



Transgender
Equality
Network
Ireland

Submission to the Review of the Gender Recognition Act 2015

About TENI

TENI is a non-profit, non-governmental organisation supporting the trans community in Ireland. TENI seeks to improve the situation and advance the rights and equality of trans people and their families. Our vision is an Ireland where trans people are understood, accepted and respected, and can participate fully in all aspects of Irish society. Despite recent advances, Ireland remains a place where it can be difficult for trans people to lead safe, healthy and full lives. TENI is dedicated to ending transphobia, including stigma, discrimination and inequality and continues to advocate for social, political and legal recognition of trans people in Ireland.

TENI has a broad membership base and engages actively with members of the trans and gender variant community throughout Ireland. Prior to formulating this submission, TENI invited members of the community to engage in a detailed discussion forum on the issues to be considered by the Review Group of the Gender Recognition Act 2015 as set out under the terms of reference for the review.

TENI would welcome the opportunity to provide further information, including expert testimony, to assist the Review Group in its work.

Glossary

Cis / Cisgender - A non-trans person (i.e. a person whose gender identity and gender expression are aligned with the sex assigned at birth).

Intersex - Refers to individuals who are born with sex characteristics (such as chromosomes, genitals, and/or hormonal structure) that do not belong strictly to male or female categories, or that belong to both at the same time.

Non-Binary - An umbrella term for gender identities that fall outside the gender binary of male or female. This includes individuals whose gender identity is neither exclusively male nor female, a combination of male and female or between or beyond genders.

Self Determination - The principle that a person's declaration of their gender identity, for the purpose of obtaining gender recognition, should not require validation by a medical expert, judge or other third party. It is legitimate to require proof of the originality of the statement, but not of its contents.

Trans / Transgender - Refers to a person whose gender identity and/or gender expression differs from the sex assigned to them at birth. This term can include diverse gender identities.

Transition - A process through which some transgender people begin to live as the gender with which they identify, rather than the one assigned at birth. Transition might include social, physical or legal changes such as coming out to family, friends, co-workers and others; changing one's appearance; changing one's name, pronoun and sex designation on legal documents (e.g. driving licence or passport); and medical intervention (e.g. through hormones or surgery).

Executive Summary

This submission reviews certain provisions relating to the Gender Recognition Act 2015 (hereafter 'the Act') as specified in the terms of reference adopted by the Review Group of the Gender Recognition Act 2015. In making its submission, TENI recalls the commitment set out in section 7 of the Act that the Minister shall "not later than 2 years after this section comes into operation, commence a review of the operation of this Act, and not later than 12 months after its commencement, make a report to each House of the Oireachtas of the findings made on the review and of the conclusions drawn from the findings". TENI is pleased to see the promised review being established and looks forward to the Report of the Review Group.

This submission is arranged according to the following sections:

1. Introduction
2. Arrangements for children aged 16 and 17.
3. Arrangements for children aged under 16.
4. Arrangements for persons who identify as neither male nor female (e.g. non-binary)
5. Arrangements for intersex people
6. Other relevant issues including issues relating to the operation of the current legislative provisions. This includes:
 - a. Recognition for people in Northern Ireland entitled to Irish citizenship
 - b. Matters associated with the operation of the Act giving rise to forced disclosure of trans identity
 - c. The process for change of name in Ireland
 - d. Access to gender recognition by persons ordinarily resident in Ireland without citizenship
 - e. Policy for educational institutions
 - f. Impact of changes to the legislation on other legislation (e.g. non-discrimination legislation)

The following recommendations are made to the Review Group for consideration:

- 1.** TENI recommends that the Minister amend the Gender Recognition Act 2015 so that, in accordance with international standards of best practice, persons aged 16 and 17 years can self-determine their legal gender with no requirement for medical certification and no court order.
- 2.** TENI also recommends that the Minister ensure young people who have reached the age of 16 are enabled to apply for legal recognition of their preferred gender on their own initiative.
- 3.** TENI asks the Minister to amend the Gender Recognition Act to make provision for children and young people by removing the criterion relating to minimum age that prevents them from being able to obtain legal recognition of their preferred gender.

- 4.** TENI also requests that the Minister ensures parents or guardians are enabled to make an application for a Gender Recognition Certificate on behalf of their children at any age.
- 5.** TENI requests that the Minister amend the Gender Recognition Act to allow for the recognition of a gender other than male or female.
- 6.** TENI asks the Minister to amend the Passport Act 2008 to allow 'X' or other suitable marker on passports.
- 7.** TENI also asks that the Oireachtas include the honorific 'Mx' as an option in all governmental (including civil and public service) documents.
- 8.** TENI asks that the Oireachtas enact amending provisions to mitigate the impact of gendered language in legislation
- 9.** TENI asks that the Minister ensure that intersex people are not discriminated against in legislation and that sex characteristics are included in non-discrimination law.
- 10.** TENI urges the State to end the imposition of non-therapeutic genital normalizing surgeries.
- 11.** TENI calls on the Minister to ensure that information contained on a birth certificate with particulars from the Register of Gender Recognition cannot give rise to knowledge or suspicion in a manner not provided in law that a person has legally changed gender.
- 12.** TENI calls on the Irish government to work concretely with the Governments of Northern Ireland and the United Kingdom to ensure that the provisions of the Gender Recognition Act are available, in full, to Northern Irish Citizens.
- 13.** TENI recommends that the presentation of a Gender Recognition Certificate and new birth certificate be treated as signifying a legal name change without recourse to other legal and administrative mechanisms (e.g. deed poll).
- 14.** TENI urges the Minister to allow make provision for subsequent review for the Gender Recognition Act 2015.

