

# **Gender Recognition Advisory Group**

**Report to Joan Burton, T.D.,  
Minister for Social Protection**

**15 June, 2011**

## **TABLE OF CONTENTS:**

Summary	3
Chapter 1 – Introduction	5
Chapter 2 – Initial Work of the Group	7
Chapter 3 – Public Consultation Process	13
Chapter 4 – Gender Recognition in the EU, Other Countries and International Bodies	21
Chapter 5 – Analysis of Issues and Recommendations	27
Chapter 6 – Gender Recognition Bill – Proposals	45
Appendix 1 – Membership of the Gender Recognition Advisory Group	51
Appendix 2 – Gender Recognition Public Consultation Document	52
Appendix 3 – Organisations Responding to the Consultation Process	55
Appendix 4 – Gender Change in Other Countries and International Sources	57
Glossary	65

## **SUMMARY: Report of Gender Recognition Advisory Group**

The Gender Recognition Advisory Group (GRAG) was established by the Minister for Social Protection in May, 2010, following a High Court ruling that Ireland is in breach of the European Convention on Human Rights in not having a process to legally recognise the acquired gender of transsexual persons. Its terms of reference were to advise the Minister on the legislation required to provide for legal recognition of the changed gender of transsexuals.

### **Work of the Group**

- ✦ Researched issues relating to transsexualism in Ireland and internationally – particularly the condition known as Gender Identity Disorder (GID).
- ✦ Consulted with medical and mental health experts and other stakeholders in Ireland, and with the authorities responsible for the operation of the Gender Recognition Act in the United Kingdom together with leading academics and the Registrar General for England and Wales.
- ✦ Issued a public consultation document in August, 2010. There was a good response from organisations (14) and individuals (26). The Group met with selected organisations and individuals in follow-up bilateral meetings.
- ✦ Conducted a review of legislation and schemes in other countries and international bodies as well as relevant European court cases.
- ✦ Analysed issues that take into account the input of experts, stakeholders, respondents to public consultation as well as domestic and international legal frameworks.

### **Outcome**

- ✦ Recommendations on the legislation required to enable the Minister for Social Protection to set up a scheme whereby the State formally recognises the changed gender of transsexuals who have made a permanent transition to the preferred gender.
- ✦ Formal recognition to mean that the person's changed gender is fully recognised by the State for all purposes – including the right to marry in the changed gender and the right to a new birth certificate. Recognition of the changed gender to apply from the date of the recognition decision.
- ✦ All rights, responsibilities and consequences of actions by the person in their original assigned gender prior to the date of recognition remain unaffected.

### **Qualification Criteria**

Based on analysis of the issues the Group recommends 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 scheme.

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**

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.

# **CHAPTER 1: Introduction**

## **1.1 Introduction**

There are a number of conditions that result in people feeling that they are of a gender opposite to that of their bodily characteristics.

The most common condition involved is Gender Identity Disorder (GID). A person with GID feels that their true gender identity is at variance with the gender registered at birth on the basis of their bodily characteristics. In this context, “gender identity” refers to the person's own deeply felt view of themselves as either a man or a woman.

It is a serious condition in that it causes considerable mental distress to the person concerned, not least due to prejudice, ridicule, and lack of understanding of the condition.

Treatment for Gender Identity Disorder aims to help people with the condition to achieve contentment in terms of their gender identity rather than trying to “cure” the condition. Treatment can range from counselling to dressing and living in the preferred gender, to hormone treatment, and to other treatments to alter physical appearance, and may go as far as surgery to alter bodily features.

In many cases, the end point for treatment of GID is for the person to make a permanent transition from the original gender registered at birth to the opposite gender.

People who have made the transition to the preferred gender may wish to have the transition recognised by official bodies and have the altered gender reflected in official documents.

Many official bodies in Ireland already issue documents recognising changed genders of individuals – for example, passports, driving licences and PPS numbers. However, there is no provision in law for the recognition of changed gender by means of a new birth certificate.

A High Court Order of 10 March, 2008<sup>1</sup>, declared that certain sections of the Civil Registration Act, 2004, are incompatible with the obligations of the State under the European Convention on Human Rights by reason of their failure to respect the private life of transsexuals in that there are no provisions that would enable the acquired gender identity of transsexual persons to be legally recognised by the State.

Following this order, the Minister for Social Protection set up an inter-Departmental advisory group – referred to hereinafter as the Gender Recognition Advisory Group – to advise on the legislation required to rectify this deficiency.

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<sup>1</sup> Order of Mr. Justice McKechnie in *Foy v An t-Árd Chláraitheoir, IEHC, 2007*.

## **1.2 Terms of Reference for the Gender Recognition Advisory Group**

The specific terms of reference of the Group are as follows:

*“...On foot of a High Court ruling that Ireland is in breach of the European Convention on Human Rights in not having a process to legally recognise the acquired gender of transsexual persons, the Minister for Social Protection established an inter-Departmental group – the Gender Recognition Advisory Group – with the following terms of reference:*

- ✧ To advise the Minister for Social Protection on the legislation required to provide for legal recognition of the acquired gender of transsexuals. In particular, to propose the heads of a bill to provide for:*
  - the establishment of a process for legal recognition of the acquired gender of transsexual persons who have made the transition from one gender to another;*
  - the establishment of a gender recognition register;*
  - the granting of entitlement to marry in the legally recognised reassigned gender, and*
  - any other provisions as may be deemed necessary consequent on the main provisions of the Bill...”*

The Group held its first meeting on 6 May, 2010, and has met on ten other occasions. The composition of the Group can be found in Appendix 1 of this report.

## **CHAPTER 2: Initial Work of the Group**

### **2.1 Basic Task**

The Group agreed that the terms of reference require it to advise the Minister for Social Protection on the legislative provisions required to allow persons living in the gender opposite to that indicated on their birth certificates to have a new birth certificate issued that shows the lived-in gender and any altered forenames and/or surnames. In particular, the legislation should officially recognise the changed gender of persons who have made the transition from the gender registered at birth.

### **2.2 Assumptions by the Group**

At the beginning of its work, the Group agreed to certain assumptions and definitions to establish a basis for its work programme. These assumptions and definitions were based on the framework set down by the High Court ruling as well as developments in international case law and the Group's knowledge of the relevant legislation in Ireland.

The assumptions were as follows:

- ⤴ The basic scope of the legislation would be to authorise the Minister to establish and provide for the operation of a scheme whereby the State recognises the changed gender of transsexual persons.
- ⤴ The term “transsexual” was taken as referring to individuals who experience unhappiness or discomfort with the gender assigned to them based on their biological sex at birth and who wish to, or have already made, the transition to the preferred or acquired gender.<sup>2</sup>
- ⤴ Formal recognition means that the person’s preferred or altered gender would be fully recognised by the State for all purposes – including the right to marry in the acquired gender and the right to a new birth certificate.
- ⤴ Recognition of the acquired gender would apply from the date of issue of a formal statement to that effect and would automatically entitle persons whose birth is registered in Ireland to a new birth certificate.
- ⤴ All rights, responsibilities and consequences of actions by the person in their original registered gender prior to the date of recognition would remain unaffected.

### **2.3 Potential Risks**

The Group considered the risks to the State of fraudulent or frivolous applications for gender

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<sup>2</sup> The Group accepts that the term “transsexual” is not universally accepted as appropriate and that the term “transgender” might be preferable. However, for the sake of consistency, this report uses the term “transsexual” throughout.

recognition – in particular, the consequences of giving recognition to spurious cases.

The Group was unable to identify any risks to the State of a financial nature, in that there is no economic gain to an individual changing gender through, for example, access to better welfare benefits or tax treatment.

The Group did recognise the possibility of embarrassment to the State if the new scheme resulted in what might be seen as the acceptance of “frivolous” claims for recognition of changed gender and, as such, the terms and conditions should be sufficient to deter such claims.

However, the Group felt that, given the nature of the condition and the difficulties and distress experienced by individuals in making the transition from one gender to the opposite one, the probability of frivolous applications was extremely low.

## **2.4 Gender Identity Disorder**

There are well established standards and guidelines for the diagnosis of Gender Identity Disorder. These are published by international bodies and are kept under constant review. By using the guidelines, clinicians should be able to arrive at a firm diagnosis and treatment path.

Gender Identity Disorder is described as an atypical gender development condition and is given a clinical label by international bodies responsible for the definition and classification of disorders. The World Health Organisation, in its ‘International Classification of Diseases 10’ (or ICD-10) of 1993, defines the condition as “transsexualism” if present in a profound and persistent form. It is further defined as “...*the desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment. The transsexual identity has been present persistently for at least two years...*”.

The same state is called Gender Identity Disorder (GID) in the ‘Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition’ (or DSM-IV), which was published by the American Psychiatric Association in 2000, and where it is described as “...*the strong and persistent cross-gender identification and a persistent discomfort with the sex and a sense of the inappropriateness of the gender role...*”. It is a relatively rare condition in which individuals experience their “gender identity” (i.e. the psychological experience of oneself as male or female) as being incongruent with their phenotype (i.e. the external sex characteristics of the body).

It should be noted that the condition itself is sometimes described as “gender dysphoria” even though, strictly speaking, dysphoria refers to the extreme form of distress experienced by people with Gender Identity Disorder.

When individuals with the condition meet specified criteria in either of these two official nomenclatures – the ICD-10 or the DSM-IV – they are formally diagnosed with GID.

Many countries and international organisations have set out standards of care for persons diagnosed with GID. For example, the ‘Standards of Care for Gender Identity Disorders’,



published by the World Professional Association for Transgender Health (WPATH), articulate the organisation's professional consensus about the psychiatric, psychological, medical and surgical management of gender identity disorders. Professionals are invited to use the published standards to better understand the parameters within which they may offer assistance to those with gender identity problems. The WPATH standards are better known as the 'Harry Benjamin Standards of Care' – the name inherited from the earlier name of the Association.

It is noted that there is a proposal that GID be de-classified as a mental disorder in the fifth edition of the American Psychiatric Association's (APA's) 'Diagnostic and Statistical Manual of Mental Disorders' (or DSM-V), which is due to be published in May, 2013. It is proposed that the title "Gender Identity Disorder" be replaced with "Gender Incongruence" (GI) because the latter is a descriptive term that better reflects the core problem – that is to say, an incongruence between, on the one hand, what identity one experiences and/or expresses and, on the other hand, how one is expected to live based on one's assigned gender (usually at birth).

Some lobby groups are pressing strongly for "self-certification" by those who wish to have their lived-in gender officially recognised and even to widen the scope of recognition to include people who live part-time in both genders.

## **2.5 Consultations with Experts and Stakeholders**

The Group consulted with a number of experts and stakeholders in Ireland and the United Kingdom as well as conducting a public consultation on the issues.

Members of the Group attended a symposium that was hosted by the Centre for Criminal Justice and Human Rights at University College Cork in Cork City for the purpose of contributing to the debate regarding the drafting of gender recognition legislation. The symposium, which was held On 14 May, 2010, was opened by Mary White, T.D., the then Minister of State for Equality, Human Rights and Integration, and other speakers included Professor Andrew Sharpe from the School of Law at Keele University in England, Professor Stephen Whittle from the School of Law at Manchester Metropolitan University in England, Ms. Eilís Barry, Barrister at Law, Mr. Michael Farrell, a solicitor representing the Free Legal Advice Centres, and Ms. Tanya Ní Mhuirthile from the Faculty of Law at University College Cork.

Presentations on the day covered topics such as the experience of implementing gender recognition abroad, including the lessons to be learned following the introduction of the Gender Recognition Act in the United Kingdom in 2004. Current Irish law on this issue was also outlined and views were expressed as to what should be included in a gender recognition framework in Ireland.

### **2.5.1 Ireland**

The Group met with a number of recognised experts in the field of diagnosis and treatment of persons with GID.

It is difficult to estimate the number of people with GID – estimates of the incidence are in the region of 1 in 25,000 in Ireland. The majority (9 in 10) of cases are males who wish to transition to female – with only 1 in 10 wishing to transition from female to male. In Europe, a Scottish study suggested an incidence of 1 in 12,000 while a Dutch study found an incidence of 1 in 21,000 with the ratio of transgender men to transgender women in the region of 1:3 or 1:4. These levels of incidence would suggest that there could be in the region of 300 adults with GID in Ireland.

The numbers undergoing treatment are also difficult to estimate. There are two principal clinics operated by mental health professionals for GID patients in Ireland – which, between them, have about 300 GID patients on their books. There is no public (i.e. HSE) psychiatric or psychological clinic.

A HSE consultant endocrinologist operates a hormone treatment clinic at which approximately 130 patients attend. Unknown numbers may be receiving treatment from private practitioners, while others may be self-medicating with hormones purchased over the internet. Concern was expressed as to this latter practice as hormones need to be administered under medical supervision to avoid or minimise dangerous and potentially life-threatening side-effects.

Gender re-assignment surgery is not available in Ireland, and while some patients are known to have had surgery in the United Kingdom and in other countries such as Thailand, the numbers actually going through with the full surgery are understood to be relatively small. This is due to a variety of reasons – viz., costs, lengthy waiting periods, fear, or medical inability to undergo the rigours of what is a serious operation.

