

Submission on the Review of the Gender Recognition Act 2015

February 2018



Founded in 1995, the Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

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Ag Eisteacht
Alcohol Action Ireland
Amnesty International Ireland
An Cosán
ASH Ireland
Assoc. for Criminal Justice Research and Development (ACJRD)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Autism Network Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Care Leavers' Network
Catholic Guides of Ireland
Child Care Law Reporting Project
Childhood Development Initiative
Children in Hospital Ireland
COPE Galway
Cork Life Centre
Crosscare
Cybersafe
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Down Syndrome Ireland
Dublin Rape Crisis Centre
Early Childhood Ireland
Educate Together
EPIC
EQUATE
Extern Ireland
Focus Ireland
Foróige
Future Voices Ireland
Gaelscoileanna Teo
GLEN- the LGBTI equality network
Immigrant Council of Ireland
Inclusion Ireland
Independent Hospitals Association of Ireland
Institute of Guidance Counsellors
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Centre for Human Rights, NUI Galway
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)
Jack & Jill Children's Foundation
Jesuit Centre for Faith and Justice
Jigsaw
Kids' Own Publishing Partnership
Law Centre for Children and Young People
Lifestart National Office
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mounttown Neighbourhood Youth and Family Project
MyMind
National Childhood Network
National Museum of Childhood
National Organisation for the Treatment of Abusers (NOTA)
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
Parentstop
Pavee Point
Peter McVerry Trust
Rape Crisis Network Ireland (RCNI)
Realt Beag
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
School of Education UCD
Sexual Violence Centre Cork
Simon Communities of Ireland
Social Care Ireland
Society of St. Vincent de Paul
Sonas Domestic Violence Charity
Special Needs Parents Association
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
Step by Step Child & Family Project
Suas Educational Development
Teachers' Union of Ireland
Terenure Rugby Football Club
The Ark, A Cultural Centre for Children
The Prevention and Early Intervention Network
The UNESCO Child and Family Research Centre, NUI Galway
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
youngballymun
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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1. Introduction

The Children's Rights Alliance unites over 100 members working together to make Ireland one of best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

In 2015, the Irish Government passed the Gender Recognition Act, providing transgender or trans people with a process to achieve full legal recognition of their preferred gender. The Act, based on a self-declaration model, is a progressive piece of legislation. However, it is limited in scope given that it fails to adequately protect and fulfil the rights of all trans and intersex children and young people. Children under the age of 16 cannot be recognised in their preferred gender under the legislation. While more generally the Gender Recognition Act 2015 allows for a legal change of gender without any medical prerequisites,¹ applicants aged 16 or 17 have to apply for a court exemption to overcome the age barrier for legal recognition and this requires consent of a parent or guardian along with the approval of two medical professionals.²

2. Children's Rights and Gender Recognition

2.1 Right to Identity

Article 8 of the UN Convention on the Rights of the Child (UNCRC) recognises a child's right to identity. The Convention does not explicitly reference the right to gender recognition. However, the UN Committee in a recent general comment has noted the importance of respecting the 'rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy'.³ The Gender Recognition Act 2015 does not facilitate trans children under the age of 16 to access their right to identity as there is no effective mechanism for legal recognition of their preferred gender.

In 2006 the Principles on the application of *international human rights law in relation to sexual orientation and gender identity* (the 'Yogyakarta Principles')⁴ were adopted by 29 human rights experts. The Principles, published in 2007, state that 'each person's self-defined... gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom'.⁵ These Principles were updated in 2017 elaborating on the right to recognition before the law and stating that a minimum age should not be a prerequisite to legal recognition.⁶ The updated *Yogyakarta Principles plus 10* document is defined as:

[...] an affirmation of existing international legal standards as they apply to all persons on grounds of their sexual orientation, gender identity, gender expression and sex characteristics. States must comply with these principles both as a legal obligation and as an aspect of their commitment to universal human rights.

1 Gender Recognition Act 2015, s 10.

2 *ibid*, s 12(4)(b). These professionals include the young person's primary medical care practitioner and an impartial endocrinologist or psychiatrist.

3 UNCRC 'General Comment No. 20 on the implementation of the rights of the child during adolescence (2016) UN Doc CRC/C/GC/20 para 33.

