Observations on the General Scheme of Gender Recognition Bill 2013

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IHRC
AN COIMISIÚN UM CHEARTA AN DUINE
IRISH HUMAN RIGHTS COMMISSION

Introduction

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution (NHRI), set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001 and functioning in accordance with the United Nations Paris Principles. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice. One of the functions of the IHRC is to examine legislative proposals and to report its views on the implications of such proposals for human rights, having regard to the Constitution and international human rights treaties to which Ireland is a party.[1] The IHRC is mandated to make recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and promote human rights in the State.[2]

2. The IHRC welcomes the opportunity to comment on the General Scheme of Gender Recognition Bill 2013 ("the General Scheme"). The IHRC has previously made a policy submission to Government on the Rights of Transgender Persons[3] as well as making a presentation to the Gender Recognition Advisory Group in 2010.[4]

3. The requirement for Government to introduce gender recognition legislation stems directly from its obligations under the European Convention on Human Rights ("ECHR"), and more specifically Article 8 thereof.[5] The proposed legislation, *inter alia*, is in response to a Declaration of Incompatibility granted by the High Court in 2007 in the case of *Foy v An tArd Chláraitheoir & Ors*, in which Irish law was found to be incompatible with the ECHR, insofar as it did not make provision for the legal recognition of the preferred gender of transgender persons.[6] This followed the precedent set in the cases of *Goodwin v the United Kingdom*[7] and *I v United Kingdom,*[8] in which the European Court of Human Rights (ECtHR) found breaches of Article 8 of the EHCR, in respect of the failure of the United Kingdom to provide a civil birth registration system for the legal recognition of the new gender of transgender persons.[9]

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[1] Section 8(b) of the Human Rights Commission Act 2000.

[2] Section 8(d) of the Human Rights Commission Act 2000.

[3] Submission to Government concerning the protection of the rights of transgendered persons, IHRC, September 2008.

[4] Submission to the Gender Recognition Advisory Group, IHRC, September 2010. The Gender Recognition Advisory Group submitted its report to the Minister for Social Protection in June 2011.

[5] Article 8 of the ECHR provides: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[6] *Foy v An tArd Chláraitheoir, Ireland and the Attorney General*, [2007] IEHC 470. A declaration of incompatibility may be made in accordance with section 5(1) of the European Convention on Human Rights Act, 2003 which provides as follows: "In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section 2* , on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

[7] *Goodwin v The United Kingdom*, [2002] 35 EHRR 447, (Application No. 28957/95*)* Grand Chamber, Judgment, 11 July 2002.

[8] **I. v.** The United Kingdom (Application No. 25680/94) Grand Chamber, Judgment, 11 July 2002.

[9] *Goodwin* followed the earlier decisions of the European Court where no violation of Article 8 was found in respect of the failure to recognise the preferred gender of transgendered persons. See *Rees v The United*

4. The IHRC welcomes the fact that the Government is proposing to legislate to bring Ireland's laws into line with the requirements of Article 8 of the ECHR. The IHRC is nonetheless concerned that the State's response to Declarations of Incompatibility, under section 5 of the European Convention on Human Rights Act, 2003, has not been sufficiently urgent. The IHRC notes that the Declaration of Incompatibility in the *Foy* case was originally granted by the High Court on 19 October 2007. This Declaration did not automatically bring an end to the human rights breach identified by the High Court, but rather provided a political impetus for a response in the form of legislation.[10] It is now some six years later that proposed legislation has finally been published.[11] Such a delay is incompatible with the State's obligation to provide for effective remedies under the ECHR[12] and brings into question the effectiveness of the European Convention on Human Rights Act, 2003, in ensuring individuals have a remedy for a breach of their human rights.[13]

5. Overall, while the IHRC considers that the core system proposed in the General Scheme for gender recognition appears to be sufficiently transparent and accessible, there remain areas where it may not fully meet the human rights standards applicable to the protection of transgender persons. In particular, the IHRC is concerned that certain restrictions on access to gender recognition for transgender persons in the General Scheme of Gender Recognition Bill, 2013, may unduly exclude certain individuals from the recognition provided under the system.