Introduction

In preparing its submission, TENI is informed by international standards and commitments governing the formal recognition of trans people and trans young people. In 2015, the Parliamentary Assembly of the Council of Europe passed a resolution on the 'Discrimination against transgender people in Europe' which required Council of Europe Member States to:

6.2.1. develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;

6.2.2. abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender; ...

6.2.4. consider including a third gender option in identity documents for those who seek it;

6.2.5. ensure that the best interests of the child are a primary consideration in all decisions concerning children;⁴

Our submission is also informed by the Yogyakarta Principles, adopted in 2006 and developed by leading international experts in human rights including Professor Michael O'Flaherty (Rapporteur) from Ireland and Former President of Ireland and Former UN High Commissioner for Human Rights Mary Robinson. The Yogyakarta Principles were intended to 'reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity'². Principle 3 makes specific reference to the right to recognition before the law and encourages States to:

a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity,

and

b) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity.

¹ Parliamentary Assembly (2015), *PACE - Resolution 2048 (2015) - Discrimination against transgender people in Europe*. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> (Accessed on 19th January 2018).

² *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2006) Hirschfeld-Eddy-Stiftung. Available at: <https://yogyakartaprinciples.org/> (Accessed on 19th January 2018)

On the 10th of November 2017, the Yogyakarta Principles Plus 10 were adopted to supplement the original principles. Principle 31, the right to legal recognition directs states to only record personal information that is "*relevant, reasonable and necessary as required by law for a legitimate purpose*" and to end the registration of sex and gender of a person in identity documents, and as part of their "*legal personality*".³ Where gender continues to be registered, states are urged to "*ensure that no 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*".

³ *The Yogyakarta Principles Plus 10: 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* (2017) Available at: <http://yogyakartaprinciples.org/principles-en/yp10/> (Accessed 19th January 2018)

1. Arrangements for Children Aged 16 and 17

Under the Gender Recognition Act 2015 (the Act), applications for a gender recognition certificate or revocation of a gender recognition certificate are limited to persons who have attained 18 years of age⁴. However, if an applicant has not attained 18 years of age but has attained 16 years, they may, under section 12 of the Act, apply for an exemption to the age criterion⁵. To qualify for an exemption, an applicant must first secure a court order indicating that the applicant's parents, surviving parent or guardian consent or consents to the request. Prior to granting an order the court must be provided with two medical certificates. The first must be obtained from the applicant's GP confirming the applicant's maturity, understanding of the consequences of this decision and that the applicant is transitioning or has transitioned to their new gender. A second certificate must be obtained from either a psychiatrist or consultant endocrinologist confirming this opinion. Consequently, the applicant must satisfy the court that sufficient grounds (including testimony by medical or psychiatric practitioners) exist before the court will grant an order for exemption.⁶

The situation in other jurisdictions

The situation for 16 and 17-year-olds who wish to secure gender recognition in Ireland differs from that of other jurisdictions operating similar laws on gender recognition. In Norway and Malta, where adults may secure recognition through self-declaration, persons who have reached the age of 16 years can also self-declare their gender. In these states, the process for applying for gender recognition does not differ between those who are 16 & 17 and those who have reached 18 years of age.

In Norway, under The Legal Gender Amendment Act, 2016, '*once a person has reached the age of 16 they are themselves able to apply for a legal gender amendment. Consent of the person or persons with custody is not required.*' The Act implements a model of self-determination which can be accessed by all individuals over the age of 16.⁷

In Malta, the Gender Identity, Gender Expression and Sex Characteristics Act 2015, define a minor as a '*person who has not as yet attained the age of sixteen years*'. Thus, the full extent of the Act can be accessed by children aged 16 and 17. The Maltese GIGESC Act is based on a model of self-determination that can be accessed by all those who have attained 16 years.⁸

⁴ *Gender Recognition Act 2015, sec. 9, par. 2(a)*, Ireland. Available at: <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html> (Accessed 16th January 2018)

⁵ *Gender Recognition Act 2015, sec. 12*, Ireland. Available at: <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html> (Accessed 16th January 2018)

⁶ *Ibid*

⁷ *Excerpt from: Prop 74 L (2015-2016) Proposition to the Storting (proposal for a legislative decision) The Legal Gender Amendment Act, 2016, par. 4.* Norway. Available at: <http://tgeu.org/wp-content/uploads/2016/07/Prop74LEng.pdf> (Accessed 16th January 2018)

⁸ *Gender Identity, Gender Expression and Sex Characteristics Act, 2015, par. 2.* Malta. Available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1> (Accessed 16th January 2018)

