

Review of the Gender Recognition Act 2015

**Report to the Minister for
Employment Affairs and Social Protection**

June 2018

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Foreword

In 2015 we changed what it means to be lesbian, gay, bisexual or transgender (LGBT) in Ireland with two historic steps - a resounding Yes in support of marriage equality by popular vote (and subsequent legislation) and the introduction of some of the most progressive Gender Recognition legislation in the world. Since then youth groups, schools, and other support services have witnessed a huge increase in the number of young people 'coming out' as they report a greater sense of being respected and protected by the State and a greater sense of acceptance and support from Irish people.

Equal recognition sends a strong message to LGBTI+ people that we are equal citizens, we are valued, and we belong. As well as equal status, it also addresses the practical realities of citizens' lives such as protections for families and access to identification. We know that unfortunately it does not end the anti-LGBTI+ stigma that is deeply rooted in Irish society. LGBTI+ people continue to experience social exclusion, isolation, fear of rejection, bullying, and violence because of who they are. Legislation must be supported with further work around awareness and education to change hearts, minds, and behaviour.

My work in BeLonG To Youth Services has taught me that life for young transgender and non-binary people in Ireland can be incredibly challenging. This is due to the lack of visibility, awareness or understanding about what it means to be transgender or non-binary. I have heard from young people, parents, and teachers about some of these challenges including not being allowed to use their preferred name or pronoun at home or in school, not being able to access appropriate healthcare and support (including mental healthcare). The LGBTIreland report found that 1 in 4 transgender and intersex people have been punched, hit or physically attacked in public. Attacks such as these, and other violent acts, are sadly also still happening

in our schools¹. The most worrying accounts are about the impacts these challenges have on our young people. Severe mental health problems such as depression and anxiety, as well as self-harm and suicidal ideation, are frequently part of transgender young peoples' lives.

We must ask ourselves – do we want another generation of people in Ireland spending their 20s, 30s and beyond recovering from their early experiences of bullying, rejection and exclusion? That is, if they are resilient enough to make it to adulthood? Or do we want all our young people to thrive, to reach their full potential, and to be part of a world where they are equal, safe, and valued in the diversity of their identities and experiences?

The Review

When we began this process in late November 2017, we marked the 25th anniversary of Ireland's ratification of the United Nations Convention of the Rights of the Child (UNCRC) and witnessed the publication of the Yogyakarta Principles Plus 10. It was also a year when some members of the Review Group worked on the LGBTI+ Youth Strategy with Minister Zappone and the Department of Children and Youth Affairs. This Gender Recognition Act review report has been informed by all of these milestones for LGBTI+ young people in Ireland, and is underpinned by the principle that children have their own inalienable rights as enshrined in our Constitution and the United Nations Convention on the Rights of the Child (UNCRC).

I am very grateful to Minister Regina Doherty for her leadership in this review of the Gender Recognition Act. I was honoured to be appointed Chairperson of the Gender Recognition Act Review group and grateful for the opportunity to guide and support the expert team of representatives from civil society, academia, social work, youth participation, and relevant

¹ The LGBTIreland Report: national study of the mental health and wellbeing of lesbian, gay, bisexual, transgender and intersex people in Ireland. (2016)
<https://www.hse.ie/eng/services/list/4/mental-health-services/connecting-for-life/publications/lgbt-ireland-pdf.pdf>

Government Departments. I am also grateful to all my colleagues on the Review Group for their commitment and dedication over the past six months and for coming on this journey. We learnt together, from each other, from submissions and consultations, and we are very proud of our work and to deliver this deliberated report to the Minister with recommendations for her consideration. In particular, I would like to thank Séamus Byrne and Sara Phillips for sharing their lived expertise with the group and for their gracious patience as we discussed issues and proposals that relate personally to their own lives. It is my hope that all future reviews of legislation will take Minister Doherty's lead and include expert voices from the communities of people whose lives are directly affected.

Thank you also to the secretariat in the Department of Employment Affairs and Social Protection for all their work to support me and the group and for bringing this report together.

While our remit was solely in relation to the Gender Recognition Act, matters in relation to schools, healthcare, equality legislation, intersex genital mutilation and safe spaces (to name a few) are some other issues that were raised in the course of this review. They will be highlighted with Minister David Stanton for the Department of Justice's upcoming LGBTI+ Strategy.

I am very grateful to everyone who presented a submission to the Group and to everyone who met us with us to answer our questions and help us deliberate, especially the young people who shared their personal stories and experiences.

During the course of the review process, we heard on a number of occasions that young trans people do not just wake up one morning and decide that they want to change their legal gender. This happens after a period of social transition, living in their preferred gender. What is clear from the young trans and non-binary people that we heard from, however is that having access to legal gender recognition will have a hugely positive impact on their

self-esteem, self-worth, and well-being. We hope our work will help move Ireland along this journey and that very soon trans, non-binary and intersex people/people with variations of sex characteristics will all feel equal, respected and that they belong.

Moninne Griffith

Executive Director, BeLonG To Youth Services

31 May 2018

Chapter 1 - Introduction and Background

1.1 Introduction

The Gender Recognition Act 2015 (the Act) was enacted on 22 July 2015 and commenced with effect from 4 September 2015. The purpose of the Act is to enable a person, aged 16 or over, to have their preferred gender recognised in law. The Act facilitates a person to change their gender from male to female or from female to male. It is widely recognised internationally as one of the most progressive systems of legal gender recognition in the world, based on self- declaration for adult applicants.

Persons aged 18 or over, apply for a gender recognition certificate on the basis of a statutory declaration to live in their preferred gender for the rest of their life.² An exemption to the minimum age requirement exists for 16 and 17 year olds.³ A parent or next friend makes the application for an exemption to the Circuit Family Court on behalf of the young person.⁴ Applications to the Court must be accompanied by a certificate from the child's primary treating medical practitioner and also a certificate from an endocrinologist or psychiatrist who has no connection with the child.⁵ There must also be evidence that the parent or legal guardians consent to this application.⁶

Once a gender recognition certificate is issued, the person's preferred gender becomes the legal gender for all purposes, including dealings with the State, public bodies and civil and commercial society.⁷ A recognised person can, if

² S9 and S10 of the Gender Recognition Act 2015.

³ S12 of the Act.

⁴ S12(2) of the Act.

⁵ S12(4)(b) of the Act.

⁶ S12(4)(a) of the Act.

⁷ S18(1) of the Act.

they wish, obtain a new birth certificate from the General Register Office which shows their new legal gender and new names (if names are also changed) where their birth is registered in Ireland. (Chapter 3 sets out a more detailed description of the provisions of the Act.)

During the passage of the Gender Recognition Bill 2014 through the Oireachtas, the then Government gave a commitment to review the operation of the legislation and to examine particular issues that arose during the debate that required time for further analysis and consideration.⁸ These issues include the position of people who are non-binary and the position of young people (both those aged 16 and 17; and those aged under 16). (Chapter 3 charts the development of the legislation in more detail.)

Section 7 of the Act provides that the Minister shall commence a review of the Act within two years of its coming into operation. Specifically, the section states:

“7. The Minister shall—

- (a) not later than 2 years after this section comes into operation, commence a review of the operation of this Act, and*
- (b) 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.”⁹*

This is the report of the review conducted in accordance with that provision.

⁸ Minister Kevin Humphreys, Seanad Deb, 5 March 2015, Vol. 870 No. 3.

⁹ For the purposes of the Act “Minister” is defined (in section 2) as the Minister for Social Protection.

1.2 Membership of the Review Group¹⁰

On 3 November 2017, the Minister for Employment and Social Affairs, Regina Doherty, T.D., announced Moninne Griffith (Executive Director, BeLonG To) as Chair of the Review Group.¹¹ The Minister also announced three other members of the group on that date – Sara R Phillips, Chair of Transgender Equality Network Ireland (TENI);¹² Séamus Byrne, member of IndividualiTy (BeLonG To’s youth group for transgender young people in Dublin) and Dr. Tanya Ní Mhuirthile, Assistant Professor of Law at Dublin City University. The full membership of the group was finalised shortly thereafter and is as follows:¹³

- Moninne Griffith, BeLonG To (Chair);
- Sara R Phillips, Transgender Equality Network Ireland (TENI);
- Séamus Byrne, IndividualiTy;
- Dr. Tanya Ní Mhuirthile, Dublin City University;
- Anne O’Donnell, Manager, Hub na nÓg - Young Voices in Decision-making;
- Michele Clarke, Chief Social Worker, Department of Children & Youth Affairs;
- Dearbháil Nic Giolla Mhicíl, Department of Employment Affairs & Social Protection;
- Olive McGovern, Department of Children and Youth Affairs;
- Neville Kenny, Department of Education and Skills;
- Joanne King, Department of Foreign Affairs and Trade;

¹⁰ <http://www.welfare.ie/en/pressoffice/Pages/pa031117.aspx>

¹¹ BeLonG To is the national organisation supporting lesbian, gay, bisexual, transgender, and intersex (LGBTI+) young people in Ireland aged between 14 and 23 years.

¹² Transgender Equality Network Ireland (TENI) is the national organisation that seeks to improve conditions and advance the rights and equality of trans people and their families.

¹³ This is the membership at the time the report was completed. There were some changes during the course of the review which are set out in Appendix 1.

- Tracy O'Keeffe, Department of Justice and Equality (Civil Law Reform Division);
- Caroline Mellows, Department of Justice and Equality (Equality Division);
- Diane Nurse, Health Service Executive.

Secretariat:

- Conor O'Reilly, Department of Employment Affairs & Social Protection
- Déaglán Ó Ceallaigh, Department of Employment Affairs & Social Protection

1.3 Terms of Reference

The Review Group were requested to undertake their work in line with the following terms of reference:

1. To report to the Minister for Employment Affairs and Social Protection on the operation of the Gender Recognition Act 2015 since its commencement.
2. To review the current arrangements under the Gender Recognition Act 2015 including, but not confined to, the following:
 - a) (i) Children aged 16 to 17 years,
(ii) Children aged less than 16 years,
 - b) Persons who identify as neither male nor female (e.g. non-binary), and
 - c) Any other issues such as intersex conditions.

3. To look at the arrangements in other countries.
4. To consult widely with relevant stakeholders, including those who were consulted in the preparation of the Gender Recognition Act 2015 and to report to the Minister on the consultation process.
5. To make any recommendations to the Minister, which arise as a result of the Group's review of the Gender Recognition Act 2015 in relation to the operation of the Act.
6. The report of the Review Group should be completed and presented to the Minister for Employment Affairs and Social Protection, ideally by end May 2018.

The Minister may request the Chair for periodic updates of the work of the review and these will be provided.

The Secretariat was provided by the Department of Employment Affairs and Social Protection.

1.4 Work of the Group

Overview

- The group held its first meeting on 13 December 2017 and met on 10 occasions.
- In carrying out its work the group had regard to a number of international human rights frameworks such as the UN Convention on

the Rights of the Child, the Yogyakarta Principles (YP) and YP Plus 10 (see page 9 below and also Chapter 5).¹⁴

- The group was also mindful of the Constitution of Ireland and domestic law (see Chapters 5, 6 and 7).
- Key elements of the group's work were the public consultation process (written submissions) and meetings with members of the trans and non-binary community, parents of trans children and legal and medical experts (see pages 12 to 16 below as well as Chapters 5, 6 and 7).
- Desk research included examining a range of documents such as the ILGA Trans Legal Mapping Report, and a comparison of the international position with regard to the gender recognition of people who are non-binary.¹⁵
- In order to inform the group with regard to the international position, the Department of Foreign Affairs and Trade issued requests to a wide range of States for information on laws and policies in the field of gender recognition (See Chapter 4). The Group examined in detail the provisions of the Maltese legislation and proposed legislation in Iceland.
- The group also met with staff from the Department of Employment Affairs & Social Protection's Client Identity Services Unit (where applications for Gender Recognition Certificates are processed) and

¹⁴ The Yogyakarta Principles and YP Plus 10 are available here:

<https://yogyakartaprinciples.org/>

The UN Convention on the Rights of the Child is available here:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

¹⁵ ILGA is the International Lesbian, Gay, Bisexual, Trans and Intersex Association. The 2017 Trans Legal Mapping Report is available here:

https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf

from the General Register Office (where the Register of Gender Recognition is held and from where copies of birth or adoption entries in that register are issued).

Human Rights Framework

Public Sector Equality and Human Rights Duty

Section 42 of the Irish Human Rights and Equality Commission Act 2014 places a duty on public sector bodies to take proactive steps to eliminate discrimination, promote equality and protect human rights or people who use their services, people affected by their policies and people employed in the organisation¹⁶.

In addition, Ireland is party to a number of international agreements that need to be considered in assessing the appropriateness of current legislation and in making any recommendations for legislative change. They need to be viewed in the context of the Constitution of Ireland regarding rights to autonomy, privacy and dignity, as well as taking into account the Constitutional protection of the family as the natural, primary and fundamental unit group in society.

*United Nations Convention on the Rights of the Child (UNCRC)*¹⁷

The UNCRC sets out key fundamental rights applicable to children, a number of which are particularly relevant in the context of considering gender recognition for children (See Chapter 5 for more detail). Ireland signed the Convention in September 1990, and ratified it in September 1992.

¹⁶ That Act is available here:

<http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>

¹⁷ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

*European Convention on Human Rights*¹⁸

The European Convention on Human Rights (ECHR) is an international agreement that aims to protect the human rights and fundamental freedoms of every person in Member States of the Council of Europe. Ireland is one of the founder members of the Council of Europe and ratified the Convention in 1953.

The provision in the Convention of most relevance to gender recognition is found in Article 8 which concerns the right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 rights have always been understood to encompass the right to respect for one's preferred gender. The European Court of Human Rights (ECtHR) confirmed this when first asked to do so in *Van Oosterwijk v*

¹⁸ https://www.echr.coe.int/Documents/Convention_ENG.pdf

Belgium.¹⁹ The Court acknowledged that the right to recognition of preferred gender identity was an intrinsic, inseparable part a person's status and person and thus is a general principle of law.²⁰ Yet for many years, claims for recognition were unsuccessful due to the margin of appreciation, a technical device that allows States to do what they deem best when there is a lack of consensus on an issue from member states of the Council of Europe.²¹ Nonetheless, there was a growing trend amongst the minority judges acknowledging that recognition of preferred gender identity was an inherent part of the right to self-determination and respect for the innate dignity of the person.²² In 2002, the ECtHR gave a unanimous judgment in *Goodwin v UK* that the persistent refusal of the UK to recognise the gender of the applicant was 'no longer sustainable'²³ and amounted to a violation of her Article 8 rights.

*Yogyakarta Principles*²⁴

The Yogyakarta Principles consist of 'a set of principles on the application of international human rights law in relation to sexual orientation and gender identity.'²⁵ The Principles relate sexual and gender rights issues to established human rights norms, so as to 'collate and clarify State

¹⁹ *Van Oosterwijck v Belguim* (1980) 3 EHRR 557.

²⁰ *Van Oosterwijck v Belguim* (1980) 3 EHRR 557, at 577.

²¹ Tanya Ní Mhuirthile, "Article 8 and the Realisation of the Right to Gender Recognition" in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, 2014), 201.

²² *Cossey v UK* [1990] 13 EHRR 622, in particular the dissenting judgment of Judge Martens at 648; and *Sheffield & Horsham v UK* [1999] 27 EHRR 163, dissenting judgment of Judge Van Dijk at 207.

²³ *Goodwin v United Kingdom* (2002) ECHR 588, at para 90.

²⁴ <https://yogyakartaprinciples.org/>

²⁵ O'Flaherty et al, *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* Available online at http://www.yogyakartaprinciples.org/principles_en.htm (last accessed 07/02/10)

The Yogyakarta Principles make recommendations about the legal treatment of sexual orientation and gender identity based on twenty-nine rights that currently exist in international law.

obligations²⁶ and establish a legal framework for assessing sexual and gender rights claims. The Principles are not a binding international treaty, but rather a universal guide to human rights that affirm binding international legal standards with which all States must comply. The original set of Principles was established in 2006 and supplemented in 2017 with the Yogyakarta Principles plus 10 (YP+10). Principle 31 (in YP+10) deals with legal recognition:

"PRINCIPLE 31: THE RIGHT TO LEGAL RECOGNITION

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. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

- A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;*
- B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;*
- C. While sex or gender continues to be registered:*

²⁶ O'Flaherty et al, *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* Available online at http://www.yogyakartaprinciples.org/principles_en.htm.

- i. *Ensure a quick, transparent, and accessible mechanism that legally recognizes and affirms each person's self-defined gender identity;*
- ii. *Make available a multiplicity of gender marker options;*
- iii. *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;*
- iv. *Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender."*

European Fundamental Rights Agency: Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU

In 2005 The European Fundamental Rights Agency (FRA) updated its report on discrimination on the basis of LGBTI status in the EU which was first published in 2010. The FRA noted that there is growing awareness that States must stop treating trans people as if they suffer a pathology and that legal gender recognition should not require the diagnosis of a gender identity disorder.²⁷ This is confirmed in the adoption by the European Parliament of Resolution of 28 September 2011 on sexual orientation and gender identity at the UN Human Rights Council.²⁸ FRA notes that a depathologised approach is reflected in standardising and simplifying access to gender

²⁷ European Fundamental Rights Agency, *Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU* (Publications Office of the European Union, 2015), p16.

²⁸ European Parliament (2011), Resolution of 28 September 2011 on sexual orientation and gender identity at the UN Human Rights Council, P7_TA(2011)0427, Brussels, point 16.

recognition process across the EU.²⁹ It also notes the “positive trend” towards recognition of the preferred gender identity of children.³⁰ In this FRA echoes the statement by the Commissioner for Human Rights of the Council of Europe that “trans and intersex children encounter specific obstacles to self-determination ... Children are rights-holders and they must be listened to in decision-making that concerns them.”³¹

Public Consultation Process

Central to the review was a public consultation process. A call for submissions was announced by Minister Doherty on 10 January 2018 with a closing date for receipt of submissions of 5 February 2018³².

Reflecting the terms of reference, contributors were invited to make submissions under the following headings:

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

The call for submissions was publicised on the gender recognition webpage of the Department of Employment Affairs and Social Protection, on social

²⁹ European Fundamental Rights Agency, *Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU* (Publications Office of the European Union, 2015), p18.

³⁰ European Fundamental Rights Agency, *Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU* (Publications Office of the European Union, 2015), p19.

³¹ Council of Europe, Commissioner for Human Rights of the Council of Europe (2014), ‘LGBT children have the right to safety and equality’, Human Rights Comment, Strasbourg.