General Observations

6. In *Goodwin v the United Kingdom,* the ECtHR provided guidance regarding the nature of the "*respect*" required under Article 8 of the ECHR in the context of the legal recognition of transgender persons. The ECtHR noted the following:

a) A fair balance has to be struck between the general interest of the community and the interests of the individual when determining whether there is a positive obligation on the State to give legal recognition to transgender persons.[14]

Kingdom, Judgment, 17 October 1986, and *Cossey v. The United Kingdom*, Judgment, 27 September 1990. In contrast the case of *B v France,* Judgment, 25 March 1992, found a breach of Article 8 in relation to the refusal of the French authorities to amend the civil status register to reflect the applicant's preferred gender, on the basis that the civil status register was intended to be changed throughout life, unlike the system for birth registration in Ireland and the United Kingdom.

[10] Section 5(2) of the European Convention on Human Rights Act, 2003, provides 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."

[11] In the meantime that State established a Gender Recognition Advisory Group which published its report in May 2010.

[12] See for example the decision of the ECtHR in *R. and F. v. The United Kingdom*, Admissibility Decision, 28 November 2006, wherein the Court expressed the view that a Declaration of Incompatibility granted under the UK Human Rights Act, 1998, was not an effective remedy for the purpose of the ECHR.

[13] Since the *Foy* case, a further Declaration of Incompatibility was made in *Donegan v Dublin City Council & Ors,* [2012] IESC 18. Again, to date no legislative measure has been introduced to address the finding in that case that section 62 of the Housing Act, 1966 (as amended), is incompatible with Article 8 ECHR, in circumstances where there is a dispute between a local authority and a tenant regarding the underlying reason for seeking their eviction.

[14] *Goodwin v The United Kingdom*, [2002] 35 EHRR 447, at para 72.

b) The Court must have regard to the changing conditions within the respondent state and within contracting states generally and respond, for example, to any evolving convergence as to the standards to be achieved.

c) Serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity.

d) Where gender re-assignment surgery or other treatment is available in the member State it is illogical for that State to refuse to recognise the legal implications of the result to which the treatment leads.

e) In relation to balancing the public interest against the privacy rights of a transgender person the Court stated 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.*"[15]

7. In the *Goodwin* case, the applicant also claimed that her rights to marry under Article 12 of the Convention had been breached, because she was unable to marry her male partner as legally she was still considered a man, and marriage for same sex couples was prohibited in the UK.

8. In finding a breach of Article 12 of the ECHR, the ECtHR noted that the protection under the Convention in respect of marriage relates to marriage between a man and a woman. However, the Court did not consider that the gender of the persons concerned could now be purely determined by biological criteria. The Court posed the question whether in the case of the applicant, the fact that she could still marry, at least in theory, meant that she still enjoyed a right to marry under Article 12. The Court found that this could not be the case, as she lived as a woman, was in a relationship with a man and would only wish to marry a man, but she had no possibility of doing so. The Court came to the following conclusion:

> "*The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.*"[16]

9. In Goodwin, the ECtHR was satisfied that the applicant's right to marry under Article 12 of the ECHR had effectively been extinguished as she could not marry in the gender opposite to her new gender, and therefore her right under Article 12 was breached. While the impact of a pre-existing marriage on the right of the person to have their preferred gender legally recognised is a complex issue, which is examined further below, it is clear therefore that a person who has been granted a gender recognition certificate in their preferred gender must be permitted to marry in that gender and it is welcomed that this would appear to be the intention under the proposed scheme.

10. The IHRC will make observations below addressed at the Heads of the General Scheme where questions arise in relation to human rights law compliance.

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[15] At para. 91.
[16] At para. 99.

Head 2: Interpretation

11. The term "*acquired gender*" is defined as the gender opposite to that shown on the applicant's birth certificate. While, in substance, this definition would appear to be consistent with the purpose of the Bill, the use of the word "*acquired*" may not be appropriately sensitive to the reality of the experience of transgender persons or persons who are intersex.[17] The word "*acquired*" suggests that gender is a matter extraneous to the person, rather than an intrinsic part of a person's identity.

12. The IHRC **recommends** that, to better reflect the intrinsic nature of the gender to which a person ascribes, a more appropriate term, which relates more closely to the experience of the person concerned, such as "*identified gender*", be used.

Head 5: Qualification Requirements for Gender Recognition Certificate

13. This Head sets down four essential pre-conditions that must be satisfied by an applicant before the person can even have an application for a gender recognition certificate considered. These conditions are in no way related to determining whether the person is transgender or not (the question of evidence is dealt with under Head 6.