Legal consent at 16 years in Irish law

In Ireland, the treatment of persons who have attained 16 and 17 years of age is recognised as distinct to that of other minors within specified areas of civil and criminal legislation. For example, section 23 of the *Non-Fatal Offences Against the Person Act 1997* permits persons from the age of 16 to consent to 'surgical, medical or dental' interventions in their own right⁹. This includes 'any procedure undertaken for the purposes of diagnosis'. In the *Protection of Young Persons (Employment) Act 1996*, a distinction is made between a minor (under 16) and a young person (16 & 17) for the purposes of employment, rest periods, duties and obligations of employers¹⁰. Similarly, while the current age of sexual consent in Ireland is set at 17 years of age, the law recognises differences in treatment regarding consent to certain sexual activity for persons aged between 15 and 17 years of age where there is less than two years in age between consenting individuals. The provisions outlined here highlights how Irish law already treats 16 and 17-year olds as different to minors and recognises that persons aged 16 and over have attained a level of maturity including to make informed and independent decisions regarding their physical wellbeing and person.

Legislation governing access to gender recognition should be based on existing human rights principles, the treatment of persons age 16 and 17 in other areas of Irish legislation and internationally recognised best practice concerning gender recognition for persons aged 16 and 17 years. This means that access to gender recognition, or revocation of gender recognition, for 16 and 17-year-olds should not be grounded on the requirement for a court order and a medical or psychiatric assessment as evidence of transition but should be permissible under the same conditions governing self-declaration (section 9 and section 11) for persons who have attained the age of 18 years.¹¹

Recommendations

TENI recommends that the Minister amend the Gender Recognition Act 2015 so that, in accordance with international standards of best practice, persons aged 16 and 17 years can self-determine their legal gender with no requirement for medical certification and no court order.

TENI also recommends that the Minister ensure young people who have reached the age of 16 are enabled to apply for legal recognition of their preferred gender on their own initiative.

⁹ *Non-Fatal Offences Against the Person Act, 1997, s. 23*, Ireland. Available at: <http://www.irishstatutebook.ie/eli/1997/act/26/section/23/enacted/en/html#zza26y1997s23> (Accessed 16th January 2018)

¹⁰ *Protection of Young Persons (Employment) Act, 1986*, Ireland. Available at: <http://www.irishstatutebook.ie/eli/1996/act/16/enacted/en/pdf> (Accessed 16th January 2018)

¹¹ Scottish Government (2017) *Review of the Gender Recognition Act, 2004, sec. 3*. Available at: <http://www.gov.scot/Resource/0052/00527449.pdf> (Accessed 16th January 2018).

2. Arrangements for Children Aged Under 16

Currently there is no provision in the Act for persons aged under 16 years to obtain a gender recognition certificate. This means that for children who identify as trans or gender non-conforming (e.g. non-binary) it is not possible to obtain legal recognition of gender regardless of parental consent. In addition, the prohibition of gender recognition for children aged under 16 years of age means that a child presenting as intersex may not make an application to correct legal documents in matters relating to gender.

Children already identifying as trans

“I think it is unfair to have to wait until you are at least 16... There are so many difficulties around having to wait until at least 16 years of age, for example, passports and other legal documents that still refer to you in your birth gender and having to dress as a gender you don't identify with to get through customs to travel abroad is very distressing”.

14-year-old trans child

In Ireland, there are many trans and gender variant children who live in their expressed gender with the full knowledge and support of parents/guardians and other relevant authorities (e.g. schools, clubs, health services, etc). Children who are trans or gender non-conforming can face issues not encountered by their cisgender peers when they don't have official documentation; they may have difficulties accessing an appropriate school, facilities within their school, or gender-segregated activities such as sport¹².

The argument that a trans young person cannot make an informed decision about their gender identity is, according to research, flawed. A recent study using a cross-matched sample of transgender and cisgender children between the ages of 5 and 12 showed that the transgender children were just as sure of their gender as their cisgender counterparts¹³. Children identifying as trans were found to view themselves in terms of their expressed gender and showed preferences for their expressed gender in manners indistinguishable from cisgender children.

Many international rights bodies have called for gender recognition to be extended to all trans people taking into account the best interests of the child. These include the

¹² Henzel, L. (2016) Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children p.12. Available at: <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf> (Accessed 17th January 2018)

¹³ Olson, K.R., Key, A.C., Eaton, N.R. (2015) 'Gender Cognition in Transgender Children,' *Psychological Science*, 26(4), 467–474. Available at: <http://journals.sagepub.com/doi/abs/10.1177/0956797614568156> (Accessed 16th January 2018)

Parliamentary Assembly of the Council of Europe¹⁴; the Yogyakarta Principles Plus 10¹⁵, and the World Professional Association for Transgender Health¹⁶. In addition, while the UN Convention on the Rights of the Child (UNCRC) does not explicitly refer to transgender children, a number of articles may be viewed as guaranteeing rights¹⁷.

