welfare.ie/en/downloads/Revised-General-Scheme-of-the-Gender-Recognition-Bill-2014.pdf>

² Department of Social Protection Press Release, “Bill will provide for State recognition of the acquired gender of transgender people”, June 18, 2014, available at: <http://www.welfare.ie/en/pressoffice/Pages/pr180614.aspx>

also be put in place to address the day- to- day concerns of transgender people under the age of 16 years.”³

In this current report, the Authority has also reiterated the view that the minimum age of 18 is too high and should be reduced to at least 16. The reasons for this recommendation are set out in this report.

Following the recommendations of the Joint Oireachtas Committee, the Minister, in the Revised Scheme, has proposed that the minimum age at which a person may apply for legal recognition should drop from 18 to 16. Head 5(d) of the Revised Scheme maintains that applicants must be “at least 18 years of age on the date of application, unless they meet the requirements of Head 7”. Head 7 (as revised) allows a person aged 16 or 17 years to apply to the Minister for a gender recognition certificate. A number of specific conditions apply to a person aged 16 or 17 who seeks such a certificate:

- a. The person aged 16 or 17 years of age must first apply to a court seeking an exemption from the minimum age requirement in Head 5(d). The explanatory note suggests that such applications would be made to the Circuit Family Court. Given the application of the *in camera* rule to proceedings in that Court, the choice of the Circuit Family Court as the appropriate forum seems prudent. Such an application may be made informally and may be heard and determined otherwise than in public. No court fee will be charged in respect of the application.
- b. The Court will only grant the exemption where the applicant provides satisfactory documentary evidence that:
 - i. The consent of the person’s parent or guardian has been obtained;
 - ii. The person’s treating physician “is satisfied that the person has attained a sufficient degree of maturity to make the decision to apply for gender recognition, that the applicant is aware of and has considered all the consequences and the physician is satisfied that the applicant’s decision was freely made without duress and without the undue influence of any person”; and
 - iii. The treating physician’s opinion is supported by the opinion of an independent physician.

This revision considerably enhances the options for transgender and intersex young people, specifically those aged 16 and 17. It recognizes moreover, the evolving capacity of young persons and offers greater scope for the vindication of the rights of 16 and 17 year olds. Vitally, it will allow young people the opportunity to gain recognition of a preferred gender before they commence their Leaving Certificate examinations.

³ Report on the General Scheme of a Gender Recognition Bill 2013 (Joint Oireachtas Committee on Education and Social Protection, January 2014) available at: <http://www.oireachtas.ie/parliament/media/committees/educationandsocialprotection/Report-on-Gender-Recognition-Bill.pdf>

The Authority broadly welcomes this move, and commends the responsive approach of the Minister and her willingness to engage with and consider suggestions made by agencies and organisations such as the Equality Authority.

A number of points may be made in relation to the proposed reform:

- a. Persons under the age of 16.** Although this revision is to be welcomed, the question of the status of persons aged 15 or younger remains. While this revision reduces the waiting time for such young people, the absence of a recognition mechanism for transgender and intersex people under the age of 16 leaves those people in limbo, albeit for a shorter period than originally envisaged. This may present particular difficulties for those who are intersex whose identified gender does not tally with the sex listed on their birth certificate. In some cases, the person may identify as being of the gender opposite to that recorded on their birth certificate at a very young age. As this report explains, it remains unclear whether a person who is intersex can change their birth certificate. Where an error has been made in the recording of their sex at the time of birth, it is possible that a rectification of that error may occur, though this point remains unclear. The continuing absence of provision for recognition of the identified gender/preferred gender of people under the age of 16 continues to leave those young people in limbo and presents practical difficulties for those young people in their daily lives, particularly in relation to schooling and sports.
- b. Agreement between guardians/parents.** The Revised Scheme is unclear as to whether the consent of one of the guardians or parents of a child would suffice or whether the consent of all parents/guardians is needed. Given that the married parents of a child have equal constitutional rights and duties in respect of the child, it is unclear what would happen if one parent who is a guardian consented to legal recognition but the other did not. The possibility arises that one guardian could block the application to which another guardian has consented. Some clarification is needed on what will happen where those whose consent is required disagree.
- c. Standing of persons who are parents but not guardians.** In most cases, the parents of a child are also guardians of the child. In some cases however, a parent might not also be a guardian. In particular, a father of a child who is not married to the mother of his child does not automatically acquire guardianship responsibilities in respect of the child. Unless the non-marital father marries the mother, or has been conferred with guardianship by court order⁴ or by virtue of a statutory declaration made jointly with the mother,⁵ he will not be entitled to act as guardian. It is unclear whether a father who is not a

⁴ Under section 6A of the Guardianship of Infants Act 1964 (as amended)

⁵ Under section 2(4) of the Guardianship of Infants Act 1964 (as amended)

guardian would be required to consent in this context. As a parent he would appear to be required to do so, but if it is envisaged that he must be a parent and a guardian, his consent may not be required. Some clarification is needed on this point.

- d. Supporting documentation.** While the introduction of this facility is to be broadly welcomed, it is notable that the child aged 16 or 17 will have to obtain a supporting letter from two physicians. This would appear to be additional to the letter required by Head 6(vi) of the Scheme on application to the Minister. This means that the young person will require parental/guardian consent and supporting documentation from two physicians, as well as the consent of the Court before he or she can apply to the Minister.

These points notwithstanding, the amendment is broadly welcomed.

2. Recognition of identified gender of intersex persons.

Head 6(vi) of the Revised General Scheme makes express reference to the identified gender of intersex persons. As originally drafted, Head 6(vi) (which requires a person seeking recognition to provide a statement from his or her primary treating physician) had required that the statement confirm (amongst other things) “that the person has transitioned/is transitioning to their acquired gender.” The revised clause now requires:

“(vi) a statement by his/her primary treating physician, in a form to be prescribed by the Minister, which confirms that the person has transitioned/is transitioning to their acquired gender or, in respect of intersex persons the identified gender, and that he/she is satisfied that the person fully understands the consequences of his/her decision to live permanently in the acquired gender.”

The added reference to intersex persons is welcome but may need some further amendment. The reference to the identified gender of the intersex person is to be commended as a more appropriate acknowledgment of the experience of an intersex person than ‘acquired gender’. Nevertheless, the new wording still presupposes that an intersex person has ‘transitioned’ or is ‘transitioning’. As pointed out in this report, it may not be accurate to describe an intersex person as having ‘transitioned’ from one gender to another. The true gender of an intersex person instead may be said to evolve or be discovered over time. As such, the use of the term ‘transition’ in this context may not be wholly appropriate in the context of intersex people.

3. Omission of two clauses originally contained in the General Scheme.

Head 11(3) of the original General Scheme stipulated that:

“(3) An tArd-Chláraitheoir shall not authorise the issue of a certified copy, a copy or a certified extract of the birth register or adopted children register entry of a person issued with a gender recognition certificate,

(other than to the person themselves) unless he/she is satisfied that there exists a legitimate requirement for the request.”

In a somewhat similar vein, Head 12(3) contained the following statement:

“(3) Once the entry in the gender recognition register has been made, an tArd-Chláraitheoir shall take all practical steps to ensure that the person’s entry in the register of births or the adopted children register is secured in such a manner as to prevent the issue (except to the person themselves) of any certified copy, copy or certified extract without the approval of an tArd-Chláraitheoir.”

In the corresponding provisions of the Revised Scheme (Heads 12 and 13), both of these clauses have been omitted. It is unclear why this step has been taken. Both provisions appeared to have been designed to secure the privacy of records concerning applicants who obtain gender recognition under the Act. Notably, Head 11(5) of the Revised Scheme requires that “the gender recognition register shall not to be open to public inspection or search”, and as such it is probably unlikely that the privacy of records will be compromised though it remains unclear why these additional safeguards have been removed.

4. Gender-specific offences.

Revised Head 26 contains more detail on the issue of gender-specific offences than was contained in the original corresponding Head. The substance of the provision remains the same as in the original version of the Scheme, namely that “the fact that the person’s gender has become the acquired gender does not prevent the offence being committed or attempted.” The revised Scheme contains a useful definition of a relevant gender specific offence and thus provides greater clarity in relation to what offences are covered by this Head. Such clarity is to be welcomed.

5. Sports

The original Scheme, in Head 26, contained a clause addressing the participation of persons with an acquired gender in sporting activities. In this report, the Authority has criticised the original clause, and has made a number of recommendations in relation to its reform. Notably, the revised Scheme has entirely omitted the original clause relating to sports. In the absence of this clause, the provisions of the Equal Status Act 2000 will apply without qualification.

Observations on the General Scheme of the Gender Recognition Bill 2013

Equality Authority, May 2014

A. Introduction and Context

Introduction

1. These observations address the terms of the General Scheme of the Gender Recognition Bill 2013, published by the Department of Social Protection in July 2013.⁶ The General Scheme contains proposals for the formal legal recognition of the preferred or 'acquired' gender of transgender and intersex people,⁷ as required by the European Convention on Human Rights.⁸ The central purpose of the Scheme is to allow a person the facility of altering their legally assigned gender and in particular to obtain a revised birth certificate in the acquired gender, such that the person may be treated for all purposes as a person of the acquired gender.⁹

2. The Equality Authority welcomes this opportunity to contribute to the deliberations on how best to promote the dignity, equality and human rights of people who are transgender and intersex. In doing so, we wish to offer constructive observations with a view to achieving the legislative framework best suited to meeting the needs of transgender and intersex people living in Ireland and to serving the public interest. Part A of these observations sets out the general context, legal and social, for reform. Part B summarises the main provisions of the Authority's prior submission to the Gender Recognition Advisory Group. While Part C sets out general remarks on the Scheme, identifying overarching values that should inform reform, Part D addresses specific Heads of the Scheme. Part E concerns matters that are not dealt with in the Scheme, which we believe deserve some consideration. Finally, Part F summarises the recommendations in these observations.

The Remit of the Equality Authority

3. The Authority and its predecessor (the Employment Equality Agency) have long sought to promote the equality rights of transgender and intersex people. Although gender identity is not *expressly* recognised as a ground of unlawful discrimination under the Employment Equality Acts and the Equal Status Acts, discrimination against those who are planning to transition gender, are

⁶ See Department of Social Protection press release at the following link: <http://www.welfare.ie/en/pressoffice/Pages/pr170713.aspx>

⁷ Although some intersex people identify as trans, others do not. We have chosen to name intersex people separately in this report, with a view to highlighting the distinct requirements and experience of intersex people, and to signal that any scheme for gender recognition must adequately address the situation of intersex people as well as of transgender people.

⁸ See *Goodwin v United Kingdom*, (2002) 35 E.H.R.R. 18, Application no. 28957/95, July 11, 2002; *I v United Kingdom* (2003) 36 E.H.R.R. 53, Application no. 25680/94, July 11, 2002

⁹ Head 9, General Scheme of the Gender Recognition Bill 2013

transitioning or who have transitioned is treated as gender discrimination for the purpose of Irish and EU equality law.¹⁰

4. Among the functions of the Equality Authority are the requirements to work towards the elimination of discrimination, harassment and sexual harassment in relation to employment¹¹ and in the context of the provision of goods and services.¹² The Authority is also mandated to promote equality of opportunity in relation to the matters to which the Employment Equality Acts 1998-2011 and the Equal Status Acts 2000-2012 apply.¹³

5. The Equality Authority has previously highlighted the precarious legal situation of transgender people in Eilís Barry's report *Transsexualism and Gender Dysphoria* (Equality Authority, 2004). The Authority commissioned and published research by Eoin Collins and Brian Sheehan, *Access to Health Services for Transsexual People* (Equality Authority, 2004), which maps the experience of transgender people in accessing medical supports and treatment. In 2011, it supported and funded a joint ICTU/TENI publication on *Gender Identity in the Workplace*, highlighting best practice in relation to transgender and intersex people in employment.¹⁴ The Authority has previously made a detailed submission to the Gender Recognition Advisory Group,¹⁵ which is discussed further below. It has also made a written submission concerning the General Scheme of the Gender Recognition Bill 2013 to the Joint Oireachtas Committee on Education and Social Protection,¹⁶ and on October 24, 2013, testified before the Committee during its consideration of the provisions of the Scheme.¹⁷

6. The Authority has been especially proactive in practice in promoting the interests of transgender people. In particular, the Authority initiated and successfully argued the Equality Tribunal case of *Louise Hannon v First Direct Logistics Ltd*.¹⁸ In *Hannon* the Tribunal ruled that the applicant had been unlawfully discriminated against on the grounds of gender and disability arising from her employer's treatment of her following her decision to undergo gender reassignment. (This case is discussed in further detail below at page 43 (118-120). The Authority was also instrumental in negotiating a settlement with the State Examinations Commission that led, in 2007, to the reissuing of a Group Intermediate Certificate and Leaving Certificate to a transgender woman. The

¹⁰ See, for instance, *Hannon v First Direct Logistics Ltd*, Equality Tribunal DEC-E2011-066, March 29, 2011.

¹¹ Employment Equality Act 1998, section 39(a)

¹² Equal Status Act 2000, section 39(a)

¹³ Employment Equality Act 1998, section 39(b); Equal Status Act 2000, section 39(b).

¹⁴ ICTU/TENI, *Gender Identity in the Workplace: An Introductory Guide*, (ICTU/TENI, 2011)

¹⁵ Equality Authority Submission to the Gender Recognition Advisory Group (September 2010) <http://www.equality.ie/en/Publications/Submissions/Equality-Authority-Submission-to-the-Gender-Recognition-Advisory-Group.html>

¹⁶ Available at <http://www.equality.ie/en/Publications/Submissions/Equality-Authority-Submission-to-the-Gender-Recognition-Advisory-Group.html>.

¹⁷ The Committee debate (including the Authority's presentation) can be accessed at http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committee_takes/EDJ2013102400003?opendocument

¹⁸ DEC-E2011-066

Commission agreed to alter the certificates so as to reflect the woman's new name and preferred gender.¹⁹

Context: Social and Legal

The lived experience of transgender and intersex people

7. McIlroy defines transgender people as "individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth."²⁰ This definition includes, but is not confined to those who wish to live permanently in a gender different from that assigned to them at birth. It also includes people whose gender expression diverges from that expected of those of the person's birth sex, as well as people who may identify as neither male nor female. A transgender status thus may embrace a wide variety of experiences of gender identity and expression.²¹

8. An intersex person is a person whose sexual anatomy and genetic makeup cannot be clearly and unambiguously deemed to belong solely to one single gender category. TENI notes that:

"A person with an intersex condition may have elements of both male and female anatomy, have different internal organs than external organs, or have anatomy that is inconsistent with chromosomal sex. These conditions can be identified at birth (where there is obviously ambiguous genitalia), at puberty (when the person either fails to develop certain expected secondary sex characteristics, or develops characteristics that were not expected), later in adulthood (when fertility difficulties present) or on autopsy."²²

While some intersex people self-define as transgender, others do not.

9. Transgender and intersex people live life with considerable courage, purpose and fortitude. Nonetheless, they typically face many daily difficulties – often serious and distressing – in social and administrative interactions. These interactions often result in entirely unjustified and inexcusable ill treatment of and misbehaviour towards transgender and intersex people,²³ which leads to

¹⁹ Black, "Transsexual wins plea to alter gender on exam certs" *Irish Independent*, June 1, 2007.

²⁰ McIlroy, *Transphobia in Ireland*, Research Report (TENI, 2009)

²¹ The "Declaration of the Trans Rights Conference", Malta, October 28, 2009, p. 4, fn. 1, available at <http://www.tgeu.org/node/87>, adopts a somewhat broader term – "trans people" – who are defined as including:

"...people who have a gender identity which is different to the gender assigned at birth and those people who wish to portray their gender identity in a different way to the gender assigned at birth. It includes those people who feel they have to, or prefer or choose to, whether by clothing, accessories, cosmetics or body modification, present themselves differently to the expectations of gender role assigned to them at birth."

²² TENI, Glossary of Trans Terms: <http://www.teni.ie/page.aspx?contentid=139>.

