



**Department of Employment Affairs and Social Protection:
Review of the Gender Recognition Act 2015**

Submission by the Ombudsman for Children's Office

5 February 2018

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Recommendations of the Ombudsman for Children's Office

Children's Rights Standards

- In light of the State's obligations under the UN Convention on the Rights of the Child (UNCRC), the European Convention on Human Rights, and Article 42A of the Constitution, the current review of the 2015 Act and decisions emanating from it in relation to children and young people under 18 need to be underpinned and driven by a commitment to fulfilling children's rights and key children's rights principles, in particular the principles of non-discrimination, treating the best interests of the child as a paramount consideration, and hearing and affording due weight to the views of the child in all actions and decisions affecting them.
- In accordance with Article 12 of the UNCRC, the current review should take due account of the views of children and young people under the age of 18 who are affected by the provisions of, and existing lacunae in, the 2015 Act.

Arrangements for Children aged 16 to 17 years

- Young people who have reached the age of 16 should be able to apply for legal recognition of their preferred gender on their own initiative.
- The onerous mechanism in place for 16 and 17 year olds seeking to obtain a Gender Recognition Certificate, as well as the inappropriate requirement for medical approval prior to obtaining a Certificate, should be removed from the 2015 Act. 16 and 17 year olds should be enabled to apply for gender recognition in the same way as adults aged 18 and over.

Arrangements for Children under 16 years

- Provision should be made to enable parents or guardians to make an application for a Gender Recognition Certificate on behalf of their children aged under 16 years.
- Consideration should be given to whether it would be sufficient to have the consent of one parent/guardian rather than both parents/guardians (if there are two) in order for a parent/guardian to make an application for a Gender Recognition Certificate on behalf of a child aged under 16 years.

- Appropriate legislative provision should be made to address circumstances where one parent/guardian wishes to make an application for a Gender Recognition Certificate on behalf of their child under 16 years and the other parent/guardian does not support such an application being made.
- Provisions made to enable parents or guardians to apply for a Gender Recognition Certificate for their children under 16 years need to provide for a child-centred, accessible process.

Supports for Children and Young People

- Consideration should be given in the context of the current review of 2015 Act as to whether and, if so, how appropriate legislative underpinning could be given to the provision of suitable supports for children and young people under 18 years in relation to matters concerning their gender identity.

1. Introduction

The Gender Recognition Act 2015 (2015 Act) was enacted on 22 July 2015. The stated aim of this legislation is to recognise change of gender and to provide for Gender Recognition Certificates. Section 7(a) of the 2015 Act provides for a review of the 2015 Act to be held no later than two years following commencement of Section 7(a) of the 2015 Act.

The consultation process initiating the review of the 2015 Act was launched on 8 January 2018. Taking into account that questions of identity go to the core of a person's dignity and that maintaining and respecting identity is a very serious matter, the Ombudsman for Children's Office (OCO) welcomes the commencement of this review and the opportunity it presents to strengthen the protection and fulfilment of the rights of children and young people under the age of 18 in respect of gender recognition.

The OCO provided advice on the General Scheme of the Gender Recognition Bill 2013 in October 2013. In this advice, we highlighted children's rights standards relevant to the issues of gender identity and gender recognition. We recommended at the time that provision should be made for children and young people under the age of eighteen years by:

- removing the then proposed criterion relating to minimum age, which would have prevented children and young people from being able to obtain legal recognition of their preferred gender;
- enabling parents or guardians to make an application for a Gender Recognition Certificate on behalf of their children;
- enabling young people who have reached the age of 16 to apply for legal recognition of their preferred gender on their own initiative.

A copy of the OCO's submission on the 2013 General Scheme is enclosed with this current submission. We note that the OCO's recommendations at the time were not provided for in full in the subsequent legislation enacted by the Oireachtas.

The OCO has prepared this submission in response to an invitation from the Department of Employment Affairs and Social Protection dated 15 January 2018 and pursuant to Section 7(4) of the Ombudsman for Children Act 2002 (as amended), which provides for the Ombudsman for Children to advise on any matter relating to the rights and welfare of children, including legislation affecting children.

