

LEGAL SUBMISSION TO THE GENDER RECOGNITION ADVISORY GROUP

Introduction

Gender identity is fundamental to our sense of self. It represents a deeply held and highly personal “conviction of maleness or femaleness.”¹ In Ireland a person’s legal sex is determined at birth and remains the legal sex of an individual for life. For most, this approach is unproblematic but for transgender and intersex people the assignment of a fixed legal sex for life at birth can cause great hardship. Ireland currently does not provide any legislative framework for gender recognition. This was declared by the Irish High Court to be incompatible with the European Convention on Human Rights (hereinafter ‘the ECHR’) in the landmark decision *Foy v. An t-Ard Chlaraitheoir & Ors*² in which Justice McKechnie observed that;

“Ireland as of now is very much isolated within the Member States of the Council of Europe ...[and] must be even further disconnected from mainstream thinking [in relation to recognising transgender persons]”³.

The European Convention on Human Rights

The *Foy* case followed two judgments of the European Court of Human Rights namely, *Goodwin v. United Kingdom*⁴ and *I v United Kingdom*⁵. Both cases concerned claims by post-operative transgender women that United Kingdom’s refusal to recognise the applicants’ gender identity breached their rights under the Convention. The Court of Human Rights ruled that United Kingdom’s denial of their requests amend their legal sex and official records to reflect their post-operative gender identity violated both the right to respect for private life and the right to marry. As a result of the above decisions all signatory states of

1 Money, John (1994). "The concept of gender identity disorder in childhood and adolescence after 39 years".
Journal of Sex and Marital Therapy 20 (3): 163–77.

2 *Foy v. An t-Ard Chlaraitheoir* [2007] IEHC 470.

3 *Ibid.*

4 *Goodwin v United Kingdom* (2002) 35 EHRR 18.

5 *I. v United Kingdom* (2003) 36 EHRR 53.

the European Convention must provide for recognition of the true gender of transgender persons. In *Goodwin v. UK* the European Court of Human Rights emphasised that:

“The notion of personal autonomy is an important principle ..., protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings”.⁶

European Union Law

In addition to Convention rights consideration must also be given to European Union law. that the Court of Justice of the European Union has since its 1996 decision *P. v. S. and Cornwall County Council*,⁷ interpreted sex discrimination in the EC treaties to cover ‘gender reassignment’. Recital 3 of the Preamble of the Gender Recast Directive has now introduced an explicit legislative reference in to discrimination based on ‘gender reassignment’.⁸ The Directive codifies the *P. v S.* judgement in its Preamble by stating that:

The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.⁹

The European Union Agency for Fundamental Rights summarises European Union law in light of Court of Justice jurisprudence and the new Gender Recast Directive as follows:

Every piece of legislation prohibiting discrimination on grounds of sex and establishing the principle of equal treatment between men and women in the fields of employment, whether pre-existing the Gender Recast Directive or introduced as a

⁶ *Goodwin v United Kingdom* (2002) 35 EHRR 18.

⁷ Case C-13-94 (1994).

⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), published in the Official Journal of the European Union L 204, 26 July 2006, pp. 23–36.

Full text is available at: [http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:](http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:EN:PDF)

0023:0036:EN:PDF.

⁹ Recital 3.

measure to implement it, must be interpreted so as to include a prohibition of discrimination based on the gender reassignment of the individuals.

Domestic judges and administrative authorities called on by domestic law to decide on cases of discrimination against trans individuals in the workplace must interpret the law taking into account Recital 3 of the Preamble in light of the case-law of the European Court of Justice and rule that discrimination against trans individuals violates the principle of equal treatment between men and women.¹⁰

It follows that Ireland must not only provide for gender recognition (*Foy v. An t-Ard Clárúitheoir*)¹¹ but must also prohibit discrimination based on gender reassignment (Gender Recast Directive). It is submitted that 'gender reassignment' for the purposes of Recital 3 of the Gender Recast Directive should not be interpreted narrowly and legislative protections should encompass gender identity and expression. Marriage Equality makes the following legal submission to assist the Gender Recognition Advisory Group in addressing what direction such legislative reform should take.

Gender Recognition

The approach taken to gender recognition by other EU member states (all of whom are contracting parties to the ECHR) vary considerably. The Gender Recognition Advisory Group is strongly urged to follow best practice and to view the Foy decision as a unique opportunity for Ireland to develop best practice for gender recognition and in so doing to avoid the missteps made by other parties to the European Convention on Human Rights. The approach taken to gender recognition by other Council of Europe member states may be categorised as follows:

- i. No provision for official recognition (a breach of the Convention).¹²
- ii. Provision for gender recognition:

10 Report: "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation (updated on 02.06.2009). Available at http://www.fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_part2_en.pdf.

