

Legal Recognition of Preferred Gender Identity in Ireland: An Analysis of Proposed Legislation

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Introduction

In order to come *sui juris*, to be recognisable by the law, one must define oneself in a manner which the law can comprehend. At present, the law divides people into two categories: male and female (*Civil Registration Act, 2004*, Schedule 1). However, nowhere in legislation are these terms defined. Nor is it clearly explained whether an individual must be male in order to be legally recognised as a man. This chapter investigates the question of legal gender recognition in Ireland. It teases out the manner in which Irish case law has defined male/female and man/woman for legal purposes. Emerging debates in international human rights discourse are analysed to provide a critique of the current legal situation in Ireland and the report of the Irish Gender Recognition Advisory Group (GRAG) is examined to ascertain how this position might be reformed (GRAG, 2011).

Terminology

Prior to engaging in an analysis of the question of legal gender recognition it is first necessary to clarify some terms used repeatedly in this chapter. The first terms to explain are ‘sex’ and ‘gender’. Often-times these terms are used interchangeably. For the purposes of this chapter ‘sex’ refers to biological considerations while ‘gender’ refers to social considerations. With this as a framework ‘male’ and ‘female’ are terms referring to sex. They refer to the biology and

bodily characteristics of a person. 'Man' and 'woman' are social terms and indicate a person's gender. Where this chapter specifically employs either of these terms, 'sex' or 'gender', it does so with these particular meanings in mind. Where the chapter refers to discussions where the terms are used interchangeably the term 'sex/gender' will be employed to indicate that the terms have been treated as synonymous. It is not given that people's sex will correspond with their gender. Although a person who considers himself to be a man might have male biology this is not necessarily always the case. Where there is a conflict between a person's biological sex and the social gender adopted, for example a male who identifies as a woman, the term 'preferred gender identity' will be employed to prevent confusion. Likewise, in deference to a person's perceived sense of self the pronouns used will correspond to that person's preferred gender identity. Thus the person born male who identifies as a woman will be referred to using female pronouns so that her preferred gender identity is acknowledged.

'Sexual orientation' is a term which connotes a pattern of emotional, romantic, and/or sexual attractions to men, women, both genders, neither gender or another gender. According to the American Psychological Association, 'sexual orientation' can also refer to a person's sense of identity arising from these attractions, related behaviours and membership of a community of others who share these attractions (American Psychological Association). This is quite distinct from 'gender identity' which is defined as one's own innate sense of self as either male, female or ambivalent (Money 1965, Money 1973). One's internal sense of self as a gendered being is in no way linked to one's sexual orientation.

The term 'transgender' is a fluid term that includes and implies many different identities. It refers to those people who challenge 'norms' of sex and gender. It is intended as an all encompassing term to indicate those who cross-dress whether occasionally or frequently, those

who live in a gender other than that implied by the sex in which they were born including both those who do not seek medical or surgical treatments/assistance and those who do, or anyone else whose sex and gender identity do not cohere as the 'norm' suggests. Thus transgender will be used throughout this chapter to mean those who engage in a generic questioning of the correlation between sex and gender. The term 'trans' is a more recent take on the term 'transgender'. Although it had been about for a while the term 'trans' was first formally approved when it was used by a parliamentary discussion group in the United Kingdom with the specific intention of it being as inclusive as possible in equality legislation (Whittle 2006: xi). Throughout this chapter, the term 'trans-man' will be used to identify a person whose preferred gender identity is as a man and likewise 'trans-woman' will be used to indicate a persons whose gender preference is to be a woman.

'Transsexual' refers quite particularly to those who have undergone some form of medical and/or surgical procedures or treatment to bring their bodily sex into congruence with their preferred gender identity. Generally, transsexuals experience a conflict between their bodily sex and their preferred gender identity and have a medical diagnosis of Gender Identity Disorder. In fact such a diagnosis is essential to qualify as eligible for treatment.

Finally, 'Intersex' is an umbrella term for a variety of physical conditions where a person's body simultaneously combines traits of both males and females.

Current Paradigm for the Determination of Legal Gender Recognition

As stated above, in order to be legally recognisable an individual or entity must assume a form with which the law is familiar and which the law can categorise in a manner enabling that

individual or entity to access all the rights and privileges pertaining to that categorisation. One of the criteria for legal recognition is that a person's sex be declared. This requirement can be seen in Irish domestic legislation in the *Civil Registration Act, 2004*. Under section 19(1) of that Act, all births must be registered no more than three months from the date of birth. Such registration involves providing the Registrar with the required particulars including the child's name, the date, time and place of birth and the sex of the child (*Civil Registration Act, 2004*, Schedule 1). The Act is silent on the meaning of the term 'sex'. It neither discusses nor mentions any potential conflict between a person's biological sex and social gender identity. Nor does it define sex, or delineate how many possible sexes there might be.