²³ Two particular reports offer a useful and comprehensive overview of research into the negative experiences of transgender people. McIlroy's *Transphobia in Ireland: Research Report*, (TENI, 2009) provides an excellent albeit sobering review of research findings relating to the experience of transgender people. The Council of Europe has detailed the stark findings of a wide range of European studies highlighting discrimination, bullying, harassment and violence that is often directed towards transgender persons, as well as the heightened levels of suicidality

considerable embarrassment, humiliation and serious incursions on personal privacy. Such experiences as well as the expectation of negative reactions often result in transgender and intersex people being excluded from, avoiding or curtailing participation in the full range of social, economic and cultural activities offered by society.

10. People who identify as transgender and who are intersex typically experience high levels of discrimination. Additionally, UK research has highlighted high levels of harassment of and violence towards transgender people in public places.²⁴

11. Particular difficulties arise in accessing employment, healthcare and leisure facilities. Notably, transgender people are considerably more likely to face unemployment than their non-transgender ('cisgender') counterparts, while many transgender people in employment face discrimination and harassment on account of their gender identity.²⁵

The legal position of transgender and intersex persons: Gender Recognition

12. Such social and cultural difficulties are further exacerbated by legal and administrative practices that fail adequately to recognise the transgender person's current gender identity and expression. The Transgender Equality Network Ireland (TENI) has noted that lack of legal recognition, "has

experienced by such people: see Council of Europe Commissioner of Human Rights Issue Paper on *Human Rights and Gender Identity*, (2009) CommDH/IssuePaper(2009)(2), Strasbourg, July 29, 2009, available at https://wcd.coe.int/ViewDoc.jsp?id=1476365#P128_27908 particularly at 3.5. The general experience of LGBT communities in Ireland is highlighted in Mayock, Bryan, Carr and Kitching, *Supporting LGBT Lives*, (GLEN/BeLonGTo, 2009) which, while noting high levels of resilience, evidences the significantly widespread experience of verbal abuse, physical violence, mental distress and suicidality amongst the broader LGBT population. Of the 46 transgender respondents interviewed in their study, 80% reported having suffered verbal abuse, while 60% had been threatened with violence owing to their gender identity. 39% had experienced physical violence, 15% involving a weapon while 17% had been sexually assaulted.

²⁴ See Whittle, Turner and Al-Alami, *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*, (Wetherby: The Equalities Review, 2007). See also Moran and Sharpe, "Violence, Identity and Policing: The Case of Violence against Transgender People" (2004) 4(4) *Criminal Justice* 395-417; McIlroy, *Transphobia in Ireland: Research Report*, (TENI, 2009) pp. 21-24 and the Council of Europe Issue Paper on *Human Rights and Gender Identity*, (2009) CommDH/IssuePaper(2009)(2), Strasbourg, July 29, 2009, available at https://wcd.coe.int/ViewDoc.jsp?id=1476365#P128_27908 at 3.5.

²⁵ In Whittle, Turner and Al-Alami, *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*, (Wetherby: The Equalities Review, 2007) the authors report that less than a third of respondents (31%) held full-time employment. 23% reportedly left employment due to discrimination on the ground of gender identity, while only 30% reported that they felt that they were treated with dignity at work. Of those who had not transitioned to their preferred gender, 43% reported that this was due to a fear of losing their current jobs. Whittle et al. also reported comparatively high levels of verbal and physical abuse against transgender people in the workplace. In a Finnish study by Lehtonen and Mustola, *"Straight People don't tell, do they?" Negotiating the Boundaries of Sexuality and Gender at Work*, (Helsinki: Ministry of Labour, 2004), 77% of respondents reported that they had not informed their employers that they were transgender, a factor that resulted in considerable stress for a majority of the respondents.

significantly impacted upon [the ability of trans and intersex people] to access basic services such as social security benefits, education and transport.”²⁶

13. As Irish law currently stands, a person’s sex for legal purposes is determined solely by reference to specific biological factors present at the time of the person’s birth. If, examined as of the time of birth, the chromosomal, gonadal and genital features of a person were consistently those of one sex alone, the person’s sex for legal purposes is deemed to be that sex and is, moreover, fixed from birth for life.²⁷ Where a person’s sex judged by these biological criteria was clear and unambiguous at the time of birth, it is not possible to look to other factors, such as psychological factors or surgical intervention.

14. In particular, it is not possible to alter a birth certificate to reflect a person’s subsequent gender reassignment.²⁸ In *Foy v An tArd-Chláraitheoir (No. 1)*²⁹ and *Foy v An tArd-Chláraitheoir, Ireland and the Attorney General (No. 2)*³⁰ the High Court concluded that as a matter of Irish law a transgender woman who had undergone gender reassignment was not entitled to a revised birth certificate recording her preferred gender. Stressing that a birth certificate is a record of historic fact, the Court ruled that where a person had the congruent biological features of one sex alone at the time of birth; it was not possible subsequently to alter the birth certificate by reference to the person’s psychological sex or the fact that the person had undergone gender reassignment. The legislation only allows an alteration where there had been a clerical error or an error of fact.³¹ In this case, considering the biological criteria and judged by reference to the time of birth, no such error had been made. The plaintiff had been accurately recorded as male at the time of birth, based on the applicable biological criteria. The Court, notably, concluded that there was insufficient evidence to add psychological sex as a factor for determining a person’s legal gender. While the law had been accurately applied, the Court ruled however, that this outcome brought Ireland into conflict with the European Convention on Human Rights, a conclusion that led the Court to hand down a declaration of incompatibility under section 5 of the European Convention on Human Rights Act 2003. (See below at pp. 8-9).

15. The test applied in *Foy* is notable in that it looks only to features present and evident at birth and ignores factors (such as psychological sex) that come to light subsequently. The test, moreover, is exclusively biological in focus.

²⁶ Transgender Equality Network Ireland, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government’s Gender Recognition Bill 2013* (TENI 2013) at p. 6

²⁷ *Corbett v Corbett* [1970] 2 WLR 1306, *R v Tan and Others* [1983] QB 1053, *Foy v An tArd-Chláraitheoir (No. 1)* High Court, McKechnie J, July 9, 2002. The approach in *Corbett* has been rejected by the Australian Family Court: see *Attorney General for the Commonwealth v. ‘Kevin and Jennifer’* [2003] Fam. CA 94, [2004] 2 L.C.R. 254

²⁸ *Foy v An tArd-Chláraitheoir, Ireland and the Attorney General (No. 2)* [2007] IEHC (Irish High Court) 470. On the *Foy* cases see generally Crowley, *Family Law*, (Thomson Round Hall, 2013) at pp. 69-78.

²⁹ High Court, McKechnie J, July 9, 2002.

³⁰ [2007] IEHC (Irish High Court) 470

³¹ The Civil Registration Act 2004, sections 63-66

16. Where a person is intersex, and in particular where there is biological ambiguity as to the person's sex at the time of birth, there *may* be scope for a somewhat more flexible test, though Irish law is unclear on the point. English and Welsh case law suggests that where, on examination of chromosomal, gonadal and genital biological characteristics, the gender of a person was ambiguous or unclear at the time of birth, and other factors may be considered. In particular, the English and Welsh High Court (Family Division) in *W v W (Nullity: Gender)*³² ruled that where an examination of the biological factors noted above produces ambiguity, one could proceed to look to psychological and hormonal factors, as well as secondary sexual characteristics as a guide to that person's true sex. The court, moreover, could consider matters that came to light after the birth. The wife in that case was registered as a boy at birth, though there had been some uncertainty as to her genital sex even at that time. As she grew, she developed female bodily characteristics and wished to live as a woman. Charles J. found that while her genetic and gonadal features were male, her genital features were ambiguous. As a result, the judge concluded that it was possible to look beyond the normal three biological criteria and consider other factors, including developmental, psychological and hormonal factors. The inquiry, moreover, was not confined to factors present at birth but could consider in hindsight factors that had subsequently come to light. On this basis, the court found that, for the purpose of marriage, the wife was female. Thus it would appear that there *may* be more flexibility in the case of a person born intersex where biological sex (judged by reference to chromosomal, gonadal and genital features) is unclear or ambiguous at the time of birth, though Irish law is unclear on this point. Certainly, the Civil Registration Act 2004 does not make express provision for intersex people and absent establishing that an error of fact was made at birth, there is no facility for altering a birth certificate.

17. In an unreported Irish case, *S v Adoption Board*,³³ an intersex child had been registered on adoption as female. The child, however, identified as male. This led to difficulties in accessing pre-school places. The female gender marker in the adoption records precluded him from gaining admission to a boys' school, while his presentation as male meant he could not access a female school. In an *ex tempore* High Court decision, Sheehan J ordered the amendment of the adoption register to indicate that the child was male. No written judgment however, was issued and it is unclear on what basis the judge made this order. (The Adoption Board had contended that the Adoption Acts did not permit such an alteration). Notably, this case concerned adoption records and a child who had been born abroad. It is thus unclear whether it is of precedential value when it comes to birth certificates.

18. It is possible that there may be some scope to alter a birth certificate to reflect the true gender of an intersex person, but only where it can be shown that an error of fact has been made at the time of birth. On the other hand, where a transgender person's biological features at the time of birth were unambiguously

³² [2001] 2 WLR 674

³³ Unreported, High Court, Sheehan J, December 4, 2009.

those of one gender alone, it is not currently possible to change the person's birth certificate to recognise an acquired or preferred gender, a point confirmed in *Foy v An tÁrd-Chláraitheoir, Ireland and the Attorney General (No. 2)*³⁴. This is notwithstanding the fact that the person may be living and presenting to society as a person of the opposite sex to that legally assigned to them. The absence of a facility to bring the legal gender of a person into conformity with their lived gender places transgender and intersex people in a very vulnerable position, and strikes at the core of their right to dignity, equality and privacy. It has, moreover, as discussed below and as confirmed in *Foy (No. 2)*, brought Ireland into direct conflict with the European Convention on Human Rights.

The Passports Act: Limited Recognition

19. Notwithstanding the ruling in *Foy*, there are some limited contexts in which social gender (the gender as which the person lives) and gender reassignment are, *in practice*, considered relevant. In various administrative contexts (such as in relation to the issuing of exam results), there is scope to recognise social gender but these are exclusively areas where a difference of gender does not affect the legal rights and responsibilities of the person (in other words, in contexts where it makes no legal difference whether the person is treated as male or female). The Passports Act 2008, section 11, for instance, makes provision for passports to be issued in the preferred gender and name of a person. This may be done where a person:

“has undergone, or is undergoing, treatment or procedures or both to alter the applicant's sexual characteristics and physical appearance to those of the opposite sex.”³⁵

20. This was a welcome move that allowed at least some transgender people access to an important identity document in the preferred gender. Nonetheless, the requirement that the applicant has undergone or is undergoing treatment or procedures to alter their sexual characteristics and physical appearance³⁶ clearly excludes transgender persons who either choose not to undergo such treatment or procedures or cannot do so (for example, for medical or financial reasons.) The section firmly predicates the granting of a new passport on solely physical, medicalised criteria and excludes those who have undergone a social transition without physical change. The section is unclear, moreover, on precisely what extent of physical change or intervention is required to satisfy the section's requirement and potentially makes entitlement to a passport heavily dependent on the discretion of the relevant civil servants. There is significant potential for inconsistencies to arise in practice.

21. Even where a passport is issued in the acquired gender, recognition under the Passports Act is partial. In particular, it does not generally change the legal gender of the person to whom the passport is issued. According to section 11(3)

³⁴ [2007] IEHC (Irish High Court) 470. The Equality Authority is grateful to Dr Tanya Ní Mhuirthile for bringing this case to our attention.

³⁵ Section 11(1)(a), Passports Act 2008.

³⁶ Section 11(2) of the Passports Act 2008 states that the applicant must supply supporting medical evidence from a registered medical practitioner.

of the 2008 Act, the issuing of a passport in the new name or preferred gender “does not confer any right or entitlement on the person that is not connected with the purposes of this Act” nor does it “affect any right, entitlement, duty or obligation arising under statute or otherwise.” In short, this means that while a person may be given a passport in the preferred gender, for legal purposes generally the person is still treated as being of the original gender.

22. The 2008 Act potentially conflicts with the 2013 scheme in that it imposes conditions that the Scheme does not propose to require (the Scheme does not require applicants to have undergone any form of treatment or procedures) while other conditions proposed under the Scheme are absent from the 2008 Act. Notably, while deficient in other respects, section 11 of the Passports Act does not impose any conditions as to civil status or age. This interaction between the General Scheme and the 2008 Act is addressed further below at pp. 46-47.

Foy and the Declaration of Incompatibility

23. In *Foy v An tÁrd-Chláraitheoir, Ireland and the Attorney General (No. 2)*³⁷ the High Court concluded that Ireland was in breach of its commitments under the European Convention on Human Rights in not making provision for the legal recognition of the preferred gender of a transgender woman. The Court handed down a declaration of incompatibility under section 5 of the European Convention on Human Rights, formally recording that Ireland was in breach of the Convention. Notably the Court found that incompatibility could arise by omission (here, the state’s failure to provide a suitable mechanism for gender recognition) as well as commission. While this declaration did not serve to change the law,³⁸ the decision created a considerable political and moral imperative for reform.

24. In doing so, the High Court followed and applied the decisions of the European Court of Human Rights in *Goodwin v United Kingdom*³⁹ and *I v United Kingdom*.⁴⁰ In these cases, the European Court found that laws that precluded a transgender woman from being legally recognised in her acquired gender (in particular by denying her a birth certificate in her acquired gender) breached Article 8 and Article 12 of the European Convention. In *Goodwin* and *I* the Court found that the failure to allow for gender recognition infringed the right to privacy of the plaintiffs. The Court found, moreover, that this failure was not justified or excused by any sufficiently pressing countervailing public interest. In particular, the Court in *Goodwin* found that any inconvenience to the public interest arising from gender recognition would be small when compared to the benefits for transgender people:

³⁷ [2007] IEHC (Irish High Court) 470.

³⁸ Section 5(2)(a) of the European Convention on Human Rights Act 2003 makes it clear that a declaration of incompatibility “shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made”

³⁹ Application no. 28957/95, July 11, 2002

⁴⁰ Application no. 25680/94, July 11, 2002

“No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”⁴¹

Notably, the Court in both *Goodwin* and *I* also found a breach of Article 12 (the right to marry), as the law prevented each of the plaintiffs from marrying a partner of the sex opposite to that in which she identified. (The High Court did not find a breach of Article 12 in *Foy*, given that Dr Foy was already married.)

25. The impetus for reform is further enhanced by the fact that gender recognition has been available in the United Kingdom since 2004,⁴² a factor that places Ireland in breach of its commitment under the Good Friday Agreement to ensure that human rights protections in the State are at least equivalent to protections available to people in Northern Ireland.⁴³

⁴¹ Application no. 28957/95, July 11, 2002, at para. 91

⁴² Gender Recognition Act 2004 (UK)

⁴³ The *Agreement reached in the Multi-Party Negotiations, 1998 (Good Friday Agreement)* requires that the State “ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”

B. Equality Authority Submission to the Gender Recognition Advisory Group

26. The Authority has previously made a detailed submission to the Gender Recognition Advisory Group.⁴⁴ While some of the recommendations made therein are no longer relevant, it is worth rehearsing some of the key recommendations in that submission.

27. The key recommendations in the Authority's submission from 2010 are set out below, together with comments outlining the extent to which these recommendations have been addressed by the Scheme:

Equality Authority Recommendation (2010)	Comment
Legislation providing for legal gender recognition should not require surgical, hormonal or other medical intervention as a prerequisite to legal recognition (as is the case currently under the Passports Act 2008, section 11).	<p>The Authority welcomes the absence of any requirement for surgical, hormonal or other medical intervention as a precondition to recognition under the Scheme.</p> <p>The Authority recommends the amendment of the Passports Act 2008 to remove the requirement that an applicant first undergo treatment or procedures as a precondition to the issuing of a passport in the applicant's acquired gender.</p>
Provision for legal gender recognition should be available to all people regardless of civil or marital status. The dissolution or annulment of a marriage or civil partnership should not be required as a pre-condition to legal recognition.	The Authority respectfully maintains that gender recognition should not be contingent on civil status. This point is addressed further below.
Legal gender recognition should be available to young persons from at least the age of 16 onwards rather than 18.	The Authority respectfully recommends that the suggested minimum age limit of 18 years be revisited.
Equality laws should be amended to provide <i>express and comprehensive</i> protection in employment and in the provision of goods and services for <i>all</i> transgender and intersex people from discrimination on the ground of gender identity.	This point is addressed further below.

