



**Submission to the Department of Employment Affairs and Social Protection as part of the
Review of the Gender Recognition Act 2015**

5 February 2018

Introduction

Amnesty International Ireland (AI) welcomes the consultation process currently being undertaken by the Department of Employment Affairs and Social Protection as part of the review of the Gender Recognition Act 2015.

AI would like to take this opportunity to outline its concerns regarding the areas specified by the Minister for the consultation process, covering areas addressed in and beyond its initial submission on the then Bill; and looks forward to engaging with the Department and the Review Group in the course of the consultation/review process.

a. Arrangements for children aged 16 to 17 years

AI is concerned that Article 9(2)(a) of the Act does not meet the human rights standards of being quick, transparent and accessible. The provisions which must be met in order for a 16 or 17 year-old person's gender to be legally recognised are onerous, and a blanket age restriction is not in line with international standards on the rights of the child.

The lack of gender recognition may harm transgender or intersex children or adolescents in a number of ways, depending on their individual circumstances. For example, denial of recognition would raise particular human rights concerns for certain categories of children, including those in single-sex schools, or children in detention settings.

AI is concerned the Act excludes anyone aged 16 to 17 years who cannot obtain parental consent (which is particularly demanding given the increased potential for discrimination against transgender teenagers), and anyone whose primary treating medical practitioner would not or does not feel knowledgeable enough to sign off on the decision. The additional requirement for a certificate from an endocrinologist or psychiatrist who has no connection with the child makes the process even more onerous.

The UN Convention on the Rights of the Child (CRC), to which Ireland is a state party, requires states to respect the right of children to be heard and to duly take into account their views. A further key requirement of the CRC is that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.¹ The UN Committee on the Rights of the Child has highlighted that the identity of the child includes also characteristics such as sexual orientation and gender identity and that “[t]he right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests”.²

Intimately linked to this is the right of children to express their views freely and to have those views taken into account in matters affecting them.³ As the Committee on the Rights of the Child has noted, “assessment of a child’s best interests must include respect for the child’s right to express his or her views freely and due weight given to said views in all matters affecting the child”.⁴

The right of children to express their own views regarding what is in their best interests is especially important regarding older children, in light of their evolving capacities. As the Committee on the Rights of the Child has emphasised, “[t]he child’s views must be given due weight, whenever the child is capable of forming her or his own views. In other words, as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them”.⁵

Children who seek legal gender recognition should not such face additional barriers to doing so. AI urges the removal of the blanket age restriction and the onerous provisions which must be met in order for a 16 or 17-year-old person’s gender to be legally recognised. AI further urges the removal of the requirement to provide a medical practitioner’s certificate in order for persons between 16 and 17-years-old to obtain legal gender recognition.

b. Arrangements for children aged under 16 years

As stated above, AI remains concerned at the blanket age restriction, in that the Act makes no allowance for persons under the age of 16 years to legally change gender, and that the absence of such provisions will have adverse consequences for the human rights of transgender and intersex children and adolescents.

Absolute denial of legal gender recognition to individuals under a given age is not consistent with existing international standards regarding the rights of children. Legal gender recognition should be accessible to children on the basis of their best interests, and taking into account their evolving capacities.

Amnesty International urges that this restriction be reconsidered in light of Ireland’s requirement as a state party to the CRC.

¹ Convention on the Rights of the Child, Article 3.1

² Committee on the Rights of the Child, General Comment 14: The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), para. 55 (2013)

³ Convention on the Rights of the Child, Article 12.1

⁴ Committee on the Rights of the Child, General Comment 14, para. 43 (2013)

⁵ Committee on the Rights of the Child, General Comment 12, para. 85 (2009)

Many of the same considerations apply to arrangements for children aged under 16 years as apply to 16 and 17 year-olds. The CRC requires states to treat the best interests of the child as a primary consideration in decisions affecting the child. Children seeking legal recognition of their gender identity must be given the chance to express their views regarding what constitutes their own best interest and have these views taken into account according to their evolving capacities. An individualised assessment of the situation of each child would therefore be more compliant with the requirements of the CRC than the current absolute restriction.

AI urges the Government to ensure that children will be given the possibility to obtain legal gender recognition taking into account their best interests, the child's freely expressed views regarding their own best interests, and in light of their evolving capacities. AI would encourage a case-by-case approach in which the child's views can, as highlighted by the UN Committee on the Rights of the Child, be "given due weight, whenever the child is capable of forming her or his own views".⁶

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

AI recommends that the Act be amended to address the lack of any process to allow a person who identifies as neither male nor female (e.g. non-binary persons) to obtain legal recognition of their gender identity. AI considers that legal gender recognition is essential in order to ensure the right of non-binary individuals to recognition before the law.