Despite increasing equality, the law maintains differences between men and women. Thus the sex as which one is legally recognised can have a profound effect on the rights and responsibilities available to a person under the law. It determines who one can marry, as marriage is defined as the union of one man and one woman (*Hyde v Hyde* [1866] LR 1 P & D 130). In addition to mandating that one must marry a person of the opposite sex, the law also restricts which members of that sex one can marry. The list of prohibitive degrees is therefore gendered and different for both men and women (*Marriage (Prohibited Degrees of Relationships) Acts 1907, 1921*). Prisons are divided along gender lines, and thus the experience of incarceration can vary significantly depending on whether one is a woman or a man.ⁱ In Ireland the vast majority of schools are single sex and thus the educational experience may also differ depending on sex, as for example few girls' schools offer subjects like construction studies or technical drawing.ⁱⁱ Determining one's sex/gender is thus crucially important not only to the establishment of one's legal identity, but to a whole range of aspects of one's life.

Two thirds of the member states of the European Union have an official identity card system.ⁱⁱⁱ

Neither the United Kingdom (UK) nor Ireland has an identity card system, although there is some debate in the UK about its potential introduction. In these countries to establish one's current identity and acquire legal status, an individual must resort to official documentation which was not designed exclusively for identification purposes such as driver's licences, passports and birth certificates.

In Ireland, to apply for either a driver's licence or a passport the birth certificate is needed as proof of identification. Thus the birth certificate becomes the document by which legal status is definitively determined. Birth certificates can, under the *Civil Registration Act, 2004* be altered in three ways. Firstly, to add or change the forename of the child (*Civil Registration Act, 2004, s25*); secondly, to include the name of the father where the parents were not married at the time of the birth (*Civil Registration Act, 2004, s23*); and finally, to reflect the subsequent marriage of the parents (*Civil Registration Act, 2004, s24*). Altering an individual's name is a relatively simple procedure requiring the swearing of an affidavit which is witnessed by a Commissioner of Oaths and registered in the High Court. Registering an alteration of sex is not so simple. Ireland does not have a formal procedure for official recognition of such an alteration. Thus it has fallen to the courts to elucidate how the legal gender of a person ought to be determined.

In the common law world, two schools of thought as to how the sex of an individual ought to be determined emerge. The first, deals with the question of sex as a matter of law. It defines sex within the confines of biology and medicine and focuses on birth as the crucial moment when the sex of an individual is set for life. In Sharpe's words this first school of thought deploys a '(bio)logic approach to constructing sex' (Sharpe 2002: 39). The second

school, by contrast, combines considerations of medicine and biology with the individual's psychological and social identity and treats the question of sex as one of fact. In essence the difference between these two schools is that by deeming sex to be legally determined at birth, the first school cannot accommodate those who would wish to subsequently alter that sex. By contrast, deeming sex to be a matter of fact facilitates such a desire, as a legal determination can be reached in consideration of the changing facts. A quick description of the leading case of each school illustrates the point.

The English case *Corbett v Corbett (Corbett v Corbett (otherwise Ashley))* [1970] 2 All ER 33) concerned the validity of the marriage of a man and a male-to-female trans woman. The husband, who was the petitioner in the case, sought to have the marriage annulled and thereby avoid maintenance payments. Thus the essential question to be determined by the court was whether Mrs Corbett was a man or a woman for the purposes of marriage. The judge in the case, Justice Ormrod, was uniquely well placed to adjudicate as in addition to being a judge he was a qualified doctor. His Lordship evaluated the available expert medical evidence. He noted that the medical experts agreed on four criteria for assessing the sex of an individual: chromosomal, gonadal, genital and psychological. Some of the experts, he noted, would add a fifth criterion the hormonal factor (*Corbett v Corbett* : 44). Such criteria, he remarked, had been evolved by doctors to systemise medical knowledge and to assist unfortunate patients who suffer either physically or psychologically from sexual abnormalities. However, he stated that: '[t]hese criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination' (*Corbett v Corbett*: 44).