⁴⁴ *Equality Authority Submission to the Gender Recognition Advisory Group* (September 2010) <http://www.equality.ie/en/Publications/Submissions/Equality-Authority-Submission-to-the-Gender-Recognition-Advisory-Group.html>

Transgender and intersex people should be allowed full access to the facilities and services available exclusively to persons of their preferred gender. ⁴⁵	This point is addressed further below.
The status, obligations and entitlements of parents should not be affected adversely by legal recognition of a preferred gender.	The Authority is pleased to see this recommendation being addressed in Head 21 of the Scheme.
Provision should be made to ensure that victims of gender-specific offences are protected and their rights are vindicated regardless of the fact that either they or the alleged perpetrators of gender-specific offences have been recognised as being of a preferred legal gender different to that assigned at birth.	The Authority welcomes the terms of Head 25, and recommends a further amendment to remove any remaining doubt regarding criminal liability. (See below at pp. 33-34).
All reasonable steps should be taken to ensure that the dignity and privacy of applicants for legal gender recognition be preserved and that confidentiality will be respected in all cases.	The Authority is pleased to see the safeguards in the Scheme to protect confidentiality, though it is concerned at the possible impact of Head 26 in 'outing' transgender and intersex people in the context of sport.
The Prohibition of Incitement to Hatred Act 1989 should be amended to include protection from incitement to hatred for transgender and intersex people.	This Scheme provides a useful opportunity for making such an amendment, which would send a powerful signal of support for and solidarity with transgender and intersex people.
Consideration should be given to allowing judges to impose tougher sentences where violent or other illegal activity is motivated by hatred towards people who are transgender or intersex along the lines of the Offences (Aggravation by Prejudice) (Scotland) Act 2009.	This Scheme provides a useful opportunity for making such an amendment, which would very powerfully signal support for and solidarity with transgender and intersex people.

28. Many of these recommendations are reflected in the current General Scheme of the Bill. The Authority welcomes, in particular, the measures in Heads 21 and 25 of the General Scheme that address some of the concerns noted above in relation to parenthood and gender-specific offences respectively.

⁴⁵ Subs. 5(2)(c) and (g) of the Equal Status Act 2000 allow services and facilities to be provided to members of one gender only, on the basis that the service is of an aesthetic or cosmetic nature that involves physical contact between the service provider and recipient or where sharing a facility would involve embarrassment or infringement of privacy.

C. The Authority's Response to the Scheme: General Remarks

29. In the Authority's view, the Scheme broadly is to be welcomed, subject to certain reservations. While welcoming the Government's Bill, the Authority is mindful also that two private members' bills have recently been published in relation to this matter, namely the Gender Recognition Bill 2013, promulgated by Deputy Aengus Ó Snodaigh TD, and the Legal Recognition of Gender Bill 2013, proposed by Senator Katherine Zappone.

30. There is no doubt that even in the short time since the Gender Recognition Advisory Group reported, the approach to this issue has evolved considerably. In particular:

- *The Authority welcomes the fact that the Scheme does not require that an applicant must undergo or have undergone any medical or hormonal intervention or physical transition in order to facilitate gender reassignment.* In taking this approach, the Scheme clearly signals a rejection of a reductive view focused on physical features and has adopted an appropriately holistic approach to the concept of gender.
- *The Scheme does not posit any formal diagnosis of gender dysphoria or gender identity disorder. This is to be welcomed.* Psychiatric best practice has shifted from viewing transgender as a disorder or illness. A requirement of evidence of gender dysphoria would have risked stigmatizing transgender people without any particular benefit to the State. It is arguable after all, that what *causes* a person to have a gender identity different from their original physical sex is not especially relevant from a policy perspective. The primary concern of gender recognition legislation should be to ameliorate the social and legal position of the transgender or intersex person and to address the lived reality of being transgender or intersex.
- *The Scheme does not require any real life test to qualify for recognition, whereby the applicant would have to live as a person of the acquired gender for a set period of time.⁴⁶ This is to be welcomed.* It is clear that the real life test would have delayed recognition for some applicants and would potentially have worked an injustice in the case of relatively elderly applicants. The imposition of a real life test would have undermined the applicant's right of self-determination and would have risked handing the real decision-making power to medical professionals. There is a possibility also that a real life test may have fostered an expectation that the applicant present as 'authentically' male or female, in turn entrenching stereotypes of what it is to be male or female.

31. In many respects the General Scheme as proposed is significantly more progressive than legislation in other European States, some of which States have retained requirements for sterilization of transgender persons that clearly would not be acceptable in a modern scheme for recognition and would possibly conflict with the constitutional right to bodily integrity. This is to be welcomed,

⁴⁶ In its submission to GRAG, the Equality Authority discussed the possibility of requiring a real life test, but specifically as an alternative to a requirement of medical or surgical intervention.

though in fairness some of the features of the legislation of other European States reflect the fact that those gender recognition regimes were put in place a long time ago and predate quite significantly the proposed Irish reforms.

Values that should inform Gender Recognition legislation

32. A number of key principles or values may be identified that should inform reform in this context:

- Fundamentally, any Scheme must respect the dignity and freedom of the individual transgender or intersex person and their right to be treated with consideration and respect.
- Any Scheme must cater to the diversity of the transgender and intersex experience, recognizing that different solutions may be required for the different situations of transgender and intersex people so as to ensure no one is excluded from recognition. *It is vitally important, in particular, that the scheme adequately addresses the position of intersex people.* As Tanya Ní Mhuirthile has observed:

“To deliberately exclude intersex individuals from any proposed scheme for gender recognition in Ireland is to knowingly enshrine discrimination into Irish law and thus will fundamentally undermine any claim of such a scheme to be rights compliant.”⁴⁷

- The right to autonomy and self-determination of the individual must be respected and facilitated, subject to appropriate safeguards. In particular, the Authority believes that the best model for recognition is one based on self-determination and self-declaration.
- Any Scheme should avoid the medicalisation and pathologisation of transgender and intersex people. *In particular, it is vital that the process of legal gender recognition is decoupled from medical pathways.* Subject to such safeguards as are necessary to prevent an abuse of process, a decision to recognise a person’s gender should as far as possible be based on the individual’s own self-declaration rather than the assessment of medical personnel.
- A model Scheme must ensure that the privacy and confidentiality of a transgender or intersex person is zealously guarded and protected. Where it is strictly necessary to override the right of privacy, any incursion should be as limited as possible.
- Any workable Scheme must provide safeguards from fraud and wrongdoing, but no more than are necessary to prevent fraud. It should not be readily assumed that a scheme for gender recognition will be the subject of widespread abuse.
- The civil status of a person – that is the fact that a person is or was married or a civil partner, divorced, separated or widowed, should not be a factor in determining gender recognition.

⁴⁷ Ní Mhuirthile in O’Sullivan (ed.), *Equality and Identity* (TENI, 2012) at p. 121.

D. The Authority's Observations on Specific Heads

Head 1 – Short Title and Commencement

33. This provision allows the Act to be brought into operation on such day or days as the Minister for Social Protection shall appoint. This will be done by means of a commencement order. This approach is necessary so that the Department will have time to put in place the technical rules and processes to allow the Act to be implemented smoothly. Different provisions may be brought into force on different dates so that the Act's implementation may be staggered.

34. That said, the language of the Head may potentially facilitate undue delay in the coming into force of the Act. Head 1 requires that the Act *shall* come into operation on such day or days as the Minister *may* appoint. In *State (Sheehan) v Government of Ireland*⁴⁸ the Supreme Court ruled that a similar clause allowing the Government to decide when to bring a section of legislation into operation was open-ended and did not require the section's implementation even within a reasonable timeframe. This meant that the Supreme Court could not be compel the Government to bring the section into force, even after an inordinate time had passed since the Act was signed by the President.

35. The Authority does not, of course, anticipate any deliberate or negligent delay in the implementation of this important legislation. Nonetheless, given the very long delays in bringing forward this legislation (and bearing in mind that the declaration of incompatibility handed down in *Foy (No.2)* is now over 6 years old), time is of the essence. Many people have waited a very long time for such legislation. (Dr Foy, in particular, commenced her proceedings over 15 years ago). As a result, any further prospect of delay should be firmly resisted.

36. The effectively open-ended wording of Head 1, coupled with the absence of any reference to a reasonable timeframe, may facilitate further delays that will cause added difficulties for transgender and intersex people. Given that this Act seeks to address the breach of a human right, the imperative for swift action is strong.

Recommendation: Head 1 should be amended so that the Minister will be required to bring the Act into force within a 'reasonable timeframe' and at most within 6 months of the Act being signed by the President.

Head 2 - Interpretation

37. This is a standard definition section. The Act is also subject to the Interpretation Act 2005 and, unless the contrary is clearly stated in the Act, will be interpreted by reference to the principles contained in that Act. The Act must also be interpreted, so far as possible, in compliance with the European Convention on Human Rights.⁴⁹

38. The Irish Human Rights Commission has remarked that the phrase 'acquired

⁴⁸ [1987] IR 550

⁴⁹ European Convention on Human Rights Act 2003, section 2.

gender’ suggests that “gender is a matter extraneous to the person, rather than an intrinsic part of a person’s identity.”⁵⁰ It suggests that the phrase ‘identified gender’ should be used in preference. Indeed, many transgender people will maintain that they have not acquired a new gender but are instead living in their true gender. Notably, the Transgender Equality Network Ireland has recommended using the phrase ‘preferred gender’, arguing that this more strongly reflects the right to self-determination (though they caution that this phrase should not be taken “to imply that gender identity is an optional choice for people.”)⁵¹ The *Report of the Joint Oireachtas Committee on Education and Social Protection on the General Scheme of a Gender Recognition Bill 2013* (henceforth the ‘Joint Committee Report’)⁵² also opts for ‘preferred gender’ over ‘acquired gender.’

Recommendation: The phrase ‘identified gender’ or ‘preferred gender’ should be used in preference to ‘acquired gender.’

39. ‘Physician’ for the purpose of the Bill means a medical practitioner registered by the Medical Council on a Specialist Register under section 47 of the Medical Practitioners Act 2007. It is suggested that this definition should be considered carefully to ensure that it does not unduly exclude any practicing medical practitioner who has direct experience addressing the health needs of transgender or intersex people. It is suggested, in particular, that the definition of ‘physician’ should be widened to include medical practitioners working outside Ireland. Specialists in endocrinology and in transgender medicine are in very short supply in Ireland. As such, some transgender and intersex people may have a primary treating physician who is not based in Ireland.

Recommendation: The definition of ‘physician’ should be wide enough to include any practicing medical practitioner who has experience addressing the health needs of transgender or intersex people, including a registered medical practitioner practising in any EU member state.

Head 4 - The Minister to be the Issuing Authority for Gender Recognition Certificates

40. Head 4 designates the Minister for Social Protection as the person responsible for issuing gender recognition certificates. In various respects, this is a welcome move. In particular, the Minister is politically accountable and is answerable, as a member of the Government, to Dáil Éireann. The Head represents a welcome move away from the panel system proposed by the Gender Recognition Advisory Group and imposes direct responsibility on an accountable Minister for the relevant decision.

⁵⁰ Observations on the General Scheme of Gender Recognition Bill 2013, (IHRC, November 2013) at p.5, available at http://www.ihrc.ie/download/pdf/ihrc_observations_on_the_general_scheme_of_gender_recognition_bill_november_2013.pdf [accessed January 27, 2014]

⁵¹ Transgender Equality Network Ireland, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government’s Gender Recognition Bill 2013* (TENI 2013) at p.2

⁵² Houses of the Oireachtas, January 2014 at p.37

41. Notably, Head 4 is imperatively worded, requiring that the Minister *shall* issue a gender recognition certificate if the application meets all the qualification requirements. This would appear at face value to suggest that where the applicant fulfils the criteria for recognition, the Minister has no discretion but to grant the application, though the criteria for recognition appear in fact to afford the Minister some flexibility in deciding whether to recognise the person.

42. The reference in Head 4(4) to the Minister being entitled to seek specialist medical or other advice is of note. While certainly any decision should be made on the basis of the best possible advice, it is unclear why the Minister would need to seek such advice if the person meets the requirements set out in Head 5 and 6. The possibility thus arises that the Minister's decision will become a medical decision rather than an administrative determination. Particularly when viewed alongside the provisions in Head 5, Head 4(4) risks pathologising transgender people and making the decision a wholly medical one rather than a decision based on social and personal factors.

43. The Authority welcomes the express requirement that, where the Minister decides that an applicant does not meet the qualification requirements, the Minister must give reasons for her decision. This is in line with best practice and with the principles laid down in *Mallak v Minister for Justice, Equality and Law Reform*⁵³ and allows the person sufficient information on which to lodge an appeal or seek judicial review of the Minister's decision. The reasons given should be specific to the individual rather than generic or *pro forma* in nature.

44. The Authority also welcomes the fact that there shall be no application fee for the gender recognition process. We suggest that every effort should be made to ensure that the costs of preparing and submitting evidence to the Minister will be kept to a minimum.

Head 5 – Qualification Requirements

45. Head 5 sets out the requirements that a person must meet in order to qualify for a gender recognition certificate. The first group of requirements broadly stipulate that an applicant must have some connection with the State, namely that they are registered as having been born or adopted in Ireland, are registered on the foreign birth register (and thus have an Irish citizen parent) or are ordinarily resident in Ireland. While some clarification may be required in relation to the meaning of 'ordinarily resident' in this context, these alternative criteria are unobjectionable.

46. The remaining qualification requirements, however, raise potential difficulties for some applicants:

(i) Age

47. The General Scheme proposes in Head 5(d) that applicants for gender recognition must be aged 18 or over. Certainly, complex issues arise in relation

⁵³ [2012] IESC 59

to the recognition of people under the age of 18. A straightforward application of the Scheme to underage persons, without modification, may not be ideal. It is nonetheless unclear why the Government has not included mechanisms that would afford young transgender and intersex people the right to access legal gender recognition where this is appropriate and in the best interests of the young person.

48. The reluctance to allow young people to avail of the Scheme appears to be based on concerns, voiced by the Gender Recognition Advisory Group, that “minors who desire a gender change frequently change their minds as they reach adulthood”.⁵⁴ TENI has noted that there is “little evidence to support GRAG’s statement”⁵⁵ and that research demonstrates that levels of regret amongst those who transition are very low. TENI maintains, moreover, that levels of regret are likely to be particularly low where there are high levels of family support and healthcare provision for trans people.⁵⁶

49. While there may be good grounds for caution in this context, the blanket exclusion of all under 18s is disproportionate and will impact seriously on the wellbeing of young trans and intersex people. A blanket exclusion of all persons under the age of 18 from the remit of the Scheme risks adding significantly to the isolation and exclusion experienced by trans and intersex youth. In short, it is not in the best interests of young trans and intersex people to impose a blanket ban on recognition.

50. It is likely that appropriate steps can be taken to minimise the risks identified by the GRAG report. In particular, should the Government consider that safeguards are necessary in the case of younger persons, it may feasibly require that gender recognition occur only:

- With the consent of the young person’s guardians or
- On foot of a court order made with a view to ensuring that the best interests of the child are secured.

51. A number of points may be made in favour of reducing or removing the minimum age, subject to appropriate safeguards being in place:

- The Transgender Equality Network Ireland indicates that the average age at which transgender people discover their true gender can be quite young, *in some cases as young as aged 3 to 5*. TENI cites a UK study by Kennedy and Hellen that found that:

“The percentage of transgender people who came to the realization of their gender variance at age 18 or later is less than

⁵⁴ *Gender Recognition Advisory Group Report*, (Department of Social Protection, 2011), p.4

⁵⁵ Transgender Equality Network Ireland, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government’s Gender Recognition Bill 2013* (TENI 2013) at p.4

⁵⁶ *Ibid.* at p.5

4%, with 76% of participants being aware they were transgender or gender variant before they left primary school.”⁵⁷

Kennedy and Hellen proceed to outline the significant negative impact of the suppression by transgender youth of their gender identity. The evidence suggests that requiring that a person must wait until they are 18 places a very significant burden on the person and may cause significant disruption to the person’s transition to an acquired gender.