In 2013, the Ombudsman for Children issued advice on the General Scheme of the Gender Recognition Bill 2013. This advice discusses whether children have a right to gender recognition and linked the UNCRC to gender recognition under the following articles¹⁸:

- States are obliged to respect and ensure the rights set out in the Convention to each child within their jurisdiction without discrimination of any kind. (Art. 2)¹⁹.
- The UNCRC requires that in all actions concerning children, including those undertaken by legislative bodies, the best interests of the child shall be a primary consideration (Art. 3).
- States are obliged to ensure to the maximum extent possible the survival and development of the child. (Art. 6) Under this article the state should consider whether providing recognition would aid the development of the child in a holistic manner.
- UNCRC requires States to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law. (Art. 8). The non-exhaustive list allows for gender to also be covered by this article²⁰.

¹⁴ Parliamentary Assembly (2015), PACE - Resolution 2048 (2015) - Discrimination against transgender people in Europe. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> (Accessed on 19th January 2018).

¹⁵ The Yogyakarta Principles Plus 10: 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 (2017) Available at: <http://yogyakartaprinciples.org/principles-en/yp10/> (Accessed 19th January 2018)

¹⁶ World Professional Association for Transgender Healthcare (2017) WPATH Identity Recognition Statement. Available at: <https://tgeu.org/wpath-2017-identity-recognition-statement/> (Accessed 19th January 2018)

¹⁷ United Nations, 1989. Convention on the Rights of the Child. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (Accessed 12 January 2018).

¹⁸ Ombudsman for Children, 2013. Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013. [Online] Available at: <http://www.teni.ie/attachments/cac06b6d-c2d4-4d81-a8d7-8a29dffa4544.PDF> (Accessed 12 January 2018).

¹⁹ 6 UN Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4 (20 October 2008), at para 24-25. Available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4>. (Accessed 17th January 2018)

²⁰ Schmahl, Stefanie (2013): Kinderrechtskonvention mit Zusatzprotokollen. Nomos-Handkommentar. Baden-Baden: Nomos Verlagsgesellschaft (As cited in Henzel, L. (2016) Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children p.15. Available at: <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf> (Accessed 17th January 2018))

- The Convention obliges States to assure children who are capable of forming their own views the right to express those views in all matters affecting them, with due weight given to those views in accordance with the age and maturity of the children. (Art. 12). Due to this article, the views of the child should be consulted when a parent is applying for recognition on their behalf.
- The UNCRC provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, home or correspondence. (Art. 16) This article is similar to Article 8 of the European Convention of Human Rights, [and] is significant as Article 8 has played a key role in the implementation of legal gender recognition throughout Europe and most significantly in this review, in Ireland.

Additional rights under CRC have also been identified as providing protection to trans children including:²¹

- The Right to Health (Art. 24) Interpreted as '*an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health.*'²² The bullying and harassment faced by trans children often lead to health problems. Member states therefore have an obligation to take measures to ensure that these children are not subject to violence including that of institutions due to a lack of gender recognition²³.

The situation for under 16-year-olds in other jurisdictions

Legal gender recognition for children under the age of 16 has been implemented by EU/EEA states of Malta, Austria, Germany, Croatia, Switzerland, Moldova and Norway. States permitting legal recognition for persons under 16 years of age and whose legal systems for gender recognition are similar to Ireland's include Norway and Malta.

Norway's model allows children between the age of six and under the age of 16 to access gender recognition with one or both parents' consent²⁴. Guardians have the right to submit an application on behalf of the child. In the condition of joint custody, and where one

²¹ Henzel, L. (2016) Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children p.16. Available at: <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf> (Accessed 17th January 2018)

²² UN Committee on the Rights of the Child (2013): General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art.24) par. 2. (As cited in Henzel, L. (2016) Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children p.16. Available at: <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf> (Accessed 17th January 2018))

²³ Henzel, L. (2016) *Back me up!* The UN Convention on the Rights of the Child and the Rights of Trans Children p.16. Available at: <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf> (Accessed 17th January 2018)

²⁴ Norwegian Law Amending the Legal Gender [online] (n.d.), *TGEU Norwegian law amending the legal gender Comments*. Available at: <https://tgeu.org/norwegian-law-amending-the-legal-gender/>. (Accessed 19th January 2018)

parent/guardian does not support an application, the supporting parent/guardian may apply alone to the County Governor. In such cases, due consideration will be given to the best interests of the child²⁵.

The model employed in Malta requires the parent or guardians of a minor (under 16) to request that the Civil Court change the gender and name of the minor to reflect the child's gender identity. The court takes steps to ensure the best interests of the child are given paramount consideration and that the child's views are given due weight 'having regard to the minor's age and maturity'²⁶.

In both systems, the best interest of the child principle is viewed as paramount. Both systems allow self-determination and recognise that medical requirements should not be part of the legislative process. Both systems also recognise that there are times when parents/guardians are not in agreement on decisions concerning gender recognition.

Failure to provide legal gender recognition: The impact on children

"My son is 7 years old... My son should have a voice. We have been forced to change his school because [the school is] refusing to recognise or accept that he is transgender. [My son] has suffered because of the way his school has treated him. The Principle and the teacher alike. It's appalling."