GID patients who present themselves for treatment in Ireland are characterised as being generally older than their international counterparts. A higher proportion tends to be already married with families. It has been suggested that the reasons for delays in seeking help could include:

- ✦ societal factors particular to Ireland;
- ✦ a lack of knowledge and awareness of the condition among the general public and the medical profession;
- ✦ a lack of treatment options in the public health service and amongst General Practitioners (GPs) generally, and
- ✦ some people may already have emigrated to seek treatment and live their lives abroad.

In general, the group is described as lonely, distressed, passive and frequently on very low incomes. There is evidence from several studies that the group experiences violence and discrimination – with a high proportion having contemplated suicide.

The relatively small number of mental health and medical professionals who are active in treating GID patients in Ireland has implications for the proposed gender recognition scheme in that it would seem to rule out the establishment of lists or panels of approved expert witnesses as are provided for in the schemes of other countries.

## 2.5.2 United Kingdom

From the outset, given the similar legal systems, the Group paid particular attention to the United Kingdom's Gender Recognition Act, which came into effect in April, 2005. This Act was a response to several judgements in the European Court of Human Rights, particularly *Goodwin v UK* (application no. 28957/95), which was the same judgement that strongly influenced the High Court case in Ireland. The Act was regarded as very progressive at the time as it did not insist on either gender re-assignment surgery or on hormone treatment if there were contra-indications, provided that the acceptance criteria were otherwise satisfied.

Members of the Group met with the Gender Policy Unit of the UK Ministry of Justice for detailed discussions on the operation of the Gender Recognition Act, as well as with the Chairman of the Gender Recognition Panel and the Panel Secretariat, the Deputy Registrar General for England and Wales, and two leading British academics who were involved with the development of the Gender Recognition Act.

### Gender Recognition Act

The United Kingdom's Gender Recognition Act came into effect in April, 2005. The purpose of the Act is to provide transsexual people with legal recognition in their acquired gender. Legal recognition follows from the issue of a Gender Recognition Certificate by a Gender Recognition Panel. The Panel itself is a constituent tribunal of HM Courts and Tribunal Service and consists of legal and medical members.

The system requires the applicant for gender change recognition to submit specified evidence to the Gender Recognition Panel. The Panel then reaches its decision based on the documentary evidence submitted. The Panel meets at regular intervals throughout the year.

Before issuing a certificate, the Panel must be satisfied that the applicant:

- ✦ has, or has had, Gender Dysphoria<sup>3</sup>;
- ✦ has lived in the acquired gender throughout the preceding two years, and
- ✦ intends to continue to live in the acquired gender until death.

The issue of the Gender Recognition Certificate signifies that the person's new gender is officially recognised for all purposes – including marriage and civil partnership – in the United Kingdom. The person is entitled to a new birth certificate reflecting the new preferred gender (provided a UK birth register entry already exists for the person) and will be able to marry someone of the opposite gender to his or her acquired gender.

Following the introduction of the Gender Recognition Act in 2005, an initial rush of applicants was expected from people who had made the transition many years earlier. However, this rush of applications did not materialise, and applications continue to be fewer than originally estimated. About 350 applications are received *per annum*. The age profile of the applicants is around 30 years of age. Translated on a proportional basis, this would suggest about 20 to 25

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<sup>3</sup> Gender Dysphoria is the term used in the UK legislation to denote Gender Identity Disorder.

cases per year in Ireland.

There seems to be general agreement that the system introduced by the Gender Recognition Act is working well. Some concerns were expressed initially that the legal/judicial character of the Panel resulted in an overly legalistic approach – but these concerns appear to have abated. There are some mixed views about the level of detail required by the Panel, with some applicants finding it excessive, while other stakeholders feel that the level required is insufficient.

The most contentious issue relates to the requirement for persons who seek to have a Gender Recognition Certificate to be unmarried. Cases have been taken to the European Court of Human Rights that object to the requirement that a couple end their marriage in order for one of the partners to be granted a Gender Recognition Certificate. However, the Court found in the United Kingdom's favour and held that it is within its rights (“margin of appreciation”) to not provide for same-sex marriage and noted that there is a civil partnership arrangement available for such couples.

The United Kingdom's gender recognition legislation also allows for the issuing of an interim Gender Recognition Certificate to enable married persons to have an existing marriage annulled. This interim certificate is valid for six months and a marriage becomes “voidable” from the date of issue. A fast-track process has been developed whereby a couple may have their marriage annulled and a new civil partnership completed in the course of one or two days. This is not set out in legislation but is operated by agreement with the Courts and the Registrars of Civil Partnerships. The issuing of an interim Gender Recognition Certificate is a ground for annulment in England and Wales and a ground for divorce in Scotland.

UK legislation does not provide for recognition of intersex persons whose lived-in gender is at variance with the gender on their birth certificates. Commentary on the legislation has criticised this omission.

## **CHAPTER 3: Public Consultation Process**

A consultation document inviting submissions from both the public and interested groups was published on the Department of Social Protection website (and remains available for viewing at <http://www.welfare.ie/EN/Policy/Legislation/Pages/genderrecognition.aspx>) on 4 August, 2010 (please see Appendix 2). The Group received 40 submissions in total – 14 from organisations and 26 from individuals (please see Appendix 3). The high quality and constructive nature of the submissions received was noted by the Group. Based on an assessment of the submissions, the Group met with 10 of the organisations and individuals in mid-October, 2010.

The consultation document outlined proposals in the following areas:

### **3.1 Outline of Process**

The consultation document proposed that the process would be as follows:

- ⤴ The person seeking recognition of his/her changed gender makes an application to the Minister, or to a decision-making body designated under the legislation, seeking to have the new gender recognised.
- ⤴ The applicant submits evidence in support of the application.
- ⤴ The Minister, or the decision-making body, examines the application and the evidence and makes a decision to either accept or reject the application.
- ⤴ The Minister or the decision-making body issues a formal statement to the successful applicant recognising the new gender.
- ⤴ There will be an appeal process for unsuccessful applicants.

#### ***3.1.1. Responses***

The majority of submissions received from organisations were in broad agreement with the proposed outline of the process. A number of submissions expressed the view that the scope of the legislation should be widened to include intersex conditions.

Concern was expressed in a small number of individual submissions as to how the process would function if the Minister was able to arbitrarily accept or reject an application. It was also stated that the composition of any decision-making body requires careful consideration to prevent the relevant body from becoming a gate-keeper in the accessing of rights contained in the legislation.

### **3.2 Principles**

The proposed guiding principles to inform the design of the decision-making process and the

setting of the qualification criteria contained in the consultation document were as follows:

- ⤴ The process should fully respect the rights and dignity of the applicant.
- ⤴ The terms and conditions of the scheme should not deter potential applicants from applying.
- ⤴ The criteria should be capable of being interpreted in a consistent and objective manner.
- ⤴ The process and the criteria should be such as to command the respect and trust of the applicants and of the wider community in terms of its integrity and fairness.
- ⤴ The process should be completed in a timely manner.
- ⤴ Respect for privacy and confidentiality is a key requirement

### **3.2.1 Responses**

A number of organisations proposed that the principle of inclusion should also be included to ensure that the rights and dignity of all people who could benefit from its introduction are respected. The Group understood this to mean that the scheme should not be confined to persons diagnosed with GID. One submission expressed the view that, in order for the criteria to be capable of being interpreted in a consistent and objective manner, the legislation should only include appropriate medical/clinical terms used – i.e. the actual diagnosis of GID/Gender Dysphoria and the exclusion of all inappropriate and detrimental terminology. Another submission recommended that, in relation to the terminology, the term transgender should be the term employed. It was also recommended in a further submission that the Advisory Group should adopt as guiding principles for reform the twelve recommendations of the Council of Europe's Commissioner for Human Rights in his Issue Paper on Human Rights and Gender Identity.<sup>4</sup>

The majority of individual submissions did not express a firm view on the proposed guiding principles. One submission commended the Group for stating that any process must fully respect the privacy and dignity of the applicant and that the person(s) assessing the application should only have access to the documentary evidence for the amount of time required to process the application. Another submission urged that no fee should be charged for making an application, as any financial barrier to having a person's gender recognised would impact unfairly on the most vulnerable members of the transsexual community.

### **3.3 Eligibility Criteria**

Submissions were invited on the proposed eligibility criteria for the scheme to include the

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<sup>4</sup> Hammarberg, T. (2009), 'CommDH/Issue Paper: Human Rights and Gender Identity', Council of Europe, Strasbourg. (<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1476365>)

following:

### **3.3.1 Minimum Age**

The Group proposed that applications should only be accepted from persons aged 18 years or older.

### **3.3.2 Irish Residents**

The Group proposed that applications should only be accepted from:

- ✦ persons ordinarily resident in Ireland, or
- ✦ persons whose births are registered in Ireland.

### **3.3.3 Other Criteria**

Submissions were also invited on other possible eligibility criteria – for example:

- ✦ Should persons in an existing marriage or civil partnership be excluded?

### **3.3.4 Responses**

#### Minimum Age

Some organisations would agree with a minimum age of 18 years for applying for a Gender Recognition Certificate but suggested that where a young person has been diagnosed as transgendered and has lived “in role” for a period before reaching the age of 18 years, this should be taken into account in fulfilling any living “in role” requirement. Other submissions expressed the view that any exclusion of under-18s from the gender recognition process would be a step backwards in the legal rights of young people in Ireland. Concern was also expressed with regard to discrimination faced by young people under the age of 18 years who have gone through or are undergoing transition. Transgender young persons may consent to medical or surgical treatment from the age of 16 years and, thus, may be in a legal limbo if a minimum age of 18 years is introduced.

A number of individual submissions felt that the age of recognition should be more flexible as more young people are questioning their gender identity at a younger age. The view was also expressed that any legislation should also consider how to deal with the growing number of cases where pre-pubescent children of school age show symptoms of GID. One submission also stated that the minimum age criterion requires particular attention in the context of intersex children. Puberty is a time when diagnoses of intersex conditions are regularly made.

#### Irish Residents

A number of submissions expressed the view that the term “ordinarily resident” in Ireland

should be defined broadly to include those who are asylum-seekers, refugees or other migrants. It was also proposed that transsexuals who have already been recognised in their preferred gender in another country should be able to apply for recognition in Ireland without going through the full assessment procedure.

The inclusion of the “ordinarily resident” criterion was welcomed by one individual submission as it ensures that the large numbers of non-Irish nationals living in Ireland can access the rights contained in the proposed legislation. However, it was also pointed out that a category of applicants who might be excluded by the criteria outlined are those from outside the State whose preferred gender identity is already legally recognised by their home country or a third country. If these people were required to go through the process of legal recognition, it would represent an undue interference with their human rights.

### **3.4. Other Criteria**

Almost all of the submissions received by organisations expressed the view that persons in an existing marriage or civil partnership should not be excluded from applying for a Gender Recognition Certificate. It was stated that gender recognition should not in any way be linked to a person’s marital status and any such exclusion may render the scheme open to legal challenge under Article 41 of the Irish Constitution. It was also pointed out in one submission that the number of people involved would be very small and, also, it would not provide a back-door to same-sex marriage as people could only be in this situation where they had already been involved in a heterosexual marriage and one party had later acquired a different gender.

All individual submissions received expressed the view that people in existing marriages and civil partnerships should not be excluded from the scheme. It was pointed out that if the right to obtain a new birth certificate is linked to a requirement to divorce, this could lead to a significant delay as it is not possible to obtain a divorce until a couple have been separated for more than four years.

### **3.5 Acceptance Criteria**

In making its decision, the Minister or official decision-making body will require a level of evidence to the effect that the applicant has made, or is making, a genuine transition from the original gender to the opposite preferred gender.

The Group invited submissions as to the evidence that should be required of the person making the application.

#### ***3.5.1 Responses***

A number of submissions from organisations stated the view that the evidence required should be similar to that required by the United Kingdom – i.e. evidence from two medical practitioners that the applicant suffers from Gender Identity Disorder and is determined to live in his/her acquired gender as well as evidence that the applicant has lived as fully as possible in the acquired gender for a significant period. A number of other submissions expressed the



view that the submission of an affidavit from the applicant stating their decision to make a change to their gender identity along with a submission of a supporting document from a health professional indicating that a person has a Gender Identity Disorder, Gender Dysphoria or an intersex condition should be sufficient evidence. The majority of submissions recommended that it should not be necessary for the applicant to have undergone surgery.

One individual submission recommended that a person should be required to submit medical evidence from a GP and a surgeon to prove that a diagnosis of GID has been made and gender reassignment surgery has taken place. If a person is unable, for health reasons, to go ahead with full gender re-assignment surgery, they should also be entitled to apply. However, the majority of submissions expressed the view that it was crucial that medical treatment was not a requirement for legal gender recognition.

### **3.6 Decision-Making Process**

The Group invited submissions on the type of decision-making process that should be established. Options could include:

- a **Judicial or Court Model** whereby applicants would apply to a designated existing court, and
- a **Statutory Panel Model** whereby an expert independent panel would be appointed under the legislation to make the gender recognition decisions.

#### ***3.6.1 Responses***

It was recommended by a majority of submissions that applications should be considered by an independent panel or tribunal rather than by the courts system – although a number of questions were raised as to the composition and selection of any panel. It was proposed in a number of submissions that there should be no fee for making an application for a Gender Recognition Certificate.