4 International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (ICJ 2007) Principle 3.

5 *ibid*.

6 International Service for Human Rights & ARC International, *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* (ISHR & ARC International 2017) Principle 31.

Any review of the current legislation should take into consideration the *Yogyakarta Principles plus 10* as the authoritative and most up-to-date statement on international human rights law on gender identity.

2.2 Non-Discrimination and Gender Identity

Research has shown that children often become aware of their gender identities at a young age, some as young as three.⁷ Article 2 of the UNCRC requires States to ‘respect and ensure the rights [of] each child within their jurisdiction without discrimination’.⁸ In 2016, following its examination of Ireland, the UN Committee on the Rights of the Child called on the State to ‘strengthen its efforts to combat discrimination against stigmatisation and social exclusion of children including that based on gender identity’.⁹ The Irish Government has an obligation to undertake all appropriate legislative measures to implement the rights outlined in the Convention,¹⁰ including the right to identity and non-discrimination. Trans children under 16 are currently unable to access their right to identity through legal recognition and may face discrimination in accessing services when they are not legally recognised in their preferred gender.¹¹ To inform their recommendations, the Review Group should consider the impact that the lack of recognition has on younger children and teenagers by looking at evidence of discrimination faced by trans children from early childhood through to adulthood.

2.3 Best Interests of the Child

Article 3 of the UNCRC requires that in all actions concerning children, including action by legislative bodies, the best interests of the child shall be the primary consideration. The best interest of the child is seen as a threefold concept; a substantive right of the child, an interpretative legal principle, and a rule of procedure.¹² The Committee has outlined that when a decision is to be made that will affect a specific child or an identified group of children, ‘the decision-making process must include an evaluation of the possible impact of the decision on the children concerned’.¹³ It is welcome that the State is undertaking the review of the Gender Recognition Act. This should include an impact assessment of how any changes, or lack thereof, to the legislation may positively or negatively affect trans and intersex children’s best interests. In noting the special relationship between identity and best interests, the UN Committee in its guidance on how to interpret the best interests principle in decision-making called on States to respect the child’s right to identity, taking it into consideration when assessing the best interests of the child.¹⁴

2.4 Right to Life, Survival and Development

Article 6 of the Convention recognises the child’s right to life and requires States to ensure the survival and development of the child to the maximum extent possible. The term development is to be accorded the broadest possible meaning under the Convention and includes ‘embracing the child’s physical, mental, spiritual, moral, psychological and social development’.¹⁵ Intersex and trans young people face elevated risks of experiencing mental health difficulties and experience high rates of depression, anxiety, and stress and are more likely to attempt suicide compared with people identifying as lesbian, gay or bisexual. Bearing in mind the State’s obligation to promote the optimal development of the child, the lack of recognition of a child’s preferred gender and the impact this has on their right to health and right to life, survival, and development, must be taken into consideration during the review of the Act.

7 Ruari-Santiago McBride *Grasping the Nettle: The Experiences of Gender Variant Children and Transgender Youth Living in Northern Ireland* (Institute for Conflict Research 2013) cited in Transgender Equality Network Ireland *Gender Recognition and Transgender Young People* (TENI 2015).

8 UN General Assembly, Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Article 2.

9 UNCRC ‘Concluding Observations: Ireland’ (2016) UN Doc CRC/C/IRL/CO/3-4 para 28.

10 UNCRC (n8) Art 4.

11 Transgender Equality Network Ireland, *It’s Time to Hear our Voices* (TENI 2016) 1 & 12.

12 UN Committee on the Rights of the Child, General Comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration (art.3, para 1), (2013) UN Doc CRC/C/GC/14 para 6C.

13 *ibid.*

14 *ibid.*, para 55.

15 UN Committee on the Rights of the Child, ‘General Comment No. 5 General measures of implementation of the Convention on the Rights of the Child’, (2003) UN Doc CRC/GC/2003/5, para 12.