³² <http://www.welfare.ie/en/pressoffice/Pages/pr080118.aspx>

media via that Department's social media channels, and by advertising in the main national daily newspapers. Members of the group highlighted the call for submissions on the websites and social media accounts of their own organisations to raise awareness and to call for submissions from representative groups and individuals in their networks. The consultation process was also brought to the attention of Members of both Houses of the Oireachtas as well as a range of organisations (such as Comhairle na nÓg, and the Ombudsman for Children) that were invited to make submissions.

In order to ensure that the consultation process was visible to young people, the group contacted, amongst other young peoples' representative groups, the Irish Second Level Student's Union (ISSU - the national umbrella body for second-level student councils). The ISSU assisted the group by contacting student councils via email and inviting submissions to the consultation process. They also included an advertisement for the consultation process in their regular bulletin and published an interview with the Chair on their Facebook page.

A total of 92 written submissions were received with a wide range of opinions and recommendations in relation to the issues for consideration. All submissions were acknowledged and brought to the attention of the Review Group. The submissions were from private individuals (adults and young people); Members of the Oireachtas; individual professionals (such as medical doctors and academics); advocacy groups (such as BeLongTo and TENI) and other organisations (such as the Union of Students of Ireland). The submissions have been published (with personal information redacted) on the Department's website at this link:

<http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx>

Content of Submissions

A breakdown by subject matter referred to in the written submissions is set out in Table 1.1 below.

Table 1.1 Issues raised in the Written Consultation Process

Subject	Number of submissions
Children aged 16 and 17	45
Children aged under 16	54
People who are Non-Binary	50
People who are Intersex	45
Operational Issues	32
Medical Issues such as medical needs, supports, counselling etc.	26
Other issues such as gender markers & language, deed polls, Foreign Birth Register, fears of ciswomen, changing rooms & bathrooms, sport, sex offences and reference to other legislation.	28

The majority of submissions were broadly supportive of a simplified and more flexible arrangement for children aged 16/17 years; and were also supportive of extending provision for gender recognition to children under 16 years and persons who are non-binary.

A substantial number of submissions referred to human rights law and international agreements such as the United Nations Convention on the Rights of the Child (UNCRC) to which Ireland is a party, in addition to referencing standard setting statements such as the Yogyakarta Principles. Many submissions described the current system for children aged 16 or 17

years as overly onerous, forcing children down a medical path, and suggested removing medical practitioners from the application process.

Some submissions drew attention to weaknesses in areas of operation of the current legislation such as gender recognition for Irish citizens from Northern Ireland, the process for change of name, the absence of reference numbers on new birth certificates, the cost of updating official documents, maintaining privacy in updating official records, and absence of indication on a Gender Recognition Certificate that it is not based on a medical diagnosis.

A small number of submissions were critical of the process. They expressed concerns about the current gender recognition provisions, and one criticised the composition of Review Group, the compatibility of gender recognition legislation with the Irish Constitution, and the lawfulness of consultation process. One submission raised questions about the nature of transgender identity, particularly for children, and cited very high regret rates for pre-pubertal children.

Other submissions highlighted related issues that are outside the scope of the Act and therefore of the review. These include difficult experiences dealing with schools, arrangements in female prisons, the need for better provision of services and supports for transgender people and their families, the challenges for transgender people around toilet facilities and changing rooms, the mental health risks for transgender people, fears of violence against women, the risk of incorrect results in blood tests and amending the nine grounds in equality legislation to expressly include gender identity, gender expression and sex characteristics as a protected ground against discrimination.

Consultation Meetings

The Review group held consultation meetings with members of the trans community, medical practitioners, and legal experts. They heard first hand experiences of trans young people and their parents and also held discussions with a non-binary adult. Details of the participants in these meetings are as follows:

- Dr. Geoffrey Shannon, Special Rapporteur on Child Protection (2 meetings) [See Chapter 5]
- Three young people (accompanied by a youth support worker)– two of whom are transgender and one of whom is non-binary [See Chapter 5]
- Three parents of children (ranging from ages 9 to 18) who are transgender [See Chapter 5]
- Dr. Fergus Ryan (senior lecturer in law, Maynooth University) and an adult who is non-binary [See Chapter 6]
- Representatives of the medical profession [See Chapter 5]:
 - Dr. Aileen Murtagh (Consultant Child and Adolescent Psychiatrist, St. Patrick’s Mental Health Services)
 - Prof. Donal O’Shea (Consultant Endocrinologist, representing the Royal College of Physicians of Ireland),
 - Dr. Susan O’Connell (Paediatric Endocrinologist, Our Lady’s Children’s Hospital, Crumlin, representing the Royal College of Physicians of Ireland),
 - Dr. Andree Rochfort (representing the Irish College of General Practitioners).

The group is very grateful to all those who took time either to make a written submission and/or to meet with the group. Unfortunately, it wasn’t possible to meet with everyone who offered to meet the group.

1.5 Outline of the Report

Chapter 2 outlines the developments leading up to the introduction of the Gender Recognition Act. Chapter 3 sets out the provisions of the Act as well as the associated operational issues. Chapter 4 describes the international position with regard to the legal recognition of people who are transgender.

Issues regarding gender recognition for those under age 18 (both 16 & 17 year olds and those under age 16) are considered in Chapter 5. The position of people who are non-binary or intersex with regard to gender recognition is examined in Chapter 6. Issues arising with the current operation of the Act are presented in Chapter 7. The group's recommendations are presented in Chapter 8.

Chapter 2 - The Gender Recognition Act, Path to Enactment

2.1 Introduction

Ireland introduced some of the world's most progressive gender recognition legislation based on self-declaration in 2015. The Gender Recognition Act, 2015 followed a High Court Order of 10 March 2008 declaring that certain sections of the Civil Registration Act 2004, by not providing for a gender recognition process, were incompatible with the obligations of the State under the European Convention on Human Rights³³.

This chapter sets out an overview of the cases leading up to this Court Order. It also charts the development of the legislation from the work of the Gender Recognition Advisory Group (GRAG), through the General Scheme published in 2013, the hearings at the Joint Oireachtas Committee on Education and Social Protection, the subsequent report and its consideration at the Dáil. Publication of the Revised General Scheme of the Bill followed in June 2014. Ultimately, the Gender Recognition Act 2015 came into effect from 4 September 2015.

2.2 The Dr. Lydia Foy Cases

In 1993, Dr. Lydia Foy, a transgender woman, applied to the Registrar General for a birth certificate to reflect her preferred gender identity. Following refusal of her application she initiated High Court proceedings in 1997 in which she sought to compel the Registrar General to issue her with a new birth certificate³⁴. Mr Justice Liam McKechnie's judgment was delivered on 9 July 2002 and Dr. Foy's claim was rejected. Justice McKechnie

³³ Order of Mr. Justice McKechnie in *Foy v An t-Árd Chláraitheoir*, IEHC, 2007.

³⁴ *Foy v. An t-Ard Chlaraitheoir & Others* [2002] IEHC 116

held that the birth certificate is intended as a “snapshot”³⁵ of matters on the day the birth is registered and was never intended to, nor does it, establish the current legal status of a person. He ruled that legal gender in Ireland is determined by the congruence of the chromosomes, gonads and genitals at the moment of birth.³⁶ He noted that delaying completion of the sex box on the register of births until a person developed a trans identity, or not, would render the entire system of birth registration “inoperable”.³⁷ He called on the Government and the Oireachtas to deal with the position of transgender persons, concluding his judgment by saying: “*Could I adopt what has repeatedly been said by the European Court of Human Rights and urge the appropriate authorities to urgently review this matter*”³⁸.

Two days later (on 11 July 2002) the European Court of Human Rights found in favour of Christine Goodwin in her case against the UK Government seeking to have a new birth certificate issued³⁹. The Court said that there was now “*clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals*”⁴⁰ and that “*the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable*”⁴¹.

Dr. Foy appealed to the Supreme Court but before the appeal was heard, the European Convention on Human Rights Act 2003 (the ECHR Act) was enacted, bringing the European Convention into Irish domestic law. A further development was the introduction of the Civil Registration Act 2004.

³⁵ *Foy v An tArd Chlaraitheoir (No. 1)* [2002] IEHC 116, at para 170.

³⁶ *Foy v An tArd Chlaraitheoir (No. 1)* [2002] IEHC 116, at para 121

³⁷ *Foy v An tArd Chlaraitheoir (No. 1)* [2002] IEHC 116, at para 171.

³⁸ *Foy v An tArd Chlaraitheoir (No. 1)* [2002] IEHC 116

³⁹ *Christine Goodwin v. UK (2002)* 35 EHRR 447

⁴⁰ *Christine Goodwin v. UK (2002)* 35 EHRR 447, at para 55.

⁴¹ *Christine Goodwin v. UK (2002)* 35 EHRR 447, at para 90.

As neither the *Goodwin* decision, nor these new legislative enactments had been law when the High Court made its original decision, the Supreme Court sent the case back to the High Court for a determination on the applicability of these legal developments.⁴² Justice McKechnie ruled that he had not erred in not taking into consideration matters which did not exist at the time of his decision, and thus Dr. Foy lost her remitted action.⁴³

Independently of this, in November 2005, Dr. Foy made a new application to the Registrar General, asserting the obligation under the ECHR Act to comply with the requirements of the European Convention. When this application was refused she began a second set of proceedings in the High Court.

In October 2007 the High Court ruled that the failure to recognise Dr. Foy's gender was a violation of her rights under Article 8 of the European Convention on Human Rights (which deals with the right to respect for private and family life).⁴⁴ The Court made a declaration, under the ECHR Act, that Irish law was incompatible with the Convention because of its failure to provide for the recognition of transgender persons.⁴⁵ In his concluding comments Justice McKechnie stated: "*Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person subject, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life. All persons by virtue of their being are so entitled.*"⁴⁶ The Government appealed this decision to the

⁴² *Foy v An tArd Chláraitheoir & Ors (No 2)* [2007] IEHC 470, at para 12.

⁴³ *Foy v An t-Ard Chláraitheoir & Ors, (No 2)* [2007] IEHC 470, at paras 12 and 44.

⁴⁴ *Foy -v- An t-Ard Chláraitheoir & Ors*, [2007] IEHC 470 (2007)

⁴⁵ Under s5 of the European Convention on Human Rights Act 2003. This was the first occasion upon which such a Declaration was issued.

⁴⁶ *Foy v An tArd Chláraitheoir (no 2)* [2007] IEHC 470, at para 118.

Supreme Court but withdrew its appeal in June 2010, having decided to introduce gender recognition legislation (see Section 2.4 below).

In February 2013, Dr. Foy announced a return to court due to the absence of any Gender Recognition legislation. In November 2014, Dr Foy settled that case. The Government committed to introducing legislation in 2014 and made a "firm intention" of enacting legislation in 2015⁴⁷.

2.3 The Gender Recognition Advisory Group

The *Renewed Programme for Government*, published on 10 October 2009, included a commitment to "introduce legal recognition of the acquired gender of transsexuals".⁴⁸ In May 2010, the Gender Recognition Advisory Group (GRAG) was set up by the then Minister for Social Protection, Eamon Ó Cúiv, T.D. The GRAG was an inter-departmental working group to advise the Minister on the legislation required to comply with the High Court ruling and had as its terms of reference to propose heads of a bill; to provide for the legal recognition of the acquired gender of transgendered people; the issuing of births certificates reflecting the new gender; granting entitlement to marry in the new gender; and any other provisions consequential on the main provisions.⁴⁹

The GRAG held its first meeting on 6 May 2010 and submitted its report to then Minister for Social Protection, Joan Burton, T.D., in June 2011⁵⁰. The Group consulted with a number of experts and stakeholders in Ireland and

⁴⁷ <http://www.welfare.ie/en/pressoffice/Pages/pa281014.aspx>

⁴⁸ [http://www.defence.ie/WebSite.nsf/72804bb4760386f380256c610055a16b/2a49a2267d0f095b80257754004d3e17/\\$FILE/94315182.pdf/Renewed_Programme_for_Government,_October_2009.pdf](http://www.defence.ie/WebSite.nsf/72804bb4760386f380256c610055a16b/2a49a2267d0f095b80257754004d3e17/$FILE/94315182.pdf/Renewed_Programme_for_Government,_October_2009.pdf)

⁴⁹ <http://www.welfare.ie/en/pressoffice/pdf/pa300610.pdf>

⁵⁰ The report is available here: <http://www.welfare.ie/en/downloads/Report-of-the-Gender-Recognition-Advisory-Group.pdf>

the United Kingdom as well as conducting a public consultation process. Based on their analysis of the issues the Group recommended the following qualification criteria for applicants for gender recognition:

1. Residency/Irish Birth Registration. Applications confined to persons whose births are registered in Ireland, persons included on the Foreign Births Register and persons who are ordinarily resident in Ireland.
2. Minimum Age. Minimum age limit of 18 years.
3. Marital and Civil Partnership Status. Persons in an existing valid marriage or civil partnership excluded from the scheme⁵¹.
4. Permanent Transition. A clear and settled intention to live in the changed gender for the remainder of his or her life.
5. Living in the Role. A minimum 2-year period of living full-time in the changed gender.
6. Medical Criteria. One of the following:
 - a formal diagnosis of Gender Identity Disorder (GID) plus relevant supporting medical evidence, or
 - medical evidence that the applicant has undergone gender reassignment surgery, or
 - evidence of the recognition of changed gender in another jurisdiction.

Other provisions identified by the GRAG to be considered in drafting legislation were as follows:

⁵¹ At the time there was no provision for same-sex marriage in Irish law.

1. Basic process for applying for gender recognition. Decision to be based on examination of documentary evidence submitted. Provision for oral hearings if required.
2. Recognition decision to be made by a three-person independent Gender Recognition Panel appointed by Minister and supported by a secretariat.
3. Panel to issue a Gender Recognition Certificate to successful applicants.
4. Provisions relating to setting up of a Gender Recognition Register by the General Register Office (GRO), issue of new birth certificates and handling of data.
5. Provision for appeal to the Family Court and for revocation/correction of issued certificates.

The model proposed was similar to the system operating in the UK at the time (Gender Recognition Act 2004) and which continues to operate there. The UK Government announced a review of that Act in 2016.⁵²

2.4 General Scheme of the Gender Recognition Bill 2013

On 17 July 2013, the then Minister for Social Protection, Joan Burton T.D., published the General Scheme of the Gender Recognition Bill 2013.⁵³ It

⁵² <https://www.gov.uk/government/news/gender-recognition-act-review-announced-in-plan-for-transgender-equality>

provided for the recognition of the acquired gender of transgender people aged 18 and over who were not married or in a civil partnership.⁵⁴

While the scheme was in keeping with the overall structure of the proposals put forward by the GRAG it differed in a number of key aspects. Most notably, rather than a person having to present before a three person panel, the scheme provided for an administrative approach involving a statutory self-declaration by the applicant that they intend to live permanently in the new gender; and validation by their primary treating physician that the person had transitioned or was transitioning to the acquired gender. In addition, there would be no requirement for an applicant to have lived in their acquired gender for any specific period.

While the requirement to be single remained, the then Minister gave a commitment that the position of transgender people who were already married or in a civil partnership would be reviewed once the Government had decided its response to the Constitutional Convention recommendations on same-sex marriage⁵⁵.

2.5 Joint Oireachtas Committee on Education and Social Protection

Pre-legislative Scrutiny

Following its publication, the General Scheme of the Bill was referred for pre-legislative scrutiny to the Joint Oireachtas Committee on Education and Social Protection. Officials from the then Department of Social Protection,

⁵³ The text of the General Scheme is available here:

<http://www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf>

⁵⁴ The term “acquired gender” was used in the 2013 scheme. Ultimately, the term “preferred gender” was used in the 2015 Act.

⁵⁵ <http://www.welfare.ie/en/pressoffice/Pages/pr170713.aspx>

representative groups and legal and medical experts participated in hearings held by the Joint Oireachtas Committee over two days in October 2013.⁵⁶ Following an introduction and a general explanation of the Heads of Bill, as agreed by Government, the following are some of the issues that were raised in the discussion:

- The lack of medical expertise in the area of transgender issues and the difficulties in gaining access to the necessary medical personnel, the definition of transition and the expectation that the medical experts would demand a diagnosis. The increasing number of transgender people presenting in the paediatric age group in Ireland was noted.
- The blanket exclusion of those aged less than 18 years with calls to reduce the age of self-declaration to 16 years and introduce provision to cater for those under 16 with parental consent (section 23 of the Non-Fatal Offences Against the Person Act 1997 was mentioned in this regard).
- Other criticisms of the Bill - the necessity to not be in a marriage or civil partnership, requiring a physician's statement to confirm a transition is stigmatising and degrading; intersex persons not specifically mentioned in the Bill;
- The need to start with best practice and wider issues such as obstacles young people experience in schools; transgender persons and sports; calls to make discrimination on the basis of gender identity explicitly unlawful.

⁵⁶ The transcript is available here: https://www.oireachtas.ie/en/debates/debate/joint_committee_on_education_and_social_protection/2013-10-23/2/

The Joint Committee's Report

The Joint Committee's Report was published in January 2014.⁵⁷ The recommendations of the Committee in relation to the General Scheme of the Gender Recognition Bill 2013 covered a range of issues as follows:

- Having regard to practices in other jurisdictions as well as to legislative constraints, consideration should be given to whether the term preferred gender should replace the term acquired gender in the Bill.
- The age at which a person is entitled to apply for a Gender Recognition Certificate should be reduced from 18 years to 16 years. Measures should also be put in place to address the day-to-day concerns of transgender people under the age of 16 years.
- The wording with respect to evidence of transition should be reconsidered to address the concerns raised at the hearings that people not be stigmatised as a result of the requirements in this regard.
- The Committee believes that the fact that a person is in an existing marriage or a civil partnership should not prevent him or her from qualifying for a Gender Recognition Certificate, and urges the Minister to revisit this issue.⁵⁸

The Committee also recommended that: consideration should be given to amending equality legislation to add gender identity to the existing nine grounds under which discrimination is illegal; guidelines on supporting the inclusion of transgender young people in schools should be developed in

⁵⁷ The report is available here:

<https://webarchive.oireachtas.ie/parliament/media/committees/educationandsocialprotection/report-on-gender-recognition-bill.pdf>

⁵⁸ Minister Burton had already (in July 2013) given a commitment that the position of transgender people who were already married or in a civil partnership would be reviewed once the Government had decided its response to the Constitutional Convention recommendations on same-sex marriage.

consultation with relevant stakeholders; and that Irish sporting regulatory bodies receiving public funding should develop comprehensive policies in relation to the participation of transgender people.

