

Submission to the Gender Recognition Act Review Group

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I am grateful for the opportunity to make some comments and suggestions relating to the review of the Gender Recognition Act 2015 and hope that these comments may be of some assistance to the Review Group.

Underlying principles

The Preamble to the Constitution of Ireland speaks of the critical importance of assuring the “dignity and freedom of the individual.”² In her Supreme Court decision in *Re a Ward of Court*, Denham J (as she then was) recognised an implicit right to dignity under the Constitution.³ Article 1 of the European Union Charter of Fundamental Rights also prioritises personal dignity in categorical terms: “Human dignity is inviolable. It must be respected and protected.”

The dignity of the person lies at the heart of the discussion concerning the legal recognition of gender. The Gender Recognition Act 2015 undoubtedly makes an exceptional and welcome contribution to the lives of people who are transgender and intersex. In practical terms, the Act has greatly enhanced the lived experience of many people. Laws that formerly assigned to a person a gender that conflicted with that person’s gender identity caused great distress to many, and threatened to infringe a variety of rights including, most crucially, the right to privacy and the right to dignity.⁴

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² Constitution of Ireland 1937, Preamble.

³ [1996] 2 IR 79 at 163

⁴ In *Goodwin v UK and I v UK*, Applic. 28957/95, 12 July 2002 (2002) 35 EHRR 18 and 447, the European Court of Human Rights found that the UK’s failure to facilitate legal gender recognition for transgender people infringed Articles 8 (inter alia, the right to a private life) and Article 12 (the right to marry) of the European Convention on Human Rights). See also *Foy v An tArd-Chláraitheoir (No. 2)* [2007] IEHC 470

In allowing legal recognition consistent with gender identity, the Gender Recognition Act 2015 confirms in a very powerful way the full citizenship of people who are transgender. The Act is symbolically resonant in that it signals that Irish society acknowledges the autonomy of transgender people and respects and trusts people who are transgender. The law is notable for its emphasis on self-determination and agency, allowing adults who otherwise meet the jurisdictional requirements to self-declare their preferred gender (gender of identity). The Gender Recognition Bill 2014 as initiated had sought to filter applications by requiring a doctor's certification that the applicant was transitioning or had transitioned,⁵ but the Oireachtas dropped this requirement before passage of the bill through the Dáil.⁶ The experience of the operation of the 2015 Act vindicates the adoption of the self-determination/self-declaration approach. A relatively modest number of people have opted for gender recognition, assuaging any fears that a self-determination model might be widely abused.

A. Children aged 16 or over but under the age of 18

The Act allows minors aged 16 or 17 to apply for legal recognition of their gender subject to certain conditions. A 16 or 17 year old seeking permission to apply for a gender recognition certificate must effectively obtain the approval of his or her parents or guardians,⁷ of two medical professionals,⁸ and of a court, a 'triple lock' that makes obtaining legal gender recognition challenging for older minors.⁹ In particular, the Court must be satisfied that "the child's parents, surviving parent or guardian consent or consents to the making of the application under this section".¹⁰ The Court may dispense with parental or guardians' consent with in certain limited circumstances.

⁵ See the Gender Recognition Bill 2014 as initiated in the Seanad, s.9(1)(g).

⁶ The relevant provision was dropped from the Bill at Committee Stage in the Dáil, Select Sub-Committee on Social Protection, 17 June 2015

⁷ The Court must be satisfied that "the child's parents, surviving parent or guardian consent or consents to the making of the application under this section".

⁸ Specifically, the child's primary treating medical practitioner, defined as a "person's primary treating endocrinologist or psychiatrist in relation to the matter the subject of an application for a gender recognition certificate;" and one other endocrinologist or psychiatrist with no connection to the child.

⁹ S.12 of the 2015 Act.

¹⁰ S.12(4)(a) of the 2015 Act.

