



Fine Gael LGBT

Submission to the Review of the Gender Recognition Act 2015

5 February 2018

Fine Gael LGBT welcomes the establishment in 2017 of the Review of the Gender Recognition Act 2015 by Minister for Employment Affairs and Social Protection Regina Doherty TD. The Review fulfils a commitment made by the Fine Gael led Coalition Government in 2015 and provided in the Act to review the operation of the legislation two years after enactment.

The terms of reference for the review has set out five areas for consideration.

- Arrangements for children aged 16 to 17 years;
- Arrangements for children aged under 16 years;
- Arrangements for persons who identify as neither male nor female (e.g. non-binary);
- Arrangements for intersex people;
- Any other relevant issues, including issues relating to the operation of the current legislative provisions.

1. Arrangements for children aged 16 to 17 years

The *Gender Recognition Act 2015* (hereafter “the Act”) provides a process which enables trans people over the age of 18 to change their legal gender marker through a process of self-determination. The Act also allows trans minors between the ages of 16 and 17 years of age to secure legal recognition of their gender. However, for 16- and 17-year-olds, the process of securing legal gender recognition is significantly more onerous than for adults. To qualify for a Gender Recognition Certificate, a trans young person must first obtain a court order guaranteeing parental consent together with two certificates from medical practitioners confirming that they are transitioning or have transitioned to their preferred gender.¹

Legal gender recognition should be distinguished from a medical transition. Formal recognition of young trans people should not be linked to medical interventions or certification. Decisions that young people make about their bodies is separate from having their true gender legally

¹ Gender Recognition Act 2015, s. 12 (1). Available:
<http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf>

recognised. It should be noted that the age of consent for medical procedures generally is 16, and a declaration required for a gender recognition certificate is not a medical procedure.

Five Council of Europe states expressly allow minors to legally transition – Ireland, Netherlands, Norway, Sweden and Malta.² In the Netherlands, Sweden and Norway, minors above 15 years can access recognition on the same term as adults.³ In Sweden⁴ and Norway⁵, young applicants with the support of parents or guardians can obtain recognition from 12 and 7 years respectively. Malta does not enforce a minimum age for gender recognition.⁶

Recommendations

Fine Gael LGBT calls on the Review Group to give due consideration to the following recommendations concerning 16 and 17-year-olds:

- Permit persons aged 16 and 17 years to self-determine their legal gender with no requirement for medical certification and no court order in line with international best practice.
- Allow a person who has reached the age of 16 to apply for legal recognition of their preferred gender without the need for parental consent, court order or medical certification.

² Transgender Europe, 'Trans Rights Europe Index 2016' (*Transgender Europe Website*, 10 May 2016) <<http://tgeu.org/wp-content/uploads/2016/05/trans-map-B-july2016.pdf>> accessed 14 October 2016.

³ Dutch Civil Code, art. 28.

⁴ Act for Change of Juridical Gender, s. 2.

⁵ Law Decisions 71, Law 46 (2015–2016), s. 4

⁶ Gender Identity, Gender Expression and Sex Characteristics Act 2015, s. 7.

2. Arrangements for children aged under 16 years

At present, legislation does not permit a person who has yet to attain the age of 16 to apply for legal gender recognition in Ireland.

In her 2013 advice on the General Scheme of the Gender Recognition Bill the Ombudsman for Children noted that, “including children and young people within the scope of the legislation would represent an affirmation from the State that is overdue. The importance of this dimension should not be underestimated.”⁷

The UN Committee on the Rights of the Child has highlighted that the identity of the child includes characteristics such as sexual orientation and gender identity, and that “[...] the right of the child to preserve his or her identity is guaranteed by the Convention (Article 8) and must be respected and taken into consideration in the assessment of the child’s best interests.”⁸

In November 2017, *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 (Yogyakarta +10)* were adopted. Principle 31 states:

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 ... [and that] ... Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics.⁹

The Principle also states that while a state continues to register sex or gender...*[n]o 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;*

Amnesty International have noted that the UN Convention on the Rights of the Child (CRC) requires states to respect the right of children to be heard and to duly take into account their views.¹⁰

⁷ Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013

⁸ 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 (Article 3, para. 1), para. 55, 2013.

⁹ The Yogyakarta Principles plus 10, Principle 31, Available <http://yogyakartaprinciples.org/principle-31-yp10/>

¹⁰ The state decides who I am: Lack of legal gender recognition for transgender people in Europe (2014) Amnesty International, London. Available: https://www.es.amnesty.org/uploads/media/The_state_decide_who_I_am_Febrero_2014.pdf

Recommendations

Fine Gael LGBT calls on the Review Group to give due consideration to the following recommendations concerning children aged under 16 years:

- Make provision by amendment to the Act to permit children aged under 16 years of age to secure legal recognition of gender by removing the criterion relating to minimum age.
- Ensure that parents/ surviving parent or guardian can make an application for a legal recognition of gender on behalf of their children.

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

An increasing number of trans people, including many young people, identify as neither male nor female. Terms such as gender non-binary and gender non-conforming are frequently used as self-descriptors while aviation authorities in Ireland and globally increasingly accept 'X' as a valid gender marker on official travel document, e.g. passports.

Provisions in the Act currently allow for change of gender only from female to male and from male to female. Where a person declares in the female gender the sex of that person will be listed as female and where a person declares as male gender the sex will be listed as male.¹¹ There is no provision in law for persons to declare in any other gender category.