In accordance with the Ombudsman for Children's statutory function to promote the rights and welfare of children, the overall aim of this submission is to highlight a number of ways in which the current legislation could be strengthened to more fully respect, protect and fulfil the rights of transgender, non-binary and intersex children and young people in Ireland.

2. Children’s Rights Standards

The OCO set out the human rights standards relevant to the question of gender identity and obtaining legal recognition of a child’s or young person’s preferred gender in our previous advice on the General Scheme of the Gender Recognition Bill 2013.¹ Among the matters that we referenced in this regard were relevant provisions of the UN Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR) as well as international legal developments on gender recognition for young people.

Since the enactment of the 2015 Act, there have been a number of notable developments. At an international level, for example, the UN Committee on the Rights of the Child in its 2016 General Comment on the implementation of the rights of the child during adolescence identified lesbian, gay, bisexual, transgender and intersex adolescents (LGBTI) as a group of adolescents requiring particular attention from States to help them realise their rights. In the same General Comment, the Committee strongly endorsed the right of adolescents to respect for their emerging autonomy.²

At national level, significant relevant developments include the insertion of Article 42A into the Irish Constitution in 2015, following the enactment of the Thirty-First Amendment of the Constitution (Children) Act 2012. Article 42A strengthens the visibility and recognition of children’s rights at a constitutional level. Article 42A.1 provides that the State “recognises and affirms” the natural and imprescriptible rights of “all” children and requires the State to “protect and vindicate” those rights “through its laws”, in so far as practicable. The OCO is of the view that it will be important for the current review of the 2015 Act to take appropriate account of Article 42A.1 given that it provides a strong articulation of the principle of non-discrimination and places a constitutional obligation on the State to protect and vindicate the rights of *all* children *through its laws*.

Articles 42A.4.1^o and 42A.4.2^o respectively require provision to be made by law for the best interests of the child to be treated as a paramount consideration and for the views of the child to be ascertained and given due weight in the context of certain court proceedings affecting children. Taking into account Ireland’s obligations under Article 3 (best interests of the child) and Article 12 of the UNCRC (the child’s right to be heard) and that legislation is a key vehicle for realising children’s rights, we are of the view that work to develop, review and amend any legislation affecting children, including the current review of the 2015 Act,

¹ Ombudsman for Children’s Office, *Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill, October 2013*, pp7-13. Available at <https://www.oco.ie/library/advice-general-scheme-gender-recognition-bill-2013/>

² UN Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20, at pp. 9-10.

should entail appropriate provision being made in relation to these two core children's rights principles.

Recommendations:

- **In light of the State's obligations under the UN Convention on the Rights of the Child (UNCRC), the European Convention on Human Rights, and Article 42A of the Constitution, the current review of the 2015 Act and decisions emanating from it in relation to children and young people under 18 need to be underpinned and driven by a commitment to fulfilling children's rights and key children's rights principles, in particular the principles of non-discrimination, treating the best interests of the child as a paramount consideration, and hearing and affording due weight to the views of the child in all actions and decisions affecting them.**
- **In accordance with Article 12 of the UNCRC, the current review should take due account of the views of children and young people under the age of 18 who are affected by the provisions of, and existing lacunae in, the 2015 Act.**

3. Arrangements for children aged 16 to 17 years

Sections 10(1)(f)(ii) and 10(1)(f)(iii) of the 2015 Act allow an adult to self-declare their preferred gender by confirming they have a settled and solemn intention of living in the preferred gender for the rest of their life and they understand the consequences of their application.

By contrast, Section 12(1) of the 2015 Act provides that the Minister may only consider an application for a gender recognition certificate or for revocation of a gender recognition certificate made on behalf of a 16 or 17 year old if the Minister is furnished with a court order. In addition to requiring a 16 or 17 year old to apply through a parent or next friend to the Circuit Family Court for an exemption from the standard requirement of a minimum age for gender recognition of 18 years, the 2015 Act requires the consent, as appropriate, of the young person's parent(s) or guardian(s) (Section 12(4)(a)) as well as two medical reports (Section 12(4)(b) of the Act).