A number of individual submissions expressed a view that a statutory panel would be best suited for making recognition decisions – although concern was also expressed that the people selected for any panel could allow their religious beliefs or personal bias to influence a decision to grant legal recognition.

### **3.7 Gender Recognition Certificate and the Recording of Data**

The consultation document proposed the following procedures relating to the process following the recognition decision:

- ✧ The Minister or the decision-making body will issue a Gender Recognition Certificate to the successful applicant.
- ✧ Recognition of the new gender of an individual will apply from the date of issue of the

Gender Recognition Certificate. All rights, responsibilities and consequences of actions by the person in their original gender prior to the date of recognition would remain unaffected.

- ✦ The issue of each new Gender Recognition Certificate will be notified to the Registrar General of the General Register Office (GRO).
- ✦ The question as to the notification of other official bodies remains to be considered.
- ✦ The GRO will be required to keep a confidential register of all persons whose acquired gender is recognised.
- ✦ In the case of persons whose birth is already registered with the GRO, the successful applicant would be entitled, on application, to a new birth certificate with the new gender and any other required changes indicated.
- ✦ This certificate would be indistinguishable in format from the standard birth certificate.
- ✦ The creation of a birth entry in a register maintained for the purposes of gender recognition will not affect the original entry in the register of births.
- ✦ The issue of a new birth certificate showing the new gender will not extinguish the original birth certificate. Both will continue to be available for use and be legally valid.

The Group invited submissions on these proposals.

### **3.7.1 Responses**

A number of responses from organisations expressed concern with the proposal that the original birth entry remain in the register of births. It was proposed that any new certificate should supersede the original birth certificate and that the new birth certificate would be used in all instances and without reference to the original certificate. Access to original birth certificates should operate in a similar manner to the Adoption Register. The view was also expressed that the issuing of a new certificate should be done in a timely fashion.

The majority of individual submissions also supported the view that any new birth certificate should supersede the original certificate and that the original certificate should remain sealed and not be available for future use. The style of the original certificate should also be duplicated on the new certificate. One submission expressed the view that the applicant's name and gender is inherently wrong on the original certificate and, as such, it should be rendered irrelevant – it is not a historical document because the information contained is incorrect. The need for a Gender Recognition Certificate was also questioned by one submission.

### **3.8 Other Issues**

A number of groups and individuals who made submissions during the consultation process

raised matters outside the strict scope of the legislation that the Group is required to advise on. These include:

- adequacy of anti-discrimination and equality legislation especially for transsexuals in the process of making the transmission;
- access to health and support services for transsexuals;
- supports for young people in schools and in sporting and other organisations, and
- the issuing of educational certificates by official bodies.

### **3.9 Summary**

All submissions received welcomed the initiative to provide for official recognition of the changed gender of transsexuals. Similarly, most, if not all, submissions approved of the general outline of the proposed scheme and of the guiding principles adopted by the Group. However, some felt that a principle of inclusion should also be adopted to cater for a wider transgender community.

Several proposed that the scheme should also cater for intersex persons who find themselves living in a gender at variance to the gender assigned at birth.

Regarding the eligibility criteria, there was general agreement to the proposed minimum age of 18 years, but there was a level of concern that the issues facing young people making the transition in their teens should be catered for in some way. Some respondents proposed that the qualifying period of “living in the role” could commence at 16 years.

There was also a good level of agreement on the proposed residency requirements – but several argued that the scheme should include asylum-seekers and other migrants.

The most contentious issue concerned the question of excluding persons in an existing valid marriage from the scheme. Those submissions that expressed a view were unanimous that married persons should not be excluded.

There was a wide range of views on the proposed acceptance criteria and the evidence to be submitted by the applicant. Some felt that the criteria should be strictly based on a medical/mental health diagnosis, while others felt that an unduly medical emphasis stigmatised transsexuals. There was some object to the term “transsexual” as it emphasised the sexual preferences aspect rather than gender identity. The majority of submissions recommended that it should not be necessary for the applicant to have undergone surgery.

There was general agreement that the applicant must demonstrate a settled intention of living in the preferred gender for the rest of his/her life and that there should be a test period of living full-time in that gender.

There was also general agreement that the decision-making body should be an independent panel set up under the proposed legislation.

Concerning the issue of an amended birth certificate, the majority of respondents urged that the original birth entry be hidden from general view and that the new certificate should supersede the original. There was also much concern for the need to preserve the confidentiality of personal data and gender history.

## **CHAPTER 4: Gender Recognition in the EU, Other Countries and International Bodies**

### **4.1 Situation in Other Countries**

The Group conducted a review of the legislative and administrative systems relating to gender recognition in European countries and in other English-speaking countries as well as developments in European and United Nations agencies responsible for fostering and monitoring human rights issues. In addition, summaries of relevant court cases are presented.

### **4.2 EU Member-States**

The legal frameworks relating to official registers of personal identity vary widely across EU Member-States. Countries that maintain population registers simply make a change to the gender in the person's record in the database and may issue an amended identity card. Birth certificates are less relevant in some countries than in others.

Some countries deal with the issue through the courts while others recognise changed genders by administrative processes – often at a local level. There seems to be an increasing trend towards simplification of the processes. Some lobby groups are pushing for self-declaration and self-certification but, as far as the Group is aware, this has not been introduced in any country.

In general, those countries that were among the first to introduce procedures for recognition of gender change have the stricter criteria for acceptance – e.g. insistence on surgery, infertility in the original gender, and hormone treatment. Countries that were later adopters, or which have recently modified their requirements, seem to be gradually relaxing the criteria – especially in not requiring surgery or hormone treatment, provided there is otherwise valid evidence of the gender change and the reasons for the change.

The situation varies widely relating to the question as to whether married persons may have their changed gender recognised. Countries that do not recognise same-sex marriage generally require gender change applicants to not be in an existing marriage. The European Court of Human Rights has ruled – in a British case – that Member-States are within their rights in not granting recognition to persons in an existing valid marriage, particularly if the State also provides for civil partnership.

A table summarising the salient points of selected European Union recognition schemes is given overleaf.

### Summary of Gender Recognition Schemes in selected EU Member-States

Country	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment/ physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Exclude married persons
Austria	√	√	√	√	-	√	Removed (court decision)	Removed (court decision)
Belgium	√	-	-	√	-	√	√	-
Czech Republic	√	√	√	√	-	√	√	√
Finland	√	√	√	-	-	√	√	√
France	-	-	√	√	√	√	√	√
Germany	√	-	√	√	√	√	√	Removed (court decision and law)
Hungary	-	-	-	-	-	√	-	√
Italy	-	-	√	√	√	√	√	√
Netherlands	√	√	√	√	√	√	√	-
Poland	-	-	-	√	√	√	√	√
Portugal	√	-	√	√	√	√	√	-
Spain	-	-	√	√	-	√	-	-
United Kingdom	√	√	√	-	-	√	-	√

**Source:** Adapted from the European Union Agency for Fundamental Rights (2010), 'Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity', Vienna, pp. 16-17.

#### **4.3 English-speaking Countries**

English-speaking countries have broadly similar schemes but most insist on surgery or medical treatment as a pre-requisite for recognition. The situation is complicated by the federal structure of the largest countries involved – namely, the United States, Canada and Australia.

#### **4.4 European Case Law**

The jurisprudence of the European Court of Human Rights in relation to the rights of transsexuals has evolved over the years and is of considerable importance.

The first transsexual case came before the Court in 1979 and, in the following years, a number of transsexual persons applied to the Court for relief under Articles 8 (the right to

respect for private and family life), 12 (the right to marry) and 14 (non-discrimination) of the European Convention on Human Rights.

In almost all such cases, the applicants sought a new or amended birth certificate showing their acquired sex and change of name and, also, asserted a right to marry in their new gender.

While at first such cases were usually unsuccessful, the Court stressed the importance of keeping the difficulties faced by transsexuals under review. As a result, over the years, the “margin of appreciation” of States was gradually reduced, culminating in the Court’s historic decision in *Goodwin*.

The evolution of the law can be seen from the following cases:

*Rees v United Kingdom (1987) 9 EHRR 56*

The applicant, a female-to-male transsexual, claimed that UK legislation relating to the registration of births and marriages violated Articles 8 and 12 of the Convention.

The Court held that:

- although the essential object of article 8 is to protect the individual against arbitrary interference by public authorities, there may also be positive obligations inherent in an effective respect for private life, albeit subject to a State’s margin of appreciation;
- the mere refusal to alter an original entry, or to issue a new birth certificate in corrected terms, could not be regarded as such an interference;
- the notion of “respect” for private life, particularly with regard to positive obligations, was not clear cut, and having regard to the diversity of practices throughout the Contracting States, the requirements will vary from case to case;
- this diversity of practice was evidenced by the fact that, via legal, judicial and/or administrative practices, many States had a system whereby transsexuals could align their personal status with their acquired status. However, the conditions under which this could be done were also quite variable. As a result, there was little common ground in this area and so the “margin of appreciation” was wide;
- in deciding whether or not a positive obligation exists, regard must be had to the fair balance which must be struck between the general interest of the community and the interest of the individual.

The Court noted that the authorities had endeavoured to meet the practical needs of the applicant in a reasonable way and did not consider that the United Kingdom should be asked to adopt a new system of registration. Accordingly, it found that there was no violation of Article 8.

In relation to Article 12, the Court held that the right to marry, as provided for in that Article, referred to the traditional marriage between persons of the opposite biological sex. It thus

found that there was no violation of Article 12.

*Cossey v United Kingdom (1991) 13 EHRR 622*

Similar issues were addressed in *Cossey*, where the applicant, a male-to-female transsexual, complained that the failure to permit her to marry a male constituted a violation of Articles 8 and 12.

The Court followed its earlier decision in *Rees*. Whilst the court noted some developments since *Rees*, these were not such as to reveal any real common ground on the issue between Contracting States. A considerable diversity of practice still existed. In such circumstances, it considered that a departure from its decision in *Rees* would not be justified.

*B v France (1992) 16 EHRR 1*

Until the Court's decision in *Goodwin*, this case provided the only instance where the Court found a violation of Article 8 in respect of transsexual persons. The Court distinguished *Rees* and *Cossey* on the grounds that the French system impugned in this case was significantly different to that at issue in *Rees* and *Cossey*.

However, because of the particular features of the French system at issue (for example, birth certificates could be amended by court order, the applicant was not permitted by law to change her forename and she experienced frequent difficulties on production of official documents), this case did not have a widespread impact on the position of transsexuals in other States.

*Sheffield and Horsham v United Kingdom (1999) 27 EHRR 163*

The Court was again invited to find that the United Kingdom, by not recognising the applicants' new gender, had failed to comply with its positive obligations to ensure respect for the applicants' private lives.

However, the Court refused to overturn *Rees* and *Cossey*, finding that there had been no significant developments in the area of medical science in the previous 10 years, which would justify a departure from their previous decisions. The Court also found that an examination of legislative trends across Europe did not establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status.

The Court did reiterate, however, the need for States to keep this area under review.

*Goodwin v United Kingdom (2002) 35 EHRR 447*

This was a landmark judgment, in which the Court found that the rights of a transsexual under Articles 8 and 12 of the Convention had been violated by a failure on the part of the United Kingdom to provide for legal recognition of the applicant's new gender.



The Court referred to its previous decisions in *Rees* and *Cossey* and noted that, although it was not formally bound by its previous decisions, it was in the interests of legal certainty that it should only depart from previous decisions for good reason. The Court held, however, that since the Convention is first and foremost a system for the protection of human rights, it must have regard to changing conditions within Contracting States.

The Court noted 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 identity of post-operative transsexuals.

The Court noted that it had repeatedly emphasised the importance of keeping the need for appropriate legal measures under review and found that the United Kingdom could no longer claim that the matter fell within their “margin of appreciation”, save as regards the appropriate means of achieving recognition of the Article 8 rights.

The Court concluded that, since there were no significant factors of public interest to weigh against the interest of the applicant in obtaining recognition of her gender reassignment, the fair balance inherent in the Convention had tilted decisively in favour of the applicant. Accordingly, the Court found that her Article 8 rights had been breached by the failure of the United Kingdom to provide recognition of her post-operative gender.

In relation to the right to marry under Article 12, the Court found that, while the Article referred expressly to the right of a man and a woman to marry, it could no longer be assumed that the meaning of those terms must be determined by purely biological criteria. The Court found that the allocation of sex in national law to that registered at birth was a limitation impairing the very essence of the applicant’s right to marry.

The Court concluded that while it was for States to determine the conditions under which a transsexual’s new gender will be recognised, or under which past marriages cease to be valid, and the formalities applicable to future marriages, there could be no justification for barring the transsexual from enjoying the right to marry under any circumstances.

Accordingly, the Court found a violation of both Articles 8 and 12 of the Convention.

*Parry & Parry v United Kingdom (Application 42971/05)*<sup>5</sup>

The applicants in this case were married – with the first applicant being a male-to-female transsexual. The applicants complained, *inter alia*, that the provision in the United Kingdom’s Gender Recognition Act, 2004, that a Gender Recognition Certificate may not be issued to a married person was in breach of Articles 8 and 12 of the Convention.

