

Submission to the Gender Recognition Act Review Group

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I am an international human rights consultant specialising in sexual orientation, gender identity and sex characteristics who has previously worked on the topic of legal gender recognition for transgender people with the United Nations. I am also an Irish trans identified non-binary person. I am making a submission drawing upon my expertise in the provision of legal gender recognition across different regions. I have also provided references to a few additional resources that may be of benefit to the review group.

As the Yogyakarta Principles state, “each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.” This affirms transgender people’s right to their own gender identity and gender expression.

Transgender people’s dignity, equality, privacy and security are severely compromised if their gender identity and expression is not recognized through legal and administrative processes. These processes include the possibility of changing name details and gender markers on identification documents and administrative records, such as birth certificates, identity cards, passports, and educational and employment records. While Ireland has made great strides in address legal gender recognition for transgender people several areas remain unaddressed.

Do you think the current legislation needs to be changed?

Yes

If so, what changes do you think need to be made?

1. Arrangements for persons who identify as neither male nor female (e.g. Non-binary)

The current Gender Recognition Act only provides the ability to change gender marker from F to M and vice versa. There is no 'other', 'X' or third option gender marker facilitated which has ramifications for non-binary and third gender identified persons.

Discrepancies exist between the name change by deed poll process for those with a gender recognition certificate and those without. For instance, currently a non-binary person who does not wish to change their gender marker from F to M or vice-versa (and cannot choose another option) can change their name by deed poll to better reflect their gender identity but then must wait two years before they can change the name on their passport. This is a difficulty that I personally experienced. I changed my name but did not wish to change my gender marker between the binary options. I work internationally and professionally under my chosen, and now legal, name. I experienced difficulties opening bank accounts, negotiating work contracts and payment because my main form of documentation overseas (passport) did not match my bank account information, driving licence or deed poll. So while I had undertaken the straight forward name change by deed poll process mandatory bureaucratic passport delays for name change in Ireland that are addressed for binary trans people through the Gender Recognition Certificate are absent for non-binary people. Additionally, cost barriers exist in changing educational degrees and transcripts to reflect my legal name that are waived for those with legal gender recognition certificates (as well as the need to enroll your deed poll in the high court for the issuance of a driving licence under the correct name). It is also worth noting that while some non-binary people may wish to be officially recognised as a third category they may also wish to retain the same gender marker (for personal or practical reasons) while availing of an official name change without unnecessary delays in documentation issuance.

Additionally, at this time there are several countries which provide recognition of a third gender marker category through legal gender recognition or on official forms and documentation (including birth certs, passports, driving licence and social security card), including New Zealand, Nepal, Pakistan, India and Bangladesh . While in 2017 Germany becoming the first European country to do so and with Malta, Scotland and several other jurisdictions likely set to follow suit.

It is important to note that visitors and residents in Ireland from these countries may arrive, live and interact with government and civil departments with documentation reflecting a third category that is not recognised by the Irish bureaucracy causing undue distress, difficulties, misunderstanding and misgendering of overseas visitors and residents.

Recommendations:

Currently Ireland has no 'other', 'X', 'O' or third option gender marker for official documentation and identification. This includes passports, registration documents, social welfare forms, grant applications and all other information

gathering documentation that requests gender specific information. The provision of a third option in forms and identification that require declaration of gender should be mandatory for official documentation (and encouraged for non-official).

Gender specific honorific titles should be reviewed to include non-gender specific titles options or the ability not to choose a title. For instance Mr./Mrs/Ms/Mx/No Title.

Review when it is actually required to gather this information (in many incidences the gathering of gender specific information is not relevant and the addition of honorific titles should only ever be a voluntary selection rather than a mandatory requirement).

2. Arrangements for intersex people

Intersex people's experiences of bodily diversity are strongly connected to their right to bodily integrity. There are some overlaps, but also many differences, between the experiences of intersex and transgender people. It is vital therefore that intersex people and their needs are specifically addressed in consultation with intersex people and their representative organisations. Parameters that address the needs of transgender people cannot be seen to fully address the needs of intersex people.

There is a common assumption that intersex people have non-binary gender identities, and even a belief that a third sex classification recognises the existence of people with intersex variations.

It is important to note that not all people with intersex variations seek an intermediate birth certificate, and assumptions that conflate the intersex experience with non-binary gender identities take an essentialist approach to biology that promotes the misgendering of very many intersex people who identify as men or women.

Any provisions to provide gender recognition to intersex people including children and youth must be based on informed consent and must not require medical or surgical procedures and be based purely on self-determination, in concordance with the process for transgender people.

While some jurisdictions allow for a record of 'indeterminate', 'intersex' or 'blank' for gender at birth this is not recommended by international intersex activists as it leaves intersex people vulnerable to discrimination. The best practice proposal is to provide a simple administrative procedure for intersex people or their guardians to 'correct' their birth records without the requirement for medical or surgical interventions.