The UN Convention on the Rights of the Child, in Articles 5 and 14, speaks of the “evolving capacities” of the child. This emphasises that while parents still have an important role to play in the lives of their children, and important decision-making responsibilities, a child’s understanding and capacity to make decisions grow and develop as they age. As Lansdown comments:

“The concept of evolving capacities is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth. This concept provides the basis for an appropriate respect for children’s agency without exposing them prematurely to the full responsibilities normally associated with adulthood. It is important to recognise that it is not respect for rights, as such, which is influenced by the evolving capacities of children: All the rights in the Convention on the Rights of the Child extend to all children irrespective of capacity. What is at issue is where responsibility for the exercise of the rights lies.”¹¹

Thus, while one should support the role and responsibilities of parents, the Convention requires respect also for the developing agency of the child, and “establishes that as children acquire enhanced competencies, there is a reduced need for direction and a greater capacity to take responsibility for decisions affecting their lives.”¹² The case for allowing autonomous decision-making is particularly strong in relation to 16 and 17 year olds. Given that 16 and 17 year olds have capacity to consent to surgical and medical treatment without parental or court approval,¹³ it seems incongruous that a young person seeking legal recognition would have to jump through so many hoops to gain legal recognition independently of any surgical or medical intervention. It is submitted, therefore, that the option to obtain gender recognition by self-declaration should be

¹¹ Gerison Lansdown, *The Evolving Capacity of the Child* (UNICEF Innocenti Research Centre 2005) ix.

¹² *Ibid.*

¹³ Non-Fatal Offences Against the Person Act 1997, s.23. S.23(3) appears to indicate that this does not necessarily exclude, by implication, the capacity to consent of persons under 16. The Act is a criminal law measure; though one can argue (and it seems to be widely accepted) that s.23 establishes or at least confirms a principle of general application. See also The Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (7th edn, IMC 2009), *Consent to Medical Treatment in Ireland: An MPS Guide for Clinicians* (MPS 2015) p. 9, and Law Reform Commission Consultation Paper, *Children and the Law: Medical Treatment* (LRC CP 59-2009), particularly Chapter 4 thereof.

extended to persons aged 16 and 17 on the same basis as is currently available to adults.

B. Children under the age of 16¹⁴

The 2015 Act entirely denies children under the age of 16 any right to legal gender recognition, even in cases where their parents and medical practitioners support recognition. This approach places transgender children in a legal limbo for a potentially substantial time, and especially during their teenage years, a critical point in their development towards adulthood. Each case will inevitably turn on its own facts and one must evaluate each child's situation on the merits. Nonetheless, as a general principle, it one must surely acknowledge that great harm and distress may be caused where the law compels a child to be treated as being of one gender, where the child identifies as and wishes to express as a person of a different gender. The harm may be particularly acute where the child attends an educational institution that is single-sex, or where schools require students to wear gender-specific uniforms. The failure to accommodate children in this context arguably infringes the principle of hearing the voice of the child; a child's view on his or her gender identity is denied a hearing until he or she turns 16.

In principle, legal gender recognition should therefore also be available to those under 16 so that younger people have the option to be treated as being of their preferred gender for legal purposes. It is important to emphasize that the extension of legal recognition is an entirely separate matter from surgical or medical intervention. Legal recognition is neither a necessary pre-requisite to nor a guarantee of access to medical intervention.

I appreciate that it may prove challenging to identify the conditions under which children aged under 16 should be permitted legal gender recognition. Parents and guardians have responsibilities and interests in this context, in particular, a duty

¹⁴ See generally Ana-Maria Bucataru, "Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: the Context of Education and Transition" (2016) *QMHR* 3(1) and Peter Dunne, "Transgender Children and the Law" (20-17) *Family Law* 123-124.

to guide and protect the minor. The fundamental question is whether the steps taken are in the best interests of the child. Given the constitutional and legal position of parents and guardians, one should ordinarily attach a good deal of weight to parents' and guardians' views as to what is in their children's best interests.¹⁵ Where parents support legal gender recognition for a child who wishes to be recognised in their preferred gender, the case for such recognition is strong, though a regime that necessitates parental approval in all cases risks undermining the rights of some children. In particular, as a general principle, the older a child is, the greater the agency and autonomy he or she should be afforded. The voice of the child must be heard, respected, and given weight, particularly where the child is older and/or more mature.¹⁶

Argentina's Ley de Género (Gender Law) of 2012 allows young people aged under 18 to request gender recognition. The child may do so "through their legal representatives [parents or guardians]¹⁷ and with explicit agreement by the minor, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right[s] of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents. Likewise, the minor must be assisted by a children's lawyer as prescribed by Article 27 of Law 26061."¹⁸ Where some or all of the child's parents or guardians do not consent, however, a court may decide on the child's application based on the best interests of the child.

Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015 also makes provision for children to obtain legal gender recognition, through an application by their parents (or those in parental authority) to the Civil Court.¹⁹

¹⁵ See in particular Art.42 of the Constitution of Ireland and the Guardianship of Infants Act 1964 (as amended).

¹⁶ See, for instance, the decision of the UK House of Lords in *Gillick v West Norfolk and Wisbech AHA* [1986] 1 AC 112.

¹⁷ In this context, "representantes legales" appears to mean the child's parents or legal guardians (i.e. persons entitled by law to act on the child's behalf) rather than lawyers. In reference to lawyers, Article 5 uses the term "abogado".

¹⁸ Art. 5, English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on May 8, 2012: <https://tgeu.org/argentina-gender-identity-law/>

¹⁹ S.7 of the Gender Identity, Gender Expression and Sex Characteristics Act 2015 (Law XI of 2015)

The Court's decision must be based on the best interests of the child and must give due weight to the child's views, based on the child's age and maturity.

One possible approach in this context is to allow young people who identify as transgender to obtain an interim or provisional gender recognition certificate either with parental/guardians' consent or, where that is absent, by order of the court. This would temporarily recognize the person as being of their preferred gender for the duration of their minority. Such a certificate would be temporary only, affording the young person an opportunity to reconsider when they turn 16. The person would then be able to decide whether or not to seek a full gender recognition certificate or revert to their original gender.

C. Provision for people who identify as non-binary

Although the 2015 Act confers the freedom to alter one's originally assigned gender marker, the Act appears to recognize only two gender options – male and female. While the Act does not directly and expressly rule out a non-binary option, s.18 indicates that the person must select one of two genders – male or female.²⁰ The statutory declaration required for this purpose also contains only two options of male and female. This is in line with case law on civil registration legislation. A child, at birth, must be registered as having a sex. The options for entries relating to sex are binary in character. It appears that the Registrar must register a child's sex and may only register the child's sex as male or female.²¹ Irish law has never made provision for a third gender or non-binary option. In short, a person, legally speaking, must be either of the male or female gender.

This binary approach excludes and alienates people who do not identify definitively or exclusively as male or female, those who are genderfluid, as well as those whose physical characteristics at birth are not definitively and exclusively of one sex alone. People who identify as non-binary as well as intersex people (if

²⁰ S.18(1) "Where a gender recognition certificate is issued to a person the person's gender shall from the date of that issue become for all purposes the preferred gender so that if the preferred gender is the male gender the person's sex becomes that of a man, and if it is the female gender the person's sex becomes that of a woman."

²¹ *Foy v An tArd Chláraitheoir (No. 1)*, High Court, 9 July 2002 at para.110

they do not identify as exclusively male or female) should be accommodated in the Gender Recognition Act by permitting a 'non-binary' or third gender option. It is submitted that the law could and should accommodate an option that allows people to choose not to self-designate as either male or female and, instead, to identify in law as gender non-binary or as third gender.

Several jurisdictions now permit non-binary identity options for people who do not identify as definitively male or female. In October 2017, for instance, the German Federal Constitutional Court ruled in favour of a third gender option for people who are intersex and non-binary gender, holding that previous laws that allowed the gender marker to be left blank on official documents were insufficient to protect the rights of people who are intersex and who have a non-binary gender identity.²²

C.1. The legal relevance of gender in Irish law

It is possible to amend the law to accommodate such an option in Irish law. Formally speaking, there are comparatively few laws that require a person to be of one specific gender in order to hold an office or employment, carry out a task, exercise a right, incur a liability, or commit (or be the victim of) an offence. This is not to say that legal processes are entirely gender blind, or that legal outcomes and opportunities are never influenced by gender. Nonetheless, legislation rarely formally requires a person to be of one sex only in order to exercise a right or freedom, or be subject to a liability. Subject to very limited exceptions,²³ in the context of employment²⁴ and in relation to the provision of goods and services²⁵ one cannot deny a person employment or discriminate against that person based on gender. What this means is that, as a general principle, a person's gender should not be a determining factor in the workplace or in consumer transactions.

²² 1 BvR 2019/16, decision of 10 October 2017. See court press release at: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html> See Leo Yannick Wild, "Trans, intersex, queer: Germany's highest court makes groundbreaking ruling" <https://www.gwi-boell.de/en/2017/11/28/trans-intersex-queer-germanys-highest-court-makes-groundbreaking-ruling>

²³ See for instance ss.24-27 of the Employment Equality Act 1998.