The Court noted that the requirement that the applicants annul their marriage flowed from the

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<sup>5</sup> The Court gave judgment in *R & F v United Kingdom, Application 35748/05*, which involved a similar challenge to the position under Scottish law, on the same day as *Parry*, and with the same result.

position in English law that only persons of the opposite gender may marry. The Court also noted that the applicants could continue their relationship and could give it a legal status akin, if not identical, to marriage, through civil partnership. The Court concluded, therefore, that, as regards Article 8, the effects of the system had not been shown to be disproportionate and that a fair balance had been struck in the circumstances.

In relation to the right to marry, the Court concluded that the question as to how to regulate the effects of the change of gender in the context of marriage falls within the margin of appreciation of the Contracting State. The State could not be required to make allowances for the small number of marriages where both partners wish to continue notwithstanding the change in gender of one of them.

The Court found the applicants' claims under Articles 8 and 12 to be manifestly ill-founded.

#### **4.5 International Bodies**

Evolving policies by bodies such as the Council of Europe, the United Nations and the European Union Agency for Fundamental Rights also serve to influence Member-States in the development of policy in this area.

The 'Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity' (2007), while not binding, affirm international legal standards with which all States are urged to comply.<sup>6</sup>

In July, 2009, the Council of Europe's Commissioner for Human Rights published an issue paper on human rights and gender identity which addressed a number of specific human rights issues in relation to gender identity.<sup>7</sup> In particular, it urged the removal of the requirement for surgery, sterilisation and other compulsory medical treatment, and the removal of restrictions on the right of transsexual persons to remain in an existing marriage following a recognised change of gender.

On 31 March, 2010, the Council of Europe's Committee of Ministers adopted a policy statement addressed to Member States on the need for constant review of legislation relating to direct or indirect discrimination on grounds of sexual orientation or gender identity.

A more detailed overview of these documents can be found in Appendix 4 of this report.

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6 The Yogyakarta Principles were developed by an international group of human rights experts. The full text of the Principles is available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

7 <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1476365>.

## **CHAPTER 5: Analysis of Issues and Recommendations**

### **5.1 Introduction**

This chapter sets out the analysis carried out by the Group on four principal issues together with its conclusions and recommendations. The principal issues examined were:

- qualification requirements;
- the decision-making body,
- the Gender Recognition Certificate, and
- the treatment of data.

In analysing the various issues involved, the Group took into account the input from experts and the public consultation as well as the review of recognition schemes in other countries, evolving international case law and the existing legislative framework in Ireland.

### **5.2 Qualification Requirements**

The primary purpose of the proposed gender recognition scheme is to enable persons living full-time and permanently in the gender opposite to that recorded on their birth records to have their lived-in gender recognised in law.

The Group considered the qualification requirements for the scheme. The principal requirements examined were:

- residency/Irish birth registration;
- minimum age;
- marital and civil partnership status;
- permanent transition;
- real life test, and
- medical criteria.

### **5.3 Residency/Irish Birth Registration**

In the public consultation document, the Group proposed that applications would be accepted from:

- ✦ persons whose births are registered in Ireland;
- ✦ persons who are ordinarily resident in Ireland.

Concerning the term “births registered in Ireland”, the Group agreed that the term comprises those births registered with the General Register Office (GRO) as well as those registered in the Foreign Births Register maintained by the Department of Foreign Affairs and Trade.

The term “ordinarily resident” is taken as that widely used in Irish legislation and administrative practice.

#### ***5.3.1 Recommendation***

**Having examined the issues and views put forward, the Group recommends that the following persons should be entitled to apply for a Gender Recognition Certificate:**

- **persons whose births are registered with the GRO;**
- **persons included on the Foreign Births Register maintained by the Department of Foreign Affairs and Trade, and**
- **persons who are ordinarily resident in Ireland.**

### **5.4 Minimum Age**

In its consultation document, the Group proposed that applications should only be accepted from persons aged 18 years or older. This reflects practice in other countries. There was a variety of views expressed on this topic in the consultation process.

Some organisations’ submissions stated that they would agree with a minimum age of 18 years for applying for a Gender Recognition Certificate but suggested that, where a young person has been diagnosed as transgendered and has lived “in role” for a period before reaching the age of 18 years, this should be taken into account in fulfilling any living in role requirement. A number of other submissions expressed the view that under-18s should be eligible to apply for gender recognition. Concern was expressed with regard to discrimination faced by young people under the age of 18 years who have gone through or are undergoing transition. Transgender young persons may consent to medical or surgical treatment from the age of 16 years and, thus, may be in a legal limbo if a minimum age of 18 years is introduced.

There is evidence in the literature and from other countries – notably the United States and Germany – that under-age children with parental support are undergoing treatments to support their desire to live in the opposite gender. From a strictly medical point of view,

early – pre-puberty – treatment simplifies the eventual full transition to the other gender. Bodily characteristics may be modified by the administration of treatments that block the undesirable hormones – for example, boys who wish to become females will not develop the typical male bodily characteristics if treated with male hormone blockers. This would increase the eventual likely success of the transition to female.

However, mental health professionals advised the Group to exercise great caution if considering reducing the minimum qualification age. There is evidence from the literature that minors who desire a gender change frequently change their minds as they reach adulthood. One mental health professional advised that the living in role period should be extended to possibly three years for persons aged 18 years at the time of application.

One option considered by the Group would be to allow applications from 16-year-olds who would, with parental consent, seek an exemption from the age 18 minimum from a District Court in much the same way as provided for in the Civil Registration Act for marriages of minors. However, the Group does not recommend this option given the reservations expressed by mental health professionals on the issue.

#### ***5.4.1 Recommendation***

**The Group recommends that applications should only be accepted from persons aged 18 years or older at the time of application.**

**It further recommends that time spent living in the preferred role prior to the age of 18 years should be taken into account – but that it should be fixed at a maximum of two years starting at the age of 16 years.**

**The Group further recommends that, in relation to an applicant seeking to rely on time spent living in the preferred gender while under the age of 18 years, the Gender Recognition Panel should require evidence from that applicant’s treating mental health professional that the applicant had the requisite mental capacity at 16 and 17 years to understand the nature and effect of the treatment he/she was undergoing, and the likely consequences thereof. The evidence should be in addition to any medical evidence ordinarily required to support an application for a Gender Recognition Certificate. In making this recommendation, the Group is aware of the special position of a minor in law and is cognisant of the need to ensure that the rights of young persons seeking to rely on acts done during the course of their minority are adequately protected.**

#### **5.5 Marital and Civil Partnership Status**

The Group carefully considered the question of whether applications should be accepted from people who are in existing marriages or civil partnerships. The question arises because, if a person in an existing marriage or in a civil partnership succeeds in having their changed gender recognised in law, then the existing marriage becomes a “same-sex” marriage or the civil partnership becomes one between persons of the opposite sex.

Many countries, including Ireland, do not recognise same-sex marriages. Several countries require that an applicant for gender recognition must not be in an existing marriage. This requirement gives rise to the criticism that couples who wish to remain in their existing marriage after the changed gender of one of the parties is recognised are faced with the choice of dissolving their marriage or else foregoing official recognition of the changed gender of one of them. Similar issues arise in relation to civil partnership where it is not available to opposite sex couples.

The responses to the public consultation that expressed a view strongly urged that the marital status of the applicant should not be taken into account in the decision to recognise the changed gender. The point made is that, apart from legal or human rights aspects, the marital status of the applicant has no bearing on the actual decision itself if the criteria are otherwise satisfied.

For the majority of transgender persons who were married in their former gender but have since transitioned to the opposite gender, the marriage will have broken down by the time the transgender spouse wishes to apply for gender recognition. However, respondents to the public consultation indicated, and experience in other jurisdictions suggests, that there is likely to be a small number of cases where the spouses wish to stay together and continue in the marriage – with the non-transgender spouse wishing to assist her/his partner through what may be a difficult experience. A provision precluding the recognition of the changed gender of a person in a subsisting marriage would place them in a very difficult position – particularly since divorce in Ireland is conditional on living apart for at least four years and there being no prospect of reconciliation.

In considering its recommendations, the Group examined what is permitted within the parameters of the Constitution.

Same-sex marriage is currently not provided for in Irish law and, as such, any attempt to legislate for same-sex marriage would be vulnerable to constitutional challenge. Although not specifically defined in the Constitution, marriage enjoys special protection under Article 41.3.1, which provides that “...*The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack...*”.

Both the High Court and the Supreme Court have defined the parameters of marriage in a Constitutional context in a number of decisions – namely, (i) *Murray v. Ireland* [1985] IR 532, (ii) *TF v Ireland* [1995] 1 IR 321, (iii) *DT v CT* [2003] 1 ILRM 321, (iv) *Zappone and Gilligan v Revenue Commissioners* (Unreported, High Court, 14 December, 2006) and (v) *HAH v SAA and the Attorney General* (Unreported, High Court, 4 November, 2010). These cases provide that “marriage”, as referred to in the Constitution, is a traditionally understood concept that involves the union of one man and one woman, in principle for life, to the exclusion of all others. In *Zappone*, the High Court was invited to recognise the Canadian same-sex marriage of the applicants. In dismissing the applicants’ claim, Ms. Justice Dunne held that marriage was understood under the Constitution to be confined to persons of the opposite sex and the Court could not now redefine marriage to encompass same-sex marriage. Having regard to the provisions of Articles 41 and 42 of the Constitution, the definition of marriage could not relate to a same sex-couple.

There have been decisions in other jurisdictions (i.e. in Germany and Austria) whereby requirements for already married transgender persons to divorce or dissolve their existing marriage as a pre-condition for recognition of their changed gender were successfully challenged as being in breach of the rights of transgender persons. However, these decisions are of limited relevance to the Irish situation. The key difference is that any proposal for the recognition of the rights of transgender persons must take account of the special position that marriage enjoys in the Irish Constitution.

The Group recognises that, while there would only be a small number of people for whom the preservation of their existing marriage is a priority, the requirement to dissolve such a marriage would be very distressing for them. Nevertheless, any recommendation which the Group makes must be constitutionally sound.

In this context, the Group has also considered the position of persons in a civil partnership who wish to apply for legal recognition of their acquired gender. The Civil Partnership and Certain Rights and Obligations of Co-habitants Act, 2010, provides for a category of relationship, known as “civil partnership”, between persons of the same sex. In the event that a party to a civil partnership transitions to an acquired gender without the dissolution of the civil partnership, legal recognition of this acquired gender would result in two persons of the opposite sex being in a civil partnership. Such a scenario would effectively result in a state-recognised opposite sex relationship that does not benefit from the full protection afforded to marriage. For example, such a partnership could be dissolved without compliance with the conditions set out in Article 41.3.2 of the Constitution. In the Group’s view, a failure to require the dissolution of a civil partnership as a condition for recognition of an acquired gender could be vulnerable to constitutional challenge.

In addition, there is currently no European-wide consensus in relation to the status of same-sex marriages in that some states provide for same-sex marriages while others do not. The European Court of Human Rights has ruled (in *Schalk and Kopf v Austria*, application no. 30141/04) that the regulation of same-sex marriage falls within the margin of appreciation of Member-States and that the latter are not obliged to provide for same-sex marriages.

The Group also notes that a claim that a similar provision in the United Kingdom’s Gender Recognition Act, 2004, involved a breach of Articles 8 (the right to respect for private and family life) and 12 (the right to marry) of the European Convention on Human Rights was rejected by the European Court of Human Rights as manifestly ill-founded (in *Parry & Parry v United Kingdom*, application no. 42971/05).

In *Parry*, the Court concluded, in relation to Article 8 of the Convention, that the requirement that an existing marriage be terminated before the issue of a Gender Recognition Certificate was not disproportionate, and that a fair balance had been struck between the general interest of the community and the interests of the individual. The Court noted, in particular, that the applicants could continue their relationship and could give it a legal status through civil partnership.

In relation to Article 12 of the Convention, the Court concluded that “...*the matter falls within the appreciation of the Contracting State as to how to regulate the effects of the change of gender in the context of marriage...It cannot be required to make allowances for the small*

*number of marriages where both partners wish to continue notwithstanding the change in gender of one of them...”.*

The Group believes, therefore, that the inclusion of a provision whereby legal recognition of an acquired gender cannot be granted to a person who is in a subsisting marriage or civil partnership is compatible with Articles 8 and 12 of the European Convention on Human Rights.

#### **5.5.1 Recommendation**

**Accordingly, the Group recommends that the criteria for legal recognition of an acquired gender should include a provision whereby the applicant cannot be married or in a civil partnership.**

### **5.6 Permanent Transition**

The Group accepts that a clear and settled intention of living in the preferred gender for the rest of one’s life is the foundation step for any person wishing to make the transition from one gender to the other.

#### **5.6.1 Recommendation**

**In terms of evidence to prove this intention, the Group recommends that the applicant be required to provide a statutory declaration of a clear and settled intention of living in the preferred gender for the rest of his/her life (preferred gender in this case refers to the gender opposite to that shown on the applicant's birth record). In the declaration, the applicant should also affirm his/her understanding of the implications of applying for recognition.**

### **5.7 Real Life Test**

Completion of a minimum “life test” period of living full-time in the preferred gender is also regarded as a vital qualifying criterion. This is essentially a social and personal test whereby the person making the transition can establish to their own satisfaction that they are comfortable personally and socially in the new gender.