14. The pre-conditions are as follows:

i) That the person's birth or adoption is registered under Irish law or;
ii) That the person is ordinarily resident in Ireland;
iii) That the person has reached eighteen years of age;
iv) That the person is not married or in a civil partnership.

15. While the requirement that the person have their birth registered in Ireland or that they be ordinarily resident in the State, appears to encompass all those person that would a have a genuine interest in having their new gender recognised by the Irish State, the latter two requirements raise legal and policy choices, in relation to which an assessment of their human rights compliance is necessary.

The requirement to attain eighteen years of age

16. The decision to seek gender recognition from the State is no doubt a momentous one, which will have implications for the person throughout their life. The State therefore has an interest in assuring itself that any person seeking a gender recognition certificate, is doing so in the full knowledge of the consequences that flow from the decision, and that they have the necessary maturity and indeed legal competence to make that choice. However, it is inevitable that this requirement will exclude certain individuals under eighteen years of age who are living in their new gender, or are undergoing physical treatment, such as hormonal treatment, or indeed have embarked on the path of full gender reassignment surgery, but who nonetheless will be excluded from the opportunity, possibly over an extended period, to have their new gender recognised by the State.

[17] The term "acquired" has been used in a number of legal judgments; see for instance *Foy v An tArd Chláraitheoir & Ors.*

17. The State has a legitimate interest in ensuring that children or young adults are protected from making misinformed or unwise choices at an early stage of their life. Nonetheless, a young person who identifies as a transgender person or a person who is intersex[18] also has a legitimate interest in having that reality recognised by the State. The question therefore arises as to whether the absolute prohibition on applying for a gender recognition certificate before a person reaches eighteen years of age, is in compliance with the ECHR.

18. It is noted that in the case of *Sclumpf v. Switzerland*[19] the imposition by law of a two year waiting period before undergoing gender reassignment surgery, in order to have the costs of the operation covered by health insurance, was found to be in breach of the applicant's right to respect for their private life under Article 8 of the ECHR, particularly in light of the importance of the matter to the applicant and her relatively advanced age (67 years). The ECtHR found that the waiting period had been applied mechanically without regard to the applicant's individual circumstances and that this constituted a breach of her rights under Article 8. In a similar manner, the blanket prohibition on applying for a gender recognition certificate for young adults 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.

19. A further anomaly posed by a requirement to attain 18 years of age is the failure to align it with section 23 of the Non Fatal Offences Against the Person Act, 1997, which recognises that a person over 16 years is capable of consenting to medical treatment. There may thus be a conflict between the ability of a transgender person to access treatment at sixteen years of age, such as hormonal treatment or indeed gender reassignment surgery, and their inability to have the consequences of such treatment recognised by the State. As noted in the *Goodwin* case, if gender reassignment surgery or other treatment is available in the Member State concerned it is illogical for that State to refuse to recognise the legal implications of the result to which the treatment leads. It is, therefore, questionable whether the exclusion of young persons from availing of the proposed gender recognition scheme is in line with the right to respect for private life under Article 8 of the ECHR.

20. The United Nations Convention on the Rights of the Child is also relevant in this context. There are a number of Articles of the Convention relating to identity,[20] privacy[21] and the necessity to take into account the views of the child in the context of any decisions or measures affecting them, particularly where their age and maturity is such that they have the capacity to make decisions.[22] The principle of recognising the evolving capacity of children,

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[18] Intersex is used here to refer to individuals who have the biological features of both the male and female sex.

[19] *Schlumpf v. Switzerland*, Judgment, 8 January 2009.

[20] Article 8 of the CRC provides; 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

[21] Article 16 of the CRC provides; 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks.

[22] Article 12 of the CRC provides; 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the

their right to an identity and respect for their privacy are not presently reflected in the General Scheme, insofar as it totally excludes children from its ambit. Nonetheless, being transgender, is a circumstance which impacts on young people as well as adults and has significant consequences for their lives.

21. The IHRC **recommends** that the General Scheme be amended to allow the possibility, with safeguards appropriate to the age of the person concerned, such as the consent of a parent or guardian, for a gender recognition certificate to be granted to persons under eighteen years. This could be done by reducing the age requirement to sixteen years, or otherwise being subject to the consent of a parent or guardian.