Ormrod J found that it was common ground between the medical experts that the biological sexual constitution of an individual is fixed at birth (at latest) and cannot be changed,

either by the natural development of organs of the opposite sex, or by medical or surgical means (*Corbett v Corbett*: 47). Having thus found, his Lordship concluded that the law should adopt the first three of the doctor's criteria, i.e. the chromosomal, gonadal and genital tests. Where all three are congruent at birth, this determines the sex of an individual for the purposes of marriage, and any operative interventions can be ignored (*Corbett v Corbett*: 48). Accordingly, the respondent was deemed to be legally male and the marriage was a nullity on the basis of *Hyde v Hyde*. Although Ormrod attempted to confine this test to the context of marriage, in *R v Tan* (*R v Tan* [1983] QB 105) the test was applied in the context of criminal law and thus became the *de facto* legal test for the determination of the sex/gender of an individual in England and Wales.

The key case for the second school of thought is *MT v JT* (*MT v JT* [1976] 140 NJ Super 77) from the Superior Court of New Jersey. The plaintiff was a male-to-female transsexual who was seeking an order of maintenance from her ex-husband. The respondent asserted that MT had been born a male, therefore the marriage was void and he was not liable for maintenance payments. The Court examined *Corbett* as the only case which had previously considered the legal status of transsexuals as regards marriage. The Court considered that the decision in *Corbett* had been incorrectly reached (*MT v JT*: 86). The *Corbett* court viewed sex and gender as disparate phenomena, its conclusion was rooted in the premise that 'true sex' was required to be ascertained even for marital purposes by biological criteria. The Court in the instant case found that if the anatomical sex of a transsexual is made to conform to the psychological sex then identity by sex must be governed by the harmonisation of these standards (*MT v JT*: 87). For the purposes of marriage it is the sexual capacity of the individual which must be scrutinised. Handler J stated: 'Sexual capacity or sexuality in this frame of reference requires the coalescence

of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female' (*MT v JT*: 87). Thus the Court concluded that MT was a woman, the marriage was legally valid and her claim for maintenance was successful.

The two contrasting cases demonstrate the very different outcome for parties before the courts depending on whether a biological or harmonisation approach is adopted by the courts. Interestingly, this is not a debate which emerged in the first cases before the Irish courts to consider the question of the legal sex/gender of a person.

Determining Legal Gender Before the Irish Courts

This issue first arose before the Irish Courts in *Foy v an tArd Chlaraitheoir and Ors (No 1)* (*Foy v An tArd Chlaraitheoir (No 1)* [2002] IEHC 116). The plaintiff in this case, Dr Lydia Foy, was a male-to-female transsexual. As a child she experienced a strong and persistent gender dysphoria. Marriage and the birth of two children notwithstanding, she continued to feel thus and in 1992 after extensive consultations with various medical professionals, she underwent gender reassignment surgery. At its core, her argument alleged that the refusal of the Register General to alter her birth certificate to reflect her preferred gender amounted to a breach of her constitutional rights to equality, dignity and privacy, as well infringing her constitutionally protected right to marry.

In support of these arguments Dr Foy adduced medical evidence from Professor Gooren that male and females brains differ and that the size and shape of the hypothalamus in a male-to-female transsexual is the same as that to be found in 'normal' females and smaller than that

found in 'normal' males.^{iv} Thus Professor Gooren concluded that there is a neuro-scientific basis to transsexuality, and therefore it should be considered as a form of intersexuality (*Foy v An tArd Chlaraitheoir (No 1)*): para 52-54). This argument did not find favour with the Court.

McKechnie J concluded:

I am of the opinion that the evidence to date is insufficient to establish the existence of brain differentiation as a marker of sex and accordingly I do not believe that this court in such circumstances could give to it the legal recognition which is sought (*Foy v An tArd Chlaraitheoir (No 1)*): para 121).

Therefore he held that the biological indicators enunciated by Ormrod J should continue to be decisive for this case (*Foy v An tArd Chlaraitheoir (No 1)*): para 121). As much of the evidence presented to the Court concerned medical developments, and given that it largely ignored the effects of transsexuality, this conclusion was not surprising, particularly in light of the disagreements within the medical community as to the cause of transsexuality. There is no mention in the judgment of any consideration being given to alternative approaches to the question of legal sex/gender determination. Thus it is unclear whether the Court was of the opinion that the *Corbett* test was the most suitable vehicle to employ or whether it was simply seemingly the only vehicle available.