Mother of trans child

In a school environment where a child's identity is not recognised, additional stress can be placed on the child. If a teacher is using the wrong name and pronouns toward a child, the child will feel themselves in a position where they constantly need to explain themselves. This creates an adversarial situation where the student is left open to bullying and violence from teachers and other students.²⁷ From its analysis of data from the most comprehensive survey on LGBT experiences throughout the European Union, the EU Agency for

²⁵ Excerpt from: *Prop 74 L (2015-2016) Proposition to the Storting (proposal for a legislative decision) The Legal Gender Amendment Act, 2016, par. 4.* Norway. Available at: <http://tgeu.org/wp-content/uploads/2016/07/Prop74LEng.pdf> (Accessed 19th January 2018)

²⁶ *Gender Identity, Gender Expression and Sex Characteristics Act, 2015, par. 7.* Malta. Available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1> (Accessed 19th January 2018)

²⁷ Henzel, L. (2016) *Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children* p.12. Available at: <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf> (Accessed 17th January 2018)

Fundamental Rights (FRA) found that 29% of trans students felt personally discriminated by school or university personnel in the 12 months preceding the survey²⁸.

It is TENI's view that an amendment to Article 12 of the Act to allow legal recognition of gender for children under the age of 16, with parental consent and without a minimum age barrier, offers the best solution for both trans and intersex children to express their gender identity. Measures set out in Section 12(5) allowing the courts to dispense with consent of a parent / guardian where consent cannot be obtained, may need to be enhanced to ensure the best interests of the child is maintained in relation to an application for, or a revocation of, a gender recognition certificate.

In addition, TENI believes that measures relating to an application or revocation of gender recognition should not be overly onerous and should not include a requirement for medical or psychiatric certification. Measures should be adopted to ensure that children who opt to revoke a gender recognition certificate should do so in the full knowledge that they may subsequently apply for gender recognition without fear of refusal associated with a second or subsequent application.

Recommendations

TENI asks the Minister to amend the Gender Recognition Act to make provision for children and young people by removing the criterion relating to minimum age that prevents them from being able to obtain legal recognition of their preferred gender.

TENI also requests that the Minister ensures parents or guardians are enabled to make an application for a Gender Recognition Certificate on behalf of their children at any age.

3. Arrangements for persons who identify as neither female or male (e.g. non-binary)

“I am non-binary and I want an 'X' on my birth cert. not male or female because these terms don't describe my gender. this has stopped me applying for the [gender recognition certificate]. [Being excluded from gender recognition] makes applying for jobs more difficult and applying for college as I do not have official recognition for my gender”

Non-Binary person

A significant number of people, including young people, will not identify in the binary male or female gender categories. Terms such as gender non-binary and gender non-conforming, etc, are frequently used as self-descriptors by people who do not identify in the binary model. Accommodating non-binary gender categories is reflected in the increasing use of third gender categories on official documentation in jurisdictions and among international regulatory bodies throughout the world. For example, the International Aviation Authority will accept the gender marker 'X' on passport documentation to describe the passport holder's gender where they identify as neither female nor male.²⁹

The current law on a third gender category in Ireland

Within the Gender Recognition Act 2015 there is currently only one reference to the genders of male and female. Article 18(1) states:

*'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.'*³⁰

There are also two mentions of opposite gender in Article 38 which amends the Passports Act 2008³¹.

At present, the Act would not appear to recognise a third gender category or third gender marker. The language of Section 18(1) implies that a person must select either a female or

²⁹ OII Australia (2011) *On Australian Passports and 'X' for Sex*. Available at: <https://oii.org.au/14763/on-x-passports/> (Accessed 26th January 2018).

³⁰ *Gender Recognition Act 2015, sec. 18, par. 1*, Ireland. Available at: <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html> (Accessed 16th January 2018)

³¹ *Gender Recognition Act 2015, sec. 38* Ireland. Available at: <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html> (Accessed 16th January 2018)

male gender category. There appears to be little or no scope within the Act to be recognised as a third (e.g. non-binary) category. This has the effect of denying or facilitating the mis-gendering persons whose gender does not conform to the gender binary and who wish to secure legal recognition of a change of gender. Permitting a third gender category would facilitate those who do not identify in the binary model including, where applicable, persons who are intersex, to self-identify as a third gender.

International human rights standards on a third gender category

The Yogyakarta Principles, which reflects the current state of international human rights law on gender identity, recognises the *Right to Legal Recognition Before the Law* and asks that states recognise the 'person's profound self-defined gender identity'³². For non-binary people, this recognition is currently impossible in Ireland. The recently adopted Yogyakarta Principles Plus 10, includes Principle 31 the *Right to Legal Recognition*, and determines that "where sex and gender continues to be registered" in states, multiple gender markers are made available³³.

The resolution by the Parliamentary Assembly of the Council of Europe on the 'Discrimination against transgender people in Europe' acknowledges the right of trans people to gender identity. The right to gender identity was first written into legislation as part of the Malta's 'Gender Identity, Gender Expression and Sex Characteristics Act 2014', This provision 'gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity'³⁴. Furthermore, this right to gender identity extends to all individuals, including those who are non-binary.