Dáil Debate on the Joint Committee's Report

In her opening statement at the Debate on the Joint Committee's Report in Dáil Eireann on Friday 9th May 2014, the then Minister for Social Protection, Joan Burton, T.D., explained that she would bring the matter back to Cabinet for consideration of the Joint Committee's recommendations.⁵⁹ The Report was generally welcomed by Deputies from all sides of the House with the following being some of the main points raised in the debate:

- The lack of provision for those aged under 18 years with references to the Non-Fatal Offences Against the Person Act 1997 with regard to lowering the age from 18 to 16;
- The removal of the stringent medical certification process;
- The requirement of an applicant for a Gender Recognition Certificate to be single – it was commented that the upcoming referendum on marriage could result in the removal of this condition;
- The absence of specific provisions for transgender people under equality and anti-discrimination legislation.

⁵⁹ The transcript is available here <https://www.oireachtas.ie/en/debates/debate/dail/2014-05-09/4/>

2.6 The Gender Recognition Bill 2014

Following the Cabinet's consideration of the Joint Committee's report, the Revised General Scheme of the Bill was published in June 2014.⁶⁰ Some key elements of the Bill were as follows:

- It used the term 'preferred gender' in line with a recommendation of the Joint Committee. This approach also facilitates applications for gender recognition from people with intersex conditions;
- The requirement for an applicant to be single remained but the commitment to review this in light of the marriage equality referendum was retained.
- An applicant would be legally recognised by the State as being of the preferred gender from the date of the decision to issue the gender recognition certificate. This recognition would be for all purposes, including dealings with the State, public bodies, and civil and commercial society.
- The person whose preferred gender is recognised would be entitled to marry a person of the opposite gender or enter a civil partnership with a person of the same gender.
- He or she would be able to:
 - obtain a new birth certificate that shows the preferred gender and new names (if names are also changed) where their birth is registered on the register of births or on the register of adopted

⁶⁰ The full text of the Revised General Scheme is available here: <https://www.welfare.ie/en/downloads/Revised-General-Scheme-of-the-Gender-Recognition-Bill-2014.pdf>

children (both maintained by the Registrar General) or on the register of intercountry adoptions (maintained by the Adoption Authority of Ireland)

or

- have their entry on the foreign birth register (maintained by the Department of Foreign Affairs and Trade) amended accordingly.
- All rights, responsibilities and consequences of actions by the person in their original gender prior to the date of recognition would remain unaffected.
- Provision for applications from 16 and 17 year olds, but with what the Minister described as “the double safeguard of parental/guardian consent and approval by Court order”⁶¹.
- As with the 2013 scheme, the application process would consist of a statutory declaration by the applicant that they intend to live permanently in the new gender; and a supporting statement by their primary treating medical practitioner that the person had transitioned or was transitioning to the preferred gender. However, the process would not require details of care such as medical history or confirmation of a diagnosis, nor would the person have to confirm he or she had been living in their preferred gender for a specific period of time.

The Bill was introduced in the Seanad on 21st January 2015.⁶² As the Bill progressed through the Houses amendments were tabled by the Government, Senators and Deputies with regard to:⁶³

⁶¹ <http://www.welfare.ie/en/pressoffice/Pages/pr180614.aspx>

⁶² The full text of the Gender Recognition Bill 2014 as initiated in the Seanad is available here <https://data.oireachtas.ie/ie/oireachtas/bill/2014/116/eng/initiated/b11614d.pdf>

- Lowering the minimum age from 18 to 16;
- The provision of medical evidence; that a GP be allowed to furnish the required medical evidence; that no evidence of surgical procedure required;
- Provision for method of self-declaration and removal of the requirement for medical certification for adult applicants (Seanad report stage);
- Removal of the need for an applicant to be single; and the validity of existing marriages and civil partnerships;
- The introduction of a new gender designation (gender X to provide for those not identifying as male or female);
- The provision of a review of the Act;
- The provision of an Interim Gender Recognition Certificate;
- Introduction of a specific offence for the disclosure of information contained in a gender recognition certificate; and
- The use of public bathroom facilities.

In addition there were proposed amendments to the Prohibition of Incitement to Hatred Act 1989, the Education Act 1998, the Employment Equality Act 1998, the Equal Status Act 2000, and the Passports Act 2008.

⁶³ The transcripts of the debates at the Select sub-committee on Social Protection and in the Seanad are available here: <https://www.oireachtas.ie/en/bills/bill/2014/116/?tab=debates>

2.7 The Gender Recognition Act 2015⁶⁴

The Gender Recognition Act 2015 was passed by the Houses of the Oireachtas on 15 July 2015. It was signed into law by the President of Ireland on 22 July 2015, came into operation on 4 September 2015 and was celebrated by the transgender community in Ireland and throughout the world.

S.I. No. 369 of 2015 [Gender Recognition Act 2015 (Commencement) Order 2015] provides for the commencement of all sections of the Act with effect from 4 September 2015 with the exception of the following: section 9(2)(b); section 10(1)(f)(i); section 11(2)(a)(ii); paragraphs (c) and (d)(ii)(I) of section 15(8); subsections (3) and (8) of section 18. These sections related to the requirement that the person not be married or in a civil partnership.

The Act provided that an applicant for a gender recognition certificate must be unmarried. This was necessary pending the outcome of legal challenges to the Marriage Equality Referendum and until such time as there was no impediment to same sex marriage in Irish Law. Following the dismissal of the legal challenges, an amendment to the Act was made by section 24 of the Marriage Act 2015 which removed the requirement for an applicant to be unmarried.⁶⁵

Chapter 3 sets out the provisions of the Act and its current operation.

⁶⁴ The full text of the Act is available here:
<http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>

⁶⁵ The full text of the Marriage Act 2015 is available here
<http://www.irishstatutebook.ie/eli/2015/act/35/enacted/en/print>

Chapter 3 - Provisions and Operation of the Act

3.1 Introduction

This chapter presents an overview of the main provisions of the Act, the application process, issues associated with the operation of the Act and data in relation to, for example, the number of applications processed.

3.2 Overview of the Key Provisions of the Act

The stated purpose of the Act is to enable the State “to recognise a change of gender” of applicants.⁶⁶

Once a gender recognition certificate is issued, the person’s preferred gender becomes the legal gender for all purposes, including dealings with the State, public bodies and civil and commercial society. The person can, if they wish, obtain a new birth certificate from the General Register Office which shows the preferred gender and new names (if names are also changed, which requires a separate process) where their birth is registered in Ireland.

The issuing of a gender recognition certificate does not in any way affect the rights or liabilities of a person or the consequences of an action by the person in their original gender prior to the date of issue of the certificate.

Under sections 8 and 9 of the Act a Gender Recognition Certificate can be issued to a person who:

⁶⁶ Long Title, Gender Recognition Act 2015.

- has his/her birth recorded in either the register of births or the adopted children register maintained by an tArd-Chláraitheoir (General Register Office);
or
- is registered on the foreign birth register maintained by the Minister for Foreign Affairs and Trade;
or
- is registered in the register of intercountry adoptions maintained by the Adoption Authority of Ireland
and
- is at least 18 years of age on the date of application (those aged 16 or 17 can apply to the court for an exemption to this provision under section 12 of the Act).

People aged 18 or over

For those aged 18 years or over an application for a gender recognition certificate is made on the basis of a statutory declaration, provided for under section 10, to live in the preferred gender for the rest of their life. The text of the declaration is as follows:

"I do solemnly and sincerely declare that I

(i) have a settled and solemn intention to live in the preferred gender for the rest of my life,

(ii) understand the consequences of the application,
and

(iii) make this application of my own free will."

People Age 16 and 17

Section 12 of the Act provides that a person aged 16 and not yet 18 years old may apply to the Circuit Family Court through a parent, or next friend, for an exemption from the requirement of a minimum age for gender recognition of 18 years. In order to obtain a Court Order the Act requires:

1. the consent of the child's parents, surviving parent or guardian.
There is provision for the dispersal of parental consent where (i) it cannot be obtained because the person cannot be identified or found or is failing or neglecting to respond to a request for consent or (ii) it should not be obtained because it would not be in the interest of the safety or welfare of the child to contact the person [section 12(5)];
2. a certificate from the child's primary treating medical practitioner
This is defined as "a person's primary treating endocrinologist or psychiatrist in relation to the matter the subject of an application for a gender recognition certificate" [section 12(4)(b)(i)];

and
3. a certificate from an endocrinologist or psychiatrist who has no connection with the child [section 12(4)(b)(ii)].

The certificate which the primary treating medical practitioner provides certifies that:

- (I) that he or she is the child's primary treating medical practitioner,

(II) that in the professional medical opinion of the medical practitioner—

- (A) the child has attained a sufficient degree of maturity to make the decision to apply for gender recognition,
- (B) the child is aware of, has considered and fully understands the consequences of that decision,
- (C) the child’s decision is freely and independently made without duress or undue influence from another person, and
- (D) the child has transitioned or is transitioning into his or her preferred gender,

The endocrinologist or psychiatrist, who has no connection to the child, certifies that their medical opinion concurs with the medical opinion of the child’s primary treating medical practitioner.

The Act also provides that the court shall not make an order in this regard “*unless satisfied that it is in the best interest of the child*” [section 12(6)].

Other Provisions

As well as the principal provisions dealing with applying for gender recognition, the Act also makes provision to address issues such as: revocation of a gender recognition certificate (by the Minister or by the applicant); correcting errors in a gender recognition certificate; establishing a mechanism for appeals; parenthood; gender specific offences; offences and penalties under the Act; jurisdiction of the Courts; and, amendments to the Passports Act 2008.

Section 6 of the Act requires the Minister to prepare an annual report for the Houses of the Oireachtas by the end of June each year. The report covers

the background to the enactment of the legislation, the role of Client Identity Services and the General Register Office, and statistics relating to the operation of the Act during the year⁶⁷.

Issues Outside the Scope of the Act

There are currently no provisions in legislation for persons under the age of 16 years to legally change gender nor are there any provisions to allow a person to apply to live in a preferred gender other than that of male or female. These issues are examined in detail in Chapters 5 and 6.

The Act is principally concerned with affirmation of gender identity through certification and registration. Issues relating to provision of public services and engagement with public and private organisations, are not covered by the provisions of the Act. These organisations may wish to consider how the Act impacts their service provision, their engagement with the transgender community, and adapt their policies and operations accordingly.

3.3 Operation of the Act

The operation of the Act principally concerns processing applications for gender recognition certificates, entries on the register of gender recognition, and revised passports.

Applications for a Gender Recognition Certificate

In the case of persons aged 18 years or over, applications are made by way of a statutory declaration which is included in the application form for a gender recognition certificate.

⁶⁷ Copies of the annual report are available on the gender recognition page of the Department of Employment Affairs and Social Protection website at: <http://www.welfare.ie/en/Pages/Gender-Recognition.aspx>

For children aged 16 or 17 the application form must be accompanied by a Court Order from the Circuit Family Court exempting the child from the requirement to be at least 18 years of age (see Section 3.2 above).

Applications for a Gender Recognition Certificate require completion of an application form, which includes a statutory declaration to be witnessed by one of the following: Peace Commissioner, Notary Public, Commissioner for Oaths, Solicitor. There are a number of documents that must accompany the application form:⁶⁸

- Birth Certificate or Adoption Certificate.
- Proof of residency in Ireland, for persons not born in Ireland.
- For applications to have a preferred gender already recognised in another jurisdiction validated here, a copy of the relevant decision, order or certificate.
- For persons between 16 and 18, a Court Order from the Circuit Family Court granting an exemption from the requirement to be at least 18 years of age in order to apply for a Gender Recognition Certificate.
- To have a name other than that on an original birth certificate shown on the Gender Recognition Certificate, evidence is required of “use and repute” over two years or a Deed Poll for a change of name which has been enrolled in the High Court.

Applications for gender recognition certificates are processed by the Client Identity Services division in the Department of Employment Affairs and Social Protection. The division has responsibility for establishing and authenticating customer identity as well as supporting the development of

⁶⁸ A copy of the application form for a Gender Recognition Certificate is at Appendix 2.

an identity policy framework for the governance and delivery of identity management services.

One of the key functional areas of Client Identity Services is the Data Quality Management area. Since July 2015, a small team of three people from that area have had responsibility for the operation of the Act, which includes processing of applications for a gender recognition certificate. The system that applications are processed through can only be accessed by the gender recognition certificate team in the Data Quality Management area. Confidentiality is a vital component of the gender recognition certificate application process.

Once the application is processed the records are updated to reflect the new gender. Generally, a gender recognition certificate is issued within 2-3 working days of the decision to grant being made. Staff in the General Register Office and Client Identity Services have been commended for their professionalism and sensitivity in processing applications.⁶⁹

Birth and Adoption Certificates

The Gender Recognition Act 2015 amended the Civil Registration Act 2004 by requiring the Registrar General to establish and operate a register of gender recognition. When a person has received a gender recognition certificate they may apply to be included in this register. This will allow a birth certificate showing the new gender of the person to be issued from the register.

⁶⁹ This was acknowledged by members of the group during discussions with staff from both areas.

As privacy is a crucial element of the gender recognition process, the register of gender recognition and the link to the original birth registration are confidential.⁷⁰ To further ensure confidentiality the birth certificates showing the new gender can only be obtained from the General Register Office, by the person the birth certificate relates to or, if they are deceased, the surviving family.

For persons registered in the register of births, the adopted children register, the register of intercountry adoptions or the foreign births register: an application can be made to the appropriate authority (on receipt of a gender recognition certificate) to have details relating to gender entered in the appropriate gender recognition register. The appropriate authorities for such applications are:

- The General Register Office (GRO) for entries in the *register of gender recognition* for persons registered in the register of births or the adopted children register (details will already have been sent to the GRO).⁷¹
- The Adoption Authority for entries in the *register of gender recognition of intercountry adoptions* for persons registered in the register of intercountry adoptions (details will already have been sent to the Adoption Authority).
- The Department of Foreign Affairs and Trade for entries in the *register of gender recognition of foreign births* for entries recorded in a foreign births entry book or in the foreign births register.

When a person's details are entered on the Register of Gender Recognition and they require a certified copy of this entry, they can apply in writing,

⁷⁰ S27 of the Gender Recognition Act 2015 inserting s30D in the Civil Registration Act 2004.

⁷¹ A copy of the application form for entry in the register of gender recognition is at Appendix 3.

requesting a certified copy of their entry in the Register of Gender Recognition. Applications for these certificates are processed by the General Register Office (GRO) which is the central civil repository for records relating to births, stillbirths, deaths, marriages, civil partnerships and adoptions in Ireland. It operates under the aegis of the Department of Employment Affairs and Social Protection, and has responsibility for the administration of the Civil Registration Service in Ireland.

Change of Name

Where a person wishes to have a name other than that on their original birth certificate shown on the Gender Recognition Certificate, they will need to provide the Department with either evidence of "use and repute" over two years or a Deed Poll for a change of name which has been enrolled in the High Court.

The "use and repute" of the preferred name can be proven by providing documentary evidence from two different sources (e.g. Passport, driver's licence, college identification card, pay slip, utility bills, bank statements or official correspondence from a public or private sector organisation) which show at least two years usage of the preferred name.

Passports

A person who has been awarded a Gender Recognition certificate and wants to renew their passport may submit a fully completed passport application, Gender Recognition Certificate and their new birth certificate, together with their current passport.

A first time applicant, in addition to the above documents, is also required to submit photographic ID, proof of name and proof of address. The Passport

Service website contains further information on applying as a first time applicant.⁷²

3.4 Number of Applications for Gender Recognition Certificates⁷³

The statistics in this section relate to the period from commencement of the Act up to December 2017.

Gender Recognition Certificates

The total number of applications for a gender recognition certificate received to end December 2017 was 298. Table 3.1 details the total number of gender recognition certificates issued by year and by age of applicant:

Table 3.1: Number of Applications for a Gender Recognition Certificate Received and Processed

Year	Applications Received			Applications Granted			Applications Refused		
	Age 16/17	Age 18+	Total	Age 16/17	Age 18+	Total	Age 16/17	Age 18+	Total
2017	3	96	99	2	97	99 ⁷⁴	0	1	1
2016	6	104	110	6	103	109 ⁷⁵	0	0	0
2015 ⁷⁶	2	87	89	2	87	89	0	0	0
Total	11	287	298	10	287	297	0	1	1

⁷² See this link: <https://www.dfa.ie/passports-citizenship/top-passport-questions/documentary-requirements-passport-applications/>

⁷³ Unless otherwise stated, the figures in this section refer to the position at end December 2017.

⁷⁴ Two applications on hands on 31 December 2017, these fall to be processed in 2018.

⁷⁵ One application on hands on 31 December 2016, decided in 2017.

⁷⁶ From Commencement of Act on 4 September 2015 to 31 December 2015.

Register of gender recognition

A total of 193 registrations were made on the register of gender recognition. Table 3.2 outlines the total number of registrations by age and by year.

Table 3.2: Number of Registrations on the Register of Gender Recognition

Year	Age 16/17	Age 18+	Total
2017	0	60	60
2016	6	71	77
2015⁷⁷	2	54	56
Total	8	185	193

Non-Irish born residents

Under section 9(1)(b) of the Act a non-Irish born resident of the State may apply for a gender recognition certificate. Of the 297 gender recognition certificates issued, 55 were to non-Irish born residents of the State. All of the applicants were aged 18 years or over.

Recognition in another jurisdiction

Section 11(2) of the Act allows a person who has changed gender in another jurisdiction to apply for a gender recognition certificate. Four applications have been received.

Revocations

Under section 14 of the Act the Minister can revoke a gender recognition certificate where information is received that would have led to the refusal of

⁷⁷ From Commencement of Act on 4 September 2015 to 31 December 2015

the certificate, had it been received prior to its issue. To date, no gender recognition certificates were revoked by the Minister.

Where the holder of a gender recognition certificate wants to revert to their original gender, section 15 of the Act allows them to apply to the Minister to revoke the certificate. A total of 2 applications to revoke a gender recognition certificate have been granted.

Amendments to gender recognition certificates

Under section 16 of the Act a gender recognition certificate holder can apply to the Minister to have the certificate amended if there is a clerical error or an error of fact in the content of the certificate. Three applications to amend a Gender Recognition Certificate have been received.

Passport Act 2008

Section 38 of the Act amends the Passports Act 2008 so that a holder of a gender recognition certificate may apply to the Minister for Foreign Affairs and Trade and request a passport to be issued in the name and gender specified on the gender recognition certificate. The Department of Foreign Affairs and Trade has issued a total of 50 passports to Gender Recognition Certificate holders, 5 of these were issued to persons under 18 years of age.