The OCO has previously raised concerns about the onerous steps that must be taken by 16 and 17 year olds to obtain a Gender Recognition Certificate, as well as the inappropriate requirement for medical approval prior to obtaining a Certificate.³

³ Ombudsman for Children's Office (April 2015), *Report of the Ombudsman for Children to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland's consolidated Third and Fourth Report to the Committee*, at p.19. Available at <https://www.oco.ie/library/report-un-committee-rights-child-examination-irelands-consolidated-third-fourth-report-committee/>. See also Ombudsman for Children's Office (December 2015), *Supplementary Submission by the Ombudsman for Children to the UN Committee on the*

The OCO continues to hold the view, which we articulated in our 2013 advice, that young people who have reached the age of 16 should be enabled to apply for legal recognition of their preferred gender on their own initiative.

We also believe that the onerous mechanism and inappropriate requirement for medical approval currently provided for in respect of 16 and 17 years olds under the 2015 Act should be removed and that 16 and 17 year olds should be enabled to apply for gender recognition in the same way as adults aged 18 years and over. As highlighted in our advice on the General Scheme of the 2013 Bill, there are young people over the age of 16 who can and do seek medical services as part of the transition process and, under Irish law, they can consent to any such treatment as effectively as a person over the age of 18. In this regard, Section 23(1) of the Non-Fatal Offences against the Person Act 1997 states that the consent of a minor who has obtained the age of 16 years shall be as effective as it would be if they were of full age in relation to surgical, medical or dental treatment which would otherwise amount to a trespass in the absence of consent. The different approaches adopted by Section 12 of the 2015 Act and Section 23(1) of the Non-Fatal Offences against the Person Act 1997 give rise to an illogical situation whereby the State permits a 16 or 17 year old to receive the relevant medical treatment on the strength of their own consent yet considers that consent insufficient to obtain legal recognition of their preferred gender and the outcome of the medical treatment.

Recommendations:

- **Young people who have reached the age of 16 should be able to apply for legal recognition of their preferred gender on their own initiative.**
- **The onerous mechanism in place for 16 and 17 year olds seeking to obtain a Gender Recognition Certificate, as well as the inappropriate requirement for medical approval prior to obtaining a Certificate, should be removed from the 2015 Act. 16 and 17 year olds should be enabled to apply for gender recognition in the same way as adults aged 18 and over.**

4. Arrangements for children aged under 16 years

The 2015 Act is silent on the matter of gender recognition for children aged under 16 years. In our report to the UN Committee on the Rights of the Child in 2015, we expressed concern that children under 16 years of age are entirely excluded from the ambit of the legislation,

even where there is parental consent for obtaining a Gender Recognition Certificate.⁴ In this regard, we note that this exclusion was more recently identified by young people themselves as one of the limitations of the 2015 Act.⁵

From a children's rights perspective, taking a solely age-based approach to legislating for when it will be lawful for a child to engage in a particular activity is not optimal since it fails to take adequate account of children's evolving capacities. As regards gender recognition for children under 16 years of age, it would arguably be preferable to provide for a process whereby a child under 16 years of age could apply for a gender recognition certificate on their own initiative, having due regard to their age and evolving capacities. However, as the OCO noted in our advice on the General Scheme of the Gender Recognition Bill 2013, there has been no clear legal authority in this jurisdiction as to whether children at some point prior to adulthood become competent and entitled to make decisions themselves in relation to medical treatment. On this basis, we concluded that the possibility of young people applying on their own initiative for legal recognition of their preferred gender would logically be confined to those who could consent in law to medical treatment, i.e. those over the age of 16.⁶

Correspondingly, the OCO is of the view that provision should be made to enable parents or guardians to make an application for a Gender Recognition Certificate on behalf of their children aged under 16. In this regard, we suggest that it could be constructive if the nature of such a provision was informed by the understanding of the rights and duties of parents/guardians vis à vis their children's rights articulated under Article 5 of the UNCRC. In accordance with the UNCRC's recognition of children as subjects of rights, Article 5 provides that State Parties to the UNCRC "shall respect the responsibilities, rights and duties of parents, ... legal guardians or other persons legally responsible for the child, to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise *by the child* of the rights recognised in the present Convention" (emphasis added).