The requirement to be single.

22. It is inevitable that a number of transgender persons, albeit possibly limited, may be in an existing civil partnership or more likely, marriage, but who will nonetheless wish to avail of the gender recognition scheme. However, under the General Scheme, if a person is already married or in a civil partnership, then they must seek a divorce or dissolution of their civil partnership in order to access the scheme.

23. The case law of the ECtHR relating to the interaction between marriage laws and gender recognition schemes adopted by the State have been examined in a number of cases, most recently *H v Finland*.[23]

24. The Judgment in *H. v Finland* is instructive in the context of the General Scheme, noting that the decision in the case is not final. The matter has been referred to the Grand Chamber and a further judgment is pending. The essence of the applicant's complaint in that case was that her right to respect for her private and family life, pursuant to Article 8 of the ECHR alone and also Article 8 read in conjunction with Article 14 (the right not to be discriminated against), was breached when the full recognition of her new gender was made conditional on transforming her existing marriage to a civil partnership. Full marriage for same sex couples was not permitted under Finnish Law. However, civil partnerships offered a similar level of rights and protections as marriage, except in relation to children.

25. Under Finnish law, the applicant's spouse would have to consent to the conversion of her marriage to a civil partnership, in order for the applicant to have her new gender fully recognised by the State.[24] This transformation of their marriage to a civil partnership could happen immediately once the other spouse consented. However, the spouse of the applicant did not so consent, and thus the only option open to the applicant was to divorce her spouse

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child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[23] *H v Finland*, (Applic. No. 37359/09) Judgment, 13 November 2012, referred to the Grand Chamber on 29 April 2013 (where judgment is pending following a hearing on 16 October 2013). In *R. and F. v. The United Kingdom*, Admissibility Decision, 28 November 2006, the applicants were a married couple, one of whom was seeking a gender recognition certificate on foot of having undergone gender reassignment surgery, but who was denied a certificate unless she obtained a divorce. The Court found that the Applicant's complaints pursuant to Articles 8 and 12 were manifestly ill-founded and thus inadmissible. This would imply that the judgment in *H v Finland* constitutes a possible change in the Court's case law insofar as it found the complaints in that case admissible, albeit ultimately rejecting them on the merits.

[24] Up to that point she was able to change her name, and the gender noted on her driving license, but she was not able to change her national identity number, nor the gender noted on her passport. The applicant alleged that this discordance between the gender she lived in, and her national identity was an interference with her private life.

in order to achieve full gender recognition by the State. The ECtHR reviewed its previous case law in relation to the rights of transgender persons,[25] and affirmed the obligation on Member States under Article 8 of the ECHR to implement the recognition of the gender change in post-operative transgender persons through, *inter alia*, amendments to their civil status data with its ensuing consequences. However, in relation to the right to marry, the Court noted that the right embodied under Article 12 fundamentally relates to a marriage between a man and a woman, and allows for the regulation of marriage under national law. The fact that certain Member States permit marriage under national law between same sex couples, did not alter the nature of the right protected under Article 12.

26. While it was accepted that there was an interference with the applicant's private life, in failing to provide her with a national identity number in her new gender, the question arose as to whether the State had struck the correct balance between the applicant's interest in having her gender recognised, and the State's interest in maintaining the traditional form of marriage. The ECtHR confirmed that neither Article 12, nor the broader protection afforded under Article 8 requires Member States to provide access to civil marriage to same sex couples, the Court further observing that the matter of regulating the effects of the change of gender in the context of marriage falls within the margin of appreciation of the State.

27. Turning to the question of proportionality, the ECtHR in *H. v. Finland* noted that the applicant in the case had a real possibility to alleviate her situation as her marriage could be changed at any time, by operation of law, into a civil partnership with the consent of her spouse, and in the absence of such a consent she had the possibility of seeking a divorce. The Court considered that it was not disproportionate for the State to require the consent of a spouse, as her rights were impacted by the change in marital status, and it was also noted that civil partnership offered almost identical legal protections to marriage. On this basis the Court found that a fair balance had been struck by the Finnish system between the competing interests involved and thus there was no breach of Article 8.