- *Early recognition is vitally important to the wellbeing and self-worth of the young transgender or intersex person.* Gaining legal recognition would greatly ease the transition of the young transgender person and provide a secure platform for the young intersex person at a time of great challenge. Lack of recognition, by contrast, will leave young people in limbo, sometimes for substantial periods of time. It may, in particular, preclude the person from being treated as being of their preferred gender in school and in the context of sports. Additionally, it may disrupt their schooling and transition to college, and in some cases jeopardise their entry to third level.
- TENI has noted the risk that lack of a facility for gender recognition will place young trans people in an especially vulnerable position and *potentially expose them to discrimination and abuse*. Noting that many young trans people are already undertaking or have undertaken the social/medical process of transition, and achieving positive outcomes in so doing, TENI observes that:

“without formal legal recognition to accompany their medical transition, trans youth in Ireland are vulnerable to a heightened risk of abuse. Where a young person’s outward manifestation of gender does not match the sex marker on their official documentation, that individual constantly faces the possibility of being publicly ‘outed’, with the accompanying dangers of verbal and physical violence. Excluding trans youth from GRB2013 (on the grounds of ‘safety’ and ‘protection’) will only serve to expose young people to further discrimination and abuse.”⁵⁸

- It is worth adding that young people are often required to produce birth certificates in a variety of contexts. The fact that the gender marker on the birth certificate does not match the gender in which the person is living may present particular difficulties in relation to access to education (particularly in the case of single-sex schools) and the wearing of a gender-specific school uniform.

⁵⁷ Natacha Kennedy and Mark Hellen, ‘Transgender children: more than a theoretical challenge’ *Graduate Journal of Social Science*, Vol. 7 Issue 2 (December, 2010), available at: <http://www.transgenderni.com/Branches/Youthnet/Transgender%20NI/Files/Documents/research/Kennedy%20and%20Hellen%20Transgender%20Children.pdf> [accessed January 23, 2014]

⁵⁸ Transgender Equality Network Ireland, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government’s Gender Recognition Bill 2013* (TENI 2013) at p. 3.

- *The decision to exclude young people fails to respect their emerging capacity for self-determination.* Notably, Article 5 of the UN Convention on the Rights of the Child (UNCRC), while recognising the importance of parental guidance, also notes the “evolving capacities of the child”. This phrase acknowledges that, as young people grow their capacity to make decisions with the guidance and support of their parents also evolves.⁵⁹ Article 6 of the Convention also addresses the State’s obligation to ensure to the maximum extent possible the child’s right to survival and development, while Article 8 UNCRC establishes the child’s right to preserve its identity. The Ombudsman for Children has suggested that the precise parameters of the right to identity are not fixed and may potentially be interpreted as including a right to the child’s gender identity.⁶⁰
- Article 12 UNCRC, moreover, affirms the right of the child to be heard and to express his or her views on all matters affecting him or her. In *FN v CO*⁶¹ Finlay Geoghegan J recognised that children had a constitutionally protected right to be heard in relation to matters impinging on their welfare. Head 5, however, leaves no scope for addressing the perspective of the child on the matter, as it automatically excludes all minors from consideration.
- Articles 5 and 12 UNCRC cumulatively underline the importance of respect for the growing capacity of the child to make decisions specific to his or her situation and the need for the child’s views be listened to and, where appropriate, facilitated.
- These values, in turn, are underpinned by the pending amendment to the Constitution, the 31st Amendment.⁶² Article 42A, if cleared for signature by the President, acknowledges the “natural and imprescriptible rights of the child”. It also affirms, albeit in specific legal contexts, the right to be heard and the right to have decisions made that are in the child’s best interests. The values underpinning Article 42A lean heavily in favour of providing a facility that while respecting the role of parents would allow young people, where appropriate, to obtain legal gender recognition at an earlier age than 18.
- As the Irish Human Rights Commission has noted, the European Court of Human Rights in *Schlumpf v Switzerland*⁶³ found that the application of a two year waiting period before an applicant could avail of health insurance for gender assignment led to a breach of the applicant’s right to

⁵⁹ *Gillick v West Norfolk and Wisbech Area Health Authorities* [1985] 3 All ER 402 which emphasises that (subject to certain safeguards) an underage girl may consent to a doctor prescribing contraception where she is of sufficient age and maturity to understand the implications of her decision.

⁶⁰ *Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013* (Ombudsman for Children, October 2013) at p. 5.

⁶¹ [2004] 4 I.R. 311

⁶² The Amendment is currently the subject of a referendum petition, challenging the referendum result. That petition has been turned down in the High Court, but is on appeal to the Supreme Court. In *The Matter of the Referendum on the Proposal for the Amendment to the Constitution contained in The Thirty First Amendment to the Constitution (Children) Bill 2012 (Petition of Joanna Jordan)* [2013] IEHC 458.

⁶³ Application no. 29002/06, January 8, 2009.

respect for her private life under Article 8. The Court placed particular emphasis on the fact that the applicant was aged 67. The mechanical application of the waiting requirement, the Court found, breached the applicant's privacy rights under Article 8. By analogy, the Irish Human Rights Commission has suggested that a blanket exclusion based on age:

"...may also create an artificial waiting time before recognition by the State and thus may raise concerns under Article 8, where the inflexibility of the system may not accord with the person's reality."⁶⁴

- The Ombudsman for Children's Office has also pointed out the potential human rights implications of excluding young people from the recognition scheme. While noting the concern that some young people may not have formed a settled view as to their gender identity, the Ombudsman's Office observes that such concerns must be weighed up against the real difficulties that will be experienced by young trans and intersex people if they are excluded, even temporarily, from the Scheme's remit. The Ombudsman concludes that:

"It seems untenable to argue that in order to close off the possibility of granting legal recognition to young people who have not formed a stable view regarding their gender identity, all young people should be denied the opportunity of legal recognition, irrespective of their individual circumstances. Moreover, proceeding on this premise may well render the legislation vulnerable to challenge in light of Article 8 of the European Convention on Human Rights, as outlined above."⁶⁵

- It is worth noting that, by law, a person aged 16 or over is competent to make medical and surgical decisions on his or her own behalf, without requiring parental consent, at least as a matter of criminal law.⁶⁶ It is arguable, therefore, that a young person of sufficient maturity, and in particular a 16 or 17 year old should be allowed to make decisions regarding his or her preferred gender and should not be required to wait

⁶⁴ Observations on the General Scheme of Gender Recognition Bill 2013, (IHRC, November 2013) at p.6

⁶⁵ *Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013* (Ombudsman for Children, October 2013) at p.16

⁶⁶ Non-Fatal Offences Against the Person Act 1997, section 23 stipulates that "the consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his or her person, shall be as effective as it would be if he or she were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his or her parent or guardian." While the provision seems by its wording to confirm a general principle that a 16 or 17 year old person's consent is valid in all cases, the appearance of this section in a criminal law statute may possibly mean that its application is limited to criminal matters, though the point is unclear. Arguably, the provision exhibits a general legislative preference to allow 16 and 17 year olds to give consent to such procedures without the need for parental approval and the courts would be likely to treat it as persuasive in determining the content of the civil law as well as the criminal law.

until he or she reaches the age of 18 before being recognised in the preferred gender. Given that a person may undergo gender reassignment surgery prior to turning 18, it appears inconsistent that legal recognition would be denied where medical intervention is permitted.

- The argument for a gender recognition facility for young people is all the more compelling where the young person has the support of his or her parents or guardians. The case for extending gender recognition to young people may be particularly strong where parents wish to obtain recognition for their child.
- The age requirement will pose particularly acute difficulties for young intersex people. Where the child has evolved to identify himself or herself as being of a gender different from that on his or her birth certificate, the age requirement will preclude legal recognition of that gender, under the Scheme at least, until the child reaches the age of 18. Where a child who is intersex clearly identifies as a person of a particular gender, and the child's parents and medical professionals agree that the child should be treated as being of that gender, it is imperative for the child's social development that there be no undue delay in aligning the child's preferred gender with the gender marker on official documentation.
- The Report of Joint Committee on Education and Social Protection on the General Scheme for a Gender Recognition Bill 2013 has also recommended lowering the minimum age for applicants:

“The age at which a person is entitled to apply for a Gender Recognition Certificate should be reduced from 18 years to 16 years. Measures should also be put in place to address the day-to-day concerns of transgender people under the age of 16 years.”⁶⁷

52. The Authority understands that the Government's key concern in this context is the possibility that a young person may make a decision that they may subsequently come to regret. While this might be true in some isolated cases, it is unfair to assume that this justifies a blanket ban on all under 18s seeking recognition. In most cases, trans and intersex young people have been aware of their true gender for very many years. It is likely that the decision to seek gender recognition will in most cases be one that has been made after a very considerable period of intense consideration and reflection. As TENI has observed, it is unlikely that it is a decision that will be made lightly or flippantly.⁶⁸ The point that young people might make decisions that they subsequently regret might equally be made in respect of marriage. Nevertheless, the law (while generally precluding the marriage of under 18s) provides for the possibility of marriage of those under the age of 18, with the consent of the High Court or Circuit Court, where such exemption is justified by serious reasons and is in the interests of the parties to the marriage.⁶⁹

⁶⁷ Joint Oireachtas Committee on Education and Social Protection, Report on the General Scheme of a Gender Recognition Bill 2013 (Houses of the Oireachtas, January 2014) at p.37

⁶⁸ Transgender Equality Network Ireland, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government's Gender Recognition Bill 2013* (TENI 2013) at pp. 4-5

⁶⁹ See section 33 of the Family Law Act 1995.

53. As such, it is argued that it is incumbent on the Government to explore options whereby transgender and intersex youth might be included in the Scheme with appropriate safeguards:

- It may be considered appropriate that applications by or on behalf of applicants under the age of 18 be made in consultation with and with the consent of the applicant's parents or guardians. (This is permitted, for instance, in Argentina, subject to judicial intervention in cases where the parents and child disagree on the steps that should be taken).⁷⁰
- One further possibility (that may address the Government's concerns) might be a provision that allows an interim or provisional gender certificate and interim birth certificate (identical in all outward respects to a birth certificate) to be issued to a person pending their 18th birthday (and applicable only until that date). This would allow the applicant to be treated as a person of the preferred gender as an interim measure (for instance, for the purpose of being treated as a particular gender at school and for sitting the Leaving Certificate). A final determination of the matter could then be made once the child reaches the age of 18.
- Another possibility is that the Government might require an underage applicant to apply for a court order, such orders being granted where the court is satisfied that gender recognition is in the best interests of the young person.

Recommendation: The current Scheme would therefore be well served by amendments allowing a young person under the age of 18 to access legal gender recognition, subject to appropriate safeguards. In particular, the Authority recommends that persons aged 16 and over should be allowed to make an application under the Act. Provision should also be made for applications to be made, where appropriate, on behalf of children under the age of 16.

(ii) Civil Status⁷¹

54. In its submission to the Gender Recognition Advisory Group, the Authority strongly recommended that gender recognition be open to all applicants regardless of civil status. The requirement in the Heads of Bill that applicants for legal gender recognition be single is neither necessary nor desirable. In particular, the imposition of this requirement will impose significant hardship on families where a spouse or civil partner wishes to gain legal recognition of a preferred gender. Where a married couple wishes to remain married in the wake of the transition of a spouse, this legislation will require the couple to divorce or obtain a decree of nullity as a prerequisite to formal gender recognition. A civil partner who is transgender or intersex will be required to dissolve or annul the civil partnership if they wish to obtain legal gender recognition.

⁷⁰ Argentine Gender Identity and Health Comprehensive Care for Transgender People Act (2012), section 5

⁷¹ On this point, see generally the discussion in Dunne, "Divorce in the Gender Recognition Bill" (2014) 32 *Irish Law Times* 70.

55. The imposition of a single status requirement, we argue, is neither necessary nor proportionate. Notably, the Council of Europe Commissioner for Human Rights, Nils Muižnieks, has advised the Minister for Social Protection that “divorce should not be a necessary condition for gender recognition as it can have a disproportionate effect on the right to family life.”⁷² Courts in both Austria⁷³ and Germany⁷⁴ have endorsed this approach, ruling that a transgender person cannot be forced to terminate a marriage as a precondition to legal recognition of their preferred gender. A court in Luxembourg has also rejected a similar precondition.⁷⁵ Certainly the absence of such a requirement is to be expected in states that permit same-sex marriage – such as Portugal, Belgium, Argentina and Uruguay. Nonetheless, it is notable that other states that currently confine marriage to opposite-sex couples – such as Austria, Germany, Georgia, Luxembourg and Romania – also reject this precondition. Notably, the Report of Joint Committee on Education and Social Protection on the General Scheme for a Gender Recognition Bill 2013 has recommended that the civil status requirement be reconsidered:

“The Committee acknowledges that there is a difference of opinion between the Attorney General and others on the legal issues regarding gender recognition for persons who are married or in a civil partnership. However, the Committee believes that the fact that a person is in an existing marriage or a civil partnership should not prevent him or her from qualifying for a Gender Recognition Certificate, and urges the Minister to revisit this issue.”⁷⁶

In a persuasive review of the legal and policy issues arising in respect of the single status requirement, Peter Dunne has also recommended that the requirement be dropped:

“Should the Oireachtas decide to institute a divorce requirement in Ireland, it would expressly be going against internationally recognized best practice and a strong body of human rights jurisprudence from similarly situated countries. The Irish State should adopt a gender identity recognition law which protects transgender persons and their families.”⁷⁷

⁷² Nils Muižnieks, *Letter to Joan Burton TD, Minister for Social Protection*, (Ref: CommHR/SG/sf 118-2012). Similarly, the former Commissioner Thomas Hammarberg had recommended that Convention states should permit those who have obtained legal gender recognition “to remain in an existing marriage following a recognised change of gender.” Council of Europe Commissioner of Human Rights Issue Paper on *Human Rights and Gender Identity*, (2009) CommDH/IssuePaper(2009)(2), Strasbourg, July 29, 2009, available at https://wcd.coe.int/ViewDoc.jsp?id=1476365#P128_27908t, at 3.2.2. See also the Yogyakarta Principle No. 3, which stipulates that “no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”

⁷³ BVerfG, 1 BvL 1/04 (July 18, 2006)

⁷⁴ BVerfG, 1 BvL, 10/05 (Federal Constitutional Court of Germany, May 27, 2008)

⁷⁵ Civil Judgment No 184/2009, September 30, 2009.

⁷⁶ Joint Oireachtas Committee on Education and Social Protection, Report on the General Scheme of a Gender Recognition Bill 2013 (Houses of the Oireachtas, January 2014) at p.37

⁷⁷ Dunne, “Divorce in the Gender Recognition Bill 2013”, (2014) 32 *Irish Law Times* 70

The necessity for a single status requirement

56. This precondition is predicated, it would appear, on the belief that recognising the acquired gender of a married person would convert that person's marriage into a same-sex marriage. In its 2010 submission to the Gender Recognition Advisory Group, however, the Authority noted that a single status requirement was not in fact legally necessary. The submission noted that the legal validity of a marriage is determined *solely by reference to factors (including the status of the parties) present at the date of the marriage*.⁷⁸ As Crowley has noted, "generally speaking, the incapacity to enter into a valid marriage must have existed at the time of entering into the marriage" though she adds that "the party or parties do not necessarily have to be aware of its existence at that time."⁷⁹ As Kinlen J observed in *O'B v R and O'B*:

"Despite some judgments suggesting the contrary, this Court is of the view that one must look at the condition of the parties at the time they entered into the contract and not what may have emerged later."⁸⁰

It is thus the gender of each party at the date of the marriage that counts in determining the validity of the marriage.

57. Thus, if the spouses were legally male and female respectively on the date of their marriage, the marriage remains in law a heterosexual marriage, even if one of the parties subsequently transitions to a preferred gender.⁸¹ A marriage between two persons (without a prior court exemption) who at the time of the marriage are underage is void regardless of the fact that the parties turn 18 subsequent to the marriage. Likewise, a marriage entered into between mentally competent parties would not be invalidated due to a serious brain injury incurred after the marriage has been celebrated (and not present at the time of the marriage). Likewise, prospective legal recognition of a preferred gender would not change the essential fact that the marriage – judged by reference to the factors present at the time of the marriage – is still in law a heterosexual marriage. Notably, Head 9(4) of the General Scheme emphasises that gender recognition is of prospective effect only. As such, the concern that gender recognition would convert a heterosexual marriage into a marriage between parties of the same sex is legally unfounded.

