Submission to the Gender Recognition Act Review Group

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Introduction

Over a period of months from 2013 to 2014, I undertook a piece of academic research aimed at creating a set of criteria by which gender recognition policies could be judged according to their efficacy for transgender people. The research, which took the form of a master's thesis (Field, 2014), was later used in lobbying efforts during the creation of the Gender Recognition Act (2015).

Ireland's performance on the 'policy scorecard' derived from my criteria is noteworthy. At the time the scorecard was created, Ireland was scoring 1 on a scale of 1 to +11 (higher is better), indicating a complete failure to account for the needs and experiences of trans people in Irish law and social policy. Yet, after the creation of a highly ambitious Gender Recognition Act, Ireland rocketed up the league table for these criteria. As I noted in an academic review of the policy change in 2015, the emancipatory, self-declaration model adopted in the legislation put Ireland at the forefront of upholding the rights of transgender people and made us a useful role model for other nations grappling with this element of law. In particular, it was noteworthy that Ireland went from having almost no trans rights in legislation to having a highly comprehensive gender recognition policy, with no transition period in between; this is very unusual in the history of progress on trans rights (and LGBT rights more broadly) and is a testament to the ambition of the authors of the law.

However, as I also noted in my review, the law still left certain elements of the criteria unaddressed. Specifically, the failure to make provision for transgender minors, for the recognition of non-binary identities (encompassing all identities outside of the binary male-female paradigm), and for the recognition of intersex people, meant that there was still room for improvement.

In creating this submission to the Act's Review Group, I return once again to my criteria and the *Yogyakarta Principles* that informed them. This is discussed in much greater detail in my original thesis, which I have attached for support, but I summarise my arguments with direct respect to these issues here.

Arrangements for Minors

I must initially acknowledge that the Review Group has indicated that the issue of arrangements for minors will be considered separately for those aged 16-17 and those aged under 16; however, I am of the view that my arguments are equally applicable to both and have thus taken them together.

It could be argued that any of the ten relevant *Yogyakarta Principles* may be breached by the existing age barrier. However, I would particularly highlight the issues of the **Right to the Universal Enjoyment of Human Rights**, the **Right to Recognition before the Law**, the **Right to Privacy**, and the **Right to Freedom of Opinion and Expression** as being especially vulnerable to a breach in this matter. There is no compelling reason to deny any of the above to anyone on the basis of age, more specifically on having not reached the age of majority. While there are reasons to allow minors qualified – rather than fully free – access to gender recognition, it does not follow that the provisions made for persons aged 16 and 17 should not be made available to all minors. In fact, it would appear that the most reasonable solution would be to extend the qualified provisions for 16-

and 17-year-olds, *viz*. allowing access when a request is accompanied by support from a parent, guardian, or qualified professional, to all minors. (This recommendation presupposes that no difficulties are found with these provisions to date for the 16-17 year old cohort, as indicated by submissions to the Review Group.)

Arrangements for persons who identify as neither male nor female (e.g. non-binary)
The question here is straightforward: is there a compelling reason to breach the *Yogyakarta Principles* for people identifying outside of the male-female binary? Progressive gender recognition policies, such as that in Ireland, do not present such a compelling reason as they are based on the declaration model. If we have decided – as we did when passing the 2015 Act – that people may be trusted to declare their own gender identity, then it follows that we must trust them to do so accurately even if it does not fit the 'traditional' binary of male and female identities.

Legitimately, one may ask the question of how best to facilitate a broad spectrum of identities in the State bureaucracy. However, it must also be acknowledged that while the range of possible identities may be diverse, it will also affect only a small number of people, and thus should not represent an onerous bureaucratic burden.

A minor amendment to the existing Gender Recognition Certificate application form, to delete the requirement to declare as male or female and to leave it as an 'open' declaration (to be filled in as with other open questions on the form, such as name and address), would be sufficient to effect this in the application process. In terms of which marker should be used on State documentation, I would suggest following the Australian example of using an 'X' to signify all genders that cannot be represented with 'M' or 'F'. While this does not entirely represent the vast diversity of gender identities one may find in a population, it does allow for a balance between the individual's need for recognition and the requirements of State bureaucracy.

Arrangements for intersex people
For the majority of intersex people, the Gender Recognition Act already provides the majority of legal recourse that they may require. An amended Act, allowing for the recognition of 'non-binary' identities, should provide the remainder on the recognition side.

Where intersex people *do* require greater policy change is in the realm of healthcare, particularly neo-natal care. Returning again to the *Yogyakarta Principles*, this is particularly important to guarantee the **Right to Security of the Person** and **Protection from Medical Abuses**.

It should be a matter of State social policy to raise awareness amongst medical professionals (particularly those in the OB-GYN and paediatric fields), and amongst new and expecting parents, about the natural phenomenon of intersex characteristics and how to correctly identify a newborn child with these characteristics. It is particularly important that intersex children and their families can rest assured there will be no unwarranted medical or surgical interference that might be used to change or obscure these characteristics.

The ongoing debate over how intersex people should be accommodated in birth registration is acknowledged. However, the extension of gender recognition rights to all minors, with qualified access as described above, should be sufficient to overcome practical legal impediments at this point in time.

Conclusion
Ireland has already taken a very brave stride towards the emancipation of transgender people with the 2015 Gender Recognition Act. This review process offers the opportunity to complete this emancipation by extending its rights to all transgender people, regardless of age, and to provide

legal support for intersex people as well. By continuing to pursue emancipatory, agency-based principles of legislation – particularly in line with the *Yogyakarta Principles* – we can make Ireland a beacon for trans rights worldwide.

I wish the members of the Review Group well with their deliberations and encourage them to contact me if my research may be of any assistance going forward.

Supporting document:

Field, L. (2014). *Pathways to Recognition: Lessons for new gender recognition policies from the development of currently-existing best-practice policies*. [Master's Thesis] Cork: University College Cork.