Practice in other jurisdictions

At an international level there have been a significant number of jurisdictions, who have introduced a third gender category. States and federal jurisdictions with some form of legal gender recognition for a third gender include, Canada, Denmark, Germany, India, Malta, Nepal, New Zealand, Pakistan and New South Wales in Australia. In the United States, the states of Oregon, New York, California, Washington State and Washington D.C. also provide for a third gender category.

In both Canada and Malta, systems of self-declaration in relation to a third gender category are used. In Canada, the form for having 'X' on your passport does not require any supporting documentation, just a declaration that the person would like to use that gender

³² The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007) Hirschfeld-Eddy-Stiftung. Available at: <https://yogyakartaprinciples.org/> (Accessed on 19th January 2018)

³³ The Yogyakarta Principles Plus 10: 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 (2017) Available at: <http://yogyakartaprinciples.org/principles-en/yp10/> (Accessed 19th January 2018)

³⁴ Parliamentary Assembly (2015), *PACE - Resolution 2048 (2015) - Discrimination against transgender people in Europe*. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> (Accessed on 19th January 2018).

marker, or parental consent for those under 16 years of age³⁵. In Malta, to change your gender marker on your passport to display an 'X', you must submit a form alongside a declaration from a notary. This system also allows for self-determination³⁶.

In 2014, the state of New South Wales adopted non-binary recognition following the case of *Norrie vs. New South Wales*.³⁷ The court determined that the applicant in the case was entitled to recognition in a category other than the binary male or female. Recognition was subsequently permitted for the category of 'non-specific' sex. 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.³⁸

In Germany, a recent decision by the German Federal Constitutional Court allows for a third gender option for people who identify as non-binary and/or intersex. The Court also found that provisions to allow the gender marker on official documents to be left blank provided insufficient protection for persons who do not identify in the binary categories.³⁹

In the UK, there is movement toward recognition of non-binary citizens on both passports and birth certificates. The Scottish Government recently launched a consultation to improve the Gender Recognition Act 2004. Plans to reform the Act appear to include the recognition of non-binary people⁴⁰.

³⁵ Government 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> (Accessed 22nd January 2018)

³⁶ Pace, Y (2017) 'Malta introduces 'X' on passports, ID cards and work permits' Malta Today, 5th September. Available at:

<http://www.maltatoday.com.mt/news/national/80228/malta-introduces-x-marker-on-passports-id-cards-and-work-permits#.WmYVCahlIU> (Accessed 22nd January 2018)

³⁷ 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>

³⁸ Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, sec. 43A. Australia. Available at: <https://www.legislation.gov.au/Details/C2013A00098>

³⁹ Decision of the German Federal Constitutional Court 1 BvR 2019/16, 10 October 2017. See: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html>

⁴⁰ Scottish Trans Alliance et al. (2017) *Equality organisations welcome Scottish Government consultation to improve the Gender Recognition Act*. Available at: <https://www.scottishtrans.org/equality-organisations-welcome-scottish-government-consultation-to-improve-the-gender-recognition-act/> (Accessed 22nd January 2018)

Although there have been no concrete steps made by the UK government toward legal recognition, the UK does use Mx (pronounced mix) as a standard honorific⁴¹. In Mx, the 'x' stands for a wildcard character. It can be used in most government and official documentation in the UK and is often used by non-binary people. Although it does not indicate a legal change of gender, it has an important symbolic impact in allowing people to

"I do not identify as male or female and it's genuinely causing me a lot of pain to have to go by my birth gender. No one takes me seriously or recognises it without a law. [Being excluded from the Gender Recognition Act] affects my mental health to an extreme level, family issues, and issues regarding recognition in colleges and workplaces. Please give a third gender option. Please. I can't do this anymore."

Non-Binary person

feel validated on official correspondence when Mr and Ms are not sufficient.

TENI Survey

In early 2017, TENI undertook a survey on the needs and priorities of the Non-Binary Community. Results of this survey showed that non-binary people in Ireland wished to either have a third gender on documents or for the option to opt out of gender as a category. It also showed that almost two thirds of participants suffered from mental ill health. Participants who identified as part of the trans community who were neurodiverse and/or experienced mental ill health were most likely to have had negative experiences related to non-binary exclusion in the school curriculum.

Based on the issues outlined above, TENI believes that amending the Act to explicitly allow for recognition of a third gender category, such as non-binary persons, would facilitate meaningful inclusion and provide legal recognition for gender non-binary, gender non-conforming and, where applicable, intersex people. The law should permit the use of a new gender marker such as 'X' and a form of recognition of a third-gender on birth certificates, such as allowing a place for individuals to specify their own gender identity or giving the options of 'Male', 'Female', 'Other/Undefined/Non-Binary'.

TENI also believes that the use of gender markers on government issued documents should be examined. Where gender is deemed to be an unnecessary identifier on such documents, consideration should be given to removing the identifier to allow for easier interactions for trans individuals.