²⁴ Employment Equality Act 1998-2015

²⁵ Equal Status Act 2000-2015

Political participation is equally open to men and women alike.²⁶ Property law (including the law of succession) on its face treats men and women alike. Paternity leave, despite its name, is available to female partners of a mother as well as male partners.²⁷ The capacity to contract and liability in tort are not contingent on a person's gender.

Even in the context of family law, legislative provisions are typically applicable to both sexes alike (though there are some notable exceptions, particularly in the context of guardianship of children²⁸). With the passage of the 34th Amendment to the Constitution, two persons may marry²⁹ whether they are of the same sex or the opposite sex.³⁰ Various rules that formerly treated husbands and wives differently have been abolished,³¹ declared unconstitutional,³² or extended³³ to provide equal treatment.

In the context of criminal law, most offences apply to both sexes, without distinctions based on sex. For instance, a sexual assault can be committed by or in respect of either a man or woman.³⁴ The same principle applies to an aggravated sexual assault.³⁵ Offences relating to prostitution can also be committed by both men and women alike and in respect of both male and female prostitutes.³⁶

²⁶ Article 16 of the Constitution of Ireland 1937.

²⁷ Paternity Leave and Benefit Act 2016.

²⁸ Unmarried mothers are automatically guardians of their children. Fathers who are not married to the mothers of their children are not automatically guardians unless they have cohabited with the mother for at least 1 year. Unmarried fathers may also apply to court for guardianship, and may be appointed a guardian by statutory declaration made jointly with the mother, or by will. See the Guardianship of Infants Act 1964 as amended.

²⁹ Subject to other conditions, such as age and marital status.

³⁰ Article 41.4 of the Constitution of Ireland and the Marriage Act 2015. Civil partnership – which is a union of persons of the same sex – is no longer open to new entrants.

³¹ Such as the tort of criminal conversation, abolished by the Family Law Act 1981.

³² See for instance *De Burca v Attorney General* [1976] IR 38, *State (DPP) v Walsh and Conneely* [1981] IR 412, *TO'G v Attorney General* [1985] ILMR 61, *W v W* [1993] 2 IR 476.

³³ *McKinley v. Minister for Defence* [1992] 2 IR 333.

³⁴ See Criminal Law (Rape)(Amendment) Act 1990 s.2, and Laffoy J in *SM v Ireland (No. 2)*[2007] 4 IR 369, 377.

³⁵ Criminal Law (Rape)(Amendment) Act 1990 s.3.

³⁶ Criminal Law (Sexual Offences) Acts 1993 and 2017.

Section 18 of the Interpretation Act 2005 stipulates that laws that use language referring to one gender apply also to the other gender, unless the contrary intention appears in the relevant enactment. It would be comparatively straightforward to amend the 2005 Act to indicate that, unless the context demands otherwise, words in legislation importing the masculine or feminine gender apply also to persons who are of non-binary gender.

C.2. Limited contexts where gender is formally relevant

There are some limited contexts in which gender is formally relevant for legal purposes, though it is submitted that these laws could be amended to accommodate people who are gender non-binary. This is not an exhaustive list, though it indicates some of the key areas where gender is formally relevant:

- Article 41.2 of the Constitution refers to the role of women and mothers in the home. Various proposals have been made to amend this provision to make it apply in a gender-neutral fashion.³⁷
- Electoral funding laws require that a political party's state funding will be halved unless at least 30% of their candidates in the preceding general election were women and at least 30% were men.³⁸ For this purpose, it is possible to amend the law to calculate the relevant percentages based on a party's candidates other than those whom the law regards as having a non-binary gender (i.e. disregard people who are gender non-binary for this purpose only).
- There are certain 'gender-specific' sexual offences (for example, rape³⁹ and incest⁴⁰) where the sex or gender of the perpetrator and/or victim is relevant to the offence, though (as noted above) other sexual offences are gender neutral. Rape under s.2 of the Criminal Law (Rape) Act 1981

³⁷ *Report of the Constitution Review Group* (1996) p. 333: All-Party Oireachtas Committee on the Constitution, Tenth Report: The Family (2006) Ch. 8, pp. 106-120 and pp. 126-127: <http://www.constitution.ie/reports/10th-Report-Family.pdf>; Constitutional Convention recommendations on Article 41.2: <https://www.constitution.ie/AttachmentDownload.ashx?mid=8ee5ffc2-4079-e211-a5a0-005056a32ee4>

³⁸ Electoral (Amendment) (Political Funding) Act 2012, part 6. The quota requirement will rise to 40% in 2023.