⁷⁸ See *Napier v Napier* [1915] Law Reports Probate 184 and *A.B. v N.C.* [2006] IEHC 127, both of which support the view that a marriage's validity is determined by reference to the capacity and status of the parties as of the date of the marriage. TENI cite a French case in further support of this proposition - No. 11/08743, 1453, 12/00535, Cour d'Appel de Rennes, France (October 16, 2012). TENI, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government's Gender Recognition Bill 2013* (TENI 2013) at p.8

⁷⁹ Crowley, *Family Law* (Thomson Round Hall, 2013) at p. 685.

⁸⁰ [2011] 1 IR 521 at 528-9; cited in Crowley, *ibid*.

⁸¹ For further discussion of this point, see also Ryan, "Divorce link to transgender recognition is questionable", *Irish Times*, July 25, 2011 available at <http://www.irishtimes.com/news/crime-and-law/divorce-link-to-transgender-recognition-is-questionable-1.608916> [accessed January 27, 2014] and Ryan, 'Ryan on Gender Recognition' (Human Rights in Ireland Blog, October 19, 2012) available at <http://humanrights.ie/children-and-the-law/ryan-on-gender-recognition-and-marriage/> [accessed May 26, 2014].

58. Admittedly, the contractual approach outlined above must be considered alongside the fact that marriage is a potentially life-long relationship. Some may argue that regardless of the legal niceties, affording gender recognition to spouses would convert a marriage into a de facto same-sex union. Yet even if one accepts that a marriage may be converted into a same-sex marriage by legal gender recognition, it is arguable that it is within the power of the legislature to recognise such marriages. Many constitutional and family law experts – including Eoin Carolan,⁸² Eoin Daly,⁸³ Fiona de Londras,⁸⁴ Conor O'Mahony,⁸⁵ Fergus Ryan,⁸⁶ and Brian Tobin⁸⁷ - have argued that there is no constitutional barrier to same-sex marriage. The better view may be that the courts see this issue as a legislative matter, and would be likely to defer to the legislature should it choose to permit same-sex marriages. Given the inevitable distress that would be caused to existing couples by requiring a divorce or annulment as a prerequisite to gender recognition, the argument might be made that the courts would be especially likely to defer if the legislature chose to leave such existing marriages intact.⁸⁸ Given the very small number of couples that would remain married, the broader social impact is likely to be minimal.

European Court of Human Rights: case law on single status requirements

59. The European Court of Human Rights has afforded member states a wide margin of appreciation in determining the conditions for gender recognition. While contracting states are required to make some provision for gender recognition, there is considerable leeway in terms of the form this may take. In particular, the European Court of Human Rights has upheld conditions that require that spouses terminate or annul a marriage or civil partnership prior to gaining recognition. In *Parry v United Kingdom*⁸⁹ the Court found that a requirement in UK law that those seeking gender recognition be single was not contrary to the Convention. The Court found that the requirement (designed to preserve the state's then-existing policy of confining marriage to opposite-sex couples) was not disproportionate and represented "a fair balance" in the

⁸² Eoin Carolan, "Committed Non-Marital Couples and the Irish Constitution", in Doyle and Binchy (eds), *Committed Relationships and the Law* (Dublin, Four Courts Press, 2007).

⁸³ Eoin Daly, "Same sex marriage doesn't need a referendum", (Human Rights in Ireland Blog, July 15, 2012), available at: www.humanrights.ie/index.php/2012/07/15/same-sex-marriage-doesnt-need-a-referendum/ [accessed May 26, 2014].

⁸⁴ Fiona de Londras, "A Referendum on Marriage: Social Costs and Political Choices" (Human Rights in Ireland Blog, November 11, 2013), available at: <http://humanrights.ie/civil-liberties/a-referendum-on-marriage-social-costs-and-political-choices/> [accessed May 26, 2014].

⁸⁵ Conor O'Mahony, "Constitution is not an obstacle to legalising gay marriage", *Irish Times*, July 16, 2012, available at: www.irishtimes.com/newspaper/opinion/2012/0716/1224320203659 [accessed May 26, 2014].

⁸⁶ Fergus Ryan "Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family" (2012) 48 *Irish Jurist* 201–248; Fergus Ryan, "Are two Irish Mammies (even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution" in Eoin Carolan (ed.) *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, 2012)

⁸⁷ Brian Tobin, "Law, Politics and the Child-Centric Approach to Marriage in Ireland" (2012) 47 *Irish Jurist* 210.

⁸⁸ See also the discussion in Fergus Ryan "Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family" (2012) 48 *Irish Jurist* 201–248

⁸⁹ Application no. 42971/05, November 28, 2006

circumstances. In support, the Court pointed out that the parties could maintain their personal relationship and enter into a civil partnership, which confers most of the same legal rights and obligations as marriage.

60. A similar outcome prevailed in *H v Finland*.⁹⁰ In this case, Finland required applicants for gender recognition to be single. In the alternative, applicants who were married or in a civil partnership could be recognised if their spouse or civil partner consented, in which case their marriage would be converted following gender recognition to a civil partnership and *vice versa*. In *H*, the European Court of Human Rights agreed that these requirements were justified by the state's concern to "maintain the traditional institution of marriage intact". The fact that the couple could convert their marriage to a civil partnership – with substantially similar rights and obligations – influenced the court's decision. (*H* has recently been referred to and is awaiting a decision of the Grand Chamber).

61. Notably, the Court in *Goodwin* emphasised that while the UK was required to provide for gender recognition, the state still enjoyed a margin of appreciation in determining precisely how this might be achieved, and under what conditions. In particular, states are free to impose conditions in relation to applicants in existing marriages and civil partnerships.

62. However, as the Irish Human Rights Commission has noted in its observations on this Scheme, *these decisions cannot be regarded as providing carte blanche to the Irish state to impose similar conditions*.⁹¹ As the Commission points out, in the case of Finland, the process of divorce is simpler than in Ireland, and the length of time it takes is much shorter. Effectively, Finland has a system of divorce by process, which allows spouses to divorce after a 6-month waiting period. Similarly, in England and Wales, it is possible to get an annulment on the basis that a spouse has obtained an interim gender recognition certificate, which affords a much speedier resolution than would be possible in Ireland. In other words, while the European Court of Human Rights has upheld single status requirements in the UK and Finland, it has done so in circumstances where the conditions for divorce or annulment are reasonably straightforward by comparison with Ireland and where it is possible to switch from a marriage to a civil partnership with relative ease. This means that it should not be readily assumed that a single status requirement in Ireland would also be upheld by the Court, given the significantly more rigorous preconditions for divorce that apply here (which are discussed further below). Indeed Dunne has suggested that given the different legal provisions applicable in Ireland:

"had the circumstances of Irish transgender families been before the court, it is possible that the balance of proportionality would have fallen on the other side."⁹²

⁹⁰ Application no. 37359/09, November 13, 2012.

⁹¹ *Observations on the General Scheme of Gender Recognition Bill 2013*, (IHRC, November 2013) at pp. 7-9.

⁹² Dunne, "Divorce in the Gender Recognition Bill 2013", (2014) 32 *Irish Law Times* 70.

In particular, Dunne notes that while civil partners and spouses in Finland and the UK enjoy similar rights, the denial of marital status in Ireland excludes families from the constitutional protection afforded by Article 41 of the Constitution.

Length of time in obtaining a divorce

63. In Ireland, by contrast with Finland and the United Kingdom, obtaining a divorce is not straightforward, with a lengthy waiting period applying in this jurisdiction. For those who wish to divorce, the constitutionally mandated legal requirements impose (inter alia) a living apart requirement of four of the previous five years.⁹³ Where the parties have not already been living apart, this will mean a delay of 4 years (at least) before the transgender spouse may be issued with a gender recognition certificate. *Thus, even in cases where the parties wish to divorce, there may be a significant delay in obtaining a divorce, which may in turn lead to a long delay in gaining gender recognition.* This may pose particular problems in a case where the intending applicant is elderly. Notably, in *Schlumpf v Switzerland*⁹⁴ the European Court of Human Rights found that the application of a two year waiting period before an applicant could avail of health insurance for gender assignment led to a breach of the applicant's right to respect for her private life under Article 8 (the advanced age of the applicant being of particular relevance in the court's ruling). Given that the waiting period for divorce includes 4 years' living apart, the combination of a single status requirement and the enforcement of Irish divorce law may be vulnerable to challenge under the ECHR.

Differences between civil partnership and marriage

64. It is evident also that if a single status requirement is imposed it will be considerably easier for a person who is a civil partner to meet the requirement than someone who is married. The parties to a civil partnership must have been living apart for 2 of the previous 3 years in order to dissolve the civil partnership⁹⁵ as opposed to 4 of the previous 5 years for divorce. The parties to a civil partnership dissolution, moreover, do not need to demonstrate that there is no reasonable prospect of reconciliation, and are not required to make proper provision for their children (both of which are preconditions to divorce (marriage)).⁹⁶ The net effect is that it will be considerably easier for civil partners to meet the preconditions for gender recognition than spouses, a disparity that clearly breaches the principle of equal treatment on grounds of sexual orientation.

Parties who wish to maintain their relationships post-transition

65. The imposition of a requirement that applicants be single would pose an almost insurmountable challenge to some married transgender people. Where a couple who are married or civilly partnered wishes to remain together during

⁹³ Article 41.3.2 of the Constitution of Ireland, and Family Law (Divorce) Act 1996, section 5.

⁹⁴ Application no. 29002/06, January 8, 2009.

⁹⁵ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 110.

⁹⁶ Though the Government has proposed that this be changed to require that proper provision be made for children of either civil partner as a prerequisite to a dissolution being granted. See the General Scheme of the Children and Family Relationships Bill 2014.

and after the transition of a spouse, it may prove impossible for the transgender spouse to divorce to meet the proposed requirement that applicants be single. This is because the conditions for divorce in Ireland – constitutionally mandated by Article 41.3.2 of the Constitution – require that spouses wishing to divorce must have lived apart for four of the previous five years.⁹⁷

66. Living apart comprises a mental element as well as a physical element.⁹⁸ This means that for spouses to be ‘living apart’ the parties must be living separate lives in circumstances where at least one spouse has determined that the relationship is at an end. Indeed, even if the parties live in separate places, they will not be treated as living apart if neither party regards their relationship as being at an end. A similar point applies in the case of civil partnership, where the civil partnership may only be dissolved after 2 years of living apart in the previous 3 years (the term ‘living apart’ again requiring a mental as well as a physical element.) This effectively means that if the couple’s relationship is still subsisting, and the parties both wish to maintain their relationship, technically speaking they cannot be treated as ‘living apart’.

67. For divorce (this applies to marriages only) there must, moreover, be no reasonable prospect of reconciliation. Thus, the spouses’ continued commitment to their relationship would technically preclude them from obtaining a divorce.

These constitutionally mandated requirements would thus preclude a divorce or dissolution in circumstances where the parties remain in a committed relationship, and in particular, where they are still living together as a committed and loving couple after gender reassignment. This in turn would rule out the possibility of gender recognition for the transgender party.

Difficulties with ‘forced divorce’

68. Given the constitutional protection afforded to marriage, it is at least arguable in the case of marriage that a requirement to divorce as a prerequisite to legal gender recognition may fall foul of the Constitution. The distress that would be caused to a married couple required to divorce is such that efforts to require spouses to divorce as a prerequisite to legal gender recognition may be regarded as having a disproportionately negative effect on the integrity of the constitutionally protected family. While the State may argue that such steps are necessary to preserve what it views as the integrity of heterosexual marriage, it is submitted that the dissolution of existing and happy marriages fails to respect in a proportionate manner the special position of marriage accorded by the Constitution. This submission is arguably strengthened by the fact that the number of marriages involved would be small and is unlikely to detract from the general principle in favour of confining marriage to opposite sex couples.

69. The argument may be put forward that allowing the marriage of couples to remain intact where one of the parties is legally recognised as being of the same gender as the other would lead to discrimination as between (a) same-sex

⁹⁷ See also section 5 of the Family Law (Divorce) Act 1996.

⁹⁸ See for instance *MMcA v XMCA* [2000] 2 I.L.R.M. 48 and *Santos v Santos* [1972] Fam. 27.

couples where one party has undergone a gender transition and (b) same-sex couples where both parties have had the same gender since birth. It is submitted, however, that such differentiation could be justified (if the State wishes to make such a distinction) by the very different physical and social conditions involved in each scenario, and the fact that the parties in the first scenario are already married and were, at the time of their marriage, respectively male and female.

Annulment

70. It is possible that an annulment might be available as an alternative to divorce. Certainly, where a person married in ignorance of the fact that his or her spouse was transgender, case law suggests that the marriage might be annulled on the basis of lack of consent.⁹⁹ Requiring the civil annulment of a marriage would, however, present significant difficulties, not least because of the very limited circumstances in which annulments are available and the difficulties (including the costs) involved in proving entitlement to an annulment. Annulment presents the added difficulty that, strictly speaking, spouses whose marriages are annulled have no entitlement to the financial or other remedies that are available on divorce, civil partnership dissolution and judicial separation,¹⁰⁰ though some limited relief may be available if they have been living together long enough to be treated as qualified cohabitants.¹⁰¹

Recommendation: It is therefore respectfully submitted that applicants should be permitted to apply for gender recognition regardless of civil status or marital status. The dissolution or annulment of a marriage or civil partnership should not be required as a pre-condition to legal recognition.

Head 6 – Evidence to be Submitted

71. Head 6 addresses the evidence required of a person seeking recognition. Conditions (a) (i)-(iii) address the requirement that the person must have a sufficient connection with the State, which is a reasonable requirement. Condition (a) (iv), requiring proof of identity, is also unobjectionable.

Statutory Declaration and Evidence of Transition

72. A central tenet of the Bill (in Head 6(a) (v)) is that a person who wishes to be recognised in their preferred gender may make a statutory declaration to that effect. This is a welcome approach. The self-declaration model respects the autonomy of the person and their integrity in deciding to seek legal gender recognition.

⁹⁹ *SB (formerly known as SM) v FL* [2009] IEHC 623.

¹⁰⁰ An exception applies in that section 36 of the Family Law Act 1995 allows orders to made determining the ownership of property where a marriage is void or avoided. Crowley has also noted that the courts in practice have granted ancillary orders on annulment, though it is unclear on what legal basis such orders have been made. Crowley, *Family Law*, (Thomson Round Hall, 2013) at 718-720. Notably, the Family Law Act 1995 and other legislation make no express provision for ancillary orders following annulment (otherwise than in section 36) and initial plans to include relief following annulment were abandoned during the course of the Oireachtas debates on the 1995 Act.

¹⁰¹ See Part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

73. The requirement that a treating physician must certify that a person has 'transitioned', however, risks re-introducing a criterion of medical diagnosis by the back door. Head 6 of the General Scheme requires that a person seeking gender recognition produce as evidence:

“(vi) a statement by his/her primary treating physician, in a form to be prescribed by the Minister, which confirms that the person has transitioned/is transitioning to their acquired gender and that he/she is satisfied that the person fully understands the consequences of his/her decision to live permanently in the acquired gender.”

74. A number of points may be made about the requirement for a supporting statement:

- Requiring an applicant to provide evidence of transition in the form of the statement contemplated above potentially risks excluding intersex and some transgender people from the ambit of the Bill. The requirement that there be a 'transition' may be impossible to certify in some cases. In particular, in the case of intersex people, there may be no transition as such; the person's body evolves naturally and there may be no concrete 'transition' from one gender to another.¹⁰²
- The risk also arises that the word 'transition' will in practice be interpreted as a medical transition and that physicians may be reluctant to certify that a transition has taken place where no medical intervention has occurred. For a variety of reasons, transgender people may not undergo any medical or surgical reassignment, either due to lack of funds or the medical risks involved in surgical or hormonal intervention.
- Requiring medical support risks allowing medical professionals to determine whether a person should receive a gender recognition certificate. As noted above, former Commissioner Hammarberg, in the Council of Europe Issue Paper on this topic,¹⁰³ has emphasised the risk of placing too much influence in the hands of health professionals, at the expense of the autonomy of transgender and intersex people as “subjects who are responsible for their own health needs.”¹⁰⁴
- It is unclear why, in the absence of evidence of deficient capacity, an applicant must obtain a statement from a medical professional to the effect that he or she understands the nature and consequences of his or her decision. It is unclear also why this may only be obtained from a certified physician. The imposition of this requirement implies that transgender and intersex people are incapable of making or not to be trusted to make a mature, independent decision in this context. By contrast, no such supporting statement is required, for instance, where a person makes a will. A registered solemniser must be satisfied that the

¹⁰² A point made in TENI, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government's Gender Recognition Bill 2013* (TENI 2013) at p. 11.