Irish Nationality and Citizenship Act 1956

In order to allow a person on the foreign birth register to have their preferred gender recognised, section 31 of the Act amended the Irish Nationality and Citizenship Act 1956 to provide for the establishment and maintenance of a register of gender recognition of foreign births by the Department of Foreign Affairs and Trade. It was not possible to apply under this provision prior to 1 December 2017 when regulations giving effect to

this section came into operation.⁷⁸ There were no applications in December 2017.

Adoption Act 2010

Section 33 of the Act amends the Adoption Act 2010 to allow the Adoption Authority of Ireland to establish a “register of gender recognition of intercountry adoptions”. Four registrations have been entered on the register of gender recognition of intercountry adoptions.

3.5 Issues Arising

Issues not currently covered by the Act and issues arising with its current operation are examined in detail in Chapter 5 (Children and Young People); Chapter 5 (People who are non-binary or intersex); and Chapter 7 (Other operational issues).

⁷⁸ S.I. No. 539/2017 Gender Recognition of Foreign Births Regulations 2017 refers. It is available here: <http://www.irishstatutebook.ie/eli/2017/si/539/made/en/print>

Chapter 4 - International Position

4.1 Introduction

Not all countries have systems which allow people to legally change their gender. Ireland is amongst the few countries that operate a self-determination model for adults. Others operate medicalised models which require supporting documentation from medical experts and/or evidence that the person has lived in their preferred gender for a specified period.

There is also significant variation with regard to the treatment of children with some countries applying the same process to all those aged over 16, while others, such as Ireland and Belgium apply a different system for that age group. Some countries such as New Zealand, provide a system of gender recognition for minors with no minimum age requirement, while others do not have any system for those under age 18.

Some countries have provision for a third gender marker which facilitates gender recognition for people who are non-binary. This is not the case in the Irish system.

The issue of gender recognition has gained a growing level of public awareness internationally. Research in the area is continually evolving and informing public policy formulation in many countries with several countries currently reviewing their legislation.

Appendix 4 sets out an overview of the provisions for gender recognition in Ireland; other EU Member States; and a range of other countries, including countries that responded to a questionnaire circulated by the Department of

Foreign Affairs and Trade⁷⁹ and countries that were consulted with bilaterally by the Review Group. A brief overview of the position is presented in the following sections.

4.2 Adults (Over 18)

While many countries provide some form of legal gender recognition, only a small number do so on the basis of self-determination by the applicant without recourse to court processes or medical certification.

The Transgender Europe (TGEU) *Human Rights and Gender Identity: Best Practice Catalogue* published in 2016, lauds the Irish model of gender recognition as amongst the examples of best international practice and welcomes the fact that the Irish model is depathologised.”⁸⁰

Within the EU, Ireland, Malta, Belgium, Denmark, and Latvia are the only countries with a self-declaration model. In Belgium and Denmark a period of reflection is required before legal recognition is granted (three months in the case of Belgium, and six months in the case of Denmark). The vast majority of EU Member States (such as Croatia, Finland, Germany and Sweden) require supporting medical documentation. Spain is quite different in that it requires that the person has had two years of hormone treatment.

Outside of the EU, Norway and Argentina are two of the other countries which operate self-determination models.

⁷⁹ States that replied to the questionnaire are: Andorra, Austria, Belgium, Finland, France, Germany, Greece, Japan, Luxembourg, Malta, New Zealand, Norway, Portugal, Spain, UK, Uruguay, and USA.

⁸⁰ Transgender Europe, *Human Rights and Gender Identity: Best Practice Catalogue* (2016) available at https://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf

Some countries are currently reviewing their legislation in this area and are considering a self-declaration model as part of their deliberations. They include: the United Kingdom, the Netherlands, Luxembourg, Spain, Portugal and Iceland.

4.3 Children (Under 18)

In many countries, where provision is made for adults, legal gender recognition is available to children. The minimum age requirements vary but there is usually additional conditionality and in the majority of cases there is a requirement for parental consent, sometimes a judicial process, and/or a requirement for supporting medical documentation.

Gender recognition for 16 and 17 year olds in Ireland involves a court process, parental consent and medical certification from two doctors. While the TGEU welcomes the existence of a pathway to recognition for 16 and 17 year olds, it does describe the process as “complicated and medicalised.”⁸¹

In Belgium, 16 and 17 years olds require parental consent and a report from a psychiatrist in order to have their gender changed, while those aged over 12 can have their first name changed (with parental consent). In Greece, a gender marker change is available to those aged 15 or over.

In Croatia, a child’s gender can be changed at any age, with the provision of supporting medical documentation. The system in New Zealand provides that a child’s guardian can apply for a declaration as to the appropriate gender identity of the child at any age.

⁸¹ Transgender Europe, *Human Rights and Gender Identity: Best Practice Catalogue* (2016) available at https://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf

In the case of Malta and Norway, children over 16 years may apply for legal recognition on the basis of self-declaration. In Netherlands the system of gender recognition is the same for all over age 16 – supporting expert opinion is required.

In Argentina, gender recognition is available for children based on a judicial process which it describes as *“taking into account the evolving capacities and best interest of the child as expressed in the Convention on the Right of the Child”*.⁸²

4.4 Availability of a Third Gender Marker

Official documents in Ireland do not include a third gender marker but provision for non-binary gender markers, on certain public documents, is available in a number of countries.

Malta is the only country to provide full legal gender recognition to non-binary persons based on self-declaration. In Denmark it is possible to apply for a passport with gender marker “X”.

Germany currently has no provision for a third gender marker. In November 2017 the German Federal Constitutional Court ruled the existing law to be unconstitutional. It instructed that new provisions be enacted by which either a third gender option will be introduced or gender registration abolished altogether no later than 31 December 2018⁸³. A Dutch court recently ruled that the exclusive option of ‘male’ or ‘female’ on official documents - including birth certificates - is too restrictive and should be

⁸² Article 5, Act 26.743 / 2012: <http://tgeu.org/argentina-gender-identity-law/>.

⁸³

http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html;jsessionid=530BB2A30CCC708124A3892868EE5BB2.2_cid394

revised. The court suggested the Dutch legislature initiate legislation to ensure that gender-neutral self-identification is provided for under Dutch law and The Dutch Minister of Education and Gender Equality has reportedly said the government will examine the legal consequences of the court's decision.⁸⁴

Canada provides for a third gender option on passports, while Ontario driver's licences have an "X" option for sex and the Northwest Territories allow "X" as a non-binary option on birth certificates. Australia and New Zealand both allow "X" as a gender marker on passports and in Australia birth certificates can have gender recorded as "indeterminate".

In Asia, countries such as India, Pakistan, Bangladesh, and Nepal have a culture of accommodating third gender communities and provide for third gender markers on public documents such as passports and national identity cards.

At Federal level in the USA only male or female options are available on official documentation. In 2016, an Oregon resident became the first person in the USA whose legal sex is "non-binary". In 2017 California became the first state to allow its residents to opt for a gender-neutral designation on birth certificates⁸⁵.

⁸⁴For more information see Human Rights Watch article:
<https://www.hrw.org/news/2018/06/01/dutch-court-signals-need-gender-neutral-option>

⁸⁵ The legislation is available here
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB179

Chapter 5 - Children and Young People

5.1 Introduction

As set out in Chapter 3, the current legislation does not provide for children under age 16. For those aged 16 and 17 there is provision for the minimum age requirement of 18 to be waived by an order issued from the Circuit Family Court.⁸⁶ Applications are not made by the child who wants to be recognised, but rather by their “next friend”.⁸⁷ To obtain such an order, the young person requires the consent of both their parents⁸⁸ (there are exceptions to this where this is not possible or would be dangerous),⁸⁹ and certificates from two doctors (who must be either endocrinologists or psychiatrists) - one who is the child’s primary treating medical practitioner and one who has no connection with the child.⁹⁰

In considering future arrangements for children the group were informed by the legislative environment (both international and domestic); the content of written submissions; and consultation discussions with parents, transgender young people, a legal expert in children’s rights, and with medical practitioners with experience with the medical care of trans people. They also took account of the work of the LGBTI+ Youth Strategy which included consultation with 4,000 young people.

⁸⁶ S12(1) of 2015 Act.

⁸⁷ S12(2) of the 2015 Act.

⁸⁸ S12(4)(a) of the 2015 Act.

⁸⁹ S12(5) of the 2015 Act.

⁹⁰ S12(4)(b) of the 2015 Act.

5.2 International Legal Environment

United Nations Convention on the Rights of the Child (UNCRC)⁹¹

The UNCRC defines the child as a person under 18 years of age (Article 1). Ireland signed the Convention in September 1990, and ratified it in September 1992. The Convention sets out key fundamental rights applicable to children, a number of which are particularly relevant in the context of considering gender recognition for children. The four core principles underpinning the Convention are: non-discrimination;⁹² best interests of the child;⁹³ right to life, survival and development;⁹⁴ and respect for the views of the child.⁹⁵ These core principles have been described as “underlying values that should guide the way each individual right is ensured and respected.”⁹⁶ In addition to these core principles there are two further principles that speak directly to the work of the Review Group: the right to an identity and official recognition of that identity;⁹⁷ and the right to respect for and preservation of that identity.⁹⁸ The Convention acknowledges the primary role of parents and the family in the care and protection of children, as well as the obligation of the State to help them carry out these duties.⁹⁹ It

⁹¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁹² Article 2 UNCRC, 1989.

⁹³ Article 3 UNCRC, 1989.

⁹⁴ Article 6 UNCRC, 1989.

⁹⁵ Article 12 UNCRC, 1989.

⁹⁶ United Nations, *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* (Geneva: United Nations, 1997) 393.

⁹⁷ Article 7 UNCRC, 1989.

⁹⁸ Article 8 UNCRC, 1989.

⁹⁹ Article 5 UNCRC, 1989.

also acknowledges the evolving capacity of the child.¹⁰⁰ Extracts from the relevant articles are listed below.

Article 2 (Protection against discrimination)

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Articles 3 and 18 (The best interests of the child – rights and duties of parents & the State)

Article 3.1: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

3.2 States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

Article 18.1: States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be,

¹⁰⁰ Article 5 UNCRC, 1989.

legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Article 5 (Evolving capacity)

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 7 (Right to identity and official recognition of same)

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8 (Preservation of identity)

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 12 (Hearing the voice of the child)

1: States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The UN Committee on the Rights of the Child has published 21 “General Comments” associated with the UNCRC¹⁰¹. These General Comments are guidelines as to how the Convention should be interpreted.

General Comment No. 7 (2005) defines evolving capacities as the “processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized”¹⁰²

The Committee also notes that respecting children’s evolving capacities is crucial for the realisation of their rights and that this is particularly true for young children.¹⁰³ The Committee emphasises that respect for evolving capacity should be seen “as a positive and enabling process, not an excuse for authoritarian practices that restrict children’s autonomy and self-expression and which have traditionally been justified by pointing to

¹⁰¹ These are all available at this link:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

¹⁰² Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 17.

¹⁰³ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 17.

children's relative immaturity and their need for socialization."¹⁰⁴ General Comment No. 7 also draws attention to the important role parents and guardians play in enabling children to exercise their rights. The General Comment notes that parents are motivated by what is in the best interests of their children and have the primary responsibility for promoting children's development and well-being.¹⁰⁵ Thus the General Comment charges States with respecting the primacy of parents and supporting parents in fulfilling their responsibilities towards their children.¹⁰⁶

One of the four core principles underpinning the Convention, the right of the child to be heard, is considered in General Comment No. 12 (2009).¹⁰⁷ The Committee emphasises the centrality of this right stating that it "should also be considered in the interpretation and implementation of all other rights".¹⁰⁸ Article 12.2 provides that the child "shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child..." General Comment No. 12 states that this condition "has to be respected and understood broadly."¹⁰⁹ Thus there is an obligation on the State to ensure that children know of their right to express their opinions on matters that affect them. This does not mean that children are the final decision makers or must make decision about important matters alone.¹¹⁰ General Comment No. 12 emphasises that the age of the child does not determine the significance to be given to their views. The Committee

¹⁰⁴ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 17.

¹⁰⁵ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 18.

¹⁰⁶ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 18.

¹⁰⁷ Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009) UNDoc CRC/C/GC/12.

¹⁰⁸ Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009) UNDoc CRC/C/GC/12, at para 2.

¹⁰⁹ Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009) UNDoc CRC/C/GC/12, at para 26.

¹¹⁰ Law Reform Commission, *Children and the Law: Medical Treatment* (Law Reform Commission, 2011), p27-30.

notes that “information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child’s capacity to form a view.”¹¹¹ According to the Committee, children’s voices “have increasingly become a powerful force in the prevention of child rights violations.”¹¹² As a corollary, they are also essential to ensuring that the rights of children are fully vindicated.

Also relevant in this context is General Comment No. 20 on the implementation of the rights of the child during adolescence.¹¹³ Adolescence is not a fixed concept, the Committee recognises that children reach maturity at different stages and ages, and so it notes that in this General Comment does not seek to define adolescence, but instead focuses on the period of childhood from 10 years until the 18th birthday.¹¹⁴ The Committee notes that the potential of adolescents is widely compromised because States do not recognise or invest in the measures needed for them to enjoy their rights.¹¹⁵ It highlights the importance of a human rights-based approach that includes recognition and respect for the dignity and agency of adolescents; their empowerment, citizenship and active participation in their own lives.¹¹⁶ Therefore the Committee emphasises the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy.¹¹⁷

¹¹¹ Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009) UNDoc CRC/C/GC/12, at para 29.

¹¹² Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009) UNDoc CRC/C/GC/12, at para 122.

¹¹³ Committee on the Rights of the Child, *General Comment No 20 on the Implementation of the Rights of the Child During Adolescence* (2016) UNDoc CRC/C/GC/20.

¹¹⁴ Committee on the Rights of the Child, *General Comment No 20 on the Implementation of the Rights of the Child During Adolescence* (2016) UNDoc CRC/C/GC/20, at para 5.

¹¹⁵ Committee on the Rights of the Child, *General Comment No 20 on the Implementation of the Rights of the Child During Adolescence* (2016) UNDoc CRC/C/GC/20, at para 3.

¹¹⁶ Committee on the Rights of the Child, *General Comment No 20 on the Implementation of the Rights of the Child During Adolescence* (2016) UNDoc CRC/C/GC/20, at para 4.

¹¹⁷ Committee on the Rights of the Child, *General Comment No 20 on the Implementation of the Rights of the Child During Adolescence* (2016) UNDoc CRC/C/GC/20, at para 34.

The Committee has also issued guidance on how Convention rights are to be interpreted for young children.¹¹⁸ General Comment No. 7 notes the Committee's concern that States do not give sufficient attention to young children as rights holders and to the laws, policies and programmes required to realise their rights during this distinct phase of their childhood.¹¹⁹ The Committee recognises that early childhood is understood differently in different countries and thus clarifies that it interprets early childhood as the period below eight years of age.¹²⁰ The Committee notes that respect for the young child's agency - as a participant in family, community and society - is frequently overlooked, or rejected as inappropriate on the grounds of age and immaturity.¹²¹ Consequently, the Committee acknowledges that young children have been powerless within their families, and often voiceless and invisible within society.¹²² Yet the Committee also recognises that children are acutely sensitive to their surroundings and very rapidly acquire an awareness of their own identity. "They make choices and communicate their feelings, ideas and wishes in numerous ways, long before they are able to communicate through the conventions of spoken or written language."¹²³ Therefore the Committee encourages States to ensure that children's rights are respected and that children are facilitated in the exercise of their rights;¹²⁴ that the ability to express and exercise rights is anchored in their daily life at home and in the outside world including in legal proceedings and

¹¹⁸ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1.

¹¹⁹ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 3.

¹²⁰ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 4.

¹²¹ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 14.

¹²² Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 14.

¹²³ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 14.

¹²⁴ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 14(a).

the development of policies and services;¹²⁵ and that adults should adopt a child-centred attitude, listening to young children and respecting their dignity and their individual points of view.¹²⁶ The Committee recognises the crucial role that parents, acting in their children’s best interests, play as enablers of the exercise of their rights.¹²⁷ The Committee notes the importance of birth registration for access to comprehensive services in early childhood.¹²⁸ Difficulties with such systems “can impact negatively on a child’s sense of personal identity”.¹²⁹ To be effective, such a system “must be flexible and responsive to the circumstances of families”.¹³⁰

5.3 Irish Legal Environment

Constitution of Ireland¹³¹

As set out in Chapter 1, rights in relation to gender identity, are contained in a number of international agreements to which Ireland is a party and principles such as the European Convention on Human Rights (particularly Article 8); the Yogyakarta Principles (YP); YP +10 (Principle 31 in particular); and the UN Convention on the Rights of the Child (discussed in section 5.2).

¹²⁵ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 14(b).

¹²⁶ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 14(c).

¹²⁷ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 16.

¹²⁸ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 25.

¹²⁹ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 25.

¹³⁰ Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) UNDoc CRC/C/GC/7/Rev.1, at para 25.

¹³¹ The Constitution of Ireland is available here:

<http://www.irishstatutebook.ie/eli/cons/en#part13>

All of these instruments must be considered in the context of the Constitution of Ireland, which guarantees protection of the family and affirms the natural and imprescriptible rights of all children. The rights of children are specifically provided for under Article 42A, which was added following the referendum on children's rights in 2012.

The Constitutional amendment recognises that all children have rights and pledges to protect those rights by law. It allows the courts to identify rights for children on a case-by-case basis. It clarifies how and when the State can intervene to protect children. Importantly, it shifts the trigger of intervention from focusing solely on the parents' failure to the impact of that failure on the child. It provides a strong constitutional foundation for the child protection system, by providing the State with the power to act when the 'safety or welfare' of a child 'is likely to be prejudicially affected'. It also allows for the Oireachtas to legislate that the best interests of the child will be "the paramount consideration", in certain areas of decision-making affecting a child. This means those decisions will be determined based on what is best for the child in question. It applies only to child protection and care proceedings brought by the State and proceedings concerning adoption, guardianship or custody of, or access to, any child.¹³²

The amendment recognises that all children have rights and pledges to protect those rights by law and Courts will be able to identify rights for children on a case-by-case basis.

- **Article 42A.2.1°** clarifies how and when the State can step in to protect children

¹³² Source:

https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Children's%20Rights%20Alliance%20Recognising%20Children's%20Rights%20in%20the%20Constitution%20October%202012.pdf

- **Article 42A.2.2°** commits the Oireachtas to bring in law to allow a child the opportunity of being adopted, where parents have met a high threshold of failure towards the child.
- **Article 42A.3°** commits the Oireachtas to bring in law that allows parents (married/unmarried) to voluntarily place and consent to their child's adoption.
- **Article 42A.4.1°** commits the Oireachtas to legislate to ensure that the best interests of the child will be "the paramount consideration", in certain areas of decision-making affecting a child.
- **Article 42A.4.2°** commits the Oireachtas to legislate to provide that views of the child are heard and taken into account in the proceedings regarding children in care, child protection, adoption, guardianship, custody and access cases.