AI recommends allowing individuals who identify as neither male nor female to obtain legal recognition of their gender identity, including a third gender option for those who wish it. Where an individual has yet to reach the age of 18 years, the same considerations should apply as outlined in the previous sections.

d. Arrangements for intersex people

AI notes the concerns raised by the United Nations Committee on the Rights of the Child at cases of medically unnecessary surgeries and other procedures on intersex children.⁷ AI considers that legal gender recognition is essential in order to ensure the right of intersex

⁶ General Comment No. 12, para. 85

⁷ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland: 39. The Committee notes as positive the adoption of the Gender Recognition Act of 2015 by the State party. However, the Committee remains concerned about cases of medically unnecessary surgeries and other procedures on intersex children before they are able to provide their informed consent, which often entail irreversible consequences and can cause severe physical and psychological suffering, and the lack of redress and compensation in such cases.

40. The Committee recommends that the State party:

(a) Ensure that no-one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to children concerned, and provide families with intersex children with adequate counselling and support;

(b) Undertake investigation of incidents of surgical and other medical treatment of intersex children without informed consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation; and,

(c) Educate and train medical and psychological professionals on the range of sexual, and related biological and physical, diversity and on the consequences of unnecessary surgical and other medical interventions for intersex children.

individuals and individuals with variations in sex characteristics to recognition before the law. AI recommends that the Government:

- Ensure that individuals with variations in sex characteristics who seek gender reaffirming treatment in accordance with their gender identity can access it.
- Ensure that individuals with variations of sex characteristics should be able to access legal recognition of their gender through a quick, transparent, and accessible process. Biological characteristics or medical diagnoses should not be used to justify additional barriers to accessing legal gender recognition.
- Allow individuals who identify as a gender that is neither male nor female to obtain official papers which reflect their gender identity.
- Ensures that individuals who were assigned to a sex at birth that does not reflect their gender identity are able to obtain documentation that reflects their gender identity.
- Ensure that parents are given sufficient time to declare and/or change the gender marker of their infant when the child is intersex.
- Ensure that individuals who identify as neither male nor female are able to obtain official documents provided by other institutions, such as certificates of education, that reflect their gender identity, without undue cost or time burdens.

e. Any other relevant issues, including issues relating to the operation of the current legislative provisions.

- **Discrimination:** As a general principle, AI calls on all states to ensure that all anti-discrimination legislation explicitly and specifically includes the prohibition of discrimination on the grounds of gender identity and expression and of sex characteristics.
- **Right to Privacy:** AI calls on the Government to ensure the right to privacy for transgender and intersex individuals.⁸ The rights to private life and to recognition before the law may be violated by states where procedures on legal gender recognition exist but are overly lengthy and/or contain mandatory criteria to be fulfilled that in effect exclude some groups of transgender people. The Government should ensure that the process for issuing documentation reflecting an individual's gender identity respects their right to privacy, and that all information concerning changes of legal name and gender is kept confidential; such information should not generally be accessible to third parties without the explicit consent of the persons concerned.
- **Healthcare and related services:** While it is important that the legal framework for legal gender recognition is human rights compliant, it is also critical that the appropriate healthcare and related services required for people to be able to effectively exercise and enjoy their rights are available to the highest attainable standard. This means, for example, that transgender individuals have access to gender reassignment treatment if

⁸ The right to privacy is protected by international and regional human rights standards including the International Covenant on Civil and Political Rights (ICCPR, Article 17) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Article 8).

they wish to undergo such treatment, without undue bureaucratic, financial, medical, social or political interference or delays.

- **Medically unnecessary surgeries and other procedures on intersex children:** As a general principle, AI calls on all states to:
 - Develop and implement a rights-based healthcare protocol for individuals with variations of sex characteristics to guarantee their bodily integrity, autonomy and self-determination and to ensure that no child is subjected to non-emergency, invasive and irreversible surgery or treatment with harmful effects.
 - Take steps to regulate healthcare providers with the intent of postponing non-emergency, invasive and irreversible genital surgery or hormone treatment on infants and children with variations in sex characteristics until they are able to meaningfully participate in decision making and give their informed consent, in line with the principle of evolving capacities of children and adolescents.
 - Ensure that long-term psychological support is available to families and children with variations in sex characteristics.
 - Ensure that individuals who have undergone surgeries are able to access long-term psychological support
 - Ensure that guidelines on the treatment of individuals with variations in sex characteristics are developed with the active participation of intersex organizations, activists, parents and peer support groups, and ensure accountability mechanisms. The views of children with variations of sex characteristics should be taken into account when developing these policies.
 - Ensure that medical professionals receive education and training on variations in sex characteristics.
 - Ensure that disaggregated data is collected on diagnoses of variations of sex characteristics, and operations linked to these diagnoses, that are taking place annually.
- **Ongoing Review:** AI recommends ongoing review of the Act within specified time periods, and that Article 7 of the Act be amended to provide for such.

Conclusion

AI's position is that all states must ensure that transgender and intersex people can obtain legal recognition of their gender – including issuing all documents with correct gender markers and changing the gender-related information kept in state-run registries – through a quick, accessible and transparent procedure in accordance with the individual's own sense of their gender identity, while preserving their right to privacy. AI recommends that the Government abolish blanket age restrictions to legal gender recognition procedures and ensure that legal recognition is accessible to minors, taking into account the principle of evolving capacities of children.

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