¹⁰³ CommDH/IssuePaper(2009)(2), Strasbourg, July 29, 2009, available at https://wcd.coe.int/ViewDoc.jsp?id=1476365#P128_27908

¹⁰⁴ *Ibid.*

persons whom he or she is marrying understand the institution of marriage into which they are entering,¹⁰⁵ but no formal doctor's statement is required. Where the applicant is, in particular, an adult who has reached the age of maturity there is no reason why such a person should be generally supposed not to understand the importance of their decision such that their capacity to make the decision needs to be medically certified.

Recommendation: It is respectfully suggested that applicants for gender recognition should not be required to produce supporting evidence specifically from a medical professional. Failure to produce such evidence should not conclusively preclude a person from recognition, particularly if other satisfactory supporting evidence is available.

Head 7 – Foreign Recognition Decisions

75. While Head 7 allows for the recognition in Ireland of foreign recognition decisions, applicants for recognition will have to meet the same residency, minimum age and civil status criteria as apply to applicants for recognition under Head 5. Requiring a person to meet the minimum age and civil status criteria may prove problematic if the law of the place that initially granted recognition does not stipulate such criteria. The risk thus arises that a person may be deemed legally to be one gender in some countries and of another gender in Irish law.

Head 9 – Effects of Gender Recognition

76. Head 9 lays out the general principle that a person who is issued with a gender recognition certificate is recognised as being of the acquired gender for all purposes. The Authority welcomes the fact, in particular, that a recognised person will be able to enter into a marriage or civil partnership in their acquired gender, such that they will be able to marry a person of the opposite gender to that listed on the gender recognition certificate and to enter into a civil partnership with a person of the same gender.

77. Notably, the effects of gender recognition are prospective only. Gender recognition does not affect the person's existing rights and responsibilities. Nor does it alter the consequences of the person's actions in their original gender prior to the date of recognition. This means for instance that the fact that a person is recognised as having an acquired gender does not divest the person of property entitlements which they enjoyed in their former identity or relieve them of debts or liabilities accrued prior to gender recognition.

Head 10(5), Head 12(2), Head 13(2)

78. The Authority stresses the importance of ensuring that people who receive a gender recognition certificate retain their right to confidentiality and privacy in respect of gender recognition. As such, it welcomes the proposal that the gender recognition register not be open to public inspection or search and urges the government and legislature to ensure that every effort is made to maintain the

¹⁰⁵ Civil Registration Act 2004, section 51(2)(d)

privacy and confidentiality of the register. The Authority also welcomes the fact that a reissued birth certificate will not bear any indication that the birth certificate has been altered following a gender recognition process.

Head 17 – Appeals Process

79. This Head indicates that any appeal from the refusal or revocation of a gender recognition certificate shall be heard in the Circuit Family Court. It appears to be implicit that such appeals will be heard in private (as is the general experience with cases heard before the Circuit Family Court). Nonetheless, it is arguable that the legislation should state explicitly that proceedings under Head 17 shall be in private as, in the absence of express legislation, the default position is that all court cases must be heard in public.¹⁰⁶ The Department may also wish to consider whether access to the court by *bona fide* members of the press should be permitted. Such access is now permitted in family law cases as a result of Part 2 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013. Given the very sensitive nature of such appeals, it is submitted that the Court should be permitted, in appropriate cases, to exclude or restrict press access to such appeals, as is permitted under the 2013 Act. At a minimum, the anonymity of the parties taking an appeal should be strictly preserved.

Head 19 – Revocation of Gender Recognition Certificate

80. It is suggested that before a decision is made by the Minister to revoke a Gender Recognition Certificate, the subject of such a proposed decision should be given a right to be heard. The section may be read as implicitly guaranteeing such a right, in line with the decision in *McDonald v Bord na gCon (No. 2)*¹⁰⁷ though it would be preferable to ensure that this right is explicitly stated.

Recommendation: before any decision is made to revoke a Gender Recognition Certificate, the applicant should have the right to be heard in relation to the matter. Additionally, in line with the decision in Mallak v Minister for Justice, Equality and Law Reform¹⁰⁸ the Minister should be required to give reasons for her decision to revoke the certificate, in particular so that a person may be facilitated in appealing the decision, as envisaged by Head 19(2) and Head 17.

81. Head 19 may, unintentionally, provide the facility to family members who oppose an applicant's transition to seek to undermine the family member by making an application for revocation.

Recommendation: Appropriate deterrents should be put in place to prevent frivolous or vexatious requests for revocation of gender recognition certificates and applications for revocation that constitute an abuse of process.

Head 20 - Offences/Penalty

82. Head 20 proposes that a person who gives the Minister particulars or information that he or she knows to be false in respect of an application for a

¹⁰⁶ Article 34.1 of the Constitution of Ireland 1937

¹⁰⁷ [1965] IR 217

¹⁰⁸ [2012] IESC 59

gender recognition certificate shall be guilty of an offence. This is an important safeguard. Notably the offence is committed only where the person knows that the information is false. The Head appears to contemplate summary proceedings only and does not envisage an offence on indictment. The maximum penalties are not specified but presumably would be no greater than a class A fine or a term of imprisonment of 12 months or both.

83. As TENI has pointed out, the Scheme does not seek to penalise either the disclosure of confidential information regarding an applicant for a gender recognition certificate or the abuse of process, for instance by vexatious attempts to cause a revocation of a gender recognition certificate.¹⁰⁹

The Authority concurs in TENI's recommendation that two further offences should be added to Head 20, namely: "Disclosing confidential information [and] Vexatious attempted use of the revocation clause".

Head 21 - Parenthood

84. The net effect of Head 21 is to ensure that legal gender recognition does not change a person's existing parental status. In short, a person who is a child's biological mother will remain so in law regardless of gender recognition. So too, a father will not lose his status as a father because of the acquisition of a female legal gender. Thus, a person will not lose their parental status because of gender recognition; nor will they see their parental status change as a result. The Explanatory Memorandum to the Scheme suggests also that "this may also have prospective effect in circumstances where parenthood arises after the gender is acquired, whether by assisted human reproduction using frozen gametes/embryos or otherwise."¹¹⁰

85. Notably while the obligations of biological parents are largely equivalent regardless of gender or marital status, a parent's rights may differ depending on these factors. In particular, a father of a child born outside marriage has less significant rights than those of either a mother, or of a father of a child born inside marriage.¹¹¹

86. Under the European Convention on Human Rights, a person may not be discriminated against in relation to his or her family life on the basis of being transgender. In *PV v Spain*¹¹², the European Court of Human Rights observed that what it called 'transsexualism' was one of a number of unstated grounds addressed by Article 14 of the Convention. Article 14 prohibits discrimination on various grounds in the application of other Convention rights. Some of these

¹⁰⁹ TENI, *Legislation Based on Human and Civil Rights is Key: Submission to the Joint Oireachtas Committee on Education and Social Protection in response to the Government's Gender Recognition Bill 2013* (TENI 2013) at p. 14.

¹¹⁰ Available at: <http://www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx>

¹¹¹ For instance, the father of a child born outside marriage is not an automatic guardian of his child, though he may become a guardian through marriage to the mother of the child (if he is the father), by court order, or by means of a statutory declaration jointly made with the mother.

¹¹² Application no. 35159/09, November 30, 2010

grounds are explicitly listed in the Article, though the Courts have acknowledged that the list is non-exhaustive and includes grounds not expressly mentioned in the article.

87. In *PV* the Court acknowledged implicitly that the applicant could not be treated differently in respect of her private or family life on account of the fact that she had transitioned gender. The applicant in *PV* was a father who was undergoing gender reassignment (from male to female). The applicant and the child's mother had initially agreed access arrangements. A court subsequently limited the applicant's access to the child while the applicant was undergoing gender reassignment. The court allowed the father to see the child for three hours each Saturday and under professional supervision, though over time these access arrangements were extended to eight hours every other Saturday and every other Sunday.

88. The Spanish Constitutional Court reasoned that the father's own emotional instability, coupled with the risk of undermining the child's emotional stability justified allowing the father access to his child on a restricted and controlled basis. It would thus be in the child's interest to provide access on a more limited basis, with provision for gradual expansion of access as the applicant "fully recovers her physical and psychological capacities".

89. The European Court of Human Rights found that the restrictions on access imposed by the Spanish courts arose primarily from the concern to secure the best interests of the child and were not due to the applicant's transgender status *per se*. The Court found that the Spanish court was justified in these particular circumstances in taking the view that the child should gradually be introduced to the father living in her new gender. The gradualist approach taken by the court was justified, in the particular circumstances of this case, as being in the child's best interests.

90. *PV* should not be read as allowing restrictions on custody or access in all cases where a parent is transitioning. At most, the decision suggests that a court may be justified in taking a gradualist approach in relation to access where a parent is transitioning or has transitioned, but only where the child's best interests so require. The case turns on its particular facts and focuses, in particular, on the best interests of the child in this particular case.

91. It is worth noting that the Court suggests implicitly that discrimination on the basis of transgender identity in the application of the Convention rights is not permitted. As such, and as a result of section 2 of the European Convention on Human Rights Act 2003, an Irish court considering issues of custody and access should interpret Irish law so as to prevent discrimination in the context of family law on the basis of transgender status.

Heads 22 and 24 - Succession

92. The Heads of Bill provide that the fact that a person's gender has become the acquired gender under the Act does not affect the disposal of property under a will or other instrument made *before* the date that the Act comes into effect. By

contrast, where a will was made on or after the date on which the Act came into force, the effect of Head 9 is to require that the will or instrument be read in light of the gender recognition.

93. Head 24 applies specifically where a disposition or devolution of property is made under a will or other instrument made on or after the day on which the Act comes into effect. This Head addresses the risk that a person who would otherwise have been entitled to property under a will may be denied that entitlement because of the Act. For instance, if a will made after the Act comes into force designates that a piece of land should be bequeathed to 'my eldest son', the recognition of an acquired gender under the Act may affect such a disposition. The intentions of the testator may be frustrated, and a person otherwise entitled to property may be denied that property. This potentially could infringe the property rights of a potential recipient of a bequest.

94. Head 24 seeks to address such defeated expectations by allowing the High Court, if it is satisfied that it is just to do so, to make an order in relation to any person benefitting from the different disposition or devolution of the property as it considers appropriate. Any person who claims to be adversely affected by the different disposition or devolution of the property may apply to the court for such an order.

95. Head 24 however, is short on guidance as to how a court will decide such matters. Nor is it entirely clear what a court may do where it finds that a person has been adversely affected by gender recognition. The wording of the Head is broad enough to permit an order reassigning ownership of the devolved property, though beyond requiring that the court be satisfied that it is just to do so, the Head is unclear as to the circumstances in which the court might act.

96. There is potentially a risk that Head 24 might be used vexatiously to frustrate a bequest in favour of a transgender person, and may result in delay to the distribution of an estate where a transgender beneficiary is involved.

Head 25 - Gender-specific offences

97. This Head provides that the liability of a person for a crime will not be affected by the fact that either the victim or perpetrator has an acquired gender under the Bill. The explanatory note suggests that this means that a person may be prosecuted after gender recognition in respect of gender-specific acts committed before their acquired gender was recognised. It suggests also that a transgender person may be prosecuted by reference to their original gender in respect of acts committed after their acquired gender is recognised.

98. It is important to note that notwithstanding the recognition of an acquired gender, the person in question remains the same person, as a matter of law. Contracts made, property acquired and actions taken (or omissions made) by a person remain attributable to that person, even though their legal gender may have changed in the interim. Head 9(4) acknowledges that "all rights, responsibilities and consequences of actions by the person in their original gender prior to the date of recognition shall remain unaffected." It is clear also

from Head 9 and Head 25 that a person cannot escape criminal liability by acquiring a different legal gender or because his or her victim has acquired a different legal gender.

99. Very particular issues arise where an offence is gender-specific, that is, where the offence requires that the victim or perpetrator or both be of a particular gender or where a victim or perpetrator is treated differently based on their gender. The net effect of Head 25 is to require that a person may not escape liability on account of the fact that either the perpetrator or victim has an acquired gender.

100. Four potential scenarios arise in this context:

- a. Where the perpetrator was of a particular gender at the time the offence was committed, but has since acquired a different gender under the Act.
- b. Where the victim was of a particular gender at the time the offence was committed, but has since acquired a different gender under the Act.
- c. Where the perpetrator has acquired a different gender before the commission of the offence, but retains the anatomical features of the former gender.
- d. Where the victim has acquired a different gender before the commission of the offence, but retains the anatomical features of the former gender.

101. In each case the net effect of Head 25 would appear to be that a person may not escape liability on account of the fact that either he or his victim had at the time of the offence an acquired gender or has since acquired such a gender under the Act.

102. While welcoming this clause, some care is required to ensure that there are no unintended gaps in terms of legislative protection, particularly for victims of gender-specific offences. While there are comparatively few such gender-specific offences remaining in law¹¹³ a key area where gender remains relevant is in relation to rape. What is termed 'common law rape' (though its elements are now defined by statute) is committed where a man engages in sexual intercourse with a woman where the woman does not consent to the act, and where the man knows she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it.¹¹⁴ Although a female may potentially be found guilty of rape where she has aided, abetted, counselled or procured the unlawful act,¹¹⁵ the act is gender specific in that it requires a male perpetrator and a female victim. The act of sexual intercourse requires the insertion (even partially and however briefly) of the male's penis into the female's vagina.¹¹⁶

¹¹³ In particular prostitution law and the law relating to sexual assault are largely gender neutral, the law applying equally regardless of the gender of the perpetrator or victim.

¹¹⁴ Criminal Law (Rape) Act 1981, section 2.

¹¹⁵ Criminal Law Act 1997, section 7. See the *DPP v K and B* [1997] Crim App R 36

¹¹⁶ *People (Attorney General) v Dermody* [1956] IR 307, *R v Gaston* (1981) 73 Crim App Rep 164, *Kaitamaki v R* [1984] 2 All ER 435

103. Under section 4 of the Criminal Law (Rape) (Amendment) Act 1990 a new category of rape was introduced. This involves penetration (however slight) of the anus or mouth by the penis, or penetration (however slight) of the vagina by any object held or manipulated by another person.¹¹⁷ Under section 4 the victim of oral or anal penetration by a penis may be either male or female. Notably, section 4 does not specify that the perpetrator of oral or anal rape must be male, though rape in these contexts is confined to penetration by a penis. In principle, this could be an act perpetrated by a transgender female who retains a penis.

104. Section 4 likewise does not require the perpetrator of rape by the insertion of an object into the vagina to be of any specific sex.

105. Head 25 would appear to require that a person who was born with a penis cannot be excused from a gender-specific crime involving penile penetration on the basis that she has an acquired gender. Likewise, Head 25 would appear to preclude a defence being raised, for instance, where a pre-operative transgender man with an acquired gender is penetrated per vaginam. Nonetheless, given that the Head is addressing criminal law legislation, in respect of which any ambiguity will be interpreted in the accused's favour, it is vital that the legislation clearly and unambiguously ascribes criminal liability, with no room for any doubt where the victim or perpetrator has an acquired gender.