⁴¹ Henry, R (2015) *Now pick Mr, Mrs, Miss, Ms . . . or Mx for no specific gender* The Times & Sunday Times, May 3rd. Available at: <https://www.thetimes.co.uk/article/now-pick-mr-mrs-miss-ms-or-mx-for-no-specific-gender-t2rb5bh62rs> (Accessed on 22nd January 2018)

TENI requests that the Minister create a simple, accessible mechanism to exchange a binary gender recognition certificate to a non-binary identity without need for revocation. This would facilitate those who were forced through lack of choice to choose a binary gender rather than a non-binary option.

Recommendations

TENI requests that the Minister amend the Gender Recognition Act to allow for the recognition of a gender other than male or female.

TENI asks the Minister to amend the Passport Act 2008 to allow 'X' (or other suitable) marker on passports.

TENI also asks that the Oireachtas include the honorific 'Mx' as an option in all governmental (including civil and public service) documents.

TENI asks that the Minister enact amending provisions to mitigate the impact of gendered language in legislation.

4. Arrangements for Intersex People

A person who is intersex may use the Act to change their gender. However, the options for intersex persons are the same as those who wish to change their gender from one binary category to the other. Should an intersex person wish to register in a third category this is not permitted.

Change of gender for intersex people

A person who is intersex and wishes to change their gender in the binary option may, under the Act, do so without restriction once they have attained 18 years of age. As before, applicants aged 16 and 17 must secure a court order with an exemption to the age criterion. An intersex person under the age of 16 is not permitted to change their gender marker until they have reached 16 years of age and secured the appropriate court order outlining medical certification and parental consent.

Section 19 of the Civil Registration Act 2004 stipulates that following the birth of a child, parents must register the birth within 3 months.⁴² The of registration must include the sex of the child. For children who are born intersex, the definitive sex of the child may not be clear at this age. However, the registrar is legally bound to make such a record of the child's sex. Where gender identity can be determined after 3 months but prior to the child reaching 16 years of age, the current legislation does not permit parents or guardians to apply to change the gender marker on behalf of the child.

OII Europe's Malta Declaration⁴³ states, that intersex children should not be forced into a category other than male or female at birth. They should instead, like any other person, be able to have their gender identity recognised by their own self-determined request. The opportunity to determine or change their gender classification should be available to intersex people at any age.

Unnecessary surgical intervention

The need or desire for clarity concerning a child's sex or gender on behalf of parents and medical personnel can lead to unnecessary surgical intervention to 'assign' a child's sex being conducted. The assigned sex may be in subsequent contravention of the gender identity perceived by the child including non-binary identity. The impact of unnecessary surgical interventions can be profoundly negative and have lifelong consequences for the child in question.

In 2017, following the first European Intersex Community Event, Organisation Intersex International Europe (OII Europe) issued a statement calling on states to take decisive action to:⁴⁴

⁴² *Civil Registration Act 2004, Section 19*, Ireland.

⁴³ OII Europe (2013) *Malta Declaration*. Available at: <https://oiieurope.org/malta-declaration/> (Accessed 26th January 2018)

⁴⁴ OII Europe (2017) Statement of the 1st European Intersex Community Event (Vienna, 30st – 31st of March 2017) Available at: <https://oiieurope.org/statement-1st-european-intersex-community-event-vienna-30st-31st-march-2017/> (Accessed 26th January 2018)

- Install legislative protections that ban medical interventions on children with variations of sex characteristics, on social, psychosocial, cultural or cosmetic grounds. A ban on Intersex genital mutilation (IGM) is necessary as IGM is equatable [*sic*] with female genital mutilation that takes place within hospital settings. This may include installing legislative measures that penalize medical professionals that commit or assist in IGM.
- Ensure that medical practitioners or other professionals do not conduct any treatment to the purpose of modifying sex characteristics which can be deferred until the person to be treated can provide full, free and informed consent. Medical and psychological treatment that is performed without the intersex person's free, personal and fully informed consent, unless life-saving, should be made unlawful. Informed consent requires being informed of different options, including, but not limited to, medical, sociological and human rights-based information. Peer-counselling should be mandatorily included in the decision process.

In 2015, the European Union Agency for Fundamental Rights found that 21 EU countries, including Ireland, carry out 'normalising' surgery on intersex children.⁴⁵

TENI believes that such practices are unjustifiable and should be outlawed with immediate effect.

Recommendations

TENI asks that the Minister ensure that intersex people are not discriminated against in legislation and that sex characteristics are included in non-discrimination law.

TENI urges the State to end the imposition of non-therapeutic genital normalizing surgeries.

⁴⁵ 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> (Accessed 26th January 2018)

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

- a) Forced disclosure of trans identity due to a notable difference between a Certificate from the Gender Recognition Register and that from the Registry of Births

Section 30 of the Act amends Schedule 1 Part 2 of the Civil Registration Act 2004 with the insertion of Part 2A Section 30B - To be entered in Register of Gender Recognition.⁴⁶ The particulars are identical to the particulars in Part 1 of the Civil Registration Act 2004 – Particulars to be entered into Register of Births,⁴⁷ and are intended to facilitate the production of a birth certificate showing the legal gender of the holder. The inclusion of the category “Registration Number” though not provided in the particulars of either schedule appears on both certificates. However, the actual registration number will only be included on original birth certificates and not on certificates issues from the Register of Gender Recognition.