28. The judgment in *H. v. Finland* might appear, *prima facie*, to support the approach adopted under the General Scheme; that dissolution of a pre-existing marriage or civil partnership may be required before a person may secure a gender recognition certificate. However, it is clear from the Judgment that the ECtHR did not intend to give general sanction to such a requirement in relation to gender recognition, but rather came to its conclusion based on an analysis of (1) the proportionality of the system that had been put in place by the State, and (2) whether the State had kept within the confines of the margin allowed to it under Article 8. Thus, the Court was swayed by the relative ease with which a marriage could be transformed into a civil partnership under the Finnish system, and the possibility for the applicant to relieve the situation by which she could not have her personal identity number changed to reflect her new gender. The need for her partner to be involved in the recognition process, insofar as her rights under Article 8 were impacted, was also seen as important, and the Court also noted the high level of protection afforded to couples under Finnish civil partnership legislation. The question therefore arises as to whether the requirement to be single under the General Scheme keeps within the State's margin of appreciation.

[25] *Grant v UK*, (Applic No. 32570/03) ECHR 2006- VII, *L v Lithuania* (Applic No. 27527/03), ECHR- 2007-IV, Von *Kuck v. Germany* (Applic No 35968/97) ECHR 2006-VII.

29. Finnish divorce law is provided for by sections. 25-27 of the Marriage Act (2001). Under Finnish law divorce proceedings are a petitionary matter, and divorce is generally granted in two stages. The first stage is the submission of a divorce application, which incurs a fee of €72.[26] This is followed by a 6 month "reconsideration period",[27] which begins when the petition is received by the District Court.[28] If, after the expiration of this 6 month period, the couple choose to divorce, there is an additional fee of €44. However, if the couple have lived apart for at least two consecutive years prior to filing their application for divorce, only the first fee is payable and the reconsideration period is disregarded.[29] It is particularly notable that there are no particular evidentiary requirements regarding the breakdown of the marriage in Finnish law.

30. In Ireland, the institution of marriage is recognised under Article 41.3.1° of the Constitution. Dissolution of marriage is also recognised under the Constitution and is implemented in legislation by the Family Law (Divorce) Act, 1996. The Circuit Court has ordinary jurisdiction to hear and determine divorce proceedings. The High Court also has such jurisdiction, but usually only hears cases in which one or both parties to the divorce have significant assets. Prior to hearing divorce proceedings the Court must be sure that the couple have complied with sections 6 and 7 of the 1996 Act.[30] Four different forms must then be submitted to the court.[31] If both parties have complied with these provisions, the Court must then be satisfied that there is compliance with each of the factors prescribed by section 5(1), which implements the provisions of Article 41.3.2°.[32]

31. Firstly, the two parties must have "*lived apart from one another for a period of…at least four years during the previous five years.*"[33] This requirement normally necessitates spouses living in different dwellings. However, such living arrangements are not strictly necessary; both spouses may live under the same roof and be considered to be "*living apart*" for the purpose of section 5. The requirement may be satisfied if the parties have been shown to be "*living separate and independent lives and the normal interaction of husband and wife has ceased.*"[34] The five year period requirement must also have taken place before divorce proceedings have been initiated.[35] Secondly, there must be shown to be no reasonable prospect of reconciliation. The Court cannot reach such a conclusion in a vacuum, and sufficient evidence must be provided to establish this fact. Finally, the court must be satisfied

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[26] Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union; Finland, (2007), p 19.
https://e-justice.europa.eu/fileDownload.do?id=b86f20b2-81c6-451a-ba43-9505b5c44277

[27] Section 25(1) Marriage Act 2001, "The spouses shall have a right to a divorce after a reconsideration period".

[28] Finnish Ministry of Justice, "Dissolution of Marriage".
http://oikeusministerio.fi/en/index/publications/esitteet/avioliittolaki/avioliitonpurkaminen.html

[29] Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union; Finland, (2007), p 19.

[30] These provisions prescribe safeguards that ensure that both applicants have been made aware by a solicitor of the alternatives to divorce.

[31] These documents include an application form (known as a Family Law Civil Bill), a sworn statement of means, a sworn statement regarding the welfare of any children, and a document certifying that the parties have been informed of the alternatives to divorce.

[32] Section 5(1) is textually similar (though not identical) to Article 41.3.2, which affirms the constitutionality of divorce. The Article replaced the deleted constitutional prohibition of divorce, which was removed following a referendum in 1995.