⁴ Ombudsman for Children's Office (April 2015), *Report of the Ombudsman for Children to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland's consolidated Third and Fourth Report to the Committee*, at p.19. Available at <https://www.oco.ie/library/report-un-committee-rights-child-examination-irelands-consolidated-third-fourth-report-committee/>. See also Ombudsman for Children's Office (December 2015), *Supplementary Submission by the Ombudsman for Children to the UN Committee on the Rights of the Child further to the Replies of Ireland to the Committee's List of Issues concerning Ireland's combined Third and Fourth Periodic Reports*, at p.5. Available at http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/IRL/INT_CRC_IFN_IRL_22585_E.pdf

⁵ Department of Children and Youth Affairs (December 2017), *LGBTI+ National Youth Strategy. Report of the Consultations with Young People in Ireland*, p.34. Available at <https://www.dcy.gov.ie/documents/publications/20171208LGBTIConsultationStrategyReport.pdf>

⁶ In reaching this conclusion, the OCO was not and is not supportive of a medicalised model being applied to the matter of gender recognition. Gender recognition is not a medical matter and the use of a medicalised model is inconsistent with a rights-based approach to gender recognition.

Furthermore, taking into account the State's obligations under Article 3 and Article 12 of the UNCRC as well as the provisions made under Article 42A.4.1^o and Article 42A.4.2^o of the Constitution, we would suggest that attention should be given to how appropriate provision might be made for the best interests of the child to be considered and the views of the child to be heard and afforded due weight, in accordance with their age and maturity, in circumstances where the child's parent(s) or guardian(s) would make an application for a Gender Recognition Certificate on their child's behalf.

Should provision be made to enable parents or guardians to make an application for a Gender Recognition Certificate on behalf of their children aged under 16, the question arises as to whether it would be sufficient to have the consent of one rather than both of the child's parents or guardians (if there are two) in order for the parent or guardian to make an application for a Gender Recognition Certificate. In this regard, the OCO is cognisant that there may be occasions when a child's parent(s) or guardian(s) may not agree on whether or not such an application should be made. Correspondingly, we are of the view that consideration needs to be given in the context of the current review of the 2015 Act to making appropriate legislative provision for such circumstances. While this specific situation has never been tested before the Courts, we would suggest that it may be helpful to consider the case of *Cosgrove v. Ireland*⁷ where it was found that it is not open to the State to issue a passport to one guardian of a child where the other guardian objects, unless a Court Order has authorised such a course of action. Section 14(3) of the Passport Act 2008 (as amended in 2015) now provides for the procedures to be undertaken for the issue of a passport to a child without the consent of one of the guardians of a child.

If provision is made for parents or guardians to apply for a Gender Recognition Certificate on the behalf of their children under 16 years, care will need to be taken to ensure that a child-centred, accessible process is provided for, which is not unduly onerous and which does entail medicalising gender recognition.

Recommendations:

- **Provision should be made to enable parents or guardians to make an application for a Gender Recognition Certificate on behalf of their children aged under 16 years.**
- **Consideration should be given to whether it would be sufficient to have the consent of one parent/guardian rather than both parents/guardians (if there are two) in order for a parent/guardian to make an application for a Gender Recognition Certificate on behalf of a child aged under 16 years.**
- **Appropriate legislative provision should be made to address circumstances where one parent/guardian wishes to make an application for a Gender Recognition**

⁷ [1982] ILRM48

Certificate on behalf of their child under 16 years and the other parent/guardian does not support such an application being made.

- **Provisions made to enable parents or guardians to apply for a Gender Recognition Certificate for their children under 16 years need to provide for a child-centred, accessible process.**

5. Supports for Children and Young People

As noted in the introduction to this submission, questions of identity go to the core of a person's dignity and the matter of maintaining and respecting identity is a very serious one indeed. It is vital, therefore, that suitable support services are available for children and young people under the age of 18 to enable them to engage with matters relating to their gender identity in a safe and enabling manner. Correspondingly, the OCO suggests that it would be constructive for consideration to be given in the context of the current review of the 2015 Act as to whether and, if so, how appropriate legislative underpinning could be given to the provision of suitable supports to children and young people in this regard.

- **Consideration should be given in the context of the current review of 2015 Act as to whether and, if so, how appropriate legislative underpinning could be given to the provision of suitable supports for children and young people under 18 years in relation to matters concerning their gender identity.**