11 [2007] IEHC 470.

12 See the decision of the Irish High Court decision *in Foy-v-An t-Ard Chlarúitheoir & Ors* [2007] IEHC 470.

- a. Without a requirement that applicants undergo hormonal treatment or surgery.
- b. Legal recognition of gender identity upon acceptance of evidence of gender dysphoria¹³ a 'gatekeeper' body such as experts from the Ministry of Health,¹⁴ the Gender Reassignment Panel,¹⁵ a clinical psychologist or a doctor.
- iii. In most Council of Europe member states an applicant must follow a medically supervised process of gender reassignment. In some countries mandatory sterilisation is a pre-requisite to gender recognition and applicants are also required to undergo other medical procedures, such as hormonal treatment. In addition applicants may have to prove that they have lived for a considerable period of time in the gender for which recognition is sought prior to gender recognition.

REQUIREMENT OF MEDICAL TREATMENT, SURGERY OR STERILISATION

The Gender Recognition Advisory Group are strongly urged that gender recognition must be available without any requirement that an applicant undergo surgery or other medical treatment. Surgery or other medical or hormone treatment for the purposes of body modification must be entered into freely and as a matter of choice. Any requirement that medical treatment or surgery be undertaken as a pre-requisite to gender recognition would violate the applicants' bodily integrity. Increasingly, surgery has been rejected as a pre-requisite in other European Union member states, and in a 2005 decision the German Constitutional Court (Bundesverfassungsgericht) observed "an operative intervention as a precondition for the change of gender is increasingly regarded as problematic or no longer tenable among experts".¹⁶

The European Fundamental Rights Agency has concluded that the legal protections afforded to transgender people under European Union law should not be limited to those who have undergone gender reassignment and instead legal protections must encompass gender identity. It follows that gender recognition should not be premised upon surgical or other

13 This is the medically recognised condition.

14 This is the approach taken in Hungary's authority responsible for the recognition of one's legal gender.

15 In the United Kingdom this is the authority responsible for gender recognition.

16 BverfG, 1 BvL 3/03 (6 December 2005).

medical gender reassignment procedures and Marriage Equality takes the position that it should not be necessary for an applicant to have gender reassignment in order to have their gender identity recognised. Any such requirement conflates medical decisions taken in conjunction with specialised medical advice with official recognition of gender identity which should simply be an administrative procedure. As the European Fundamental Rights Agency have observed:

“[T]ransgenderism may not have to be reduced to [a] narrow understanding, linking it to gender reassignment’ defined as ‘a process which is undertaken under medical supervision for the purpose of reassigning a person’s sex by changing physiological or other characteristics of sex, and includes any part of such a process’....It has been recommended that protection from discrimination on grounds of ‘gender identity’, more generally, should encompass not only transsexuals (undergoing, intending to undergo, or having undergone a medical operation resulting in gender reassignment), but also those other categories.”¹⁷

Marriage Equality deplors the requirement of mandatory sterilisation imposed by some states and advises the Gender Recognition Advisory Group that such any such requirement would undoubtedly breach constitutional and other human rights norms. A clear distinction must be drawn between gender recognition which is only concerned with official recognition of ones gender identity in documents about oneself and the medical treatment or surgery and body modification which an applicant might chose to undertake. Surgical requirements are not necessary in order for a State to recognise a person’s preferred gender and indeed, imposing any such condition the right to found a family and the right to bodily integrity.

REQUIREMENT THAT AN APPLICANT LIVE AS THE GENDER FOR WHICH RECOGNITION IS SOUGHT

In the United Kingdom, Section 2 of the Gender Recognition Act¹⁸ requires that the applicant demonstrate that they have lived in their acquired gender for two years and intends to

¹⁷ EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I - Legal Analysis*, 2008, p.131, online at http://fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_Part%201_en.pdf.