International intersex organisations call for *legislative protections to be installed that ban medical interventions on children with variations of sex characteristics, on social, psychosocial, cultural or cosmetic grounds. This may include installing legislative measures that penalise medical professionals that commit or assist in such interventions.*

In 2015 Malta became the first country in the world to most adequately address the rights and recognition of intersex people by prohibiting unnecessary surgical interventions on intersex infants and children. Ireland failed to follow suit in the initial drafting of our Gender Recognition Act. At this juncture it is imperative that we seize this opportunity to follow this best-practice example and to make explicit reference to the needs of intersex persons. The Malta law specifically prohibits non-consensual medical and surgical interventions on intersex infants and children. This is a prime opportunity for Ireland to follow suit, specifically as we have been questioned by the Committee on the Rights of the Child on our approach to intersex infants.

Please see the Malta Declaration (2013) and Vienna Statement (2017) which were developed by intersex organizations and advocates, available at: <https://oieurope.org/malta-declaration/> and <https://oieurope.org/statement-1st-european-intersex-community-event-vienna-30st-31st-march-2017/>

Recommendations:

Include an accurate definition of intersex and sex characteristics that distinguishes intersex and sex characteristics from transgender and gender identity so that they are not conflated and their specific needs are adequately recognised and addressed.

Prohibit unnecessary surgical interventions on intersex infants and children.

Register intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender.

Ensure that sex or gender classifications are amendable through a simple administrative procedure at the request of the individuals concerned. All adults and capable minors should be able to choose between female (F), male (M), or other option.

3. Arrangements for children aged 16 to 17 years, and children aged under 16 years

In Malta, Germany, Switzerland, Austria and Argentina, there is no lower age limit for applying for legal gender recognition. In Norway the lower age limit is 6 years old.

Best practice examples on the provision of legal gender recognition for minors exist and should be emulated by Ireland. In both Argentina and Malta, there are no age or other restrictions on who can access the provisions and there are additional protections for children. Laws in both countries have a broad focus on transgender people's human rights and the application of gender recognition to other areas of life. Both countries have addressed transgender people's rights to health, privacy, and protection from discrimination.

Recommendations:

Allow children aged 16 and 17 years to amend their name and/or gender marker through a simple administrative process.

Allow children aged under 16 years, with the consent of their legal guardian, to change their name and gender marker through a simple administrative process allowing for their evolving capacity and exploration of gender expression with the understanding that this may change in time.

Develop rights-based regulations and policies allowing transgender people to amend their gender marker on education records, based on self-determination and with no other eligibility requirements, and obtain new education documents with the appropriate gender marker. This includes the ability for transgender people, children, youth and adult to amend education documents including degrees and transcripts to reflect their gender identity.

What should the Review Group recommend in its final report?

Ensure that definitions in laws and policies of terms such as 'gender', 'gender identity', 'gender expression', 'transgender', or specific transgender identities are inclusive of diverse genders, gender identities and expressions, and are based on self-determination.

Avoid conflating transgender and intersex terms and definitions in laws, regulations and policies, and promote the use of human rights-based terms such as sex characteristics to describe the relevant prohibited grounds of discrimination for intersex people.

Provide a mandatory third gender marker option in forms and identification that require declaration of gender in official documentation and encourage the addition of such an option for non-official documentation

Review gender specific honorific titles to include non-gender specific titles options or the ability not to choose a title. (for instance Mr./Mrs/Ms/Mx/No Title).

Consider whether it is necessary to gather sex or gender details (including honorific titles) on administrative records or identification documents and, where necessary, ensure that administrative gender categories reflect the diversity of transgender populations, including, but not limited to, options of identifying as female, male, third gender, or non-binary.

Include an accurate definition of intersex and sex characteristics that distinguishes intersex and sex characteristics from transgender and gender identity so that they are not conflated and their specific needs are adequately recognised and addressed.

Prohibit unnecessary surgical interventions on intersex infants and children.

To register intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender.

To ensure that sex or gender classifications are amendable through a simple administrative procedure at the request of the individuals concerned. All adults and capable minors should be able to choose between female (F), male (M), or other option.

Allow children aged 16 and 17 years to amend their name and/or gender marker through a simple administrative process.

Allow children aged under 16 years, with the consent of their legal guardian, to change their name and gender marker through a simple administrative process allowing for their evolving capacity and exploration of gender expression with the understanding that this may change in time.

Develop confidential data collection methods that enable the diversity and size of transgender populations to be measured accurately in order to monitor and address barriers to the full realization of transgender people's human rights.

Audit existing and proposed laws, regulations and policies, including those that make distinctions based on a person's sex or gender, to ensure that they do not discriminate against transgender people, but provide respect and protection for their human rights.