[33] Section 5(1)(a).

[34] A. Shatter, *Family Law*, (Butterworths, 1997), at p. 393.

[35] *Ibid.*, at p. 395

that proper provision is made for spouses and dependent children. The factors which ought to be considered by the court when making such a determination are detailed in section 20.

32. Thus the process of obtaining a divorce in Ireland is arguably procedurally onerous and financially burdensome. However, more significantly it is clear that the evidential requirements that attend the granting of a divorce will prove to be an insurmountable hurdle to a married person who wishes to be granted a gender recognition certificate, in circumstances where their marriage has not broken down and they have not been living apart from their spouse for at least four years of the previous five. Under the General Scheme the fact that a person is transgender will not provide grounds for the grant of a divorce. It is noted that the dissolution of a Civil Partnership is possibly more accessible, although no doubt as unwelcome to the couple involved if their relationship has not broken down. A dissolution of a Civil Partnership may be granted after a couple have lived apart for at least two years out of the previous three years and where proper provision is made for each of the civil partners.[36] However, under the relevant legislation there is no requirement to show that "there is no reasonable prospect of a reconciliation" between the parties.

33. It is noted that the inclusion of "forced" divorce in gender recognition legislation has been criticised by the Council of Europe. The Commissioner for Human Rights' Issue Paper on Human Rights and Gender Identity[37] strongly advocated for the removal of any such divorce requirements. The paper noted the negative impact that such requirements may have on any children within the existing marriage, and the possibility of the loss of custody of these children by the parent who has undergone a gender change. A divorce or other change in marital status may also result in possible negative financial repercussions, as many countries do not treat married and unmarried couples equally in their tax policies, benefit systems, and so on.[38]

34. The IHRC is mindful of the argument that has been put forward that in fact the granting of a gender recognition certificate would not in law have the effect of creating marriage for same sex couples in circumstances where this is not presently allowed for under national law.[39] While not adopting a stance on whether that argument is correct or not, it is certainly an argument that should be very carefully examined before proceeding with the present legislative proposal. In addition, the IHRC **recommends** that the State give further consideration to the question of whether the present restrictions on access to divorce will ultimately create an insurmountable bar to certain individuals applying for a gender recognition certificate, even in circumstances where they would, in all other respects, satisfy the requirements of the General Scheme. If this is the case, then a serious question arises whether the State has remained within its margin of appreciation in the manner in which it has provided for gender recognition for transgender persons, noting that any conflict between the requirements of the Constitution and the ECHR, would not provide a defence for the State before the ECtHR.

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[36] Section 110, Civil Partnership and Certain Rights and Obligations of Co-habitants Act, 2010.

[37] Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Strasbourg, 29 July 2009 https://wcd.coe.int/ViewDoc.jsp?id=1476365

[38] *Ibid.*, at 22. It is noted that unmarried couples are treated less beneficially under Irish tax and social welfare law.

[39] Submission on the General Scheme of the Gender Recognition Bill 2013, Preliminary Observations of the Equality Authority, 18 September 2013.

Head 6: Evidence to be submitted with the applications for a Gender Recognition Certificate

35. The IHRC is mindful of the argument that has been put forward that one's birth certificate should be capable of being amended to reflect one's new gender identity so as to minimise any sense of stigma which may be involved in the gender recognition process. Notwithstanding this general point, the documentary requirements for the purpose of grounding an application for a Gender Recognition Certificate under the General Scheme are not onerous, which is to be welcomed. However, the requirement for medical certification does raise certain concerns regarding over intrusiveness into the person's private life, and may also raise questions as to whether gender identity is a matter of self identification, or whether the question of being transgender is one of medical diagnosis. Under Head 6(vi), the statement required of the primary treating physician has two aspects, an assessment if someone is transitioning or has transitioned to their new gender and the other requiring a psychological assessment of the persons understanding of the consequences of living in their new gender. It is unclear why a person, who is already required to provide a statutory declaration regarding their intention to live in a particular gender,[40] should then be required to produce a corroborating statement from a doctor. While such a requirement might be appropriate if there is a concern regarding a person's decision making capacity, or in the case of a minor, it is unclear why it is required in respect of an adult with full decision making capacity. The question of whether a person has transitioned, or is in the process of transitioning, may also be problematic, as doctors may take different views of what is required to satisfy this requirement. For instance, if a person is living a certain gender role but does not intend to seek any medical intervention, will this be sufficient to satisfy a doctor that they have transitioned. It has also been pointed out that if a person is intersex, there may be no transition as such, but rather a decision to emphasise one gender role over another, which presumably should be the person's individual choice, and medical certification as such may be wholly inappropriate.[41]

36. The IHRC **recommends** that the requirement for a medical statement be removed other than for certain exceptional and prescribed circumstances pertaining to the applicant.