2.5 Voice of the Child

Article 12 of the UNCRC guarantees the right of the child to be heard in all matters affecting them and due weight given to their views in accordance with the child's age and maturity. Given that gender identity is self-defined, the legislation should provide for consultation with the individual child and take their views into account. The Act currently does not include such a provision, but any change in legislation should seek to vindicate the right of the child to be heard given the critical nature of the decision at hand. In line with the UN Committee's guidelines, trans and intersex children directly affected by the legislation should be consulted during the review process and during the 'formulation of legislation and policy'.¹⁶

2.6 Right to Privacy

Article 16 of the UN Convention on the Rights of the Child guarantees a child's right to be free from arbitrary interference with their privacy. This is reflected in Article 8 of the European Convention on Human Rights (ECHR) which provides that everyone has the right to respect for their private and family life. In *Foy v an tArd Chláraitheoir and Others* the High Court found that a failure to recognise Dr Foy's true gender on her birth certificate amounted to a violation of Article 8.¹⁷ While the High Court found that the State was not compliant with the ECHR, it fell to the Oireachtas to legislate to vindicate the right of transgender people to privacy and recognition of their gender. The current formulation of the Gender Recognition Act may infringe on a child's right to privacy as children cannot change their identity documents to the gender in which they may present. This means that children presenting as their true gender in school risk being 'outed' during class roll calls as they are linked to the birth certificate used to enroll the child in school.¹⁸ This can often lead to bullying and harassment which can result in transgender children leaving school early.¹⁹

3. Conclusion and Recommendations

3.1 Arrangements for Children Aged 16 to 17 Years

Section 12 of the Gender Recognition Act lays out the requirements that children aged 16 to 17 must satisfy in order to receive gender recognition. These requirements, including the need for a court order, parental consent, and two medical reports, can create insurmountable barriers for some children seeking recognition under the legislation.²⁰

The legislation states that the Minister for Social Protection can only consider an application for gender recognition when furnished with a court order exempting the child from the age restriction.²¹ Section 12(6) of the Act states that no orders shall be made by the court unless it is satisfied that it is in the child's best interests. While the inclusion of the best interests of the child principle is welcome, the legislation does not provide for the voice of the child to be heard by the court in deciding upon this matter. The UN Committee on the Rights of the Child has outlined that an 'assessment of a child's best interests must include respect for the child's right to express [their] views freely and due weight given to said views in all matters affecting the child'.²² The child's best interests 'cannot be correctly applied if the requirements of [A]rticle 12 are not met'.²³ In any legal proceedings in relation to a child seeking legal recognition of their preferred gender, the legislation should provide that the court should consult with the child making the application to ensure that their views are heard and are considered in any decision made.

16 UNCRC 'General comment No. 12 on the right of the child to be heard (Art 12)' (2009) UN Doc CRC/C/GC/12 para 122.

17 [2007] IEHC 470.

18 Transgender Equality Network Ireland, *Gender Recognition and Transgender Young People* (TENI 2015) 4.

19 Agnes Higgins et al, *The LGBTIreland Report: a national study of the mental health and wellbeing of lesbian, gay, bisexual, trans and intersex people in Ireland* (GLEN and BeLonGTo 2016) 138.

20 Transgender Equality Network Ireland (n11) 17.

21 Gender Recognition Act 2015, s 12.

22 UNCRC (n8) 43.

23 *ibid.*

Section 12(4)(b) requires a certificate from the child's primary care physician²⁴ and a certificate from an independent endocrinologist or psychiatrist certifying that their medical opinion concurs with the primary physician's. The *Yogyakarta Principles Plus 10* requires States to ensure that psycho-medical diagnosis shall not be a prerequisite to changing a person's legal sex or gender.²⁵ To bring the Act into line with international human rights law, the Review Group should consider removing the requirement for medical certification from the Act.

Under the current legislation, in order for a court order to be granted, the child must have parental or their guardian's consent unless the court dispenses with this requirement in certain circumstances.²⁶ By requiring parental consent, the Gender Recognition Act does not align with s 23 of the Non-Fatal Offences against the Person Act 1997 which provides that consent of a minor who has reached the age of 16 to any surgical, medical or dental treatment shall be as effective as consent of a person who has reached the age of majority. As children can legally begin to transition at age 16 without parental consent the review group should consider extending the self-declaration model to 16 and 17 year olds.