³⁹ Criminal Law (Rape) Act 1981, Criminal Law (Rape)(Amendment) Act 1990.

⁴⁰ Punishment of Incest Act 1908

requires an act of non-consensual sexual intercourse between a male perpetrator and a female victim.⁴¹ Incest also presupposes an act of heterosexual sexual intercourse (consensual or otherwise) between a man and a close female relative.⁴² The State could adjust these laws to address the position of people who identify as non-binary **by focusing on physical sexual characteristics and the nature of the violation rather than the gender of the perpetrator or victim.** Notably, s.23 of the Gender Recognition Act 2015 prevents the fact that the State has issued a gender recognition certificate to a person from operating as a defence to a gender-specific sexual offence.⁴³ Likewise, s.23(4) stipulates “[a] part of the body surgically constructed (in particular through gender assignment surgery) is the same, for the purposes of a sexual offence, as a part of the body not so surgically constructed.” Thus, the law already acknowledges that certain gender-specific sexual offences can be committed by and against transgender people notwithstanding their legally recognised preferred gender. A similar saver should be possible in the case of people who identify as non-binary.

- Notably, additional to the offence of rape under s.2 discussed above, there is an offence of rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990. Section 4 criminalises a sexual assault⁴⁴ that includes “(a) penetration (however slight) of the anus or mouth by the penis, or (b) penetration (however slight) of the vagina by any object held or manipulated by another person.” In respect of (a) it is clear that the victim may be of either sex. In relation to (b) the perpetrator may also be

⁴¹ To be guilty of rape, the man must know that the woman does not consent, or must be reckless as to whether she consents or not.

⁴² Punishment of Incest Act 1908. Specifically, the Act prohibits sexual intercourse between a man and a woman whom he knows to be his mother, sister, daughter or granddaughter. The offence applies regardless as to whether the female relative consents. The female relative may also be guilty of an offence if she is aged 17 or over and consents to an act of sexual intercourse with a man she knows to be her father, grandfather, brother, or son.

⁴³ S.23(1) of the 2015 Act states “Where (apart from this subsection) a relevant gender-specific sexual offence could be committed or attempted only if the gender of the person to whom a gender recognition certificate is issued were not the preferred gender, the fact that the person’s gender has become the preferred gender does not prevent the sexual offence being committed or attempted.

⁴⁴ This presupposes that the act in question, to be an offence, must generally be carried out without the consent of the victim (unless, possibly, the act causes harm or serious bodily harm).

of either sex. In the case of (a) penetration must be by the penis and in relation to (b) penetration must be of the vagina, though the Act does not expressly refer to the sex/gender of either the perpetrator or victim. **The focus is on physical sex characteristics rather than gender.**

- While laws concerning the age of consent for sexual acts generally apply equally to persons and children regardless of sex, s.5 of the Criminal Law (Sexual Offences) Act 2006 creates an exemption in favour of females under the age of 17. A female aged below 17 commits no offence where she engages in voluntary sexual intercourse with a male under the age of 17 (though the State may still prosecute him). The Supreme Court has upheld this exemption as constitutional on the basis that it protects young females who risk becoming pregnant after sexual intercourse, a risk that males do not face.⁴⁵ The law could easily address this concern in the context of people who are of non-binary gender by focussing on the capacity to become pregnant rather than the gender of the person.
- On its face, family law legislation is generally equally applicable to men and women, though the law formally treats unmarried fathers differently from unmarried mothers in the context of guardianship of children. The ground of adultery (one of the grounds for judicial separation) and the concept of consummation⁴⁶ both require an act of sexual intercourse between a man and woman.
- Gender is also legally relevant in the context of pregnancy. Maternity leave, benefits and protections are generally available only to pregnant woman/birth mothers (the gestational mother of the child)⁴⁷ though where a mother passes away during or within a set period after the birth, a father may take over the entitlement to leave.⁴⁸ The Protection of Life During Pregnancy Act 2013 refers throughout to a “pregnant woman”, and

⁴⁵ *MD (A minor) v. Ireland & Ors* [2010] IEHC 101, [2012] 1 IR 697; see also *MD v Ireland*, 5th section, ECtHR, Application No. 50936/12, 16 September 2014

⁴⁶ Inability to consummate a marriage renders it voidable.