Article 42A

1 The state recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the state as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings—

i. brought by the state, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii. concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

Parental rights under the Constitution are set within the context of the family and are contained in Article 41.1.

Article 41.1

1° The state recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The state, therefore, guarantees to protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the nation and the state.

Children and Family Relationships Act 2015¹³³

The Children and Family Relationships Act 2015 marked the most important reform of child and family law for a generation. The legislation puts children at the heart of family law, provides legal clarity around various family types and addresses discrimination faced by children in non-marital families including same sex families. It contains new provisions regarding the best interests of children in family law proceedings which have been in operation since 18 January 2016. Section 63 of this Act inserted a new section 31 into the Guardianship of Infants Act 1964. Section 31 sets out an extensive list of factors and circumstances to be taken into account by a court when determining the best interests of a child in proceedings where the guardianship, custody or upbringing of, or access to, a child is in question.

¹³³ The Children and Family Relationships Act 2015 is available here: <http://www.irishstatutebook.ie/eli/2015/act/9/enacted/en/html>

Determination by court of best interests of child

31. (1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.

(2) The factors and circumstances referred to in subsection (1) include:

(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;

(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;

(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;

(f) the child's social, intellectual and educational upbringing and needs;

(g) the child's age and any special characteristics;

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,

(ii) to communicate and co-operate on issues relating to the child, and

(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

(3) For the purposes of subsection (2)(h), the court shall have regard to household violence that has occurred or is likely to occur in the household of the child, or a household in which the child has been or is likely to be present, including the impact or likely impact of such violence on:

(a) the safety of the child and other members of the household concerned;

(b) the child's personal well-being, including the child's psychological and emotional well-being;

(c) the victim of such violence;

(d) the capacity of the perpetrator of the violence to properly care for the child and the risk, or likely risk, that the perpetrator poses to the child.

(4) For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only.

(5) In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child.

(6) In obtaining the ascertainable views of a child for the purposes of subsection (2)(b), the court—

(a) shall facilitate the free expression by the child of those views and, in particular, shall endeavour to ensure that any views so expressed by the child are not expressed as a result of undue influence, and

(b) may make an order under section 32.

(7) In this section 'household violence' includes behaviour by a parent or guardian or a household member causing or attempting to cause physical harm to the child or another child, parent or household member, and includes sexual abuse or causing a child or a parent or other household member to fear for his or her safety or that of another household member.

National Strategies and Legislation

At national level there are strong policy and legislative measures that meet UNCRC obligations and comply with Recommendation CM/Rec(2012)2¹³⁴ of the Committee of Ministers of the Council of Europe on the participation of children and young people under the age of 18.

Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People (BOBF) (Department of Children and Youth Affairs, 2014)¹³⁵ strongly upholds the rights of children in its five national outcomes and six transformational goals. The BOBF vision names the voice of the child as a core principle and transformational goal.

In addition, Ireland is the first country in the world to have a strategy dedicated to the right of children to a voice in decision-making. *The National Strategy on Children and Young People's Participation in Decision Making* (Department of Children and Youth Affairs, 2015)¹³⁶ states that children and young people will have a voice in decisions made in their local communities; in early education, schools and the wider formal and non-formal education system; in their health and wellbeing, including on the health and social services delivered to them and; in the courts and legal system. The strategy is guided and influenced by the United Nations Convention on the Rights of the Child (UNCRC) and the EU Charter of Fundamental Rights. Under this Strategy (2015), children and young people are regularly consulted by

¹³⁴ Recommendation CM/Rec(2012)2 is available here:
<http://www.refworld.org/docid/506981802.html>

¹³⁵ Better Outcomes, Brighter Futures is available here:
https://www.dcy.gov.ie/docs/16.04.2014_Better_Outcomes_Brighter_Futures:_The_National_Po/3146.htm

¹³⁶ National Strategy on Children and Young People's Participation in Decision-making is available here:
https://www.dcy.gov.ie/docs/National_Strategy_on_Children_and_Young_Peoples_Participation/3792.htm

Government on the development of policy, legislation and services, including for the LGBTI Youth Strategy to be published in June 2018.

Legislative measures that meet UNCRC obligations and include requirements for the voice of the child to be heard in specific contexts in Ireland include¹³⁷:

- Education Act 1998
- Child Care Act 1991
- Children Act 2001
- Ombudsman for Children Act 2002
- Human Rights and Equality Commission Act 2014
- Child and Family Agency Act 2013
- Children and Family Relationships Act 2015
- Children First Act 2015
- Thirty-first Amendment of the Constitution (Children) Act 2015
- Adoption (Amendment Act) 2017

5.4 Consultation Process

Written Submissions

Where they referred to these issues, the majority of submissions were broadly supportive of a simplified and more flexible arrangement for children aged 16/17 years and were also supportive of extending provision for gender recognition to children under 16 years.

A substantial number of submissions referred to human rights law and international agreements such as the United Nations Convention on the Rights of the Child (UNCRC) and the Yogyakarta Principles. Many

¹³⁷ All of these Acts are available at: <http://www.irishstatutebook.ie/>

submissions see the current system for children aged 16 or 17 years as overly onerous, forcing children down a medical path, and suggested removing medical practitioners from the application process.

The BeLonG To submission was prepared following consultation with 48 trans and non-binary youth members of BeLonG To at nine consultation meetings in 2016 and 2017. They also consulted their National Network of LGBT+ youth services.

One submission raised questions about the nature of transgender identity, particularly for children, and cited very high regret rates for pre-pubertal children.

Other submissions highlighted related issues that are outside the scope of the Act. These include difficult experiences dealing with schools, toilet facilities and changing rooms, and provision of services and supports.

Consultation with Young Trans People and Parents of Young Trans People

The group met with three young people (two of whom are transgender and one of whom is non-binary) accompanied by a youth support worker. Separately, the group met with three parents of children who are transgender (these are not the parents of the young people the group met).

These meetings highlighted issues that were of particular concern to young trans persons and parents of young trans people. They stressed the importance of gender recognition in supporting the social transition process by affirming gender identity on official documentation which can, in turn, lead to broader acceptance in society.

They were particularly critical of the level of complexity involved in the current process of acquiring a gender recognition certificate for a 16 or 17 year old. Lengthy waiting lists and costs involved in accessing medical practitioners, and legal support, were highlighted by both parents and young persons. They suggested removing medical practitioners from the process altogether, as this was also forcing young people down a medical route when all that may be required is social transition and legal recognition. There were similar criticisms around lack of flexibility and costs in availing of court procedures to apply for gender recognition.

Both groups drew attention to situations where consent is not forthcoming from both parents and suggested that a mechanism should be put in place to address cases such as these. They referred to difficulties in changing gender markers on passports, and in dealing with schools that are not as open and accepting as others. They also raised practical issues such as the format of the revised birth certificate being different from standard certificates and difficulties navigating a path through different Government Departments and public bodies.

Consultation with Dr. Geoffrey Shannon, Special Rapporteur on Child Protection

The group met with Dr. Shannon on two occasions. The purpose of these meetings was for the group to hear Dr. Shannon's views from a legal perspective.

Dr. Shannon spoke about how children have their own autonomous rights under Article 42A of the Constitution and have rights set out under the UN Convention on the Rights of the Child (particularly with regard to rights relating to: non-discrimination, the best interest of the child, life and

development, preservation of identity, hearing the voice of the child). (See also Chapter 1).

He also outlined how parents also have rights under Article 41 of the Constitution which recognises the family as the natural primary and fundamental unit group in society. He referenced the paramountcy of parental rights in this area. He also expressed the view that age 16 appears to be an arbitrary cut-off point for a difference in treatment of minors. He noted that where both parents consent, involvement other than parental consent may not be necessary as there is a constitutional presumption that parents act in the best interests of their children. In terms of how this might apply, he told the group that the approach to asserting parental rights in the past has been paternalistic but new thinking has been emerging since passing of the referendum inserting Article 42A. Dr. Shannon stated that the new constitutional dispensation provides a more enhanced right for children to be listened to. He held that the evolving capacity of the child should also be considered having regard to Article 5 of the CRC and Article 42A of the Constitution. In cases where consent from both parents is not forthcoming, a legal mechanism would need to be established to address the issues involved as parental consent could only be dispensed with by the Courts. He suggested that, from an access to justice perspective, it may be possible to have the matter dealt with in either the District Court or the Circuit Court having regard to the provisions of the Children and Family Relationships Act 2015.

On the issue of providing for a minimum age, Dr. Shannon was of the view that regard should be had for the provisions in the international instruments which Ireland has ratified. These instruments, in particular the 1989 United Nations Convention on the Rights of the Child, focus on the age and maturity of the child rather than prescribing a particular age. In his opinion, provision should be made with reference to the evolving capacity of the child under

Article 5 of UNCRC – otherwise the State could possibly be in breach of Article 12 of UNCRC, which gives a child the right to be heard in accordance with his/her age and degree of maturity. Dr. Shannon considered that child autonomy needs to be looked at in the context of current jurisprudence, European Court of Human Rights rulings, and the right of children to due process. The voice of the child needs to be heard in a meaningful way and consideration of their views made according to a set of basic principles:

- Is the outcome in the best interest of the child?
- Does the child have a wish?
- Does the child want that wish to prevail?
- Are there any obstacles or barriers?
- Will any harm arise to the child?

He commended the Children and Family Relationships Act 2015 as an example of good practice in legally defining the principle of what is in the best interest of the child, as it gives judges a good set of objective criteria on which to make a decision. Section 63 of that Act (which inserts a new section 31 to the Guardianship of Infants Act, 1964) sets out criteria for determination by court of best interests of child; and includes provisions to take account of the views of the child, the degree of maturity of the child, and a range of other factors relevant to determining the best interests of the child. In relation to this, he highlighted that the State would need to demonstrate very sound reasoning for over-stepping the rights of the parents and questioning their ability to act in the best interest of their children.

Consultation with Medical Practitioners

The group held a consultation meeting with medical practitioners, including representatives of professional bodies (see Chapter 1 for details).

During the meeting the following issues were discussed:

- Legal gender recognition is a positive part in the journey to transition but it is a legal process, very much separate from the medical process.
- Gender identity can be seen as a spectrum and is not dependent on natal sex.
- The most positive outcomes seen by medical practitioners are for successfully transitioned patients who have proper supports but transition without appropriate supports can be disastrous.
- The medical practitioners displayed a great deal of empathy with transgender children, and their families, and acknowledged the supportive role parents and other family members play in the transition process.
- Gender identity is a part of the developmental process with 10-14 years being a key period in that regard due to the onset of puberty. Only about half patients want medical transition while social transition is acceptable for the remainder.
- Parental consent – there were concerns around extending self-declaration to children without parental consent, citing risk of relationship rupture within families. The Mental Health Act requires parental consent for persons under 18 years and difficulties arise where there is not consent of both parents.
- The experience of the medical practitioners was that schools are generally supportive of transgender children who are transitioning. While a Gender Recognition Certificate should not be a requirement for social transition in schools, doctors would like to see evidence of a social transition, especially at school. Some Review Group members explained that not all schools are supportive and that sometimes, the absence of a Gender Recognition Certificate is used as a blocking mechanism.
- Children often wish to change their minds – any danger of being “boxed-in” by legislation should be avoided and decisions should be easily

reversible. On the other hand, it is important for young people to take some time to get used to, for example, a new name, before deciding to change it again.

- Measures to resolve the issue of gender identity on passports would make big difference in terms of identity documentation and supporting social transition.
- Barriers in the system, particularly regarding access to medical appointments as waiting lists can be in the order of 1-2 years.
- Some of the Review Group members raised queries about a link with autism. In this regard, an extended diagnostic period is preferred by doctors as in their opinion some children presenting with autism, while highly functioning, are vulnerable and can have very fixed views, and need to be fully protected and supported. It was also felt that there are benefits to be gained from taking time with them to think through the implications of their decision.
- There is an increase in the number of younger people presenting to doctors who are questioning their gender identity. It was agreed by the medical professionals that puberty is a crucially important time in this journey. It is a confusing time for people and gender identity may be just one aspect of the finding of self that a person explores at this time. While there was some data put before the Group about the rate of regret amongst pre-pubertal trans children, it was acknowledged that these were older studies and not necessarily reflective of more current thinking.
- The importance of access to historical records across medical, legal, education systems was mentioned in the context of a concern that person's medical records for the period prior to their transition are no longer accessible on medical information systems.
- There was some concern that Gender Recognition Certificates are being used as evidence of suitability to start medical treatment. The number of times this occurred was questioned. Although there are only a couple

of known cases, it raises the need to educate the community and care providers that this is not a route for medical treatment (it is important to note that no medical treatment in Ireland has ever been provided based upon these requests). There were also particular concerns that GRCs could be used to access treatment overseas and in cases of regret practitioners in Ireland would be left to “pick up the pieces”.

- While some patients stop treatment “mid-journey” and may not be suitable for medical transition, a legal change of gender identity and social transition may still be appropriate for them. The introduction of a third gender marker, or none, could be helpful in assisting the transition process.
- Medical treatment for children principally consists of puberty blocking measures following psychiatric diagnosis and referral (40% referral rate). This process is reversible and is conducted alongside monitoring of social transition (cross hormone treatment is irreversible and not made available to patients under 16 years). 16 years is considered a good cut-off point regarding development and is a natural fit with school system (post Junior Cert and concurrent with Transition Year).
- Before considering a patient suitable for treatment time is needed to adapt socially (whether the patient is under or over 18).
- Part of the doctor’s role is managing distress as not all patients are in a hurry for full intervention. Some of the group members explained how trans young people are not in a hurry to medically or legally transition until after they have socially transitioned for some time.
- Some of the language in the Act, questioning may not be appropriate for children (e.g. “settled and solemn intention”), and so possibly having a different certification process for children would be better.
- Competence to assess a child’s capacity to understand consequences of their decision and how this would work in the absence of a role for

medical practitioners. Psychiatrists and psychologists would be competent to perform this function.

- As the Act only refers to the specialities of endocrinology and psychiatry, paediatricians can have no certification role in applications for a Gender Recognition Certificate.
- While GPs do not have a specifically defined role under the Act they do have a role in relation to initial referral, offering a holistic approach in a community and family setting, and also follow up care. If GPs were to be given a role under the Act this would represent a new duty which would have to be examined through the appropriate structures in the Irish College of General Practitioners.
- There was general agreement among the medical practitioners and the Review Group that the scope of the Act could be broadened to include additional professionals (other than endocrinologists or psychiatrists) who are competent to determine the capacity of the child to make a decision and understand the consequences of their decision. Possible other professionals could include appropriately qualified and trained GPs, paediatricians, psychologists, and social workers.

LGBTI+ Youth Strategy Consultation

The group were also informed by the outcome of consultation sessions that were held with transgender children¹³⁸ that fed into the LGBTI+ National Youth Strategy¹³⁹. Engagement with children during the sessions highlighted many concerns including issues such as having appropriate gender markers (e.g. ticking correct box in hospitals), bullying related to lack of recognition and acceptance, difficulties obtaining passports, experience with the medical system, challenging school experiences, disrespectful trans-phobic attitudes,

¹³⁸ Report to Minister for Children and Youth Affairs is available on request from the Department of Children and Youth Affairs

¹³⁹ LGBTI+ National Youth Strategy youth consultation report is available here: <https://www.dcy.gov.ie/documents/publications/20171208LGBTIConsultationStrategyReport.pdf>

lack of knowledge of trans issues, mis-gendering behaviour of people, and other difficulties experienced by transgender children.

The LGBTI+ National Youth Strategy held consultations with 4,000 young people, around 11% of whom are transgender, during which the issue of gender recognition came up strongly. There was a positive reaction to the provisions of the current Act but participants also expressed the need to expand these to include children under 16 years.

5.5 Group Deliberations

Feedback from young transgender persons and their parents revealed a desire for a simple and flexible process for gender recognition applications. They highlighted the importance of legal gender recognition in supporting the social transition process; they outlined difficulties with regard to the current process for 16 and 17 year olds including costs, medicalisation and waiting lists to see specialists; and they expressed the need to extend recognition to all children.

In examining the position and considering possible options for those aged under 18 the group had detailed discussions with regard to important issues such as:

- the current process for 16 and 17 year olds,
- whether the same arrangements should be available to all children under age 18 (i.e. is age 16 just an arbitrary age at which to introduce different arrangements?),
- constitutional issues with regard to parental consent,
- how the rights of the child can be balanced with the rights of the parents,

- the right of the child to have a voice,
- issues around a child's evolving capacity,
- the best interests of the child,
- concerns about reported high incidences of autism and mental health issues,
- the child's need for support not just from their family but also at school,
- the importance of a child being able to change their mind with regard their gender identity, and the need for flexibility around this.

The current process for 16 and 17 year olds

Throughout the consultation process a number of criticisms of the current process for 16 and 17 year olds emerged. These related to the involvement of medical practitioners in the process – there were principled objections to this as it is seen as medicalising the process (which is not in line with current human rights recommendations¹⁴⁰) but also practical difficulties in terms of accessing the appropriate specialists (due to long waiting lists) and the high costs that can be incurred when specialists are accessed outside of the public system.

The experience of having to attend Court can be daunting and stressful for young people and their parents. In addition, there can be high costs associated with this element of the process. These in particular apply because the matter is currently dealt with in the Circuit court where a solicitor and barrister may be needed.

¹⁴⁰ Principle 31 The Right to Legal Recognition, Yogyakarta Principles Plus 10
http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

Some contributors also outlined the difficulties that can arise when one parent is willing to consent to the child's application for a Gender Recognition Certificate but the other is not or when the child does not have the support of any parent.

The appropriateness of different arrangements for those aged under 16 and those aged 16 to 17

One of the principal areas of deliberation for the group was to address the issue of including an age limit at all in any new arrangements that might be introduced for children. During the consultations on legal issues there was a lot of discussion as to whether any cut off point under age 18 is appropriate. Consideration was given to the age of consent in place for a range of activities, for example:

- Voting, buying alcohol, marrying are all set at age 18.¹⁴¹
- Children aged between 14 and 17 years can execute a Deed Poll themselves but need the consent of both parents.¹⁴²
- When applying for a passport for anyone under age 18, parental consent is required.¹⁴³
- 16 and 17 year olds can take up an apprenticeship, they can work more hours than those aged 14 or 15 (those aged under 14 cannot be employed)¹⁴⁴; and they can drive certain vehicles (such as mopeds)¹⁴⁵.