Many states and federal jurisdictions throughout the world have introduced a third gender category for official documents. Jurisdictions where some form of legal gender recognition for a third gender is permissible include, New South Wales in Australia, Canada, Denmark, Germany, India, Malta, Nepal, New Zealand and Pakistan. In the United States of America, the states of California, New York, Oregon, and Washington, as well as Washington, DC, all permit the use of a third gender category.

Non-binary recognition was adopted in New South Wales in 2014 following the case of *Norrie v. New South Wales*. Although legal recognition of gender was based on a medical model of gender recognition, the court ruled that plaintiff Norrie was entitled to be recognised as neither male nor female. Norrie was recognised in the category of 'non-specific' sex.¹²

Australian passports also allow for 'X' markers in the gender category. The Australian Sex Discrimination Amendment 2013 further protects non-binary citizens by requiring the options on forms to identify as something other than male or female if gender is requested.¹³ Both

¹¹ Gender Recognition Act 2015, s.18(1)

¹² Brown, L & Brown, A (2014) *High Court recognises that "sex" in NSW may be other than male or female*. Available at: <https://www.hrlc.org.au/human-rights-case-summaries/high-court-recognises-that-sex-in-nsw-may-be-other-than-male-or-female>

¹³ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, sec. 43A*. Australia. Available at: <https://www.legislation.gov.au/Details/C2013A00098>

Canada and Malta have also approved recognition on passports. In Canada, the form for having 'X' on a passport does not require any supporting documentation, merely a declaration that the person would like to use that gender marker.¹⁴ In Malta, applicants for a passport marked with 'X' in the gender category may self-declare by simply submitting a form together with a notarised declaration.¹⁵ The International Civil Aviation Authority also allows M, F, or X as gender markers on passports.¹⁶

The statutory declaration in Gender Recognition Act requires an applicant who wishes to apply for a gender recognition¹⁷ a settled and solemn intention of living in the preferred gender for the rest of his or her life. This does not reflect the lived experience of gender non-conforming people who may express a sincere wish to identify with one gender at one stage in their life, while having an equally sincere wish to live in another gender, or none at all, at another stage in their life.

Recommendations

Fine Gael LGBT calls on the Review Group to give due consideration to the following recommendations concerning persons who identify as neither male nor female (e.g. non-binary):

- Allow for the recognition of a gender other than male or female in law.
- Amend legislation governing the issuing of passports to allow 'X' marker on passports.
- Amend the s.10(1)(f)(ii) of the Act to "a sincere wish to live in their preferred gender or with no assigned gender".
- Adopt as government policy that forms will not require applicants to answer a question on gender unless necessary to do so.

4. Arrangements for intersex people

No explicit reference is made in legislation to persons who are intersex. The lack of provision for children under 16 years of age to change their gender means that persons who are intersex and who may wish to correct a gender marker on official documentation is not entitled to do so.

In addition, persons presenting as intersex, particularly following birth and at a young age, are often subjected to unnecessary or inappropriate surgical intervention without the ability to consent. In 2015, the European Union Agency for Fundamental Rights (FRA) reported that 21 EU countries including Ireland carry out 'normalising' surgery on intersex children.¹⁸

¹⁴Government of Canada (2017) *Request for a travel document with 'X' in the sex field - Adult*. Available at: <https://www.canada.ca/content/dam/ircc/migration/ircc/english/passport/forms/pdf/pptc633e.pdf>

¹⁵ Pace, Y (2017) 'Malta introduces 'X' on passports, ID cards and work permits' Malta Today, 5th September.

¹⁶ OII Australia (2011) *On Australian Passports and 'X' for Sex*. Available at: <https://oii.org.au/14763/on-x-passports/>

¹⁷ Gender Recognition Act, Section s.10(1)(f)(ii).

¹⁸ European Union Agency for Fundamental Rights (2015) FRA Focus Paper: The Fundamental Rights Situation of Intersex People. Vienna p1. Available at: <http://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex-people>

Recommendations

Fine Gael LGBT calls on the Review Group to give due consideration to the following recommendations concerning intersex people:

- Take concrete steps to consult with the intersex community regarding their preferences in relation to type of recognition is needed.
- Introduce measures to prohibit the use of non-therapeutic genital ‘normalising’ surgeries.

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

There is no specific protection in discrimination law for trans people. While the gender ground has in the past been successfully used,¹⁹ it will not always be applicable, for example, to protect someone who is transitioning.

Section 7 of the Act allows for a review of the operation of the Act after two years.²⁰ Given the evolving nature of many of the issues outlined above, further opportunity for review should be incorporated into the Act as amended following the Review process.

Fine Gael LGBT calls on the Review Group to give due consideration to the following recommendation:

- Amend the Employment Equality Act 1998 and the Equal Status Act 2000 to include the discriminatory grounds of “gender identity” and “gender expression”.
- Amend the Gender Recognition Act to provide for additional review of the Act following a designated period.

¹⁹ *Hannon v First Direct Logistics*, Equality Tribunal, 29 March 2011.

²⁰ Gender Recognition Act 2015, s. 7

About Fine Gael LGBT

Fine Gael LGBT was established in April 2012 as an inclusive group for Fine Gael members who share a common goal of promoting full equality for lesbian, gay, bisexual and transgender people in our party, in our country and in our world.

Any member of Fine Gael can be a member of Fine Gael LGBT, regardless of orientation.

Mission

Fine Gael LGBT aims to:

- provide a welcome and inclusive forum for lesbian, gay, bisexual and transgender members of Fine Gael;
- promote equality within Fine Gael, including encouraging the adoption of equality policies as party and Government policy; and
- be a visible sign of the inclusivity and modernity of Fine Gael and encourage lesbian, gay, bisexual and transgender people to join and become active participants in our party.

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