Recommendations

- The Alliance recommends that in order to respect and fulfil the rights of trans and intersex children, the self-declaration model that the Gender Recognition Act is based upon should be extended to include children from the age of 16 years and up, without the need for parental consent.
- Children aged 16 and 17 should be consulted in relation to the review of the legislation in line with Article 12 of the UNCRC.

3.2 Arrangements for Children under the Age of 16 Years

The Act currently places a blanket prohibition on children under the age of 16 applying for gender recognition. This is in conflict with the position outlined in the *Yogyakarta Principles Plus 10* which requires States to ensure that there is no minimum age requirement in the recognition of gender identity.²⁷ A number of States have taken measures to either abolish a minimum age requirement or lowered the age of recognition significantly. In Norway, children from the age of six up to 16 can be granted gender recognition if they have the consent of one parent.²⁸ In Malta, there is no minimum age restriction in applying for recognition.²⁹ Parents can make an application to the registry of the civil court for gender recognition on behalf of their child, and in deciding the matter, the court will have regard for the best interest and voice of the child.³⁰

When assessing parental consent as a requirement for recognition for children under 16 years of age, the Review Group must consider whether absence of parental consent will be fatal to a child's application. This has been considered in other jurisdictions, for example in Argentina, children can apply for gender recognition if they have the consent of their parent or guardian and a lawyer is present to help with the application.³¹ However, if the child's legal representative's consent is denied or impossible to obtain, the judge may still rule in favour of the child 'taking into account the evolving capacities and best interest of the child as expressed in the Convention on the Right of the

24 The certificate must outline that in the doctor's professional opinion that the child possesses a sufficient degree of maturity to make the decision, they are aware and understand the consequences of their decision, that the decision was freely and independently made and that the child is in the process of transitioning.

25 Yogyakarta Principles plus 10 (n6) Principle 31C .

26 Section 12(5) of the Act specifies: The court may make an order dispensing with the requirement of the consent of a person referred to in *subsection (4)(a)* to the making of an order under this section where satisfied that the consent cannot be obtained because the person cannot be identified or found or is failing or neglecting to respond to a request for consent or should not be obtained because the nature of the relationship between the child concerned and the person shows that it would not be in the interest of the safety or welfare of the child to contact the person.

27 Yogyakarta Principles plus 10 (n6) Principle 31C .

28 Zhan Chiam *et al*, *Trans Legal Mapping: recognition before the law Report* (ILGA 2017) 71.

29 Peter Dunne, 'Guest Post: Malta and Gender Identity' (*Human Rights in Ireland*, 4 April 2015) <<http://bit.ly/2BXCJut>> accessed 5 February 2018.

30 *ibid*.

31 Zhan Chiam (n27) at 88.

Child'.³² In England, the mature minor test or the 'Gillick Competence' test may provide some guidance or a model in the area of consent.³³ Under the test a minor under the age of 16 may legally consent to medical examination and treatment if they have a sufficient degree of maturity and intelligence to understand the implications of medical treatment.³⁴

Recommendations

- The Alliance recommends that the Gender Recognition Act Review Group should consider how the legislation could be amended to allow children under the age of 16 to apply for recognition of their preferred gender.
- The Alliance recommends that the Review Group should take into account the updated *Yogyakarta Principles plus 10* which stipulate that, in line with international human rights law, there should be no minimum age requirement for applying for recognition.
- The Alliance recommends the Review Group consider whether there is a need for parental consent and look to international models of best practice and the evidence available on the working of those systems.
- The best interests of the child principle should be the primary consideration in all applications and the legislation should make provision for the views of the child to be heard with due weight given to their views.
- Trans and intersex children under 16 should be consulted on the review of the legislation in line with Article 12 of the UNCRC.

32 Article 5, Act 26.743 / 2012 as quoted in Zhan Chiam (n27) at 88.

33 *Gillick v West Norfolk and Wisbeck Area Health Authority* (1985) All ER 402 (HL).

34 In his judgment Lord Fraser proposed that the doctor will be justified in proceeding without parental consent if the girl who is under 16 understands the medical advice given; the doctor cannot persuade her to inform her parents; the girl is very likely to begin or continue sexual intercourse without contraception; unless she receives contraception, her physical or mental health are likely to suffer; and her best interests require the doctor to give such contraception.