¹⁴¹ The voting age is set out in the [Irish Constitution](#) - Fourth Amendment of the Constitution Act 1972 refers

The Intoxicating Liquor Acts prohibit the sale of alcohol to a person under age 18. Although the minimum age for marriage is age 18 it is currently possible to apply for an exemption to this requirement by way of a court order but this provision is being removed by the [Domestic Violence Act 2018](#) (Sections 45 & 49)

¹⁴² https://www.flac.ie/download/pdf/deed_poll_09.pdf

¹⁴³ Section 14 of [The Passports Act 2008](#)

¹⁴⁴ [Protection of Young Persons \(Employment\) Act 1996](#)

- Parental consent is required for children to have medical and surgical tests and procedures and to receive vaccinations and inoculations but there are provisions which allow a minor who has reached age 16 to give consent to medical treatment. However, refusal by a child over 16 to treatment does not override the consent of a parent or guardian to that treatment. Parental consent is required for those aged under 18 seeking to access mental health services.¹⁴⁶

It was agreed by the group that the best outcomes of all young trans people are when they have the support of their family (where possible) and that this also applied to their decision to obtain a legal gender recognition certificate. The group heard from young people, parents, medical professionals and other stakeholders that some trans young people are aware of their gender identity very young and socially transition in primary school. The need to transition legally at a very young age may also be prompted by an understanding that a child has intersex variations.

The group decided to focus their deliberations on all children under 18 years, with no age limit having regard to these issues and the Constitutional and international human rights provisions that confer an amount of autonomy on the child, based on their evolving capacity and not an arbitrary age.

The Rights of Parents

Parents have inalienable rights under Article 41 of the Constitution which recognises the family as the natural primary and fundamental unit group in society. Article 42A affirms the rights of children in the Constitution. Rights

¹⁴⁵ Information on licencing categories is available here: <http://www.rsa.ie/RSA/Licensed-Drivers/Safe-driving/For-Motorcyclists/New-Regulations/>

¹⁴⁶ The [Mental Health Act 2001](#) defines a child as “a person under the age of 18 years other than a person who is or has been married”.

of parents need to be balanced with rights of the child, including the right of the child to have their voice heard, the principle of 'best interests' and consideration for the evolving capacity of the child to make decisions about their own lives.

The group agreed that parental consent would be required in any system for children and would include all children under 18 years, as they could find no legal reason to treat children aged 16/17 differently.

There is a constitutional presumption that parents act and make decisions in the best interests of their children. It is only legal to interfere with the decision made by parents "[i]n exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."¹⁴⁷ Consequently, it should be possible to consider an administrative process, without court involvement, based on parental consent.

In cases where there is not consent from both parents, the group agreed that a legal mechanism would need to be established to address the issues involved as parental consent could only be dispensed with by the Courts. The group agreed that it would be preferable to have initial proceedings heard at first instance in the District Court. From an access to justice perspective, the District Court incurs less cost and is more straightforward than the current requirement for 16-17 year old children to apply to the Circuit Family Court. It is usually easier to get an earlier hearing date in the District Court than the Circuit Court and the District Court deals with complicated family law and child protection matters as a matter of course¹⁴⁸. Applicants in the District Court also have access to family mediation

¹⁴⁷ *North Western Health Board v H.W* [2001] IESC 90, at para 212

¹⁴⁸ For example, applications under the Child Care Act, 1991

services¹⁴⁹. These services could help a family struggling to support their child and would provide a welcome support for situations where one parent supports the child's application but the other one does not for various reasons. In certain cases, consideration may need to be given to using a guardian *ad litem* model to represent the views and best interests of the child. In the case where the child does not have the support and consent of any guardian for example, the group felt it was important that a child would have access to the courts to obtain legal gender recognition when it is in their best interests.

The Rights of the Child

Children have their own autonomous rights under Article 42A of the Constitution as inserted after the Children's Rights referendum in 2012. They also have rights under the UN Convention on the Rights of the Child (particularly with regard to: non-discrimination, the best interest of the child, life and development, preservation of identity, hearing the voice of the child) (see Section 5.2).

Child autonomy needs to be looked at in the context of current court rulings, European Court of Human Rights rulings, and the right of children to due process. The voice of the child needs to be heard in a meaningful way and consideration of their views made according to a set of basic principles:

- Is the outcome in the best interest of the child?
- Does the child have a wish?
- Does the child want that wish to prevail?
- Are there any obstacles or barriers?

¹⁴⁹ S.I. No. 9 of 2018: [District Court \(Mediation\) Rules 2018](#)

- Will any harm arise to the child?

The group considered how the voice of the child, and providing for the best interests of the child, could be included in a legislative framework. Section 31 of the Children and Family Relationships Act 2015 was cited as an example of good practice in this area and includes provisions to take account of the views of the child, the degree of maturity of the child, and a range of other factors relevant to determining the best interests of the child.

The group agreed that child autonomy in the application process is best protected by providing a child, and their family, support in the decision making process, and by providing for a simple revocation process.

Support from Third Party

It was noted that by the time a 16 or 17 year old applies for a Gender Recognition Certificate, they have likely already gone through a process which may include a social transition and they and their families may have received support from TENI and/or BeLonG To or other sources outside the family.

The group agreed that, in what is a legal process, consideration of any third party involvement should focus on supporting the child to ensure that their voice is heard and supporting the child and their family in the decision making process.

Discussion among the group focused on the role a third party may have in supporting the family. It was agreed that this would not be a decision making role with a veto over the application process. Rather, the role

would be to act as a support to assist conversation within the family, and to ensure that the voice of the child has been heard and the best interest of the child has been taken into account.

Consultation with medical practitioners highlighted the incidence of autism among transgender children. In many cases this involves an extended diagnostic period as some children presenting with autism, while highly functioning, may be vulnerable and may have very fixed views, and therefore would need to be fully supported. Whereas the group acknowledged the principle that young people and children with autism should have access to legal recognition, they agreed that involving a third party would help to ensure that these young people, and their families, are provided with the support that they may need around making this decision.

Need for flexibility

There was much discussion about the difficulties that a child or young person can face in coming to terms with gender identity issues. Children and young peoples' gender identity may evolve over time therefore requiring flexibility in terms of changing back to the gender assigned at birth or indeed in the future potentially changing to a third gender marker. Having a relatively easy revocation process would also act as a safeguard to young people who need to change back to their gender assigned at birth for reasons of safety or best interests. Therefore, the group agreed that it should be possible to reverse any legal process relatively easily.

Possible options

A number of possible options were discussed which can be summarised as follows:

- Maintain the current system for 16 and 17 year olds. The group agreed this was not accessible enough and ignored the needs of younger children.
- Allow 16 and 17 year olds to self-determine their gender identity (i.e. introduce the same system that is currently available to those aged over 18). The group was concerned about not including some element of parental consent. They were also concerned about setting an arbitrary age limit instead of recognising the evolving capacity of children.
- Maintain the status quo for under 16s (i.e. no extension of the Act to cover this group). The group agreed unanimously that there is a need to extend legal gender recognition to children under 16.
- Extend the existing process for 16 & 17 year olds to all aged under 18. The group felt this process was too complicated and costly for applicants.
- Introduce a district court application with parental consent and a medical /social worker certifying the child's capacity to make the decision (with no question of a diagnosis). This process could be applied to 16 and 17 year olds only or to all aged under 18. However, the group felt that requiring a young person and their family to enter the court system where there was no conflict should be avoided.
- Introduce an "interim" certificate that could be used for changing gender markers on passports and for interaction with schools. The group considered this proposal in the context of providing meaningful support for the social transition process, with regard to consultations

with young people where issues relating to schools and passports featured most prominently. The group was concerned as this would not involve changing gender on birth certificates. They also considered that such quasi-recognition would not sufficiently validate the rights of children; and also concerns that this could lead to 'outing' children in the school application process, as there is no corresponding alteration of a birth certificate.

- Introduce an administrative process (for 16 & 17 year olds or for all under 18s) with a statutory declaration of parental consent with or without a certificate from a third party in relation to the voice / capacity / best interest of the child and no court proceedings (unless one or both of the child's guardians /parents refused to consent to the application).

5.6 Recommendations

As explained throughout this chapter, the work of the group was informed by a child rights based approach and a recognition of the evolving capacities of the child. The group's recommendations are underpinned by the four General Principles of the UN Convention on the Rights of the Child: the right to non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6); and the right of the child to a voice in decision-making (Article 12).

The UNCRC is a set of high level principles that is reflected in Article 42A of the Constitution which provides the legal basis for affirming the rights of children in Ireland. These rights strongly advocate listening to the voice of the child and making the best interests of the child central to decision making. The group considers that, in this context, it is important to ensure that adequate support is provided to children and their families in the

decision making process, and that this process would include sufficient time for reflection.

The group agreed that a system of gender recognition should be introduced for children of any age. Rather than setting out the full details as to how this might operate, the group agreed to recommend that such a system should be straightforward and based on a number of high level principles, as set out above.

Recommendation 1:

A system of gender recognition should be introduced for children of any age, subject to the following key principles:

- Parental consent required (with an appropriate legal process to address cases where there is not consent from both parents or it is not possible or safe to obtain same),
- Process would be administrative,
- Straightforward revocation process,
- Third party support for the child and family involved.

Chapter 6 - Non-Binary Persons and Intersex Persons

6.1 Introduction

The Gender Recognition Act 2015 enables people to change their preferred gender from male to female or from female to male. It does not provide legal gender recognition for people who wish to have a preferred gender recognised that is not male or female. There is no legal provision for a third gender marker in Ireland and in certain legal documents (such as birth certificates and passports) it is mandatory to record either of the male/female binary options.

Non-binary is 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. Therefore, non-binary is a term that relates to questions of gender identity. 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.¹⁵⁰ Consequently, intersex is a term associated with the physical body of a person and does not necessarily imply any questioning of gender identity. A person with intersex variations, also known as variations of sex characteristics or VSC¹⁵¹, may identify as a man, as a woman or may identify outside the accepted gender binary.

¹⁵⁰ Both definitions from TENI submission to the Review, available here: <https://www.welfare.ie/en/downloads/Sub072-GRA2015.pdf>

¹⁵¹ For the purpose of this report the term intersex is used as that is consistent with the wording of the terms of reference, although the Review Group acknowledges the more correct current terminology.

6.2 Brief History of the Emergence of the Binary Gender Paradigm.

The legal importance of a binary gender paradigm emerged relatively recently in the required particulars for Form A of the Act for the Registration of Births and Deaths in Ireland, 1863. Before this date, the law adopted a more flexible approach to gender. Writing in the late 1600s the then Chief Justice, Sir Edward Coke discussing inheritance law stated that “[e]very heire is either a male, female or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgynous) shall be heire, as either male or female, according to that kind of sexe which doth prevails.”¹⁵². The prioritisation of a binary understanding of gender was enhanced by the introduction of legislation such as the Offences Against the Person Act 1861 and the Criminal Law (Amendment) Act 1885. Taken together these Acts outlawed homosexuality and as a corollary promoted heterosexuality and a binary understanding of gender as the legal preference. The historic visibility of gendered difference is in contrast to the relative invisibility of gendered difference until the enactment of the Gender Recognition Act, 2015.¹⁵³

6.3 International Legal Environment

As set out in Chapter 1, rights in relation to gender identity, including non-binary gender identity, are contained in a number of international

¹⁵² Sir Edward Coke, *The First Part of the Institutes of the Law of England* (Robert H. Smith, 1853), at 225.

¹⁵³ Tanya Ní Mhuirthile, “Building Bodies: A Legal History of Intersex in Ireland” in Jennifer Redmond, Sonia Tiernan, Sandra McAvoy and Mary McAuliffe, *Sexual Politics in Modern Ireland* (Sallins: Irish Academic Press), p154.

agreements and principles such as the European Convention on Human Rights (particularly Article 8); the Yogyakarta Principles (YP); YP +10 (Principle 31 in particular); and the UN Convention on the Rights of the Child.

Council of Europe Resolution 1952(2013)

In 2013 the Council of Europe adopted Resolution 1952(2013) on Children's right to physical integrity¹⁵⁴. At paragraph 7.5.3 the resolution calls on Member States to: "*undertake further research to increase knowledge about the specific situation of intersex people, ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support.*" Challenges faced by people with intersex variations can broadly be divided into two categories: matters relating to the medical management of intersex and issues regarding gender identity and the recording of gender on official documentation. While the former is outside the scope of this review, the gender recognition aspects fall squarely with the remit of the Review.

6.4 Irish Legal Environment

The Constitution of Ireland¹⁵⁵

The Constitution of Ireland does not include any specific reference to gender identity but it does include provisions which are relevant in the context of

¹⁵⁴ The text of the Resolution is available here: <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Zfc2VtYmx5LmNvZS5pbnQvbnNveG1sL1hSZWYvWDJlLURXLWV4dHIuYXNwP2ZpbGVpZD0yMDE3NCZsYW5nPUVO&xsI=aHR0cDovL3NiYW5udGljZGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRClBVC1YTUwyUERGLnhzbA==&xsItparams=ZmlsZWlkPTIwMTc0>

¹⁵⁵ The Constitution of Ireland is available here: <http://www.irishstatutebook.ie/eli/cons/en#part13>

gender identity. The manner in which the European Court of Human Rights has interpreted Article 8 of the Convention confirms the inherent dignity of all human beings¹⁵⁶. Similarly, the Preamble to the Irish Constitution assures the promotion of the dignity and freedom of the individual. The courts have consistently stated that the dignity of an individual is a value to be pursued.¹⁵⁷ Fundamental Rights are set out in Articles 40 to 44 inclusive. Personal rights are set out in Article 40. Article 40.1 provides a guarantee of equality before the law and Article 40.3.1 guarantees to vindicate the personal rights of the citizen. In *Re. A Ward of Court* Justice Denham (as she then was) stated that “[a]n unspecified right under the Constitution to all persons as human persons is dignity – to be treated with dignity.”¹⁵⁸

Article 40

1. All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

3. 1° the state guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

¹⁵⁶ See earlier discussion p8-9. See also Tanya Ní Mhuirthile, “Article 8 and the Realisation of the Right to Gender Recognition” in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, 2014), 201

¹⁵⁷ *Re. Article 26 Offences Against the State (Amendment Bill)* [1940] I.T. 470 and *Re. Philip Clarke* [1950] I.R. 235

¹⁵⁸ *Re. A Ward of Court* [1996] 2 I.R. 79

6.5 Consultation Process

Written Submissions

The position of non-binary people was raised in 50 of the submissions received. The content of these submissions was supportive of extending gender recognition to persons who are non-binary. They expressed concern at the difficulties experienced in day-to-day life by non-binary people by virtue of the lack of appropriate documentation and legal recognition.

A number of submissions cited examples of other countries where non-binary identity is provided for in certain identity documents. Many proposed the introduction of a third gender marker such as 'X' on documentation and expressed the desire to allow non-binary people avail of full legal gender recognition in Ireland. Others questioned the need to include any gender markers at all on identity documents and application forms while others noted that it may be more difficult to legislate for gender neutral language in Irish.

Some of the submissions also included reference to international agreements such as the Yogyakarta Principles and Article 8 of the European Convention on Human Rights (the right to privacy) and set out how these form the basis for legal recognition.

Consultation Meetings

The group met with non-binary adult and Dr. Fergus Ryan (senior lecturer in law, NUI, Maynooth) in order to consider gender recognition specifically as it relates to people who are non-binary.

At that meeting, the group heard about the day-to-day life experiences of the private individual and how recognition of a non-binary gender could help

alleviate some of the difficulties experienced. The individual expressed feelings of exclusion and marginalisation, and disappointment at the State for not validating their rights by way of provision of accurate gender identity documentation. They explained that on a daily basis they determine how they will present to society depending on how they feel within themselves on the day.

Sometimes when dealing with public officials (and private officials such as in banks) they need to plan their public presentation in advance, based on what they are doing for the day, which may not be in keeping with the presentation they may feel comfortable with. They often experience difficulties in public spaces, such as being inappropriately referred to as referred to as Mr or Ms, which can lead to feelings of anxiety and frustration.

These issues were similar to those faced by the young non-binary person that the group met with (see Chapter 5). They also encountered difficulties at school, particularly with regard to school trips where rooms are shared on a gendered basis.

They also raised issues concerning matters such as: the importance of the State positively affirming non-binary identity as a way to counteract negative experiences and to build public acceptance (in the same way that marriage equality has had a positive impact for LGBT peoples' sense of recognition and equal citizenship); inclusion of non-binary gender identity in anti-discrimination legislation; and the possible introduction of a third gender option on passports and official forms, including census forms. They also cited international examples of where there is already recognition for non-binary people with a third gender marker 'X', and how some Irish companies already accommodate Mx as well as Mr, Mrs, and Ms.

Dr. Ryan's research findings indicate that there are comparatively few laws that require a person to be of one specific gender, for example, in order to

hold an office or employment, carry out a task, exercise a right, incur a liability, or commit (or be the victim of) an offence. This covers a broad range of law, including family law, employment law, and criminal law.

In terms of addressing the impact on current legislation, the law with the widest application in relation to gender is the Interpretation Act 2005. The relevant provisions relating to gender are in section 18 which could be amended to include a non-binary gender identity. Other areas of law are deliberately gender specific (e.g. sexual offences, electoral funding, and laws relating to pregnancy). Dr. Ryan suggested that a possible solution, where necessary, for drafting legislation was to refer to physical attributes rather than gender. Some of the group members suggested that research and analysis would be required to determine the scope of the legislation concerned and the impact of making any amendments. On this, he also informed the group that his extensive research could be provided to the group to inform this process.

In the small number of areas where gender is legally determinative, the State may make legislative adjustments to accommodate the situation of non-binary people. This would require careful consideration of a range of laws, but the challenges of accommodating a non-binary identity in Irish law are surmountable. It was suggested that positive moves could be made by providing for non-binary identity on official ID documents and forms, in advance of full legal gender recognition.

6.6 Group Deliberations

The right of the non-binary community to have their gender identity legally recognised and positively affirmed and the positive impact this would have on their lives was recognised by the group. Feedback from the consultation

process revealed the importance of the State positively affirming non-binary identity as a way to address stigma, discrimination and other negative experiences and to increase public acceptance of non-binary identities. The issue of inclusion of non-binary gender identity in anti-discrimination legislation was raised; as were issues relating to the introduction of a third gender option on passports and official forms, including census forms.

The issue of international recognition for Non Binary people was also raised and attention drawn to states and territories that provide for a third gender marker 'X'; as were some positive measures in the private sector, for example some Irish companies that already accommodate use of non-binary titles such as 'Mx' as well as Mr, Mrs and Ms.

The group unanimously agreed, that in principle, legal gender recognition should be available to people who are non-binary.