Head 17 & Head 19: Appeal Process

37. It is to be welcomed that the system for the gender recognition incorporates an independent appeal mechanism, and that any such appeal may be made on grounds of law and/or fact, thus ensuring that a person can have a full reassessment of their application. It is also welcomed that any such proceedings will be held in camera to protect the confidentiality of the applicant concerned. However, insofar as an appeal lies to the Circuit Family Court, rather than an inquisitorial specialised Tribunal, it is inevitable that such appeals will be dealt with under an adversarial model that will put the applicant at a disadvantage if not legally represented. Similar considerations apply in respect of an appeal in the context of a

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[40] Head 6 (v) provides that in support of an application for a gender recognition certificate the applicant must provide *inter alia* "a statutory declaration by the applicant, in a form to be prescribed by the Minister, stating that he/she is not in a marriage or a civil partnership, he/she has a settled and solemn intention of living in the acquired gender for the rest of his/her life, that he/she understands the implications of the application and that he/she does it of his/her free will..".

[41] Submission on the General Scheme of the Gender Recognition Bill 2013, Preliminary Observations of the Equality Authority, 18 September 2013, at p. 8.

revocation of a Gender Recognition Certificate by the Minister as provided for under Head 19.

38. Therefore the IHRC **recommends** that any statutory appeals under the legislation would be explicitly encompassed within the Civil Legal Aid Act, 1995, and that the merits test would be disapplied to such proceedings.

Head 26: Sport

39. This head allows a sporting body to exclude a person from participating in a competitive sport in their new gender. This head is problematic from a number of perspectives. First, it has the potential to undermine the rationale for the legislation to provide universal recognition of a person's new gender,[42] if such recognition can then be completely ignored in the context of a sport. The provision by implication allows a private body, namely a sporting body, to investigate a person's gender and seek to see a person's gender recognition certificate, a practice that is discouraged under Head 8. This would allow for a most serious invasion of the individual's privacy, cause undue embarrassment regarding an intimate detail of a person's private life and may defeat the very recognition already granted to them by the State.

40. The IHRC considers that such a provision would clearly be an interference with an individual's right to respect for their private life under Article 8(1) of the ECHR. Such an interference may only be justified under Article 8(2) if it is in accordance with the law, pursues a legitimate aim and is proportionate to that aim. In addition, serious concerns arise under the personal rights of the person under Article 40.3.2° of the Constitution. The IHRC recognised that there may be a genuine concern on behalf of sporting bodies that an unfair competitive advantage might accrue to a transgender person in certain circumstances. It is important that these concerns are considered in full. However, this should not be done in a way that ignores the human rights of the transgender persons concerned. While the General Scheme cannot address in detail all the requirements of legislation, the present proposal appears to be bereft of safeguards and thus does not appear to meet the requirements of Article 8(2) of the ECHR.

41. The IHRC **recommends** that careful consideration needs to be given to any provision that would permit the questioning of the gender shown on a person's birth certificate. Even if this were justified, the circumstances in which a person could be excluded from participation in a sport in their new gender would have to be carefully set out, on the basis of appropriate criteria which exclude the possibility of any discrimination against the transgender person.

42. The IHRC **recommends** that Head 26 be reviewed to ensure it does not allow for any undue interference in a person's right to privacy, or any inappropriate exclusion of transgender or intersex persons from participation in a sport of their choice.

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[42] The explanatory note to Head 9 states "This Head provides for the fundamental principle of the legislation which is that, once a gender recognition certificate is issued to a person, the person's gender becomes the acquired gender. This formal legal recognition is for all purposes, including dealings with the State, public bodies and civil and commercial society. It includes the right to marry or enter a civil partnership in the acquired gender and the right to a new birth certificate or, if applicable, a new entry in the foreign birth register."