This is a difficult step and, generally, would require support and counselling from medical or mental health professionals. Other medical professionals or advisers might also be involved with the person during this period, administering hormone treatment or overseeing other treatments such as the removal of facial hair, minor plastic surgery to change facial appearance and coaching in gender-specific behaviour such as speech, deportment, etc.

#### **5.7.1 Recommendation**

**The Group agrees that the applicant should have been living full-time in the new gender during the two years immediately preceding the application.**



**In terms of evidence, independent evidence of two years living full-time in the preferred gender should be required. Evidence can include change of gender and name in official and other documentation (e.g. driving licence, passport, bank and credit cards), statements of witnesses familiar with the applicant, etc.**

## **5.8 Medical Criteria**

### ***5.8.1 Gender Identity Disorder***

In assessing the medical and psychological criteria to apply, the Group took account of the experience of other countries.

Historically, those countries which were the earliest to introduce procedures for the recognition of changed gender insisted on full gender reassignment surgery and/or treatment that rendered the individual infertile in the original gender. Through experience and increased awareness of the condition, certain countries began to relax the insistence on surgery – replacing it with a broader set of criteria. The United Kingdom's Gender Recognition Act, 2004, was one of the first to do so and was seen as being very progressive at the time. Relaxation of the requirement for surgery recognised that many individuals who want to make the transition from their original to their preferred gender are unable to undergo the rigours of surgery for medical reasons. Others may not be able to afford the costs involved, or be unable to travel abroad from countries where the surgery is not available locally. In addition, there can be very lengthy waiting lists for surgery – even in those countries where the service is provided. Other countries, including Spain, Portugal and Hungary, have followed the United Kingdom's example and do not insist on gender reassignment surgery as a qualifying condition for gender recognition.

The most important criterion in the case of the UK legislation is a formal diagnosis of *GID* or *Gender Dysphoria*.

All of the mental health professionals consulted by the Group advised that the basic qualification criterion should be a formal diagnosis of *GID* by one or more qualified mental health professionals, plus a statement that the person is not suffering from any other debarring mental disorder. A number of the respondents to the consultation process agreed with this proposal, but there were also strong representations that, if at all possible, the use of terms involving formal diagnoses of disorders should be avoided.

### ***5.8.2 Provision of Medical Evidence***

The Group considered that whatever criteria it proposes should be consistent to those applied by the Department of Foreign Affairs and Trade where applicants wish to have their passports reflect their changed gender. These criteria were enshrined in legislation by the Passport Act, 2008. The applicant is required to supply “...*evidence (including medical evidence from a registered medical practitioner) to the satisfaction of the Minister to confirm that the applicant has undergone, or is undergoing, treatment or procedures or both to alter the applicant's sexual characteristics and physical appearance to those of the new sex...*”.

The Department of Foreign Affairs and Trade requires a statement from a mental health professional that the applicant has been diagnosed with GID, as well as a statement or statements from medical practitioners that the applicant has undergone, or is undergoing, treatment such as hormone therapy or surgery to alter his/her external physical appearance. Evidence of living in the role for a period of two years is also required to support a change of names on the passport. This evidence may include a change of name by deed poll, a driver's licence and other documentation such as bank statements, tax returns, etc.

The satisfactory operation of the Passport Act, 2008, provisions in relation to medical evidence, and the low numbers of experienced medical and mental health professionals treating patients with gender identity in Ireland, led the Group to the conclusion that it is not possible to provide for officially approved lists or panels of providers of medical and mental health evidence. The scheme will have to rely on available evidence for each application, although it may be possible to draw up informal lists at a later stage as experience builds up.

### **5.8.3 Intersex Conditions**

Another issue highlighted during the consultation process was whether the scheme should provide for persons with an intersex condition who find themselves living full-time in a gender opposite to that recorded in their birth register entry. Intersex is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that does not fit the typical definitions of female or male.

Intersex anatomy does not always show up at birth. Sometimes, the intersex anatomy does not become evident until puberty. Some people live and die with an intersex anatomy without anyone – including themselves – ever knowing.

There is a very wide spectrum of intersex conditions and the variation is such that even the definition of the condition is difficult. The frequency with which a specialist in sex differentiation is called in to examine a newborn baby is one way of assessing the frequency of the condition. On this basis, estimates of the frequency of the condition vary greatly, but a range of about 1 in 1,500 to 1 in 2,000 births is often quoted in the literature.

One of the difficulties caused to people with the condition is that social conventions insist on a binary male or female classification at birth. In the past, it was common for surgery to be performed to render the external anatomy consistent with the assigned sex. Most frequently, surgery was in the direction of male-to-female on the basis of the simplicity of the operation. Children were then raised in the assigned sex. However, in some cases, individuals suffered distress in much the same way as those with GID. The result is that a number of intersex individuals eventually lived out their lives in a gender opposite to that recorded on their birth certificate. This results in a similar situation as pertains to those transsexuals who make the transition.

Many of the respondents to the consultation process urged that the proposed legislation should also include a facility for intersex persons to be able to change their birth register entry and have a new birth certificate issued. Advice received from British sources and mental health professionals in Ireland also urged that the proposed scheme should cater for those

people with intersex conditions who find themselves living in the wrong gender.

In terms of the evidence required to support an application from an intersex person, given the wide range of intersex conditions encountered, some respondents noted that the critical issue is that the person is living permanently in a gender opposite to that shown on their birth certificate.

Very little is known about the numbers of people living with an intersex condition in Ireland or about the numbers of people who, as adults, are living full-time in the gender opposite to that shown on their birth certificates. In these circumstances, the Group concluded that addressing the inclusion of the intersex condition required more research and medical expertise than was available to it. In addition, the Group was concerned that its specific remit was to advise on the legislation required to provide for the legal recognition of the acquired gender of transsexuals. Furthermore, a particular issue would be the difficulty of drafting legislation in the absence of clear definitions and the variety of conditions encompassed within the “intersex” term. In these circumstances, the Group felt unable to recommend the inclusion in the scheme of people with intersex conditions living in a changed gender.

#### **5.8.4 Recommendation**

**Having considered all the issues, the Group recommends that the appropriate medical criteria should be:**

- **a formal diagnosis of GID together with confirmation that the person is not suffering from any other debarring mental disorder,**

**or**

- **proof that the person has undergone gender reassignment surgery.**

#### **5.9 Foreign Recognition Decisions**

The Group considered how to deal with persons who have already had their new gender recognised in a different jurisdiction.

It is not clear as to how many such applicants there might be. For example, any non-Irish person who has had their changed gender recognised abroad would, presumably, have changed their personal documentation – passports, identity cards, birth certificates – before coming to live in Ireland. Such persons would have no need to seek a gender recognition decision in Ireland as they would have entered Ireland in their new gender with all the relevant supporting personal documentation.

There may be a group of Irish-born people who went abroad some years ago to make the transition and who have had that transition recognised in the jurisdiction where they are resident. Such persons may wish to have their gender recognised in Ireland and obtain a new

Irish birth certificate. Some countries deal with these cases by maintaining lists of jurisdictions whose gender recognition process is similar. However, it is understood from other countries' experiences that it would be better to take each case on its own merits as it can be difficult to maintain a current accurate list of such jurisdictions. This would be particularly the case where numbers of applicants from any particular jurisdiction would be very low or non-existent.

### **5.9.1 Recommendation**

**Accordingly, the Group recommends that applicants for recognition of a foreign decision should be required to meet the residency/Irish birth registration, the minimum age and marital/civil partnership status criteria outlined above and, also, that they should submit evidence of the foreign recognition decision. To accept the application, the panel would have to satisfy itself that the process in the other jurisdiction was comparable with the Irish requirements.**

### **5.10 Summary of Evidential Requirements**

**The Group recommends that the following evidence should be provided by applicants for recognition of preferred gender:**

- **an Irish birth certificate or a foreign birth registration certificate,**

**or**

- **proof of normal residency in Ireland,**

**and**

- **a statutory declaration, in a form to be prescribed, stating that the applicant**
- **has a clear and settled intention of living in the preferred gender for the rest of his/her life (preferred gender in this case refers to the gender opposite to that shown on the applicant's birth record)**
- **understands the implications of the application, that he/she does it of his/her free will and that he/she has the mental capacity to do so,**

**and**

- **is not married or in a civil partnership**

**and**

- **independent evidence of two years living full-time in the preferred gender (evidence can include change of gender and name in official and other documentation (e.g. passport, driving licence, etc.), statements of witnesses familiar with the applicant, etc). Applicants seeking to rely on time spent living in the preferred gender while under the age of 18 years, should provide evidence**

from his/her treating mental health professional that he/she had the requisite mental capacity at 16 and 17 years to understand the nature and effect of the treatment he/she was undergoing, and the likely consequences thereof.

and one of the following:

- a formal diagnosis of GID by one or more qualified mental health professionals, plus supporting relevant medical evidence such as details of treatments undergone or in progress (hormone therapy, minor surgery or treatments to change facial appearance, gender reassignment surgery, etc), if available,

or

- a formal statement by a qualified medical practitioner that, based on a physical examination, the applicant has undergone gender reassignment surgery in the past,

or

- evidence of having had the gender change recognised in a foreign jurisdiction.

### **5.11 Decision-Making Body**

The Group invited submissions on the type of decision-making process that should be established. Options could include:

- a **Judicial Court Model** – a model whereby applicants would apply to a designated existing court, or
- a **Statutory Panel Model** – a model whereby an expert independent panel would be appointed under the legislation to make the gender recognition decisions.

It was recommended by a majority of submissions that applications should be considered by an independent panel or tribunal rather than by the courts system – although a number of questions were raised as to the composition and selection of any panel. It was also argued by a number of submissions that there should be no fee for making an application for a Gender Recognition Certificate.

In considering its recommendation on this topic, the Group noted a number of factors relevant to the design of the decision-making process. First, the Group concluded that the numbers of applicants are likely to be quite low. This conclusion is supported by the small numbers of people who have requested gender change passports – approximately 100 applications over the past 5 years. Less than ten people have applied to have their gender changed on the Department of Social Protection Public Service Number (PPSN) identity record. Allied with the estimated numbers of persons attending clinics, and the experience in the United Kingdom, the Group estimates that there may be a possible early surge of 40 to 50 applications in the first couple of years followed by 20 to 25 per year thereafter.

While most respondents advocated an independent panel for making the gender recognition

decisions, a small number also agreed that an administrative system would work equally well. This is essentially the advice received in meetings with independent stakeholders in the United Kingdom. Additionally, there is evidence of a move to simple administrative procedures in European countries at the level of the local registrars of civil status.

#### ***5.11.1. Recommendation***

**Accordingly, the Group recommends that the legislation should empower the Minister to set up an independent panel of three persons to decide on each application. The panel should include a person with medical expertise, a person with legal expertise and a lay person representing wider civil society as Chair. The Panel members should be appointed for a fixed period and the Panel should be independent in the exercise of its functions.**

**The Group recommends that a dedicated secretariat be established within the relevant Government Department to support the work of the panel.**

**Finally, the Group recommends that there should be no fee for applying for a Gender Recognition Certificate.**

#### **5.12 Recognition Decision**

In the consultation document, the Group had made some initial assumptions relating to the gender change decision, namely:

- ⤴ formal recognition (of the changed gender) means that the person's preferred or altered gender would be fully recognised by the State for all purposes – including the right to marry in the acquired gender and the right to a new birth certificate;
- ⤴ recognition of the acquired gender would apply from the date of issue of a formal statement to that effect and would automatically entitle persons whose birth is registered in Ireland to a new birth certificate, and
- ⤴ all rights, responsibilities and consequences of actions by the person in their original assigned gender prior to the date of recognition would remain unaffected.

The vast majority of respondents to the consultation process either explicitly or implicitly accepted these assumptions.

Some submissions urged that the effective date of the decision should be the date of application for the gender change recognition. However, the Group considered that the effective date is the date on which the decision-making body made the decision.

### **5.12.1 Recommendation**

Accordingly, concerning the nature and effect of the decision to recognise change of gender, the Group agrees that:

- **The effect of the decision is that the person is officially legally recognised by the State as being of the new gender from the date of the decision.**
- **The recognition is for all purposes, including dealings with the State, public bodies, and civil and commercial society.**
- **The person whose acquired gender is recognised is entitled to marry a person of the opposite gender or enter a civil partnership with a person of the same gender.**
- **The decision entitles persons whose births are registered in Ireland to a new birth certificate that shows the new gender and new names (if names are also changed).**
- **Similarly, for those whose births are registered in the Foreign Birth Register, the decision will entitle them to a new Foreign Birth Registration Certificate that shows the new gender and new names (if names are also changed).**
- **All rights, responsibilities and consequences of actions by the person in their original gender prior to the date of recognition remain unaffected.**
- **The fact that a person's changed gender has been recognised does not affect the status of the person as the father or mother of a child.**
- **The recognition of the changed gender takes effect from the date of the decision.**
- **The panel will formally communicate the decision to the applicant as soon as the decision is made.**

### **5.13 Gender Recognition Certificate**

The question arises as to whether this communication should be in the form of a simple – but formal – letter or whether a formal Gender Recognition Certificate should be issued. Some countries, notably the United Kingdom, issue such a formal certificate. The status of this certificate is set down in law. Most other countries simply change the gender indicator on the civil birth register or civil identity registers.