Genitalia created by surgical intervention

106. An even more difficult and delicate question arises as to the meaning of the words 'penis' and 'vagina' in this context. Do these words include genitalia created by medical intervention? There is perhaps no reason why they should not, though any doubt is likely to be exploited by the alleged perpetrator of an offence. In *Corbett v Corbett*¹¹⁸ for instance, Ormrod J suggested that consummation of a marriage (which requires an act of sexual intercourse) could not occur where a transgender female who had undergone gender reassignment had an entirely surgically constructed vagina. A somewhat different perspective was adopted in *SY v SY (otherwise W)*,¹¹⁹ where the English Court of Appeal ruled that consummation could occur with a surgically altered or extended vagina. While *SY* establishes that consummation may occur where there has been a surgical extension of a previously vestigial cavity, some of the judges in that case agreed that a party with a wholly surgically constructed vagina would also be capable of consummation. A key difference between *Corbett* and *SY* is that the wife in *Corbett* was deemed legally male, while there was no argument that the wife in *SY* was anything other than legally female. In *W v W (Nullity: Gender)*¹²⁰ Charles J suggests that an intersex person (who, he determined, was legally female) with a surgically constructed vagina is capable of consummating a marriage. The judge distinguished *Corbett* on the basis that *Corbett* had involved a person who was legally male prior to gender reassignment and who had once been able to consummate a marriage as a man. The net effect of these decisions

¹¹⁷ It is unclear whether 'object' in this context includes a part of the body. The Act is unclear on the point, though the better view may be that 'object' in this context means an inanimate object.

¹¹⁸ [1971] LR Probate 83.

¹¹⁹ [1962] 3 WLR 526

¹²⁰ [2001] Fam 111

appears to be (though as a matter of Irish law, the point is uncertain) that consummation may be possible where an *intersex* female has a surgically constructed or extended vagina. Consummation may not be legally possible, however, where a *transgender* female who was biologically male at birth and formerly capable of consummation as a man has had similar surgery, though the point is unclear and contestable.¹²¹ Given that consummation does not require that either party be fertile,¹²² it appears illogical that such a distinction would be made.

107. In the context of rape, the primary consideration should be the effect on the victim. The impact of non-consensual penetration is not diminished in any way by the surgical history of the victim. In *R v Matthews*,¹²³ Mr. Justice Hooper, presiding at Reading Crown Court, concluded that, for the purpose of English law, a person may in principle be convicted of the rape of a post-operative transgender woman (formerly anatomically male), where the act in question involves penile penetration of a surgically constructed vagina and otherwise meets the requirements for rape.¹²⁴ This decision was handed down prior to the Gender Recognition Act 2004, and on the basis that the victim was legally male. Similarly in *R v Harris and McGuinness*¹²⁵ the Court of Criminal Appeal of New South Wales ruled that a person who has undergone gender reassignment should be treated for the purpose of a criminal offence that could only be committed by males as being of their preferred gender. The Court, however, distinguished between post-operative and pre-operative transsexuals, concluding that the preferred gender would only be recognised where the person had undergone physical gender reassignment.¹²⁶

108. Nonetheless, in the absence of express words to this effect, there is at least the possibility of doubt arising as to the necessary constituents of the offence.¹²⁷ Indeed, there is at least one case – *R v Tan and Others*¹²⁸ – where a court has treated an accused transgender person as being of their birth sex for the purpose of criminal law provisions, refusing to recognise the accused's gender

¹²¹ See *MT v JT* 140 NJ Super 77 where the New Jersey Superior Court, rejecting *Corbett*, concluded that a transsexual female, born anatomically male, was female for the purpose of the law, and that her marriage to a male was valid. The Superior Court decision appears also to have endorsed the trial judge's view that the marriage was consummated (see p. 83).

¹²² *SY v SY (otherwise W)* [1962] 3 WLR 526. See also *Baxter v Baxter* [1947] 2 All ER 886.

¹²³ Reading Crown Court, RCC NO. T960397, before Mr. Justice Hooper, October 28, 1996 reported at <http://www.pfc.org.uk/caselaw/R%20versus%20John%20Matthews.pdf>

¹²⁴ The judge rejected, in particular, the contention that there was any difference in law, for the purpose of constituting the act of rape, between a natural and a surgically constructed vagina. Thus, the accused could not escape prosecution on the grounds that the victim was a transsexual woman (and, at that time, legally male) rather than a person born biologically female. (Though, independently of this conclusion, on the facts, the accused in this case was acquitted). This conclusion is arguably strengthened by the requirement in section 2 of the European Convention on Human Rights Act 2003, which requires that Irish legislation be read in conformity with Convention rights.

¹²⁵ (1988) 35 Austr Crim Rep 146. See the discussion in Bennett, "Transsexualism and the consideration of social factors within sex identification law" (2014) 34 Adelaide Law Review 379.

¹²⁶ See also *R v Cogley* (1989) 41 Crim R 198.

¹²⁷ In *Corbett v Corbett* [1970] 2 All England Reports 33 at 49, Ormrod J. suggested that it was not possible to consummate a marriage contracted by a transsexual woman.

¹²⁸ [1983] 2 All ER 12

reassignment. It is at least possible, moreover, that a person accused of rape could claim that the alleged penetration of a post-operative transgender woman per vaginam is not an offence under either the 1981 or 1990 Acts on the basis that the orifice has been artificially constructed.¹²⁹ While Justice Hooper expressly dismissed this line of argument in *Matthews*, it is submitted that, for the avoidance of any doubt, the Criminal Law (Rape) Acts 1981-1990 should be amended to stipulate expressly that for the purposes of those Acts, penetration includes penetration of the surgically constructed vagina of a transsexual woman, as well as *by* the surgically constructed penis of a transsexual man. It would be particularly important in this context that no distinction is made between a transgender female and a person who is female by birth and that both would be equally protected, in particular, by the definition of rape in the Criminal Law (Rape) Act 1981 in respect of penile-vaginal penetration.

109. A good example of such a provision is contained in section 79(3) of the Sexual Offences Act 2003 (applying to England, Wales and Northern Ireland) stipulates that:

“References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery).”

For the avoidance of any doubt, the legislation should stipulate that a sexual offence may be committed notwithstanding the fact that either the perpetrator or victim has a body part that has been surgically constructed or extended.

Facilities for transgender people

110. The fact that an acquired gender may be ignored for the purpose of determining criminality should not mean that a person who is transgender can generally be treated as being of their original gender in the criminal justice system. In particular, in prisons and Garda holding cells, people who are transgender and intersex should be treated as persons of their preferred gender. In *R (on the application of B) v Secretary of State for Justice*¹³⁰ the English and Welsh High Court found that the retention of a female transgender prisoner in a male prison infringed her rights under Article 8 of the European Convention on Human Rights. While prison authorities are entitled to take proportionate steps to protect prison security,¹³¹ which may involve limiting some of the entitlements of prisoners, the right of a transgender prisoner to live in the preferred gender must be respected and facilitated in so far as is compatible with prison security.

The Authority would welcome an express clause to ensure that prison and detention facilities are assigned based on the acquired gender regardless of the provisions of Head 25.

¹²⁹ Where there is ambiguity in the interpretation of criminal law legislation, it is commonly the case that the benefit of any such doubt weighs in favour of the accused.

¹³⁰ [2009] EWHC 2220 (Admin)

¹³¹ See *R. (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491

Head 26 - Sport

111. In Head 26, the General Scheme proposes to permit transgender and intersex people to be excluded from competitive sport with a view to securing fair competition and the safety of competitors. *This provision will need careful consideration to ensure that transgender and intersex people are not unfairly excluded from sporting activities.* It is suggested that a more nuanced and individualised approach may be needed to ensure that Head 26 does not serve to facilitate a blanket ban on transgender and intersex people participating in sports. In particular, more emphasis should be placed on factors such as the level of hormones in a person's body rather than on the simple fact that a person is transgender or intersex.

112. There are a number of problems with this Head:

- a. Head 26 allows a potentially broad-ranging exemption in the case of sport. This risks undermining the general principle that a person with an acquired gender should be treated as being of that gender, in potential conflict with Head 9.
- b. This Head will implicitly allow a sporting body to look behind the birth certificate of a competitor, and demand that the competitor reveal if he or she has an acquired gender. This conflicts, in particular, with the privacy and confidentiality requirements of the General Scheme. In this regard, the Authority agrees with the submission of the Irish Human Rights Commission that while sporting organisations may have a genuine concern in ensuring competitive fairness, the proposed legislation lacks sufficient safeguards to protect the right to privacy.¹³²
- c. This clause may deter potential transgender competitors from competing, for fear of being identified as having an acquired gender. The risk thus arises that the person would be outed as transgender in breach of their right to privacy.
- d. TENI has highlighted the potential conflict between this Head and CM Recommendation (2010) 5.¹³³ In this recommendation, the Committee of Ministers of the Council of Europe recommends that :

“Sports activities and facilities should be open to all without discrimination on grounds of sexual orientation or gender identity”.

- e. The criteria set out in this Head are inappropriately broad and unfocussed and are not in line with best international practice. In particular, the Head focuses on the fact that a person has an acquired gender, rather than more relevant factors such as the level of gender-specific hormones in that person's body and the effect they may have on the person's sporting performance. Notably the International Olympic Committee (IOC) has established criteria for determining the eligibility of transgender people to participate in gender-segregated sports. The

¹³² *Observations on the General Scheme of Gender Recognition Bill 2013*, (IHRC, November 2013) at p. 12.

¹³³ At p. 6. Available at http://www.coe.int/t/dg4/lgbt/Source/RecCM2010_5_EN.pdf

criteria for recognition focus on legal recognition in the acquired gender and the level of gender-specific hormones in each athlete's body.¹³⁴ It is suggested that criteria for the recognition of athletes in sporting events should match those of the IOC, and in particular should focus on hormonal and androgenic criteria¹³⁵ rather than on the fact per se that a person has an acquired gender.

Recommendation: Head 26 should be revised and refocused in line with IOC criteria, with particular emphasis on hormonal criteria rather than on the fact of gender reassignment.

¹³⁴ See Juliet Jacques, Sport is slowly catching up with transgender realities" Guardian, April 16, 2013, available at <http://www.theguardian.com/commentisfree/2013/apr/16/sport-catching-up-transgender-realities> [accessed January 23, 2014].

¹³⁵ See for instance: http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf [accessed January 23, 2014].

E. Matters not addressed in the Heads that deserve consideration.

113. This bill presents a prime opportunity to address a number of other important issues impinging on the wellbeing of transgender and intersex people.

Employment and Equal Status

114. Given its remit, the Authority takes a keen interest in aspects of transgender experience that impinge upon employment equality and equal treatment in the context of the supply of goods and services. While the interpretation of current legislation has been robust and provides many transgender people with strong protections, we maintain that the legislation should be further enhanced to provide explicit protection for all transgender people in these contexts.

115. Although gender identity is not *expressly* recognised as a ground of unlawful discrimination under the Employment Equality Acts and the Equal Status Acts, discrimination against those who are planning to transition gender or who have transitioned is treated as gender discrimination for the purpose of equality law.¹³⁶ This approach has been endorsed by the decision of the Court of Justice of the European Union in *P v S and Cornwall County Council*.¹³⁷ This decision confirmed that, for the purpose of EU equality law, discrimination against people who intend to undergo, or have undergone gender reassignment constitutes gender discrimination and is unlawful under EU law (and thus Irish law). While this judgment addressed workplace discrimination, the principle is equally applicable to discrimination in the provision of goods and services. As the decision in *Hannon v First Direct Logistics Ltd*¹³⁸ illustrates, discrimination against transgender people may also be treated as discrimination on the basis of disability, depending on the particular circumstances (though this should *not* be taken as accepting that transgender status is a psychiatric or mental illness).

116. Notably, the Gender Recast Directive 2006/54/EC¹³⁹ expressly refers to gender discrimination as including discrimination on the basis of gender reassignment. Recital 3 of the Directive notes that:

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

117. In *P v S* the Court of Justice of the European Union ruled that the comparator for this purpose was a person of the sex to which the applicant belonged before

¹³⁶ See, for instance, *Hannon v First Direct Logistics Ltd*, Equality Tribunal DEC-E2011-066, March 29, 2011.

¹³⁷C-13/94 [1996] European Court Reports I-2143

¹³⁸DEC-E2011-066

¹³⁹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

transition. By contrast, in *Richards v Secretary of State for Work and Pensions*¹⁴⁰ the Court modified its approach by indicating that the correct comparator was a person of the gender with which the complainant identified who had not undergone gender reassignment. For instance, if the court is addressing the situation of a transgender woman who has transitioned, the correct comparator is a female person who is not transgender and who has been female from birth.

118. The impact of this approach is ably demonstrated by the decision of the Equality Tribunal in *Hannon v First Direct Logistics Ltd*,¹⁴¹ a case taken with the support and on the instructions of the Equality Authority. The applicant, while born physically male, is a transgender person who identifies as female. She wished to transition to her preferred gender and informed her employer of her intention to do so. While her employer initially indicated its support, the Tribunal found that the employer had failed to facilitate the applicant in her transition. In particular, the employer had instructed the applicant to meet and present to clients in her former male identity, and had required her to work from home. She was expressly precluded from using the female toilets at work. The employer, while ostensibly supportive, sought to manage the applicant in a manner that was not conducive to her successful transition. Ultimately, owing to her employer's treatment, Ms Hannon resigned from the role.

119. The Tribunal found that Ms Hannon's employer had discriminated against her on the basis of her gender and disability both in relation to its treatment of her following her decision to transition and in relation to her constructive dismissal from employment (the plaintiff having left employment owing to her experience). The Tribunal ruled that she was entitled to "a workplace that recognised her right to dress and be identified as a female." The employer's general failure to facilitate her transition was found to breach the Employment Equality Acts on the grounds of both gender and disability.

120. The Authority was instrumental in spearheading and progressing this case. The net effect of the ruling is that employers must make reasonable efforts to facilitate and support a person's transition to their preferred gender, including allowing the employee to dress as and be treated as member of the preferred gender in the workplace.

121. The decision in *Hannon* was followed in the equal status context in *Deirdre O'Byrne v Allied Irish Banks*.¹⁴² Here, the complainant, a transgender female, had been told that she would have to close down a bank account in her former male name and reopen a brand new account as a female. The Tribunal ruled that this requirement constituted unlawful gender discrimination under the Equal Status Act 2000. It awarded her €5,000 for the breach. The Tribunal (citing *Richards*) found that a non-transgender woman who, for instance, wished to change her bank account details on marriage or civil partnership would not have been required to close her account and open a new account. As such, the Bank's treatment of Ms O'Byrne had been discriminatory.

¹⁴⁰ Case C-423/04 [2006] European Court Reports 1-3585

¹⁴¹ DEC-E2011-066

¹⁴² ES/2012/0070, December 2, 2013

Reform of Equality Law

122. A particular difficulty with the decision in *P v S and Cornwall County Council* is that it is (on its face) confined to persons who are planning to undergo or who have undergone gender reassignment. The European Parliament acknowledges: “the only transgender persons covered by the European legislation so far are the ones who have undergone a gender reassignment.”¹⁴³ This potentially excludes protection for transgender people who have not transitioned and who are not planning to transition.

123. Notably, protection is afforded under Irish law in circumstances where it is *imputed* that the person has undergone or is planning to undergo gender reassignment. This means that even if a person does not fall within the direct remit of the *P v S* decision, discrimination on the basis of an imputation (whether correct or otherwise) that the person has undergone gender reassignment or intends to do so will also constitute gender discrimination for the purpose of Irish law. Discrimination by association is also prohibited. In other words, where a person is treated differently because of an association with a transgender person (for instance, that they are related to, or a partner/spouse or friend of a transgender person), this also constitutes discrimination for the purpose of employment equality and equal status legislation.¹⁴⁴

124. Nonetheless, where a person has not undergone gender reassignment and does not plan to do so, and it is not imputed to them that they have transitioned, technically the law may not protect the person from discrimination. This may exclude a number of transgender people and potentially intersex people from the protection of the law. While the EU Fundamental Rights Agency suggests that a broader interpretation of EU law is open, so as to provide protection on the basis of gender identity generally,¹⁴⁵ both the case law of the EU and the Gender Recast Directive focus only on gender reassignment.

125. Even in relation to those who are transitioning or have transitioned, there is no clear guidance on what, for this purpose, constitutes ‘gender reassignment’. Does it require, for instance, that a party must undergo surgical or hormonal intervention? The EU case law is ambiguous on the point. It is possible that the EU courts would take a broad view of what constitutes ‘gender reassignment’, such that it might include those who have not undergone medical intervention. Nonetheless, there is at least some doubt as to whether the scope of legal protection in Irish law extends beyond those who have taken some medical steps to change their physical sex.