⁴⁷ See Case C-363/12, *Z v A Government Department*, CJEU (Grand Chamber), 18 March 2014; Equality Tribunal, DEC-E2014-050, 9 July 2014.

⁴⁸ Maternity Protection Acts 1994 and 2004. See, especially, ss. 7 and 16. S.7(2) states “References in this Part to an employee are references to a female employee only.” See also the Maternity Protection (Health and Safety Leave Remuneration) Regulations, SI 20/1995.

defines 'woman' as "a female person of any age". This is potentially problematic in that the Gender Recognition Act 2015 presupposes that the law may treat a person born physically female as a male following legal gender recognition, without the necessity of surgical intervention. This means that a person with the capacity to become pregnant and to give birth may not be legally female. Thus, in the case of a pregnancy that threatens his life, the 2013 Act could potentially deny a pregnant transgender male even the limited protection that the Act offers to pregnant women. The focus of such laws is the protection of pregnant people and the unborn. The State could adjust these laws to address the situation of people with a non-binary identity and transgender males **by referring to people by reference to the fact of pregnancy rather than the gender or sex of the pregnant person.**

- In practice, prisons, most public bathrooms, and many schools are gender segregated.

These areas of law will require careful consideration if the law is to facilitate a non-binary gender option. Nonetheless, given that so much of the law is already, on its face, applicable to all regardless of gender, and ought to apply equally to males and females, there should be comparatively little difficulty in accommodating a non-binary option in law. In the small number of areas where gender is legally determinative, the State may make legislative adjustments to accommodate the situation of non-binary people. This certainly would require careful consideration of a range of laws, but the challenges of accommodating a non-binary identity in Irish law are surmountable. Critically, the exceptions should not drive the rule: the fact that gender is formally relevant in a small number of contexts should not prevent legal recognition of non-binary identities.

C.3. Necessity for gender markers

This raises a wider question as to whether identity documents such as birth certificates require a gender marker at all. Driving licences and other identifying documentation do not have a gender marker. Careful consideration should be given to the question as to whether and why gender markers are necessary in

official records and identifying documentation. It is arguable that, if gender is generally not legally relevant, there is little need to record a person's gender except in certain limited contexts. Eliminating gender markers where possible would go a long way towards accommodating the concerns of people who are gender non-binary.

D. People who are intersex

D.1. Civil Registration Act: Birth Registration

The Civil Registration Act 2004, s.19, requires that parents register the birth of their child in the Register of Births within 3 months of the date of birth. In *Foy v An tArd Chláraitheoir (No. 1)* McKechnie J said of the Registration of Births Act 1996:

“...these two requirements as to sex and name continue to form part of the mandatory notation in respect of every birth. The sex to be specified, notwithstanding the absence of the words “male” and “female” from the Schedule to the Act of 1996, must be either that of “male” or “female”, there being no suggestion that it could be otherwise. So in the execution of his duties and responsibilities, the Registrar must, as of the date of birth, record the sex of the new-born child and must do so as either being male or female.... There is no scope within this framework for any other type of original entry or for leaving columns 3 and 4 without an entry. Therefore every registrar is duty bound to make the required entry, so as to reflect the relevant particulars material at the date of birth.”⁴⁹

Amongst the particulars that parents that must supply to the registrar is the sex of the child. Where a child is intersex, the sex of the child may not be clear. The imperative to record the sex of the child (as well as social factors) may place pressure on parents and doctors to make a call on the child's sex, when in fact it may be more prudent to wait and see how the child's gender identity develops over time. With this in mind, it may be useful to amend the Civil Registration Act to allow breathing space to determine the child's sex and to register a child's sex as indeterminate or as third gender (with provision for amendment at a future date, in line with the child's wishes). Notably, in both Malta and Germany, where a child is intersex, there is a facility to leave the child's gender marker on the birth

⁴⁹ *Foy v An tArd Chláraitheoir (No. 1)*, High Court, 9 July 2002 at paras.110-111. There is no reason to believe that the same principles do not apply in the case of the Civil Registration Act 2004.

register blank (or mark it as indeterminate) until a later date. If this option is taken, it would be prudent to consult with people who are intersex on the appropriate terminology to use.