The lack of a visible or verifiable registration number on a trans person’s birth certificate represents an apparent and notable difference between the birth certificate of someone who has changed their gender and someone who has not. TENI is aware of cases of members of An Garda Síochána refusing to accept a birth certificate without a registration number as valid for official identification purposes such as signing a passport form. This can cause considerable distress and anxiety to an individual who, in order to secure the requisite service to which they are legally entitled, be forced to ‘out’ themselves as trans.

Under Section 30 of the Gender Recognition Act, “no information from [the index between register of gender recognition and the register of births] shall be given to any person except by the order of a court”.⁴⁸ In order to ensure that an individual is not unjustifiably ‘outed’ by virtue of the particulars on their birth certificate, steps must be taken to ensure that on no occasion will an official not privy to the information contained in the index between registers, be able to determine or seek to determine whether or not a person has legally changed their gender.

Recommendation

TENI calls on the Minister to ensure that information contained on a birth certificate with particulars from the Register of Gender Recognition cannot give rise to knowledge or suspicion in a manner not provided in law that a person has legally changed gender.

⁴⁶ *Gender Recognition Act 2015, sec. 30*, Available at: <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/print>

⁴⁷ Civil Registration Act 2004, Sec 19, First Schedule Part 1, Available at: <http://www.irishstatutebook.ie/eli/2004/act/3/schedule/1/enacted/en/html#sched1-part1>

⁴⁸ *Gender Recognition Act 2015, sec. 30D, par. 2*, Ireland. Available at: <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html> (Accessed 16th January 2018)

b) Recognition for people in Northern Ireland entitled to Irish citizenship

Individuals living in Northern Ireland who are Irish citizens can apply for gender recognition. However, they cannot make full use of the Act. A person born in Northern Ireland will have a United Kingdom birth certificate. At present, the UK does not recognise Irish gender recognition certificates. This is due to the difference in criteria between the UK's Gender Recognition Act, 2004 and Ireland's Gender Recognition Act 2015.⁴⁹

Individuals born in Northern Ireland cannot be registered on the Registry of Foreign Births or receive Irish birth certificates and so cannot access their full rights as Irish citizens. This appears to contradict both the spirit of the Good Friday Agreement and the agreement itself in which Article 2, Annex A, Paragraph VI, gives citizens in Northern Ireland full rights as Irish citizens.⁵⁰

Recommendation

TENI calls on the Irish government to work concretely with the Governments of Northern Ireland and the United Kingdom to ensure that the provisions of the Gender Recognition Act are available, in full, to Northern Irish Citizens.

c) The Process for a Change of Name in Ireland

In Ireland, there are two generally accepted methods of having your name changed. The first is a method known as "use and repute", effectively asking people to use the name you choose e.g. married people. The second is by deed poll. Trans people will often use deed poll as a method of changing their name. "A deed poll for a change of name contains declarations (a sworn statement or affidavit) that you are abandoning the use of your old name, that you will use your new name at all times and that you require everyone to use your new name."⁵¹

To change your name by deed poll you must attend the Central Office of the High Court in the Four Courts, Dublin, in person between 10am and 12.30pm on a Tuesday or Thursday. This mandatory attendance in court adds cost and inconvenience for citizens not ordinarily resident in Ireland or citizens outside of the capital. In addition, there is the cost of a Commissioner of Oaths and for the Stamp Duty of €60. A legal name change may cost between €70 and €150 if already living in Ireland.

⁴⁹ *Gender Recognition Act, 2004*, United Kingdom. Available at: https://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf (Accessed 30th January 2018)

⁵⁰ *Northern Ireland Peace Agreement (The Good Friday Agreement)*, 1998. Art 2., Annex A, para.(vi) Available at: <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf> (Accessed 30th January 2018).

⁵¹ Citizens Information (2016) *Changing your name by deed poll*. Available at: http://www.citizensinformation.ie/en/birth_family_relationships/problems_in_marriages_and_other_relationships/changing_your_name_by_deed_poll.html (Accessed 26th January 2018)

The deed poll register is also maintained publicly and can be searched by any individual on the court's website allowing for former names to be ascertained. This is contrary the spirit of the Act which aims to provide privacy for trans people in creating the sealed Gender Recognition Register.

Recommendation

TENI recommends that the presentation of a Gender Recognition Certificate and new birth certificate be treated as signifying a legal name change without recourse to other legal and administrative mechanisms (e.g. deed poll).

d) The Review of the Gender Recognition Act

Given the evolution of the issues involved in trans and non-binary identity, including in relation to other legislation, TENI asks that the Minister to consider renewing the provisions of the section 7 of the Act⁵² to allow for periodic review of the Act after a set period as determined following this review.

Recommendation

TENI urges the Minister to allow for subsequent review for the Gender Recognition Act.

⁵² Gender Recognition Act 2015, sec 7, Available at:
<http://www.irishstatutebook.ie/eli/2015/act/25/section/7/enacted/en/html#sec7>