¹⁸ http://www.opsi.gov.uk/acts2004/ukpga_20040007_en_1.

continue in their acquired gender 'until death'.¹⁹ It is submitted that this provision is again unnecessary for official recognition of gender identity. It must be recalled that applicants' are merely invoking the right to have official documentation changed to reflect the true facts about them. This is analogous to the right of the data subject under the Data Protection Acts 1988-2003 to ensure that the information stored about them is factually correct. For a transgender person to be legally required to present as a different gender than that recorded on official documentation for a period of two years prior to gender recognition merely exposes them to continued distress and humiliation when the discord between their gender presentation and officially recorded gender identity is revealed and potentially to violence and to discrimination in the workplace. It is submitted that applicants should not be required to live in their acquired gender for two years or for any express period before recognition. Such requirement exposes applicants to discrimination, violence and harassment in order to obtain gender recognition and again is predicated on the assumption that transgender persons lack the capacity to make a reasoned decision about their own gender identity. A simple administration period, would suffice if time for 'cooling off' is thought necessary

GENDER RECOGNITION PROCEDURE

Although the United Kingdom does not require applicant's for gender recognition to submit to surgery or other medical treatment as a pre-requisite to gender recognition all applications must be submitted to a specialist tribunal, the Gender Recognition Panel.²⁰ While the UK Gender Recognition Act has many positive attributes, it is strongly advised that the 'gatekeeper' model should not be followed in Ireland. It is an approach which assumes that fully competent adults do not have the capacity to make an informed decision about their own identity and gender presentation. The requirement that a transgender person applying for gender recognition present themselves to a panel of strangers as someone with a compelling narrative of their transgender identity, simply in order to amend official documentation about them, represents a failure to respect the dignity and autonomy of transgender people. Further, this approach conflates the process of amending official documentation with the medical decision which might be taken by a transgender or intersex person in conjunction with specialist medical advice. The Gender Recognition Advisory Group is further cautioned against the creation of costly and burdensome 'gatekeeper'

¹⁹ Section 2 Gender Recognition Act 2004.

²⁰ Section 2 Gender Recognition Act 2004.

panels for gender recognition. The above procedures do not exemplify best practice and should not be followed here.

THE GENDER RECOGNITION CERTIFICATE

In the UK at the conclusion of the gender recognition procedure the applicant obtains a birth certificate which is indistinguishable from any other birth certificate, and indicates the new legal sex and name. It can be used wherever a birth certificate is used, such as for issue of a passport. The birth certificate showing the previous legal gender continues to exist, and will carry no indication that there is an associated Gender Recognition Certificate or alternative birth certificate. Certain authorised agencies, with court permission, may have access to the Gender Recognition Register showing the links between these certificates, but the link will be invisible to the general public. This functions in the same way as birth certificates drawn from the Adoption Register in the United Kingdom. Marriage Equality recommends that the above approach be followed here in Ireland.

THE REQUIREMENT THAT APPLICANTS' DIVORCE THEIR SPOUSES

In the United Kingdom applicants' for gender recognition are required to divorce their spouses or annul their marriage in order to be issued with a gender recognition certificate. Although the UK Civil Partnership Act 2004 allows the creation of civil partnerships between same sex couples, a married couple that includes a transgender partner cannot simply re-register their new status. They must first have their marriage dissolved, gain legal recognition of the new gender and then register for a civil partnership. Whilst the drafters of the legislation may have intended this to be a simple paper exercise, in practice such divorces are like any other with burdensome court procedures and attendant legal costs. Once the annulment is declared final and the gender recognition certificate issued the couple then have to make arrangements with the local registrar to have the civil partnership ceremony; they have four weeks grace. Couples may also face hidden pitfalls where the change from civil marriage to civil partnership produces unintended consequences for wills or other provisions.

It is submitted that should such an approach be taken in Ireland it would constitute a unjust attack upon the marital family contrary to Article 41 of the constitution and would further

breach the European Convention on Human Rights in light of the *Parry* decision discussed *infra* and the effects of same upon the benefits and entitlements flowing from marriage may further breach European Union law (*K.B. v. NHS Pensions Agency*). Marriage Equality submits that section 2(2)(e) of the Civil Registration Act 2004 which provides that it is an impediment to marriage if “both parties are of the same sex” should be repealed.²¹

It must be recalled that Irish Civil Partnerships are in no way comparable to their UK equivalent or to marriage. Marriage Equality, has estimated that the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010)²² once enacted will afford only some of the rights enjoyed by married couples. It is estimated that approximately 300 statutory rights have been omitted, *vis-à-vis* the adult members of a same-sex parented family.²³ The children of same-sex couples are scarcely acknowledged in the legislation and have few if any rights under the Civil Partnership Act. Further, it is clear from *State (Nicolaou) v. An Bord Uchtála* that only the family based on marriage enjoys constitutional protection under 41.3.1°. ²⁴ This finding that the privilege of constitutional protection extends only to the family based on marriage was reiterated in *W. O’R v. E.H.*²⁵ Accordingly, having one’s marriage downgraded to civil partnership or being required to divorce and then enter a civil partnership is a very grave matter indeed compromising not only the rights of the adult members of the family but also those of the children. Accordingly, the children of a couple affected by such a provision would have *locus standi* to challenge any pre-condition requiring their parents to divorce or annul their marriage.