The Group accepts that recognition decisions for persons whose births are not registered in Ireland must also be catered for. In such cases, a formal certificate would be preferable.

The Group considered the uses and purpose of a Gender Recognition Certificate. In principle, it is purely a formal statement relating to the person to whom it is issued and intended for their use only. However, in the United Kingdom, where a similar certificate exists, a problem has

emerged in that transgender persons are increasingly asked to produce the Gender Recognition Certificate itself by police, banks, security personnel, etc., to prove gender identity. In such cases, identity documents such as passports and driving licences are not deemed as adequate.

However, the Group accepts that a limited number of public bodies may have a legitimate interest in viewing the actual Gender Recognition Certificate in specific circumstances relating to the issue of personal documents.

### **5.13.1 Recommendation**

**Accordingly, the Group recommends that:**

- **a formal Gender Recognition Certificate be issued by the decision-making body.**
- **the purpose and uses of the Gender Recognition Certificate be set out in legislation;**
- **the holder should not be required to produce it for any purpose save as required, or provided for, by law, and**
- **for persons whose births are not registered in the Birth Register, the Gender Recognition Certificate may be used to support proof of gender if the holder does not have other suitable documentation.**

### **5.14 Processes Relating to the Treatment of Data / New Birth Certificate**

The Group discussed a number of issues relating to the consequent actions relating to civil registers and the treatment of data.

The principal issues relate to:

- ⤴ the issue of a new birth certificate and the management of the data by the GRO;
- ⤴ the notification of the decision details to other relevant bodies or agencies, and
- ⤴ the treatment of personal data relating to gender change and gender history by public service bodies and other agencies where the Data Protection Act, 1988 (as amended) applies.

The consultation document had set out proposals regarding the treatment of data and the issue of a new birth certificate by the GRO. These included the following:

- ⤴ The issue of each new Gender Recognition Certificate will be notified to the Registrar General of the GRO.



- ⤴ The GRO will be required to keep a confidential register of all persons whose acquired gender is recognised.
- ⤴ In the case of persons whose birth is already registered with the GRO, the successful applicant would be entitled, on application, to a new birth certificate with the new gender and new names indicated.
- ⤴ This certificate would be indistinguishable in format from the standard birth certificate.
- ⤴ The creation of a birth entry in a register maintained for the purposes of gender recognition will not affect the original entry in the register of births.
- ⤴ The issue of a new birth certificate showing the new gender will not extinguish the original birth certificate – and both will continue to be available for use and be legally valid.

Most respondents agreed with the majority of these procedures. Their principal difficulty was with the proposal that the new birth certificate would not extinguish the original and that both would continue to be available for use.

Having examined the issues, the Group accepts that the original birth certificate must continue to be available for use but that issue of new copies should be under the direct control of the Registrar General who would be authorised to issue copies of the original in specified circumstances to persons or agencies with a legitimate interest in obtaining the record.

An issue arises concerning possible fraudulent use of the original by the holder or any other person. The Group concluded that there is no need for additional legislative provisions relating to this as any fraudulent use of the original birth certificate is a criminal act as per the Criminal Justice (Theft and Fraud) Offences Act, 2001.

The Group discussed the procedures relating to the establishment of the new gender register by the Registrar General and the issuing of a new birth certificate. It agreed that the panel should communicate each gender recognition decision to the Registrar General.

The person concerned would have decisions to make as to (a) the form of entry, and (b) the data to be recorded. The form of entries in the register of births has changed over the years. In 1997, the form was amended to record a surname for the child, and in 2002, the form was amended to record additional details of the parents and their PPSN information. It is proposed that the person concerned be given pro-forma examples of what their new birth certificate would look like to assist in arriving at a decision. Depending on the form of entry chosen by the person, additional details of their parents may have to be recorded.

The person will also have the option of changing forenames and surname, the latter being limited to that which was originally recorded, or inferred if not recorded, or to the surname in which the gender recognition has been granted. If the person has acquired a different legal name from that originally recorded, for example by deed poll, that name will be entered in the register. Decisions will also have to be made concerning the date of registration, place of

registration and who the qualified informant was. Once these decisions have been taken, the entry would be made in the separate confidential register established for that purpose, but the certificate would be indistinguishable in style and format from the original which would have been issued to that person. Owing to the need for confidentiality, certificates should only be available from the GRO. Copies of the new entries (i.e. certificates) should be made available to the public in the same manner as for any other entry.

#### **5.14.1 Recommendation**

**The recommendations of the Group are as follows:**

- **The Group agrees that the recognition decision should be communicated at the time that it is made to the Registrar General.**
- **The Registrar General should be required and authorised to set up and maintain a Gender Recognition Register in which the details of each Gender Recognition Certificate would be maintained. The Gender Recognition Register should be kept confidential in the same manner as the other civil registers.**
- **The Group agreed that the Registrar General would be required to maintain a confidential link between the original Birth Register entry and the new Gender Recognition Register entry in a similar fashion to that used for the Adoption Register.**
- **Furthermore, the Registrar General should arrange for the original entry to be hidden from general view and to be tagged on the database to prevent a certified copy of that entry being issued without his/her personal consent. The Registrar General would be authorised to make the details of the original available in specified circumstances to persons or agencies with a legitimate interest in obtaining the record for example, if required for a criminal investigation or prosecution, or for a civil court case in which the individual is involved in his/her original gender, etc..**
- **The Group recommends that, on receipt of the notification of the issue of a new Gender Recognition Certificate, the Registrar General would be required to contact the person concerned to finalise the details and arrangements for issue of the new birth certificate.**
- **Concerning the design and style of new birth certificates to be issued to successful applicants, the Group recommends that the new certificate be indistinguishable in content, style and design from the original that would have been issued to the same person.**

#### **5.15 Other Public Bodies**

The question as to whether the gender recognition details should be transmitted to other public bodies was discussed by the Group. Having considered the issues, the

recommendations of the Group are as follows:

### **5.15.1 Recommendation**

**The Group recommends that the change of gender details also be communicated to:**

- **the Client Identity Services section of the Department of Social Protection for changes to the public service identity (PSI) data-set and promulgation to the wider group of public agencies that are authorised to use the PSI data, and**
- **the Passport Office of the Department of Foreign Affairs and Trade for use in approving and issuing passports.**

### **5.16 Data Protection**

One issue that was very strongly emphasised by most respondents was the necessity for confidentiality in dealing with the transsexual person's gender history. In particular, there needs to be an assurance that gender history will be treated in an appropriately confidential manner and that there is an appropriate regulatory regime in place to ensure that all individuals are aware of their responsibilities in this respect.

The Data Protection Act, 1988 (as amended), defines “sensitive personal data” as personal data relating to:

- ⤴ the racial or ethnic origin, the political opinions or the religious or philosophical beliefs of the data subject;
- ⤴ the trade union membership of the data subject;
- ⤴ the physical or mental health or condition or sexual life of the data subject;
- ⤴ the commission or alleged commission of any offence by the data subject, and
- ⤴ any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings, or the sentence of any court in such proceedings.

**The Group considers that data relating to gender history is likely to constitute “sensitive personal data” and, accordingly, considers that there is no need to amend the Data Protection Act to ensure further protection of gender history.**

### **5.17 Discrimination in Wider Society**

The Employment and Equality Acts, 1998 to 2008, and the Equal Status Acts, 2000 to 2008, prohibit discrimination in the field of employment and in the supply of and access to goods and services on nine grounds – including on those of gender and of disability.

The Equality Tribunal, the quasi-judicial State body that was established to provide an impartial forum to hear or mediate complaints of alleged discrimination under equality legislation, has, in its case law, determined that the prohibition of discrimination on the grounds of both gender and of disability may be applied to the situations of transgender and transsexual persons. In a recent decision, *Hannon v First Direct Logistics Ltd. (DEC E2011 066)*, the Tribunal determined that an employer was obliged to make reasonable accommodation to facilitate the transition of a transgender person in the workplace – including living full-time in her acquired gender.

**The Group is satisfied that the existing legislation and investigative machinery are adequate to discourage and prevent discrimination against persons who are making the transition from one gender to the other – both during and after the transition phase.**

### **5.18 Other Issues**

The Group noted other issues raised during the consultation process, viz.

- access to health and support services for transsexuals;
- supports for young people in schools and in sporting and other organisations, and
- the issuing of educational certificates by official bodies.

However, given its specific remit, the Group felt unable to make any recommendations in relation to these issues.

## **CHAPTER 6: Gender Recognition Bill – Proposals**

The terms of reference of the Group is to advise the Minister for Social Protection on the legislation required to provide for legal recognition of the acquired gender of transsexuals and to propose the Heads of a Bill to bring the required scheme into effect. However, neither time nor resources permitted the Group to engage in the relatively technical task of drafting the Heads of a Bill. Instead, the Group sets out detailed recommendations as to what the legislation should contain.

### **6.1 Gender Recognition Bill – Recommended Provisions**

The following are the Group's recommendations for the provisions of the proposed Gender Recognition Bill:

#### ***6.1.1 Purpose of Scheme and Meaning of Recognition***

The basic scope of the legislation is to enable the Minister to set up and provide for the operation of a scheme whereby the State recognises the changed gender of persons who are living full-time in the gender that is opposite to that shown in the birth register entry of the person.

Formal recognition means that the person's lived-in gender is fully recognised by the State for all purposes – including the right to marry in the lived-in gender and the right to a new birth certificate.

Recognition of the lived-in gender should apply from the date of decision to that effect and should automatically entitle persons whose birth is registered in Ireland to a new birth certificate or, where applicable, a new Foreign Birth Registration Certificate.

All rights, responsibilities and consequences of actions by the person in their original gender prior to the date of recognition should remain unaffected.

Recognition of a changed gender does not affect the person's status as a parent of a child in the original gender.

The criteria governing the decision to grant recognition of a person's new gender should be set out in the Bill.

The Bill should enable the Minister to make regulations in relation to the administration of the scheme – including the publishing of any guidelines.

#### ***6.1.2 Outline of Process***

The Bill should set out the following basic process for the granting of recognition of a changed

gender:

- ⤴ The person seeking recognition of his/her changed gender makes an application to a decision-making body designated under the Bill – seeking to have the new lived-in gender recognised.
- ⤴ The applicant submits evidence in support of the application.
- ⤴ The decision-making body examines the application and the evidence and makes a decision to either accept or reject the application.
- ⤴ The decision-making body issues a Gender Recognition Certificate to the successful applicant recognising the new gender.
- ⤴ There should be an appeal process for unsuccessful applicants.
- ⤴ The decision-making body must provide for a revocation and correction process for certificates.

### **6.1.3 Decision-Making Body and Decision-Making Process**

The Bill should empower the Minister to set up an independent decision-making body in the form of a three-person Gender Recognition Panel to examine the evidence and make a decision on each application.

The Gender Recognition Panel should consist of a person with medical expertise (who should have access to more specialised medical/mental health expertise, if required), a person with legal expertise and a lay-person representing wider civil society as Chair. The members of the Panel should be appointed for a fixed period and the Panel should be independent in the performance of its functions.

The Panel should be required to examine and decide on each application in accordance with the criteria set out in the Bill.

The Panel should make its decision on each application by the examination of the documentary evidence submitted by the applicant. Documentary evidence may include media other than paper-based documents.

The Panel may require the applicant to attend an oral hearing. In such cases, the applicant may be accompanied and assisted by a person of their choice.

The applicant should not be required to pay an application fee to avail of the process, but should be responsible for the costs of preparing and submitting the evidence required.

Provision should be made for the development and publication of guidelines and clarifications in relation to the operation of the scheme.

The Panel should be required to report annually to the Minister on the operation of the scheme.

#### **6.1.4 Qualification Requirements**

The Bill should stipulate that applications for recognition should meet the following criteria:

##### Residency/Irish Birth Registration

Applications should be accepted from:

- ⤴ persons whose births are registered in Ireland;
- ⤴ persons who are included on the Foreign Births Register, and
- ⤴ persons who are ordinarily resident in Ireland.

##### Minimum Age

The applicant should be aged 18 years or older on the date of application.

Time, up to a maximum of 2 years, spent living in the preferred gender prior to the age of 18 years can be taken into account from the age of 16 years. Applicants applying on this basis should provide evidence from their treating mental health professionals that they had the requisite mental capacity at 16 and 17 years to understand the nature and effect of the treatment they were undergoing, and the likely consequences thereof.

##### Marital and Civil Partnership Status

The applicant cannot be in an existing valid marriage or civil partnership.

##### Permanent Transition

The applicant must demonstrate a clear and settled intention to live in the preferred gender for the remainder of his/her life.

##### Real Life Test

The applicant must have completed a minimum period of two years living full-time in the preferred gender.

##### Medical Criteria

The applicant must have a formal diagnosis of GID or have undergone gender reassignment surgery.

##### Foreign Recognition Decisions

Applicants for recognition of a foreign decision should be required to meet the residency/Irish birth registration, minimum age and marital/civil partnership status criteria. They should

submit evidence of the foreign recognition decision. To accept the application, the Panel would have to satisfy itself that the process in the other jurisdiction was comparable with Irish requirements.