126. Notably, the Equality Act 2010 in England and Wales affords protection on the ground of gender reassignment without any requirement to undergo medical

¹⁴³ *Transgender Persons’ Rights in the EU Member States* (European Parliament, 2010) at p. 5.

¹⁴⁴ See *Michelle Feighery v MacMathúna’s Pub, Nenagh* (Equality Tribunal Decision DEC-S2003-051), Case C-303/06 *Coleman v Attridge Law and Steve Law*, [2007] IRLR 88 Court of Justice of the European Union, July 17, 2008.

¹⁴⁵ EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I - Legal Analysis*, 2008, p.131, available at: http://fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_Part%201_en.pdf

treatment or surgery. Section 7 of the Act extends the protection where a person is proposing to undergo, is undergoing or has undergone a process (or part of a process) that involves reassigning the person's sex by changing physiological *or other attributes of sex*. It would thus appear that to qualify for protection the process of transition may be simply social (for instance where the person dresses and behaves as a person of the acquired gender) and need not necessarily be medical in character.

127. Finally, although EU law affords some protection to transgender people, the protection is not explicitly addressed in Irish legislation. Irish legislation must be (and is being) read in the light of EU law, but the Irish legislation itself does not highlight the fact that transgender people are protected thereby. Public and civil society bodies such as the Equality Authority have worked hard to highlight the implicit protections for people who are transitioning or who have transitioned. Yet, while there are significant advantages in being embraced by the gender ground (which attracts very robust protection), a key difficulty with Irish legislation is that *it does not explicitly name gender reassignment as a protected ground*. While the gender ground must be read as including gender reassignment, this is not explicitly evident from a review of the legislation: one needs to look to EU case law to realise the scope of protection. As such, the risk arises that the existing protection for trans people – somewhat limited as it is – will be consigned to a footnote in discussions of gender equality. The absence of express reference to gender identity may lead to a reduced consciousness of the scope of equality legislation in protecting transgender people, both among transgender people and amongst employers and providers of goods and services.

128. It is thus vital that equality legislation is amended to embrace comprehensively the full scope of gender identity and gender expression. While there are certainly advantages in affording such protection under the broad umbrella of 'gender', it is essential also that protection for all trans people is explicitly offered and explicitly named in Irish equality legislation. This would serve as a powerful signal to employers, fellow employees and providers of goods and services that transgender and intersex people are entitled to be treated with dignity, collegiality and respect in the workplace and in society generally.

As such, the Authority recommends that:

- Current Employment and Equal Status protection should be extended unambiguously to all transgender and intersex persons, and should no longer be confined to those who are planning to transition or who have transitioned.*
- Gender identity should be explicitly listed in the Irish legislation as a ground upon which discrimination is not permitted, preferably as a subcategory of the gender ground. (This is recommended because legislative protection under the gender ground is particularly strong).*

Access to gender-specific facilities

129. Transgender people should be allowed full access to the facilities and services available exclusively to persons of their preferred gender. In particular, in line with the general principle contained in Head 9, a person who is

transgender or intersex should be treated for all purposes as a person of their preferred gender. It is vital, for instance, that transgender and intersex people be entitled to use changing facilities and toilet facilities of their preferred gender. In particular, where lawfully detained in prisons and Garda holding cells, people who are transgender and intersex should be treated as persons of their preferred gender.

Recommendation: The Authority would welcome an explicit amendment to the Bill to ensure that transgender and intersex people have access to gender-specific facilities appropriate to their preferred gender.

Interaction with the Passports Act 2008

130. The Passports Act 2008, section 11, currently facilitates the issuing of a passport in the name and preferred gender of a transgender person. This does not alter the legal gender of a person, but rather allows a new name and preferred gender to be listed on the passport, the purpose being to facilitate international travel and avoid unnecessary embarrassment for transgender persons travelling abroad.

131. While this step was welcome, there are significant drawbacks with the 2008 Act, not least that it requires applicants to have undergone or be undergoing some “treatment or procedures or both to alter the applicant's sexual characteristics and physical appearance to those of the opposite sex.” This means that many transgender and intersex persons may not qualify for altered passports on the basis that they have not undergone a physical transition involving medical treatment or procedures. The Act thus excludes those who have undergone a social transition without medical intervention. Even in respect of those who have undergone some treatment or procedures, the Act is ambiguous as regards precisely what level of physical transition must be achieved, and leaves too much to the discretion of state officials.

132. There is a possibility that because of differences between the qualifying criteria for recognition under the Passports Act and under the General Scheme respectively, a person may be recognized for one purpose and not the other. There is, in particular, a risk that those who have already enjoyed the benefits of section 11 of the Passports Act 2008 may in future lose that benefit if the acquisition of a passport becomes subject to the same conditions as will apply for recognition under the General Scheme.

133. The interrelationship between the Passports Act 2008 and the Gender Recognition Bill will thus have to be carefully managed. *This does not necessarily mean that both Schemes should be identical (given that they serve different purposes).* The following points may be made:

- It is suggested, first, that the requirement in the Passports Act 2008 that a person must have undergone or be undergoing gender reassignment treatment or procedures should be removed. Such a requirement clearly excludes persons who are otherwise living in the preferred gender, and in particular those who have decided not to undergo a medical intervention (either on medical advice or for financial reasons).

- There is a possibility that a person who has qualified in the past under the Passports Act 2008 may not be eligible for recognition under the terms of the General Scheme. This may occur, for instance, if the person who otherwise qualifies for a passport under section 11 is married or in a civil partnership which they cannot dissolve or do not wish to dissolve. It would be very unfortunate and retrogressive if a change to the Passports Act 2008 resulted in the removal of the benefits of section 11 from those who have already availed of it or who might otherwise qualify. Given that heretofore there has been no requirement in the Passports Act 2008 as to age or civil status, there is arguably no reason to introduce these requirements now.

Recommendations: The Passports Act 2008 should be amended to remove the requirement that applicants are undergoing or have undergone treatment or procedures, such that the requirement of a physical transition will no longer apply. It is submitted that there is no particular reason, given the very particular and limited purpose of the Passports Act, to introduce (at least in this context) criteria as to age and civil status.

Incitement to Hatred and Harassment

134. Transgender and intersex people experience exceptionally and unacceptably high levels of verbal abuse and harassment as well as physical and sexual violence, often on a daily basis. While general legislation provides some relief,¹⁴⁶ there is no specific protection offered to transgender people under Irish criminal law.

135. The Prohibition of Incitement to Hatred Act 1989 prohibits certain public actions that are likely to stir up hatred against a group of persons based on certain specified characteristics of those persons. Those characteristics include sexual orientation but do not include either gender or gender identity. This means that a person may not face prosecution under the Act in a situation where words or images are published or broadcast that are likely to stir up hatred against intersex or transgender people.

136. While the number of prosecutions taken under the Act has been limited (and the number of convictions even less so),¹⁴⁷ the significance of the Act as a 'symbol' of social disapproval of incitement to hatred is as important as its

¹⁴⁶ The Non-Fatal Offences Against the Person Act 1997 prohibits, as criminal acts, assault (section 2), assault causing harm (section 3), assaults causing serious harm (section 4) as well as threats to kill or cause serious harm (section 5). The Act also, in section 10, criminalises harassment "by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence." Harassment is defined as any act that "seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other" McIlroy notes, however, that the "behaviour must be persistent in order to secure a conviction." McIlroy, *Transphobia in Ireland: Research Report*, (TENI, 2009) at p. 10. The Criminal Justice (Public Order) Act 1994 also bans threatening, abusive or insulting words or behaviour in a public place, though only where there the offending party acts with "intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned."

¹⁴⁷ See the discussion in McIlroy, *Transphobia in Ireland, op. cit.*, at p.18

enforcement in specific cases. It is thus recommended that the Prohibition of Incitement to Hatred Act be amended to include transgender identity (as well as gender) as a ground for the purpose of that Act. For this purpose, protection against incitement should not be confined to protecting those who have undergone or intend to undergo gender reassignment. The definition adopted in Scotland's Offences (Aggravation by Prejudice) (Scotland) Act 2009 (discussed immediately below) may prove useful for this purpose.

Recommendation: Gender and gender identity should be included as grounds in the Prohibition of Incitement to Hatred Act 1989.

Hate Crime

137. The Government may also wish to consider introducing hate crimes legislation, along the lines introduced in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. That Act relates to offences that have been committed where the offence was motivated, wholly or in part, by prejudice relating to the sexual orientation or transgender identity of the victim. For this purpose, the definition of transgender identity is very broad and includes “transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender” or “any other gender identity that is not standard male or female gender identity”.

138. Where a transphobic motivation is established, and a person has been convicted of an offence, the Act requires the Court to state and record that this was the case, and to take such aggravating factors into account in sentencing the convicted party. The Court may, in such circumstances, impose a sentence that “is different from that which the court would have imposed if the offence were not so aggravated” in which case it is required to record the extent of the difference, and give reasons for the extent of that difference. If the court decides not to impose a different sentence, it must also give reasons for its decision not to do so.

139. While some care would be required not to impede the sentencing discretion of a judge, the Council of Europe Commissioner for Human Rights¹⁴⁸ has recommended the implementation of hate crimes legislation allowing courts to take into account the fact that a crime has been motivated, wholly or in part, by hatred towards transgender people. In particular, the OSCE suggests that such legislation “by condemning bias motives” signals to offenders that such behaviour and motivation is not tolerated by society at large, and sends a message to transgender people that their safety and welfare is of vital concern to society:

“Laws — especially criminal laws — are an expression of society’s values. Hate crime laws both express the social value of equality and foster the development of those values.”¹⁴⁹

¹⁴⁸ Council of Europe Commissioner of Human Rights Issue Paper on *Human Rights and Gender Identity*, (2009) CommDH/IssuePaper(2009)(2), Strasbourg, July 29, 2009, available at https://wcd.coe.int/ViewDoc.jsp?id=1476365#P128_27908, at 3.5.

¹⁴⁹ OSCE, *Hate Crimes Laws: A Practical Guide*, (Warsaw, 2009) at p. 7

140. Additionally, it is recommended that, as in Northern Ireland, the State should systematically record incidents of violence against and harassment of transgender people as 'hate crimes' specifically noting and recording the transphobic nature of such incidents.

Recommendations: the Oireachtas should consider introducing hate crimes legislation that would allow judges to take into account a transphobic motivation in considering appropriate sentences for crimes against transgender and intersex people. The Gardaí should systematically record violence against and harassment of transgender and intersex people as 'hate crimes' specifically noting and recording the transphobic nature of such incidents.

Equality Proofing and Equality Strategies

141. With a view to creating a trans-friendly society, all Government departments and State agencies should regularly review and monitor practices and policies with a view to ensuring that they do not disadvantage, prejudice or exclude people who are intersex or transgender. Such policies and practices should be inclusive of and mindful to the particular experiences and needs of intersex and transgender people.

142. Employers and private bodies should also incorporate, as part of regular training and staff development, exercises that highlight, promote and embed best practice in relation to transgender and intersex employees, students and clients. Particular attention should be paid to the manner in which gender-specific dress codes in workplaces and schools may serve to undermine the gender identity of transgender and intersex employees and students. Customer relations training should also seek to embed best practice in dealing with transgender and intersex clients.

143. Equality policies should expressly include provisions that effectively seek to combat discrimination against employees and clients on the grounds of gender reassignment or transgender identity, while dignity at work policies should expressly address bullying, harassment and victimisation of transgender and intersex people.

Recommendation: Equality on the basis of gender identity should be mainstreamed and firmly embedded in policies and practices across the public service, in employment and amongst providers of goods and services.

F. Summary of Comments and Recommendations

1. The Authority welcomes the fact that the Scheme does not require that an applicant must undergo or have undergone any medical or hormonal intervention or physical transition in order to facilitate gender reassignment.
2. The Authority welcomes the fact that the Scheme does not posit any formal diagnosis of gender dysphoria or gender identity disorder.
3. The Authority welcomes the fact that the Scheme does not require any real life test to qualify for recognition, whereby the applicant would have to live as a person of the acquired gender for a set period of time.
4. It is vitally important that the scheme adequately addresses the position of intersex people.
5. It is vital that the process of legal gender recognition (recognition under the law) is decoupled from medical pathways.
6. Head 1 should be amended so that the Minister will be required to bring the Act into force within a 'reasonable timeframe' and at most within 6 months of the Act being signed by the President.
7. In Head 2, the phrase 'identified gender' or 'preferred gender' should be used in preference to 'acquired gender.'
8. In Head 2, the definition of 'physician' should be wide enough to include any appropriately-qualified practicing medical practitioner who has experience addressing the health needs of transgender or intersex people, including a registered medical practitioner practising in any EU member state.
9. The current Scheme would be well served by amendments that serve to allow a young person under the age of 18 to access legal gender recognition, subject to appropriate safeguards. In particular, the Authority recommends that persons aged 16 and over should be allowed to make an application under the Act. Provision should also be made for applications to be made, where appropriate, on behalf of children under the age of 16.
10. It is respectfully submitted that applicants should be permitted to apply for gender recognition regardless of civil status or marital status. The dissolution or annulment of a marriage or civil partnership should not be required as a pre-condition to legal recognition. Such a requirement is neither necessary nor proportionate.
11. It is respectfully suggested that applicants for gender recognition should not be required to produce supporting evidence specifically from a

medical professional. Failure to produce such evidence should not conclusively preclude a person from recognition, particularly if other satisfactory supporting evidence is available.

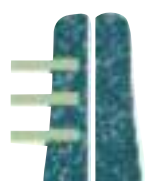
12. Before any decision is made to revoke a Gender Recognition Certificate, under Head 19, the applicant should have the right to be heard in relation to the matter.
13. Additionally, the Minister should be required to give reasons for her decision to revoke a gender recognition certificate, in particular so that a person may be facilitated in appealing the decision, as envisaged by Head 19(2) and Head 17.
14. Strong deterrents should be put in place to prevent frivolous or vexatious requests for revocation of gender recognition certificates and applications for revocation that constitute an abuse of process.
15. Two further offences should be added to Head 20, namely: “Disclosing confidential information [and] Vexatious attempted use of the revocation clause”.
16. For the avoidance of any doubt, Head 25 should stipulate that a sexual offence may be committed notwithstanding the fact that either the perpetrator or victim has a body part that has been surgically constructed or extended.
17. The Authority would welcome an express clause to ensure that, in particular, prison and detention facilities are assigned based on the acquired gender regardless of the provisions of Head 25.
18. Head 26 should be revised and refocused in line with IOC criteria, with particular emphasis on hormonal criteria rather than on the fact of gender reassignment.
19. Current employment law and equal status protection should be extended unambiguously to all transgender and intersex persons, and should not be confined to those who are planning to transition or who have transitioned.
20. Gender identity should be explicitly listed in Irish equality legislation as a ground upon which discrimination is not permitted, preferably as a subcategory of the gender ground. (This is recommended because legislative protection under the gender ground is particularly strong).
21. The Authority would welcome an amendment to the Bill to ensure that transgender and intersex people have access to gender-specific facilities appropriate to their preferred gender.
22. The Passports Act 2008 should be amended to remove the requirement

that applicants must be undergoing or have undergone treatment or procedures, such that the requirement of a physical transition will no longer apply. It is submitted that there is no particular reason, given the very particular and limited purpose of the Passports Act, to introduce (at least in this context) criteria as to age and civil status.

23. Gender and gender identity should be included as grounds in the Prohibition of Incitement to Hatred Act 1989.
24. The Oireachtas should consider introducing hate crimes legislation that would allow judges to take into account a transphobic motivation in considering appropriate sentences for crimes against transgender and intersex people. The Gardaí should systematically record violence against and harassment of transgender people as 'hate crimes' specifically noting and recording the transphobic nature of such incidents.
25. Equality on the basis of gender identity should be mainstreamed and firmly embedded in policies and practices across the public service, in employment and amongst providers of goods and services.

The Equality Authority wishes to acknowledge the contribution of
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AN tÚDARÁS COMHIONANNAIS
Equality in a Diverse Ireland