While only the marital family enjoys constitutional protection, the term ‘marriage’ is not defined in *Bunreacht na hÉireann 1937* and as a result the courts have oft cited the definition of marriage enunciated by the English jurist Lord Penzance in the somewhat ancient case of *Hyde v Hyde*²⁶; “...marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others”. This definition is considerably less persuasive than it once was, not

21 section 2(2)(e) of the Civil Registration Act 2004 provides that it is an impediment to marriage if “both parties are of the same sex.” The Act is available at <http://www.oireachtas.ie/documents/bills28/acts/2004/a304.pdf>.

22 Available online at <http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b44b09d.pdf>. Last visited on the 26.10.2010.

23 Source, The Marriage Equality “Marriage Audit” due for formal publication in 2010.

24 [1966] I.R. 567.

25 [1996] I.R. 248.

26 *Hyde v Hyde and Woodmansee* [1861-1873] All E.R. Rep. 175 .

least because marriage is no longer understood as a 'union for life' per the 1995 divorce referendum. As Murray J. (as he then was) pointed out in *T v T*,²⁷ Article 41 of the Constitution must be interpreted in a contemporary manner. Therefore, any definitional argument against same-sex marriage might not survive a contemporary analysis of marriage under the Constitution. Further, recent judicial pronouncements have suggested that the definition of marriage is best left to the legislature, and in particular in *Gilligan & Zappone v. Revenue Commissioners* the High Court, per Justice Dunne held that; "Ultimately, it is for the legislature to determine the extent to which such changes should be made."²⁸

Marriage Equality calls upon the Irish government to repeal section 2(2)(e) of the Civil Registration Act 2004 so that the constitutional and human right of lesbian, gay and transgender people to marry is upheld. It must be noted that seven EU member states permit same-sex marriage and a further twelve member states including Ireland have made provision for civil partnerships or other legal recognition for same-sex couples. Civil partnership status is problematic because each of the twelve member states which have provided for such civil status have taken different legislative approaches and as a result partnerships registered in one state are not necessarily recognized others. This creates considerable hardship for same-sex couples and their children and is clearly a barrier to exercise by them of the EU right to free movement. Further, there is strong public support for repeal of section 2(2)(e) of the Civil Registration Act. A recent Irish Times/Behaviour Attitudes survey found that 67% of Irish people felt that same-sex couples should be allowed to marry and that only 25% disagreed.²⁹

Article 8 of the European Convention on Human Rights provides a right to respect for one's "private and family life" and Article 12 provides for a right to marry. In *Parry v The United Kingdom*³⁰ the European Court of Human Rights considered the rights of applicants who had married in 1960 and had three children and post gender reassignment remained together as "a loving and married couple" and wished to remain married. UK law required that the couple divorce or have their marriage annulled as a pre-condition to the first applicant obtaining a

27 *T v T* [2003] 1 I.L.R.M. 321 .

28 *Zappone and Gilligan v Revenue Commissioners and Others* , unreported, High Court, December 14, 2006 .

29 "Yes to gay marriage and premarital sex: a nation strips off its conservative values". Irish Times.

<http://www.irishtimes.com/newspaper/ireland/2010/0915/1224278896417.html>. Retrieved 15 September 2010.

30 Application No. 42971/05.

full gender recognition certificate. As the first applicant was married, she could only obtain an interim gender recognition certificate pending the annulment of her marriage. Neither applicant wanted to annul their 50-year marriage, so the first applicant was unable to obtain a full gender recognition certificate. The Court noted that the requirement that the applicants annul their marriage flowed from the fact that same-sex marriages were not permitted in the UK. However it was noted that the applicants could continue their relationship “in all its current essentials and may also give it a legal status akin, if not identical to marriage, through a civil partnership which carries with it almost all the same legal rights and obligations.”³¹ This fascinating judgment sheds light upon the approach the European Court of Human Rights would naturally take should a similarly positioned Irish couple find themselves with no choice but to enter an Irish civil partnerships. As already outlined, the Irish civil partnerships (due to be available from early 2011) are very clearly a second class status affording only some of the legal protections of marriage to a same-sex couple and providing virtually no legal protection for their children. It follows that, in Ireland a precondition to gender recognition of divorce or annulment of an applicant’s marriage would clearly violate the ECHR. In this connexion it is worth noting that in Sweden, a government appointed Commission submitted a report in March 2007 (SOU 2007:16, Ändrad könstillhörighet- förslag till nylag) proposing that the current requirement of being unmarried or divorced as a prerequisite for authorisation for change of sex shall be omitted.³²