### **6.1.5 Evidence to be Submitted**

The applicant should be required to submit the following evidence:

- ✦ a birth certificate or a foreign birth registration certificate,

or

- ✦ proof of normal residency in Ireland,

and

- ✦ a statutory declaration, in a form to be prescribed, stating that the applicant (a) is not married or in a civil partnership (b) has a clear and settled intention of living in the preferred gender for the rest of his/her life (preferred gender in this case refers to the gender opposite to that shown on the applicant's birth record) and (c) understands the implications of the application, that he/she does it of his/her free will and that he/she has the mental capacity to do so,

and

- ✦ independent evidence of two years living full-time in the preferred gender (evidence can include change of gender and name in official and other documentation such as passport or driving licence, statements of witnesses familiar with the applicant, etc). Applicants seeking to rely on time spent living in the preferred gender while under the age of 18 years, should provide evidence from his/her treating mental health professional that he/she had the requisite mental capacity at 16 and 17 years to understand the nature and effect of the treatment he/she was undergoing, and the likely consequences thereof.

and one of the following:

- ✦ a formal diagnosis of GID by one or more qualified mental health professionals, plus confirmation that the applicant is not suffering from any debarring mental health condition, plus supporting relevant medical evidence such as details of treatments undergone or in progress (hormone therapy, minor surgery or treatments to change facial appearance, gender reassignment surgery, etc), if available,

or

- ✦ a formal statement by a qualified medical practitioner that, based on a physical examination, the applicant has undergone gender reassignment surgery in the past,

or



- ✦ evidence of having had the gender change recognised in a foreign jurisdiction.

## **6.2 Gender Recognition Certificate and Management of Data**

The Bill should provide for the issue of a formal Gender Recognition Certificate by the Panel to the successful applicant.

Recognition of the new gender of an individual should apply from the date of the gender recognition decision.

The making of each new recognition decision, together with the relevant personal data, should be notified by the Gender Recognition Panel to the Registrar General of the GRO.

The Bill should also authorise the transmission of relevant data relating to each decision to two other public bodies, namely:

- ✦ the Client Identity Services section of the Department of Social Protection for changes to the public service identity (PSI) data-set and promulgation to the wider group of public agencies that are authorised to use the PSI data, and
- ✦ the Passport Office of the Department of Foreign Affairs and Trade for use in approving and issuing passports.

The Bill should specify that the Gender Recognition Certificate is a formal statement relating to the person to whom it is issued and intended for their use only.

In particular, the legislation should specify that the holder may not be asked to produce their Gender Recognition Certificate as proof of gender for official or civil purposes except as required or provided for by law. Requests for proof of identity or identity documentation should be confined to the ones in general circulation – i.e. passports, driving licences, Public Service Cards, birth certificates, etc.

For persons whose births are not registered in the register of births, the Gender Recognition Certificate may be used to support proof of gender if the holder does not have other suitable documentation.

## **6.3 Gender Recognition Register and Issue of New Birth Certificate**

The Gender Recognition Panel should notify the Registrar General of the GRO when it issues each Gender Recognition Certificate.

The Registrar General should be required to set up and maintain a Gender Recognition Register in which the details of each Gender Recognition Certificate would be maintained. The Gender Recognition Register should be kept confidential in the same manner as the

other civil registers.

The Registrar General would be required to maintain a confidential link between the original Birth Register entry and the new Gender Recognition Register entry in a similar fashion to that used for the Adoption of Children Register.

The Registrar General should arrange for the original entry to be hidden from general view and to be tagged on the database to prevent a certified copy of that entry being issued without his/her personal consent. The Registrar General would be authorised to make the details of the original available in specified circumstances to persons or agencies with a legitimate interest in obtaining the record.

On receipt of the notification of the issue of a new Gender Recognition Certificate, the Registrar General would be required to contact the person concerned to finalise the details and arrangements for issue of the new birth certificate.

The new certificate should be indistinguishable in content, style and design from the original that would have been issued to the same person.

#### **6.4 Appeal Process**

Unsuccessful applicants should be allowed to appeal to the Circuit Court sitting as the Family Court, given that Court's confidential nature.

#### **6.5 Revocation Process**

The Bill should provide for a revocation and correction process for Gender Recognition Certificates.

## **APPENDIX 1: Membership of the Gender Recognition Advisory Group**

The Gender Recognition Advisory Group is composed of representatives from a number of Government Departments.

The membership of the Group is as follows:

- Oliver Ryan, formerly from the Department of Social Protection, Chair of the Group.
- Kieran Feely, Registrar General.
- Christine O'Rourke / Nicola Lowe, Office of the Attorney General.
- John Kenny, Department of Justice, Equality and Law Reform.
- Anne Coleman-Dunne, Department of Enterprise, Trade and Innovation.
- Geraldine Luddy, Department of Health and Children.
- Helen Faughnan, Department of Social Protection.
- Caitriona O'Brien, Department of Education and Skills.
- Deirdre Ní Neill, Department of Community, Equality and Gaeltacht Affairs.
- Deirdre Fannin, Department of Foreign Affairs and Trade.
- Garrett Cunnane, Legal Advisor, Department of Social Protection.

Other attendees include:

- Dr. Clement Leech, Chief Medical Adviser, Department of Social Protection.
- Carol O'Rourke, Department of Tourism, Culture and Sport.
- Marie McMahon, Department of Enterprise, Trade and Innovation.
- Breeda Connaughton, Department of Education and Skills.

Secretarial support was provided by Siobhan Doyle from the Department of Social Protection.

The Group also wishes to acknowledge the support provided by both Ann Marie O'Connor and J.P. Dunham – also from the Department of Social Protection.

## **Appendix 2: Gender Recognition Public Consultation Document**

The Group's public consultation document was published on 4 August, 2010.

### **1. Basic Scope of the Proposed Legislation**

The basic scope of the legislation is to authorise the Minister to set up and operate a scheme whereby the State recognises the changed gender of transsexual persons.

Recognition of the changed gender of an individual will be signified by a formal statement that the person's acquired gender is henceforth to be regarded as their gender for all purposes.

### **2. Outline of Process**

The Group's initial view is that the basic outline of the scheme should be as follows:

- ⤴ The person seeking recognition of his/her changed gender makes an application to the Minister, or a decision making body designated under the Bill, seeking to have the new gender recognised.
- ⤴ The applicant submits evidence in support of the application.
- ⤴ The Minister, or the decision making body, examines the application and the evidence and makes a decision to either accept or reject the application.
- ⤴ The Minister or the decision making body, issues a formal statement to the successful applicant recognising the new gender.
- ⤴ There will be an appeal process for unsuccessful applicants.

The Group invites submissions on the proposed process.

### **3. Principles**

The Group proposes certain guiding principles to inform the design of the decision making process and the setting of the qualification criteria:

- ⤴ The process should fully respect the rights and dignity of the applicant.
- ⤴ The terms and conditions of the scheme should not deter potential applicants from applying.
- ⤴ The criteria should be capable of being interpreted in a consistent and objective manner.

- ✦ The process and the criteria should be such as to command the respect and trust of the applicants and the wider community in terms of its integrity and fairness.
- ✦ The process should be completed in a timely manner.
- ✦ Respect for privacy and confidentiality is a key requirement.

The Group invites submissions on these draft principles.

#### **4. Qualifying Criteria**

The qualifying criteria for the scheme to include the following:

##### ***(i) Minimum Age***

The Group proposes that applications should only be accepted from persons aged 18 years or older.

##### ***(ii) Irish Residents***

The Group proposes that applications should only be accepted from:

- ✦ Persons ordinarily resident in Ireland; or
- ✦ Persons whose births are registered in Ireland.

##### ***(iii) Other***

Submissions are invited on other possible qualifying criteria, for example:

- ✦ Should persons in an existing marriage or civil partnership be excluded?

Submissions are invited on these points.

#### **5. Acceptance Criteria**

In making its decision the Minister or official decision making body will require a level of evidence to the effect that the applicant has made, or is making a genuine transition from the original gender to the opposite preferred gender.

The Group invites submissions as to the evidence that should be required of the person making the application.

## **6. Decision-Making Process**

The Group invites submissions on the type of decision making process which should be established. Options could include:

- a **Judicial or Court Model** whereby applicants would apply to a designated existing court, and
- a **Statutory Panel Model** whereby an expert independent panel would be appointed under the legislation to make the gender recognition decisions.

## **7. Gender Recognition Certificate and the Recording of Data**

The Group proposes the following procedures relating to the process following the recognition decision:

- ⤴ The Minister or the decision making body will issue a Gender Recognition Certificate to the successful applicant.
- ⤴ Recognition of the new gender of an individual will apply from the date of issue of the Gender Recognition Certificate. All rights, responsibilities and consequences of actions by the person in their original gender role prior to the date of recognition would remain unaffected.
- ⤴ The issue of each new Gender Recognition Certificate will be notified to the Registrar General of the GRO.
- ⤴ The question as to notification of other official bodies remains to be considered.
- ⤴ The GRO will be required to keep a confidential register of all persons whose acquired gender is recognised.
- ⤴ In the case of persons whose birth is already registered with the GRO, the successful applicant would be entitled, on application, to a new birth certificate with the acquired gender and new names indicated.
- ⤴ This certificate would be indistinguishable in format from the standard birth certificate.
- ⤴ The creation of a birth entry in a register maintained for the purposes of gender recognition will not affect the original entry in the register of births.
- ⤴ Issue of a new birth certificate showing the new gender role will not extinguish the original birth certificate. Both will continue to be available for use and be legally valid.

The Group invites submissions on these.

## **Appendix 3: Organisations Responding to the Consultation Process**

### **1. Submissions**

Submissions were received from the following organisations:

- ✦ BeLonG To Youth Service.
- ✦ Free Legal Advice Centres.
- ✦ Gay and Lesbian Equality Network.
- ✦ Gender Identity Disorder Ireland.
- ✦ Irish Council of Civil Liberties.
- ✦ Irish Human Rights Commission.
- ✦ Lash Back Collective.
- ✦ LGBT Noise.
- ✦ LGBT Society University College Cork.
- ✦ Marriage Equality.
- ✦ Ombudsman for Children's Office.
- ✦ The Equality Authority.
- ✦ Transgender Equality Network Ireland.
- ✦ Union of Students in Ireland.

### **2. Meetings with Organisations and Individuals**

Based on an assessment of the submissions received, members of the Gender Recognition Advisory Group met with a number of organisations and individuals in mid October, 2010. The purpose of these meetings was to allow a representative number of organisations and individuals an opportunity to discuss their submissions in further detail. The Group formed three sub-groups and met with representatives of the following organisations:

- Free Legal Advice Centres.
- Irish Human Rights Commission.

- Gender Identity Disorder Ireland (GIDI).  
BeLonG To Youth Services.  
Transgender Equality Network Ireland (TENI).  
Gay Lesbian Equality Network (GLEN).  
Union of Students in Ireland/University College Cork LGBT.  
The Equality Authority.



## **Appendix 4: Gender Change in Other Countries and International Sources**

### **1. Countries**

#### ***(i) United Kingdom***

Please refer to Section 2.5.2 of this report.

#### ***(ii) Germany***

The two former German states were among the first countries in Europe to introduce guidelines and legal measures related to gender recognition. In 1980, the Federal Republic of Germany issued a “Law concerning the change of given names and gender recognition in special cases” which came into force in 1981 and has since been commonly referred to as the “Transsexual Law” (TSG).

After the reunification of Germany in 1990, the TSG became valid for all Germans. Following a ruling by the German Federal Constitutional Court in June, 2006, the TSG also applies to foreigners who are permanent residents of Germany.

The application for a legal change of gender has to be done in court and requires two independent evaluations by mental health practitioners who are appointed by the court. These reports must confirm a diagnosis of transsexuality and testify to the presence of a strong and probably irreversible desire to live as the opposite gender for at least the last three years. Further requirements are the permanent infertility of the applicant, hormone treatment and gender reassignment surgery. The procedure takes up to two years – depending on whether the applicant has changed his/her name before or not.

The “*Offenbarungsverbot*” (prohibition of disclosure) in the TSG provides for privacy protection of the previous gender.

The Transsexuals Act required persons seeking legal recognition of their acquired gender to be unmarried and in practice it required already married transgender persons to divorce or dissolve their existing marriage as a pre-condition for recognition of their changed gender. The reason given for this requirement was to avoid the appearance of creating a category of same sex marriages, although Germany does have a category of civil partnerships for same sex couples. The German Basic Law (the German constitution), defines marriage as being between opposite sex persons.

The German Constitutional Court declared in May, 2008, that this section of the Transsexuals Act was in breach of the Basic Law and gave the German government until August, 2009, to amend it to remove the unconstitutional clauses.

In its ruling, the Constitutional Court held that because the couple in question had been validly

married, their marriage was protected by the Basic Law. Accordingly, if the two spouses did not wish to terminate the marriage, the State could not do so, or force them to do so, without violating their rights. The Court noted in addition that the requirement that the transgender spouse should terminate the marriage affected the rights of the non-transgender spouse as well.