It was considered by some members of the group that legal recognition of a third gender may have a wider impact than it is possible to assess during this current review period (in terms of a range of legislation, particularly where there's a specific reference to gender) and that, therefore, a full analysis, across Government, on the impact of legal recognition in relation to policy, legislation, and operational issues may be required. In order to implement the recognition of a third gender, State bodies, would need to have service provision measures in place that are compliant with any legislative provisions.

In terms of addressing the impact on current legislation, the law with the widest application in relation to gender is the Interpretation Act 2005. The relevant provisions relating to gender are in section 18, which should be relatively straightforward to amend, to include a non-binary gender identity.

Other areas of law are deliberately gender specific (e.g. sexual offences, electoral funding, and laws relating to pregnancy). It would require further research and analysis to determine the scope of the legislation concerned as well as assessing the impact of amending this legislation. One possible approach is to frame laws, where feasible, by describing physical attributes rather than referring to gender.¹⁵⁹

Some of the submissions received questioned the need to include any gender markers at all on identity documents and application forms. In many cases knowledge of a person's gender is not required for the purpose for which the data are collected. There are advantages to not including gender markers for non-binary people if there is only a choice of two inappropriate binary options. Inclusion of gender markers that encompass an option for non-binary gender identity is a more positive measure as it recognises and protects the rights of non-binary people.

The group agreed that in the meantime steps could be taken to improve the everyday lives of non-binary people in Ireland and increase public awareness and understanding of their identity. For example, the necessity of a gender marker where it occurs on official documents, application forms etc. should be reviewed and removed, or a third marker include, where possible. Ongoing reviews of the types of data being collected in the context of the General Data Protection Regulation provide a very useful opportunity to consider this issue and make changes where possible and appropriate.

It was noted that it is obligatory to have a gender marker on passports. The International Civil Aviation Organization (ICAO) is a specialised agency of the United Nations that sets the standards necessary for safe and efficient international civil aviation. The inclusion of a travel document holder's

¹⁵⁹ See written submission from Dr. Ryan (page 10):
<http://www.welfare.ie/en/downloads/Sub047-GRA2015.pdf>

gender was made a mandatory requirement for travel documents in the standards set out in ICAO Document 9303, first introduced in 1980.¹⁶⁰ In 2012, the ICAO considered whether to remove the requirement for gender markers on travel documents and concluded that the adverse effects of such a move would outweigh the benefits at that point in time but that this would be kept under review when border control systems would be less affected by the removal of gender markers.¹⁶¹ Nonetheless, the document does acknowledge that some countries have begun to adopt a third gender marker X, and notes that the "ICAO standards defines X as unspecified, which allows individual countries to determine who is eligible for this option."¹⁶²

Submissions received also drew attention to the fact that it may be more difficult to legislate for gender neutral language in Irish. The Review Group noted that the language in which an Act is passed is the version that takes precedence in terms of legal application. They agreed that efforts should be made to ensure that there is correct gender neutral language in the Irish version of any proposed amendment of the Act.

¹⁶⁰ International Civil Aviation Organisation, *Information Paper: A Review of the Requirement to Display the Holder's Gender on Travel Documents*, (2012) TAG/MRTD/21-IP/4, at p4.

¹⁶¹ International Civil Aviation Organisation, *Information Paper: A Review of the Requirement to Display the Holder's Gender on Travel Documents*, (2012) TAG/MRTD/21-IP/4, at p2

¹⁶² International Civil Aviation Organisation, *Information Paper: A Review of the Requirement to Display the Holder's Gender on Travel Documents*, (2012) TAG/MRTD/21-IP/4, at p9.

6.7 Recommendations

Recommendation 2A: Legal gender recognition should be made available to people who are non-binary.

Recommendation 2B: As part of cross Government departmental review of proposed legislative amendments an impact assessment may be considered.

Recommendation 2C: In the immediate term, Government Departments and other public bodies should take any positive steps they can take to improve the position of people who are non-binary.

6.8 Intersex People/People with Variations of Sex Characteristics (VSCs)

Under the Gender Recognition Act 2015, the option to change gender within the binary male-female model is available to people who are intersex and aged 16 or over on the same basis as for people who are transgender.

Forty five of the submissions received referred to the position of people who are intersex. Many of these referred to concerns regarding medical or surgical interventions, particularly those occurring shortly after a child's birth, rather than gender recognition. Those issues are outside the scope of this review but the group considered that it was important that they be referenced in this report.

The LGBTI+ Youth Strategy (which is due to be published shortly) will include a recommendation in relation to the establishment of a group to examine issues specific to healthcare provision to people who are intersex. It is hoped that the issues raised in the context of this review can be considered by that group. It was also noted, that the Government will soon be setting up a group to develop the National LGBTI+ Inclusion Strategy and it is hoped that will provide a forum where issues relating to people who are intersex can be considered. The group also considered that further research is required regarding how babies and children who are intersex are treated in Ireland and that a working group should be set up to conduct/oversee this research if it does not come within the ambit of the two strategies mentioned.

The group agreed that any measures introduced in future to improve the legal gender recognition of transgender people or people who are non-binary, would also be of benefit to people who are intersex and whose preferred gender is neither male nor female.

The registration of births in Ireland is governed by the Civil Registration Act 2004 (as amended). Section 19 of that Act provides, amongst other things that it is the duty of the parent (or qualified informant) to register the birth of a child in the State within 3 months. Amongst the required particulars to be entered into the register is the sex of the child. For children who have intersex variations, the definitive sex of the child may not be clear at this age¹⁶³. Children with intersex variations might have clear physical reasons why they would need to have their gender changed at any age but they cannot apply for a Gender Recognition Certificate until age 16. Providing a system of gender recognition for children (see Chapter 5) would be of

¹⁶³ TENI submission to the review, available here: <https://www.welfare.ie/en/downloads/Sub072-GRA2015.pdf>

benefit to intersex children who may have been assigned the incorrect gender at birth.

Recommendation 3:

All measures taken to improve access to gender recognition, both with regard to age and gender identity (either binary or non-binary), should also provide access for intersex individuals/people with VSCs.

Chapter 7 - Other Operational Issues

7.1 Introduction

Some issues relating to the operation of the current legislative provisions were highlighted in written submissions and in oral presentations to the Review Group. These include, for example, the absence of a reference number on certificates issued from the register of gender recognition. This chapter sets out the group's consideration of these issues and associated recommendations.

7.2 Birth Certificate Reference Numbers

The group noted that the current replacement birth certificate for persons on the register of gender recognition does not contain a reference number as is the case with birth certificates that are issued from the register of births. This has resulted in difficulties for trans persons presenting the certificate for official purposes. One submission gave an example of where a public official queried the legitimacy of a valid certificate and refused to accept it for the purpose for which it was presented. The absence of a reference number made the official suspicious as to the authenticity of the document. This type of incident gives rise to unintentional outing for the individuals concerned, which is not in keeping with the intention of section 30 of the Act.

Recommendation 4: That the Department of Employment Affairs and Social Protection, with the General Register Office, introduce a numbering system which looks identical to that used for birth certificates where the information is taken from the register of births.

This should apply to new certificates and the option of a replacement certificate should be made available to people who already have a certificate with no reference number (and the fee for issuing a replacement waived).

7.3 Name Change

The consultation process highlighted issues concerning the process for making a change of name, especially in relation to Deed Polls. This can pose particular difficulties in relation to, but is not confined to, applications for a Public Services Card (PSC). The change of name processes acceptable on applications for a PSC are by way of a deed poll enrolled in the High Court or by demonstrating two years living in the new identity through “use and repute”.

There is a cost involved in enrolling a deed poll that can be significant for some people. But of particular significance for trans people is the fact that the details of the name changes are published on the Courts Service website. This means that trans people are effectively outed when they change their name via this process. The group agreed that it should be possible for trans people to change their name without fear of being outed.

Recommendation 5: Section 10 of the Act should be used (either as currently enacted or by way of legislative amendment) to enable a legal change of name as part of the gender recognition process.

7.4 Irish Citizens Born In Northern Ireland¹⁶⁴

Irish Citizens born in Northern Ireland, who are living outside the State (including in Northern Ireland), are unable to apply for a gender recognition certificate under the current legislation. Applications from persons not ordinarily resident in the State are confined to persons whose birth or adoption is registered in the State or whose birth is recorded in the foreign births register. A person whose birth is not registered here and who is eligible to become an Irish citizen can register their birth on the Foreign Births Register.

The Irish Nationality and Citizenship Act 1956 (as amended) sets out the law governing Irish citizenship¹⁶⁵. All people born in Northern Ireland before 1 January 2005 are entitled to Irish citizenship by virtue of their birth on the island of Ireland. The Irish Nationality and Citizenship Act 2004, which amended the 1956 Act, provides for the circumstances in which people born on the island of Ireland on or after 1 January 2005 are entitled to Irish citizenship. The Foreign Births Register is not applicable to Irish citizens born in Northern Ireland. A consequence of this is that they are therefore not eligible to apply for a gender recognition certificate.

Even if a gender recognition certificate were available to this group it could not be used to obtain a revised birth certificate using the Irish gender recognition process due to the fact that their birth is registered in the United Kingdom. Individuals in this group must apply to the UK Government to process applications for revised birth certificates and currently Gender

¹⁶⁴ Submissions received drew attention to problems experienced by Irish citizens born in Northern Ireland. The Review Group acknowledges that these same issues may apply to other persons, born outside of the island of Ireland, who may also qualify automatically for citizenship.

¹⁶⁵ <http://www.irishstatutebook.ie/eli/1956/act/26/enacted/en/html>

Recognition Certificates issued by Irish authorities cannot be used for this purpose.

The group considered that the current process should be amended to expressly enable Irish citizens, born in Northern Ireland, to obtain an Irish Gender Recognition Certificate, even if that would not lead to them being able to obtain a new birth certificate.

Recommendation 6A: That arrangements be put in place to allow Irish citizens born in Northern Ireland and living outside the State, to apply for a gender recognition certificate.

Recommendation 6B: That the issue of revised birth certificates be raised at official level with UK authorities.

7.5 Cost of Updating Official Documentation

The experiences of trans persons navigating their way through changes to official documentation can be complex, onerous, and often incur additional costs. During the course of enactment of the legislation it was the intention of the Oireachtas that the process of having a person's preferred gender recognised would be free of charge. Removal of secondary costs would be within the spirit of the Act.

There was some discussion as to whether a fee could be reduced proportionately, if for example, a person wanted to have their gender changed on a document that would otherwise continue to be valid for a further 5 years. It was agreed that public bodies should do what they can to reduce the cost of replacing official documents on foot of a legal change of gender.

Recommendation 7: That departments and agencies examine ways of streamlining application processes; improving interconnection between Departments; and reducing costs for replacement of official documents such as birth certificates and passports.

7.6 Privacy in the Context of Change of Official Documentation

There can be a tension between simplifying administrative systems (as recommended in section 7.5 above) and maintaining the privacy of people with a Gender Recognition Certificate and this was reflected in some of the submissions received. For example, some submissions referred to the sometimes onerous and costly process of updating official documents and records in numerous agencies and others strongly reiterated that protection of privacy should be to the forefront in any updating of official records or documentation, in order to ensure that trans people are not outed during the process. A small number of the submissions received, cited occasions where updating their gender marker in official documents resulted in compromising the privacy of the individual concerned. Incidents of this nature may be significantly reduced by addressing the change of name issue (See section 7.3 above).

Recommendation 8: That each relevant Department/Government body examine how administrative processes, once a Gender Recognition Certificate is obtained, can be streamlined while maintaining a person's privacy.

7.7 Further Review of the Act

The Review Group considered it prudent that provision should be made for a further review of the Act, as research in this area and the position in other countries, is continuing to evolve.

It was considered that a period of 5 years (following enactment of any amendments arising from this review) would be a reasonable time by which a review should be completed. This would allow sufficient time to, for example, conduct the impact assessment proposed in relation to the recognition of non-binary identities (see section 6.6) and to allow any new measures to have had an impact.

Recommendation 9: That a review of the Act and any impact assessment in relation to the introduction of legislation to provide legal gender recognition for non-binary people should be completed within five years of commencement of the provisions of any enacted amending legislation arising from this review. That review would cover any new provisions contained in any amending legislation.

7.8 Provision of Information

Throughout the consultation process it became clear that there is some confusion around elements of the Gender Recognition Act and the associated processes. It is important that clear and easily accessible information is available for people.

In addition, once people have a certificate from the register of gender recognition, they will likely need to contact a range of organisations in order to have their gender changed on their records. This can be an onerous

process and so it would be useful to provide some assistance for people in this regard.

Recommendation 10A: That the Department of Employment Affairs and Social Protection publish an easy to read booklet setting out the steps involved in obtaining a Gender Recognition Certificate and an entry in the register of gender recognition. This should also include advice regarding next steps to be taken, listing other Government departments and State bodies that may need to be contacted to update personal records.

Recommendation 10B: The group also recommends that a booklet be prepared for Government Departments, other State bodies, and private sector organisations, setting out how the Act applies to them.

7.9 Gender Recognition of Foreign Births

In order to be included on the register of gender recognition of foreign births, a person must first have an entry in the foreign births register¹⁶⁶ which incurs a statutory fee of €278 (or €153 if under age 18) which is payable by all applicants for citizenship by descent¹⁶⁷. Some of the submissions received intimated that this is not in keeping with the spirit of the Act, or the intention of the Oireachtas, that the process of legally changing gender would be free of charge and this was considered by the group.

The additional service provided for gender recognition, whereby the birth of an Irish citizen born abroad is entered in the register of gender recognition of foreign births under their preferred name(s) and gender does not attract any fee. The Department of Foreign Affairs and Trade absorbs the cost of

¹⁶⁶ <https://www.dfa.ie/passports-citizenship/citizenship/born-abroad/registering-a-foreign-birth/>

¹⁶⁷ S.I. No. 47/2013 - Foreign Births Regulations 2013

processing, printing confirmation of entry on the register and sending it to the applicant by registered post.

It is important to note too that having a birth entered in the register of gender recognition of foreign births is not currently a prerequisite for obtaining an Irish passport in an applicant's preferred name(s) and gender as, once a citizen, applicants can obtain the passport by providing proof of usage of the preferred name, along with their GRC, to the passport office.

7.10 Issues outside the scope of the Review

Equality Legislation

The issue of broadening the scope of existing equality legislation to explicitly include protection against discrimination for transgender, non-binary and intersex persons, was raised in many of the submissions and discussed by the group. The group agreed that there would be merit in reviewing the provisions of the Employment Equality legislation, Equality legislation and the Equal Status Act 2000 to include gender identity, gender expression and sex characteristics as protected grounds. The Group agreed that this was a matter for the Department of Justice and Equality and that Department agreed to take it under consideration.

Shared Spaces

A number of submissions referenced issues relating to the safety and inclusion of transgender people in shared spaces such as schools, sports clubs, changing areas, toilets, and prisons. The group acknowledged that some organisations are to be commended for having already introduced measures to ensure the safety and inclusion of transgender, non-binary and intersex people in their premises. The Group would like to encourage other

organisations to do likewise, where possible, to help address stigma and exclusion. The Department of Children and Youth Affairs advise that this matter was also considered in the consultations and drafting of the upcoming LGBTI+ Youth Strategy and that it is intended to include recommendations in that regard.

Chapter 8 - Recommendations

Recommendation 1:

A system of gender recognition should be introduced for children of any age, subject to the following key principles:

- Parental consent required (with an appropriate legal process to address cases where there is not consent from both parents or it is not possible or safe to obtain same),
- Process would be administrative,
- Straightforward revocation process,
- Third party support for the child and family involved.

Recommendation 2A:

Legal gender recognition should be made available to people who are non-binary.

Recommendation 2B:

As part of cross Government departmental review of proposed legislative amendments an impact assessment may be considered.

Recommendation 2C:

In the immediate term, Government Departments and other public bodies should take any positive steps they can take to improve the position of people who are non-binary.

Recommendation 3:

All measures taken to improve access to gender recognition, both with regard to age and gender identity (either binary or non-binary), should also provide access for intersex individuals.

Recommendation 4:

That the Department of Employment Affairs and Social Protection, with the General Register Office, introduce a numbering system which looks identical to that used for birth certificates where the information is taken from the birth registers.

This should apply to new certificates and the option of a replacement certificate should be made available to people who already have a certificate with no reference number (and the fee for issuing a replacement waived).

Recommendation 5:

Section 10 of the Act should be used (either as currently enacted or by way of legislative amendment) to enable a legal change of name as part of the gender recognition process.

Recommendation 6A:

That arrangements be put in place to allow Irish citizens born in Northern Ireland and living outside the State, to apply for a gender recognition certificate.

Recommendation 6B:

That the issue of revised birth certificates be raised at official level with UK authorities.

Recommendation 7:

That departments and agencies examine ways of streamlining application processes; improving interconnection between Departments; and reducing costs for replacement of official documents such as birth certificates and passport.

Recommendation 8:

That each relevant Department/Government body examine how administrative processes, once a Gender Recognition Certificate is obtained,

can be streamlined while maintaining a person's privacy.

Recommendation 9:

That a review of the Act and any impact assessment in relation to the introduction of legislation to provide legal gender recognition for non-binary people should be completed within five years of commencement of the provisions of any enacted amending legislation arising from this review. That review would cover any new provisions contained in any amending legislation.

Recommendation 10A:

That the Department of Employment Affairs and Social Protection publish an easy to read booklet setting out the steps involved in obtaining a Gender Recognition Certificate and an entry in the register of gender recognition. This should also include advice regarding next steps to be taken, listing other Government departments and State bodies that may need to be contacted to update personal records.

Recommendation 10B:

The group also recommends that a booklet be prepared for Government Departments, other State bodies, and private sector organisations, setting out how the Act applies to them

Appendices

Appendix 1

Review Group Membership

The original membership of the group following the launch by Minister Doherty is as follows:

- Moninne Griffith, BeLonG To (Chair);
- Sara R Phillips, Transgender Equality Network Ireland (TENI);
- Séamus Byrne, IndividualiTy;
- Dr. Tanya Ní Mhuirthile, Dublin City University;
- Anne O'Donnell, Manager, Hub na nÓg - Young Voices in Decision-making;
- Michele Clarke, Chief Social Worker, Department of Children & Youth Affairs;
- Dearbháil Nic Giolla Mhicíl, Department of Employment Affairs & Social Protection;
- Olive McGovern, Department of Children and Youth Affairs;
- Gráinne Morrissey, Department of Education and Skills;
- Nuala Ní Mhuirheartaigh, Department of Foreign Affairs and Trade;
- Tracy O'Keeffe, Department of Justice and Equality (Civil Law Reform Division);
- Adam Egan, Department of Justice and Equality (Equality Division);
- Diane Nurse, Health Service Executive.