In addition to European Court of Human Rights jurisprudence, European Union law is also of relevance to the question of the capacity of transgender persons to marry or remain married after gender reassignment. In *K.B. v NHS Pensions Agency* (2004)³³ the Court of Justice of the European Union considered the issue of discrimination against trans people resulting from their inability to marry and to reap the corresponding pensions benefits. The Court of Justice noted that the inequality of treatment does not relate to the award of a widower's pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry. The Court then made a comparison with a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and noted in respect of the applicants' that;

31 Application No. 42971/05 at p. 10.

32 Cited in the European Agency for Fundamental Rights Report: “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation (updated on 02.06.2009). Available at http://www.fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_part2_en.pdf.

33 C-117/01 *K.B. v NHS Pensions Agency* (7/01/2004).

“...while they have the benefit of a survivor's pension which forms part of the pay of one of them, a couple such as K.B. and R. are unable to satisfy the marriage requirement, as laid down by the NHS Pension Scheme for the purpose of the award of a survivor's pension”.

The Court of Justice held that legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC. This is a binding interpretation of community law. As may be clear from the above strong legal argument can be made under Irish constitutional, ECHR and European Union law regarding any provision requiring a person to divorce or annul a marriage as a pre-condition to gender recognition.

Marriage Equality submits that section 2(2)(e) of the Civil Registration Act 2004 should be repealed.³⁴ It is discriminatory in effect and prevents gays and lesbians from exercising their constitutional right to marry. It is submitted repeal of section 2(2)(e) is the simplest solution to protect and vindicate the rights of married applicants for gender recognition and their spouses. If this option is not favoured by the state a temporary solution might be obtained on the basis that as section 2(2)(e) of the Civil Registration Act is concerned with registration and solemnisation of marriages, a marriage which was valid *ab initio*, i.e. valid when performed (being a marriage between persons of different legal sex) is not invalidated by reason only of section 2(2)(e) if one of the parties to the marriage subsequently applies for and obtains legal recognition of their true gender identity.

RECOMMENDATIONS

- Applicants should not be required to undergo surgery or submit to other medical treatment prior to applying for gender recognition.

³⁴ section 2(2)(e) of the Civil Registration Act 2004 provides that it is an impediment to marriage if “both parties are of the same sex.” The Act is available at <http://www.oireachtas.ie/documents/bills28/acts/2004/a304.pdf>.

- Compulsory sterilisation cannot be a pre-condition gender recognition. It is submitted that such requirements are not only unnecessary and cruel but constitute a gross violation of the autonomy and dignity of transgender and intersex persons and would breach both constitutional and human rights norms.
- There should be no obligation on transgender people to live in their acquired gender for two years or any extended period prior to gender recognition. It is submitted that the apparent conflict between a person's gender as recorded on official documentation and their gender presentation may cause unnecessary humiliation, distress and anxiety.
- Legal recognition of gender identity should be a simple administrative procedure which respects the dignity and autonomy of transgender applicants. It must be recalled that applicants' are simply seeking to amend official documentation about themselves. The decision whether or not to undertake surgery or other medical treatment for the purposes of body modification is and should be entirely separate and subject to medical advice.
- With the foregoing in mind it is proposed that the administrative procedure could take the form of a sworn statutory declaration by the applicant stating their wish to have their true gender legally recognised and that they understand the implications of the procedure. This statutory declaration should be sworn before a commissioner for oaths then lodged at the Registry of Births, Deaths and Marriages. This, together with a short administration period should suffice for legal recognition of a person's gender (eg three months, which is the notice period for applicants wishing to enter into a civil marriage).
- Marriage Equality submits that section 2(2)(e) of the Civil Registration Act 2004 should be repealed. It is discriminatory in effect and prevents gays and lesbians from exercising their constitutional right to marry. It may also be deemed an unconstitutional attack on the marital family in circumstances where a transgender person who is married is required to divorce their spouse or have their marriage annulled as a pre-condition to gender recognition, further such a measure would also have implications for the children of any such marriage who would also have standing to contest such provision.

- It is further submitted that as an interim measure (assuming that the repeal of section 2(2)(e) of the Civil Registration Act 2004 does not occur prior to the commencement of legal provision for gender recognition) it could be provided that a marriage which was valid ab initio, i.e. valid when performed (being a marriage between persons of different legal sex) is not invalidated by reason only of section 2(2)(e) if one of the parties to the marriage subsequently applies for and obtains legal recognition of their true gender identity.