In addition to protecting the institution of marriage, the Court noted that the Basic Law gave the transgender spouse the right to respect and recognition of her acquired gender identity. It held that it would be unconstitutional to force the transgender spouse to abandon one of her basic rights – the right to respect for her marriage – in order to achieve the other right, the right to recognition in her acquired gender.

The Court also considered the proportionality of the requirement to dissolve an existing marriage. Because Germany did not allow same sex marriage, the Court held that restrictions intended to avoid apparent official sanction for such marriages served a legitimate purpose, but that they were disproportionate as they would have required the couple to live apart for three years when they clearly did not wish to do so.

The European Union Fundamental Rights Agency reports that the German law was amended in July, 2009, to remove the requirement that persons seeking legal recognition of their gender reassignment must be unmarried.

### **(iii) France**

No statute exists in France to allow a person to legally change from one gender to another. Case law, codified by two rulings delivered by the *Cour de Cassation* (similar to Ireland's High Court) in 1992, provide that when an individual has undergone suitable medical treatment, no longer possesses all the characteristics of the original sex and has taken on the appearance and social behaviour of the other sex, the individual's civil status should subsequently correspond to the sex of his/her appearance. Hormone therapy and surgery are necessary before legal recognition can be granted.

In 2010, France became the first country in the world to de-classify transsexualism as a mental illness.

### **(iv) Spain**

In March, 2007, a gender recognition law was enacted in Spain that allows transgender people to modify their name and legal gender in all public documents and records on the basis of a court order – regardless of whether or not they had gender reassignment surgery. However, medical (hormonal) treatment for at least two years and a gender dysphoria diagnosis are prerequisites. The hormonal treatment is not a prerequisite if there are health or age reasons not to follow it.

### ***(v) Portugal***

Portugal has recently amended its Civil Registration Code to provide for a change of name and sex in the civil register. The new regulations introduce a simple administrative process whereby the applicant applies to the local civil registrar's office for a legal change of gender and name. While an application must be supported by a medical diagnosis of GID that is issued by a multi-disciplinary team that includes a doctor and a psychologist, there is no requirement for sterilisation, hormonal treatment or surgery to officially change gender. After presenting supporting documents, the change is effected within 8 days. As same-sex marriage is permitted in Portugal, there is no obligation on applicants to be unmarried. The new regulations also include provisions to allow for changes in the documentation of the children of transsexual persons.

### ***(vi) Austria***

In Austria, a person must make a court application for a change to their gender in order for it to be legally recognised. The applicant must be undergoing treatment (including hormonal treatment), be evaluated by a qualified mental health professional and satisfy a real life test.

Until 2006, gender recognition in Austria was determined according to a Decree of 1996, which required, amongst other things, that an applicant be unmarried in order to obtain an amended birth certificate indicating the acquired gender. In a ruling in June, 2006, the Austrian Constitutional Court found this requirement to be unlawful. The Constitutional Court ruled that there was simply no legal provision for an existing marriage to hinder the registration of legal sex. The Court ruled that it was not for the Civil Status authorities to judge how the amendment of the birth register should affect a person's marriage, nor that this should be something for the Constitutional Court to follow up.

In January, 2007, the 1996 decree was declared void by the Interior Ministry and a new decree was issued. The 2007 decree reiterates the consequences of the 2006 Constitutional Court ruling, stating that an existing marriage cannot hinder the registration of legal sex, and that it is not for the Civil Status authorities to make a judgement on the continuation of an existing marriage once an amendment is made to the birth register.

In 2010, the requirement for full gender reassignment, including mandatory surgery, was found to be unlawful by Austria's Administrative Supreme Court. The Austrian Ministry of the Interior has indicated that the practice of requiring genital surgery to proceed with a legal recognition of a change of gender should be modified – but a concrete proposal on this issue has yet to be introduced.

### ***(vii) United States***

In the United States, each State is responsible for making their own laws regarding changes of names and gender on birth certificates. The majority of States, on receipt of a Court Order and a letter from a doctor or surgeon verifying that gender reassignment surgery has been completed, allow the name and gender markers on a birth register entry to be changed. A

small number of States refuse to allow the gender marker to be changed.

**(viii) Canada**

Similar to the United States, the procedure for a person to legally change their gender on their birth register entry varies between provinces and territories. With the exception of Quebec, any alteration to the sex recorded on a person's birth register entry must be done in the province or territory where the person was born. Under the Vital Statistics Act, 1990, where a person has had his/her anatomical sex structure changed to a sex other than that which appears on his/her birth certificate, the Registrar – on production to him of two affidavits of two duly qualified medical practitioners, each affidavit deposing that the anatomical sex of the person has changed, and of evidence satisfactory to him as to the identity of the person – shall “...if the sex of the person is registered in the Province, cause a notation of the change to be made on the registry thereof...”. If the sex of the person is registered outside the Province, the Registrar transmits to the person in charge of the registration of births in the jurisdiction in which the person is registered a copy of the proof of change of sex produced to the Registrar.

**(ix) Australia**

Persons who are sex or gender diverse may seek to have the information that is recorded on cardinal documents and records amended to ensure that they accurately and appropriately confirm their identity. Once cardinal documents or records are amended, the amendment can be used to amend the sex or gender noted on other secondary documents and records.

Requests to change the sex noted on a birth certificate can be made in two ways – depending on a person's place of birth.

In the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria, persons who seek to change the sex recorded in the register of births make an application to the relevant state's or territory's Registrar of Births, Deaths and Marriages. Direct applications to the Registrar to change the sex on a birth register entry must be supported by documentary evidence, including medical evidence confirming that the applicant is unmarried and has undergone the requisite surgery.

In South Australia and Western Australia, persons who wish to change the sex on their birth register entry must apply for a Gender Recognition Certificate. Applicants for a Gender Recognition Certificate must be unmarried and have undergone a medical or surgical procedure to 'alter genitals or other sexual characteristics'.

Once a person has obtained a Gender Recognition Certificate, they may then register the Certificate with the Registrar of Births, Deaths and Marriages, who must then register the change in legal sex and request a new birth certificate.

## **(x) New Zealand**

In New Zealand, under the Births, Deaths and Marriages Act, 1995, a person who wishes to change their gender on their birth register entry must submit an application to the Family Court for a declaration as to the appropriate sex to be shown on the birth certificate. The Court will issue such a declaration if the applicant is over 18 years of age and unmarried. If lawfully married, the Act prohibits a new registration since this would result in same-sex marriage. The Court must also be satisfied by evidence that the applicant:

- ✦ has assumed (or has always had) the gender identity of a person of the nominated sex;
- ✦ has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation that accords with the gender identity of a person of the nominated sex, and
- ✦ will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex.

Documents presented to the Court will include affidavits by the applicant describing their personal background and their intention to continue to function as a person of their nominated sex, supported by statements by medical professionals which state that the applicant has had irreversible gender reassignment surgery, and is undertaking or has completed hormone treatment, and any other relevant documentation. In the case of a child aged under 18 years who has never married, the child's guardian may make an application to the Court.

Where the issue of marriage is not involved, and no contrary medical evidence has been presented, the effect of a successful sex change re-registration is that applicants create a new identity for themselves. Although the expectation is that the registration of the new gender will be recognised for all legal purposes, this has – with the exception of marriage – largely been untested. Where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex.

## **2. Other Sources**

### ***(i) Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity*<sup>8</sup>**

The Yogyakarta Principles, which were published in March, 2007, are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles were developed by a group of Human Rights experts and address a broad range of human rights standards and their application to issues of sexual orientation

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8 <http://www.yogyakartaprinciples.org/>.

and gender identity. There are 29 Principles in total and each Principle is accompanied by detailed recommendations to States. The Principles, while not binding in themselves, affirm international legal standards with which all States are urged to comply.

Principles 1 to 3 set out the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law. Principles 4 to 11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention. Principles 12 to 18 set out the importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health. Principles 19 to 21 emphasise the importance of the freedom to express oneself, one's identity and one's sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others. Principles 22 and 23 highlight the rights of persons to seek asylum from persecution based on sexual orientation or gender identity. Principles 24 to 26 address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity. Principle 27 recognises the right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of States to ensure the protection of human rights defenders working in these areas. Principles 28 and 29 affirm the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations.

Each Principle is accompanied by detailed recommendations to States. The Principles also emphasise, however, that all actors have responsibilities to promote and protect human rights. Additional recommendations are therefore addressed to the UN human rights system, national human rights institutions, the media, non-governmental organisations, and others. The full text of the Yogyakarta Principles is available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

***(ii) Human Rights and Gender Identity – Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights<sup>9</sup>***

In July, 2009, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, published an Issue Paper on Human Rights and Gender Identity. A number of specific human rights issues in relation to gender identity were outlined in this Issue Paper.

Article 8 of the European Convention states that “...everyone has the right to respect for his private and family life, his home and his correspondence...”. Member States are thus required to legally recognise the gender change of transsexual persons. However, the gender recognition procedures in place in many Member States can compel an individual to fulfil cumbersome legal and medical requirements. These procedures may also discourage a transgender person from applying to legally change their gender in the first place. The paper

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<sup>9</sup> <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1476365>.

also highlights the fact that discrimination based on gender identity is not explicitly covered in legal frameworks in a large majority of Council of Europe Member States and recommends that this should be included as a specific ground in national anti-discrimination legislation.

In relation to the qualification criteria for a person to apply for a legal change of gender, a number of Member States require an individual to have undergone surgical procedures such as gender reassignment or sterilisation. For a number of reasons, including health and financial, a transgender person may be unable to or may not wish to subject themselves to such procedures. The report expresses the view that there is no inherent need to enforce one set of specific surgical measures for the classification of an individual to be eligible for changing sex.

The paper also addresses the issue that in some countries there is a legal obligation that a transgender person who is legally married to his or her different-sex partner has to divorce before his or her new gender can be recognised. This is a particular problem in states which do not recognise same-sex marriage, where the change of gender would effectively lead to a same-sex marriage. The report points out that *"...as same-sex marriage is only possible in five Member-States of the Council of Europe, married transgender persons find themselves forced to divorce prior to their gender being officially recognized. In numerous cases, forced divorce is against the explicit will of the married couple, who wish to remain a legally recognized family unit, especially if they have children in their care..."*. The paper welcomes recent decisions by the Austrian Constitutional Court that *"...changing a sex entry in a birth certificate cannot be hindered by marriage..."* as well as a similar ruling by the German Constitutional Court which states that *"...it ends forced divorce in those countries for married couples in which one of the partners is transgender..."*.

Overall, the Issue Paper made a number of non-binding recommendations to Member-States:

- Implement human rights standards without discrimination and prohibit explicitly discrimination on the ground of gender identity in national non-discrimination legislation (the Yogyakarta Principles should be used to provide guidance for national implementation in this field);
- Enact hate crime legislation that affords specific protection for transgender persons against transphobic crimes and incidents;
- ⤴ Develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates, and other similar documents;
- ⤴ Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change;
- ⤴ Make gender reassignment procedures such as hormone treatment, surgery and psychological support, accessible for transgender persons, and ensure that they are reimbursed by public health insurance schemes;
- ⤴ Remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender;
- ⤴ Prepare and implement policies to combat discrimination and exclusion faced by

- transgender persons in the labour market, in education and health care;
- ✦ Involve and consult transgender persons and their organisations when developing and implementing policy and legal measures which concern them;
  - ✦ Address the human rights of transgender persons and discrimination based on gender identity through human rights education and training programmes, as well as awareness-raising campaigns;
  - ✦ Provide training to health service professionals, including psychologists, psychiatrists and general practitioners, with regard to the needs and rights of transgender persons and the requirement to respect their dignity;
  - ✦ Include the human rights concerns of transgender persons in the scope of activities of equality bodies and national human rights structures;
  - ✦ Develop research projects to collect and analyse data on the human rights situation of transgender persons including the discrimination and intolerance they encounter with due regard to the right to privacy of the persons concerned.

***(iii) Recommendation CM/Rec (2010)5 of the Council of Europe’s Committee of Ministers to Member-States on measures to combat discrimination on grounds of sexual orientation or gender identity***

Recommendation CM/Rec (2010)5 of the Council of Europe’s Committee of Ministers was adopted by said Committee on 31 March, 2010, at the 1,081<sup>st</sup> meeting of the Ministers’ Deputies. The Committee, under the terms of Article 15.b of the Statute of the Council of Europe, recommended that Member-States:

- *“...examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;*
- *ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bi-sexual and transgender persons and to promote tolerance toward them;*
- *ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparations for victims of discrimination;*
- *be guided in their legislation, policies and practices by the principles and measures contained in the appendix to this recommendation;*
- *ensure by appropriate means and action that this recommendation, including its appendix, is translated and disseminated as widely as possible...”*



## **GLOSSARY:**

<b>DCM</b>	Diagnostic and Statistical Manual of Mental Disorders
<b>GID</b>	Gender Identity Disorder
<b>GRA</b>	Gender Recognition Act
<b>GRO</b>	General Register Office
<b>GRC</b>	Gender Recognition Certificate
<b>HSE</b>	Health Service Executive
<b>ICD</b>	International Classification of Diseases
<b>MHP</b>	Mental Health Professional
<b>PPSN</b>	Personal Public Service Number
<b>WPATH</b>	World Professional Association for Transgender Health