D.2. Ban on unnecessary sex reassignment surgery on non-consenting intersex minors

The social anxiety to establish the sex of an intersex child leads, in some cases, to early, medically unnecessary operations being carried out to ‘assign’ a physical sex to the child. Notably, section 14 of the Maltese Gender Identity, Gender Expression and Sex Characteristics Act 2015⁵⁰ stipulates that medical practitioners and other professionals shall not perform sex assignment treatment and/or surgical intervention on the sex characteristics of a minor where doctors can postpone such treatment or intervention until the child is old enough to give informed consent. In other words, if such treatment is not medically necessary, doctors may not perform such surgery until the child can decide for himself or herself whether he or she wishes to undergo such surgery or treatment. Maltese law does not permit sex assignment surgery for purely social or cosmetic reasons without the child’s consent. Ireland should take a similar approach. The law should not permit such surgery until the child is old enough to decide for himself or herself, and then only with the child’s consent.

E. Other matters

E.1 Privacy

The 2015 Act, at several points, underlines the importance of respecting the privacy of the applicant for a gender recognition certificate (GRC). In practice, however, one significant lacuna arises. Where an applicant applies for a GRC, the Department of Employment Affairs and Social Protection requires that, to effect a change of name, the person must present evidence of ‘use and repute’ over two years in respect of the name⁵¹ or, in the alternative, present a deed poll that the applicant has enrolled with the High Court. The Act does not in fact contain these requirements; these are part of the general law on name changes. The enrolling

⁵⁰ (Law XI of 2015)

⁵¹ <https://www.welfare.ie/en/Pages/GRC1.aspx>

of a deed poll with the High Court is highly problematic as details of the enrolled deed polls are publicly accessible and published online. Members of the public may therefore easily identify people who are transgender by comparing the old and new first names in the published list. This breaches the privacy of the applicant, and should not be permitted. It should be possible instead for the statutory declaration required of the applicant under the 2015 Act to effect the desired name change.

E.2. Hate crime and hate speech laws

People who are transgender and intersex often experience heightened risks of violence, abuse and harassment, in the public sphere, in the workplace and in private. Where a person commits an offence that is motivated by hatred against people who are transgender or intersex, statute law makes no express provision for a court to consider that motivation in sentencing. (As an example of such legislation, see, for instance, Scotland's Offences (Aggravated by Prejudice) Act 2010). Likewise, in relation to hate speech that is directed towards people who are transgender and intersex, no specific protection exists. The Prohibition of Incitement to Hatred Act 1989 penalises public speech that incites to hatred against a group of people on grounds of (inter alia) sexual orientation, race, religion and membership of the Traveller Community, but *not* gender, gender identity or gender expression. Given the particularly vulnerable position of transgender and intersex people, the Oireachtas should extend the 1989 Act accordingly.

E.3 Equality Laws: Express and comprehensive protection

Interpreted in light of European Union Law, Irish equality laws⁵² protect people who intend to undergo or have undergone gender reassignment from discrimination arising from such gender reassignment.⁵³ Such protection also applies to people who are perceived as having undergone gender reassignment

⁵² Employment Equality Acts 1998-2015 and Equal Status Acts 2000-2015.

⁵³ Gender Recast Directive 2006/54/EC, Recital 3; C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143; C -243/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585; *Hannon v First Direct Logistics* Equality Tribunal DEC-E2011-066, March 29, 2011; *O'Byrne v AIB* Equality Tribunal DEC-ES/2012/070.

(even if they have not or do not intend to do so) as well as people associated with those who intend to undergo or have undergone such reassignment. For this purpose, discrimination on grounds of gender reassignment is treated in law as gender discrimination.

It is unclear whether 'gender reassignment' includes a social as well as a physical transition (though it is arguable that it does). The reference to 'gender reassignment' in the EU case law gives rise to some uncertainty as to whether people who are transgender but who do not intend to 'transition' are protected under EU and Irish law. It is unclear, also, whether people who are intersex are protected. The better view may be that a wide view of gender should be taken, and that the Court of Justice of the European Union would adopt an extensive approach, if called upon to clarify this point. Nonetheless, it is submitted that Irish law should be amended to confirm explicitly that all people who are transgender and intersex are protected from discrimination under equality laws. While the better view may be that existing equality laws may be interpreted as providing wide protection, the point should be clarified expressly so as to avoid any gap in protection. The law should expressly and explicitly protect all people from discrimination, regardless of gender identity, gender expression or sex characteristics.

Maynooth, 5th February 2018