Ensure rights-based procedures for legal gender recognition that are accessible, non-discriminatory, consistent across various documents, apply to both new and existing documents, and respect transgender people's dignity and privacy.

Ensure that existing laws and regulations governing the institution of civil marriage are clarified and extended to encompass third gender, non-binary and transgender people on an equal basis.

Develop rights-based national policies about transgender people in detention (including in relation to placement, safety, name and gender marker on records, search processes, and access to rehabilitation and health care) that recognize transgender people's gender identity and expression, irrespective of whether they have had gender-affirming surgeries, and that provide opportunities for transgender people to participate meaningfully in decisions about their detention.

If identity verification processes are required, ensure these are based on human rights standards and do not discriminate or impose eligibility requirements for legal gender recognition.

Is there anything else you would like to say on this topic?

There remains a disconnect between the process of legal gender recognition in Ireland and access to gender-affirming health services. While the process of legal gender recognition is rightly based on self-declaration, respecting the right to recognition before the law, access to gender-affirming health services remains hindered by pathologising medical gatekeeping that prevents many trans people from living their lives with dignity. The work of legal gender recognition is intrinsically linked with access to highest attainable standard of health care and it remains to be seen how Ireland can harmonise these two facets of the human rights of transgender people. In that regard further thought must be given to ensure that access to gender-affirming health services is based on informed consent and choice and without restrictive or abusive eligibility criteria, including those that discriminate on the basis of age or marital status, require a mental health diagnosis or authorization from a third person. This is particularly relevant as the International Classification of Diseases (ICD), the key psycho-medical classification system is currently being revised and reformed with a growing consensus thus far in the revision process to remove the code on "gender identity disorder" from the mental health chapter of the ICD

Please consult the following publication for more information: Kara, Sheherezade (2017) *Gender is not an illness. How pathologizing trans people violates international human rights law*. GATE.

References and further reading:

Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (2017), available at:
<https://yogyakartaprinciples.org/principles-en/yp10/>

Kara, Sheherezade (2017) *Gender is not an illness. How pathologizing trans people violates international human rights law*. GATE.

Organisation Intersex International (2013), *Malta Declaration*, available at:<https://oiieurope.org/malta-declaration/>

Organisation Intersex International (2017), *Vienna Statement*, available at:<https://oiieurope.org/statement-1st-european-intersex-community-event-vienna-30st-31st-march-2017/>

UNDP & APTN (2017). *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia*, available at: http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/legal-gender-recognition--a-multi-country-legal-and-policy-revie.html

Legal References

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

Ley 26.743: *Derecho a la identidad de género* (Argentina) (Law No. 26.743: Gender Identity Law).

Malta Gender Identity, Gender Expression and Sex Characteristics Act (2015).

Appendix: State Obligations Under International Law

The Yogyakarta Principles outline how international human rights law apply to sexual orientation and gender identity. In 2017 they were updated to include additional principles including those relevant to sex characteristics. I have provided relevant extracts below for the review group. The full text is available at:
<https://yogyakartaprinciples.org/principles-en/yp10/> .

Extract on from the **Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles**

Principle 31 THE RIGHT TO LEGAL RECOGNITION

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

C. While sex or gender continues to be registered:

- i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
- ii. Make available a multiplicity of gender marker options;
- iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
- iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

Principle 32

THE RIGHT TO BODILY AND MENTAL INTEGRITY

Everyone has the right to bodily and mental integrity, autonomy and selfdetermination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

STATES SHALL:

A. Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination;

B. Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics;

C. Take measures to address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes, as well as marriage prospects and other social, religious and cultural rationales, to justify modifications to sex characteristics, including of children;

D. Bearing in mind the child's right to life, non-discrimination, the best interests of the child, and respect for the child's views, ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that any such modifications are consented to by the child concerned in a manner consistent with the child's evolving capacity;

E. Ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity;

F. Provide adequate, independent counselling and support to victims of violations, their families and communities, to enable victims to exercise and affirm rights to bodily and mental integrity, autonomy and self-determination;

G. Prohibit the use of anal and genital examinations in legal and administrative proceedings and criminal prosecutions unless required by law, as relevant, reasonable, and necessary for a legitimate purpose.

Additional State Obligations:

RELATING TO THE RIGHT TO PRIVACY (PRINCIPLE 6)

STATES SHALL:

G. Ensure that requirements for individuals to provide information on their sex or gender are relevant, reasonable and necessary as required by the law for a legitimate purpose in the circumstances where it is sought, and that such requirements respect all persons' right to self-determination of gender;

H. Ensure that changes of the name or gender marker, as long as the latter exists, is not disclosed without the prior, free, and informed consent of the person concerned, unless ordered by a court.