The following also represented their Departments at meetings over the course of the review: Caroline Mellows, Rachel Dunn (Department of Justice and Equality); Joanne King, Teresa McHugh, Sarah Keating (Department of Foreign Affairs and Trade); Joanne Byrne, Linda O'Sullivan (Department of Children and Youth Affairs); Neville Kenny, Anne Murray, Margaret McCarthy (Department of Education and Skills).

Secretariat:

- Conor O'Reilly, Department of Employment Affairs & Social Protection
- Déaglán Ó Ceallaigh, Department of Employment Affairs & Social Protection

Appendix 2

Application Form for a Gender Recognition Certificate

Application form for a Gender Recognition Certificate

Social Welfare Services
GRC 1
Data Classification R



A person can apply to have their preferred gender recognised by the State. If you are issued with a Gender Recognition Certificate, your gender and name (if changed) will be updated on the record associated with your PPS number on the Department's central records database.

You need a Personal Public Service Number (PPS No.) before you apply.

How to complete this application form.

- Please use **BLACK** ball point pen.
- Please use **BLOCK LETTERS** and place an X in the relevant boxes.
- Please answer **all questions**. If you do not answer all the questions we may not be able to process your application.

How to apply

Complete **Part 1** of this application form.

Sign the declaration at **Part 2** of this form and have it witnessed by one of the following: **Peace Commissioner/Notary Public/Commissioner for Oaths/Solicitor**. Send the completed application form, along with the relevant required documents from the list below, to:

Client Identity Services, Department of Social Protection, Shannon Lodge, Carrick-on-Shannon, Co Leitrim, N41 KD81.

If you need any help to complete this form, please contact Client Identity Services, Telephone: 071 9672588.

Required documents

- Birth Certificate or Adoption Certificate.
- Proof of residency in Ireland, if you were not born in Ireland.
- If you have had your preferred gender recognised in another jurisdiction and wish to have that recognition validated here, a copy of the relevant decision, order or certificate.
- If you are aged between 16 and 18, a Court Order from the Circuit Family Court exempting you from the requirement to be at least 18 years of age in order to apply for a Gender Recognition Certificate.
- If you wish to have a name other than that on your original birth certificate shown on the Gender Recognition Certificate, we require evidence of "use and repute" over two years or a Deed Poll for a change of name which has been enrolled in the High Court.

For more information, log on to www.welfare.ie.

Warning: If you make a false statement or withhold information, you may be prosecuted leading to a fine, a prison term or both.

Part 2

Statutory Declaration

This declaration must be completed in the presence of a person authorised to take statutory declarations. This includes a Peace Commissioner/ Notary Public/ Commissioner for Oaths/Solicitor.

I _____

of (current address) _____

do solemnly and sincerely declare that I

- (i) have a settled and solemn intention to live in the preferred gender of male/female (delete as appropriate) for the rest of my life,
- (ii) understand the consequences of the application,
and
- (iii) make this application of my own free will.

I declare that details given above are correct and I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act, 1938.

Date:

D	D

M	M

2	0		
Y	Y	Y	Y

Signature of Person making Declaration (not block letters)

(Must be signed in the presence of the witness to the declaration)

Date:

D	D

M	M

2	0		
Y	Y	Y	Y

Signature of witness (not block letters)

Part 2 continued**Statutory Declaration**

This part to be completed by a Peace Commissioner/ Notary Public/
Commissioner for Oaths/Solicitor.

Declared before me:

(Name in Capitals) _____

a *Notary Public/Commissioner for Oaths/Peace Commissioner/Person authorised by (insert
authorising statutory provision) _____

to take and receive Statutory Declarations by (name of person making declaration)

* Delete as applicable

1. Who is personally known to me or

2. Who is identified to me by (one of the following documents)

a) Passport - Passport Number: _____ Issued on: _____

b) National Identity Card - Identity Card No: _____ Issued on: _____

c) Aliens Passport - Passport No: _____ Issued on: _____

d) Refugee Travel Document issued by the Minister for Justice and Equality -
Document No: _____ Date of Issue: _____

e) Travel Document (other than Refugee Travel Document) issued by the Minister for Justice
and Equality: - Document No: _____
Date of Issue: _____

at _____ (place of signature), this _____ day of _____ (date)

(Signature of Witness)

(Contact details/Seal or Stamp, if held)

DELETE 1, 2 (a), 2 (b), 2 (c), 2 (d) or 2 (e) AS NECESSARY

Official stamp

Data Protection Statement

Personal data is required to determine eligibility for payments and services, administered for Ireland's social protection system. It may be shared with other Government Departments/ Agencies where provided for by law. Data protection policy available at www.welfare.ie/dataprotection or hard copy.

Explanations and terms used in this form are intended as a guide only and are not a legal interpretation.

Appendix 4

Legal Gender Recognition: Comparative Position in a selection of countries¹⁶⁸

EU Member States			
Country	Adults	Children	Third Gender Marker
Ireland	Self-declaration.	Over 16: requires Court Order, parental consent and report from two medical practitioners. Under 16: no provision.	No provision.
Austria	Allows recognition of a gender change (based on the jurisprudence it is possible to amend the originally registered gender from male to female or vice versa. An expert opinion is required).	Procedure is the same as for adults. There are separate guidelines provided by the Austrian Federal Ministry of Health concerning minors taking into account their special situation.	No provision.
Belgium	Self-declaration, following three month reflection period.	Over 16: requires report from a psychiatrist and parental consent. Over 12: change of first name only, with parental consent.	No provision.

¹⁶⁸ Sources: Replies to questionnaire circulated by the Department of Foreign Affairs and Trade; and ILGA Trans Legal Mapping Report, November 2017 (<https://www.ilga.org/trans-legal-mapping-report-2017-ILGA>)

Bulgaria	Gender marker may be changed through a court process with expert opinions from medical professionals including a sexologist, a psychologist, and a psychiatrist.	Position not known.	Position not known.
Croatia	Gender marker may be changed through application to the National Health Council with supporting medical documentation.	Parents or guardian of a child are required to submit supporting medical documentation. No age limits.	Position not known.
Cyprus	No provision.	Position not known.	Position not known.
Czech Republic	Dependant on evidence of surgery affecting reproductive function and genitals.	Position not known.	Position not known.
Denmark	Self-declaration, following six month waiting period.	Position not known.	Allows applicants to receive a passport with gender marker 'X'
Estonia	Requires application to medical expert committee of the Ministry of Social Affairs.	Position not known.	Position not known.
Finland	Medical statement required stating that the applicant permanently feels to belong to the gender opposite to the one assigned, and lives in that gender role, and has been sterilised or is for some other reason infertile.	No provision.	No provision.

France	Applicant must demonstrate sufficient facts to support their claim: this can include that they appear publicly to belong to the affirmed gender; that they are known in that gender to family, friends, and colleagues; that they have changed their forename to one of the affirmed gender.	Based on application made by child's legal representative. Children over 13 years must give their consent.	No provision.
Germany	Requires two independent medical expert opinions.	Gender recognition for children is available based on parental consent. Family court approval is required for legally incompetent.	No current provision. In November 2017 the German Federal Constitutional Court ruled the existing law to be unconstitutional. It instructed that new provisions be enacted by which either a third gender option will be introduced or gender registration abolished altogether no later than 31 December 2018.

Greece	Administrative procedure through the courts. Petition for name and gender marker change are heard together. Applicants must have legal capacity and be unmarried.	Gender marker change available to minors aged 15-17 – the process retains a medicalised component (a certificate must be obtained from a psychological and medical commission). Gender marker change is not available to persons under 15.	No provision.
Hungary	Diagnoses from a psychiatrist and a supporting expert opinion from a clinical psychologist are required. The applicant must also be examined by either a gynaecologist or urologist stating that gender reassignment surgery can be performed on the applicant in the future.	Position not known.	Position not known.
Italy	Available by application to a court but requires some level of medical assessment.	Position not known.	Position not known.
Latvia	Administrative procedure, no medical requirement.	Available by way of parental application. No age limits.	Position not known.

Lithuania	No provision. The legislation provided for by the Civil Code has never been put in place, leaving no administrative or legal procedure for gender change.	No provision.	No provision.
Luxembourg	Provision for legal gender recognition currently through judicial procedure. Draft legislation for recognition based on self-declaration is currently before parliament.	Current provisions are the same as for adults but with parental consent. Draft legislation provides for recognition based on parental consent by way of (i) an administrative procedure for children over 5 years, and (ii) a judicial procedure for children under 5 years. [written consent is required from the child in the case of children over 12 years]	No provision. [Review of legislation currently underway]
Malta	Self-declaration.	Over 16: self-declaration. Under 16: first name and gender change allowed with Court permission and parental consent.	Provision for legal non-binary gender recognition by way of self-declaration.
Netherlands	Available with supporting expert opinion for all citizens over 16 years.	Available with supporting expert opinion for all citizens over 16 years.	Position not known.

Poland	Requires physical and psychological assessment, and expression of gender identity publicly for (usually) two years.	Available by parental application to court.	Position not known.
Portugal	Medical report required.	No provision. (Legislation for a self-declaration system for over 16s (with parental consent currently before Parliament.)	No provision.
Romania	Available by application to the courts. Before the hearing, two letters are needed (from a psychiatrist and an endocrinologist).	Position not known.	Position not known.
Slovakia	Requires a medical opinion (psychiatric report and evidence of sterilisation are commonly required).	Position not known.	Position not known.
Slovenia	Available but requires medical certification.	Position not known.	Position not known.

Spain	<p>Available but requires diagnosis of Gender Dysphoria and evidence of two years hormonal treatment. No prior surgery is required.</p> <p>[Amending legislation is before Parliament to provide for removal of medical diagnosis]</p>	<p>No provision.</p> <p>[Amending legislation is before Parliament to provide for applications from 16-17 year olds; and from under 16 year olds if represented by parents or legal tutors]</p>	No provision.
Sweden	<p>Applications must be accompanied by a medical report stating that the person has undergone a primary investigation, by a psychiatrist, to confirm the "diagnosis of transsexualism"</p>	<p>Minors must apply through their legal guardian.</p>	Position not known.
United Kingdom	<p>Applicant must satisfy a Gender Recognition Panel that they have gender dysphoria and have lived in the acquired gender for two years.</p> <p>[Legislation is currently under review]</p>	No provision.	No provision.

Other States

USA	<p>Legislation, court application and/or policy, varies in different states.</p> <p>The conditions to change gender marker on identity documents vary among the state laws and policies, and depending on the documents to be amended.</p>	<p>Legislation, court application and/or policy, varies in different states.</p> <p>The conditions to change gender marker on identity documents vary among the state laws and policies, and depending on the documents to be amended.</p>	<p>At a federal level only M or F is available for official documentation. No process for recognition of non-binary identities of those recognised by other countries. In 2016, an Oregon resident became the first person in the USA whose legal sex is "non-binary".</p>
Argentina	Self-declaration.	Available based on judicial process "taking into account the evolving capacities and best interest of the child as expressed in the Convention on the Right of the Child"	Position not known.
Uruguay	Judicial procedure supported by medical opinion and evidence of living in the opposite gender for two years.	Same procedure as for adults, with parental consent.	No provision.

Norway	Self-declaration.	Over 16: self-declaration. Age 6-16: self-declaration with parental consent. Under 6: provision for children with “uncertain somatic sex development”, with parental consent.	No provision.
Andorra	No provision. [Legislation currently at draft stage]	No provision. [Legislation currently at draft stage]	No provision.
Iceland	Available by application to the Expert Panel on Gender Identity Disorder – requires evidence of diagnosis and treatment. [Legislation is currently under review]	No provision.	Position not known.
Japan	Available to persons over 20 years of age who have the intention of physically and socially transitioning based on diagnosis from two or more physicians.	No provision.	No provision.

Australia	Each State and Territory has legislation that allows for birth certificates to be amended and policy guidance on name/gender marker change, while the Federal government has policy that gives guidance on change of gender markers on Australian government records.	Position not known.	Allows non-binary gender marker "X" requiring only a letter from a doctor, not proof of surgery. Can change birth certificate to sex: indeterminate. Gender marker "X" allowed on passports.
New Zealand	Available by application to the Family Court with assessment process supported by medical evidence.	Legal gender recognition available with parental consent and supporting opinion of a registered counsellor or medical professional. No age limit.	Allows passports to use a non-binary gender option, X. Self-declaration model, sworn statutory declaration.

Canada	Requires an affidavit including a "statement confirming that the person identifies with and is maintaining the gender identity that corresponds with the requested amendment to the sex on the record of birth", and supporting medical opinion.	Minors can amend their gender on their birth certificate with parental consent (applies only in Alberta).	Ontario Driver's licences have an "X" option for sex. In July 2017, the Northwest Territories began allowing "X" as a non-binary option on birth certificates. On August 31, 2017, Canada began allowing an observation to be added to passports requesting that the holder's gender should be read as "X", indicating that it is unspecified, though a gender of "M" or "F" had to be added as a gender for an undefined period to comply with legal requirements of other countries
India	The Indian Supreme Court accepted self-identification as the principle that would govern gender recognition, with no additional eligibility requirements, such as gender affirming surgeries or hormone therapy.	Position not known.	India allows passports to use the gender marker "T", meaning transgender, as well as "E" (eunuch). A third gender option can be chosen on Aadhar cards, ration cards and voter IDs, with no additional eligibility criteria.

Pakistan	Currently there is no general facility for recognition of binary trans identities in Pakistan. Two recent court cases where the petitioner requested and was granted permission to proceed with gender-affirming surgical procedures subsequently allowed those petitioners to change their identity documents to their preferred binary-identified gender marker.	Position not known.	Legally recognises hijras and eunuchs. Provides for passports with an 'X' marker for transgender/third gender.
Nepal	There are no provisions explicitly enabling a transgender person to change their gender marker from male to female or vice versa	Position not known.	The options for gender marker on a Citizenship Certificate are male, female, and 'other'. Supreme Court decisions and resulting changes to laws and policies enable transgender people to select a third gender option, "Other", based on self-defined gender identity. Allows passports to use an "O" gender marker.

Bangladesh	Position not known.	Position not known.	Since 2011, permits passports with a gender marker "other". However, but supporting documentation of a birth certificate or a national ID card is required when issuing a passport. At present, neither of those documents can carry an 'other' marker, meaning that uncertainty exists over the success of potential passport applications.
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Appendix 5

Glossary of Key LGBTI+ Terms¹⁶⁹

LGBTI+: Lesbian, gay, bisexual, trans and intersex people.

The plus sign means inclusion of those not specifically named, such as non-binary people.

Coming out: Understanding yourself and then telling others that you are LGBTI+.

Sexual Orientation: sexual and romantic attraction.

Numbers: Irish research found that LGB young people were 8-11% of all youth, including 4% who identified as gay or lesbian, 4% as bisexual, and 3% as 'not sure'¹⁷⁰. There were 352,257 post-primary students in 2016/2017¹⁷¹; 8% of these would be 28,180 students.

Asexual: someone who rarely experiences sexual attraction; they may experience romantic or emotional attraction.

Bisexual: someone who is attracted to two genders.

Gay: someone who is mainly attracted to people of the same gender. In the past, the term 'homosexual' was used.

Lesbian: a woman who is mainly attracted to other women.

Heterosexual/straight: Someone who is attracted to people of a different gender.

Pansexual: Someone who may be attracted to any person, regardless of their gender.

Gender identity our deeply felt internal experience of our own gender.

Transgender people have a gender identity that is different from the sex that they were assigned at birth¹⁷². In New Zealand, researchers found 1.7% of high school students were trans, and a further 2.5% were unsure of their gender.¹⁷³ There were 352,257 post-primary students in 2016/2017; 1.7% of these would be 5,988 trans or non-binary students.

¹⁶⁹ Glossary of Key Terms from BeLonG To's Stand up! Awareness Week, Anti LGBT bullying training, 2017.

¹⁷⁰ B. Dooley & A. Fitzgerald (2012) **My World Survey. National study of youth mental health**. Headstrong & UCD, p.59 [N = 6,085, aged 12 – 19 years.]

¹⁷¹ Dept. of Education & Skills <http://www.education.ie/en/Publications/Statistics/Key-Statistics/Key-Statistics-2016-2017.pdf>

¹⁷² https://www.unfe.org/system/unfe-89-English_Trans_Factsheet_FINAL.pdf

¹⁷³ TC Clark et al, Health & wellbeing of transgender high school students: results from the New Zealand adolescent survey (Youth '12) **Journal of Adolescent Health**, 55 (2014) 93e99.

Gender expression: How we show our gender through clothing, hair, voice, behaviour, etc¹⁷⁴.

Cisgender: Someone who is not transgender or non-binary.

Transgender, or Trans: An umbrella term for people whose gender identity and/or gender expression differs from the sex they were given at birth. In the past, 'transsexual' was used.

Gender dysphoria: The distress a person experiences because the sex they were assigned at birth does not match their gender identity.

Sex: At birth, babies are usually assigned male or female, based on their anatomy. (However, see Intersex below.) This sex designation is then recorded on their birth certificates.

Transition: the process in which some trans people begin to live as the gender with which they identify, rather than the sex they were given at birth. Transition may or may not include social, medical or legal changes, such as: coming out to family and friends; changing one's appearance and/or name, pronoun, and legal documents; and medical treatment, such as hormones, hormone blockers or surgery. **In the past, this was called a 'sex change.'**

Non-binary: An umbrella term for any gender that is not exclusively male or female.

Sex characteristics: Sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns.

Intersex people are born with sex characteristics that do not fit the typical definitions for male or female bodies. For some intersex people, these variations are apparent at birth, for others they emerge later¹⁷⁵. People with intersex variations are about 1.7% of the world population¹⁷⁶. There were 352,257 post-primary students in 2016/2017; 1.7% of these would be 5,988 intersex students.

Biphobic Bullying: Bullying based on prejudice or discrimination towards bisexual people.

Homophobic or LGBTI+ bullying: Bullying based on prejudice or discrimination towards LGBTI+ people.

Transphobic bullying: Bullying based on prejudice or discrimination towards trans people.

¹⁷⁴ ***Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review***, ARC International, International Bar Association & ILGA, Nov. 2016, http://ilga.org/downloads/SOGIESC_at_UPR_report.pdf.p.14.

¹⁷⁵<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E#sthash.oexTUxGF.dpuf>

¹⁷⁶ The US psychologist, Anne Fausto-Sterling, estimated the total intersex population around the world as 1.728% of births: ***Sexing the body***. New York: Basic Books (2000) p. 53.

UN Definitions:

The words we have highlighted in yellow above are the standard terms that are used by the **United Nations**: Sexual Orientation, Gender Identity and Sex Characteristics.



Rainbow flag



Bisexual Flag



Trans Flag