Flowing from this conclusion, McKechnie J then considered the effect of Article 8 of the European Convention on Human Rights (ECHR).^v Given that the decision in the instant case was handed down a mere two days before that in *Goodwin (Goodwin v United Kingdom (2002) ECHR 583)*,^{vi} his Justice McKechnie concluded that confining the determining criteria to those which are biological was not inconsistent with principles of the Convention (*Foy v An tArd*

Chlaraitheoir (No 1): para 122). Thus in consideration of the medical evidence, the Strasbourg case law,^{vii} UK case law and the domestic legislation, McKechnie J concluded that when responding to Dr Foy's request, the Registrar General had no alternative but to refuse to issue an amended birth certificate (*Foy v An tArd Chlaraitheoir (No 1)*: para 125).

The Court then moved to a consideration of the constitutional issues raised in the case. As the rights which were allegedly infringed are not absolute, the Court found a balance had to be achieved between the rights of Dr Foy and the rights of anyone who would be impacted by a change in her status in addition to the interests of society in general (*Foy v An tArd Chlaraitheoir (No 1)*: para 169). McKechnie J concluded that the State had a legitimate interest in operating a functioning system of registering births which occur within the jurisdiction. Given that marriage and succession rights, rights of motherhood and other rights flow from such a determination McKechnie J found that the recording of the sex of a person is a 'a vital element of society's legitimate interest in a registration system' (*Foy v An tArd Chlaraitheoir (No 1)*: para 170). Such a record constitutes a historical recoding of the facts, "'a snap shot" of matters on a particular day' (*Foy v An tArd Chlaraitheoir (No 1)*: para 170). The entire system would be 'inoperable' if a confirmation of whether a person might subsequently present as transsexual had to be awaited prior to filling in the entry as regards sex. The absence of a provision permitting possible amendment at some unspecified time in an adult's life, to take effect retrospectively from the moment of birth, was not, the Court held, unconstitutional. According to McKechnie J, the current system is 'reasonable in reach and response': criteria the State can legitimately expect of such a system (*Foy v An tArd Chlaraitheoir (No 1)*: para 171).

In his concluding remarks, the Judge, demonstrating his sympathy for the plaintiff's plight, admitted that 'many of the issues raised in this case touch the lives, in a most personal and

profound way, of many individuals and also are of deep concern to any caring society' (*Foy v An tArd Chlaraitheoir (No 1)*): para 177). Therefore, he called on the Oireachtas to review these matters urgently (*Foy v An tArd Chlaraitheoir (No 1)*): para 177).

Two days later the Strasbourg Court handed down the landmark decision in *Goodwin v UK*. This ground breaking decision changed entirely the approach of the Strasbourg Court to the issue of the recognition rights of transgendered persons. It held that the persistent refusal of the law in the United Kingdom to recognise the preferred gender identity of transgender people amounted to a breach of the privacy rights of such people under Article 8 of the convention. Thus the *Foy (No 1)* case was appealed to the Irish Supreme Court.^{viii} By the time the appeal was heard, the legal landscape had further altered by the introduction of the *European Convention of Human Rights Act, 2003* and the *Civil Registration Act, 2004* which established a new system of civil registration and repealed all previous legislation on the issue. As these developments had not been considered as part of the original hearing, the Supreme Court remitted the case back to the High Court. Unusually, by agreement of the parties, the remitted action was again heard by Justice Liam McKechnie, on the basis that he was familiar with the medical evidence and understood the issues involved. Given the absence of any new evidence, the Court found that the principle of *res judicata* (it is already decided) applied (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEHC 470, at para 12). Having analysed the then legislative framework in detail, McKechnie J reiterated the findings of *Foy (No 1)*. He then had to consider what impact if any the *Goodwin* judgment might make on these findings.

Prior to the enactment of the *ECHR Act, 2003* Ireland operated a dualist approach regarding the ECHR. Thus only those judgments of the Strasbourg Court in which Ireland was a party were binding on Irish courts. Therefore the *Goodwin* case, having been handed down in 2002,

was not binding on Ireland. Furthermore the Court noted that *Goodwin* was prospective in nature, as confirmed by the Strasbourg Court in *Grant v UK* where it held that the *Goodwin* decision did not apply at any point in time prior to the 11/7/2002 (*Grant v UK* [2006] ECHR 548, at para 42-43). Finally, given that the *Goodwin* decision post-dated the judgment in *Foy (No1)*, the decision reached on the day was correct both in light of the then case law of the Strasbourg Court and the margin of appreciation afforded to member states.^{ix} Thus the plaintiff lost the remitted action. However that is not the conclusion of events.

Independently, a second application for the amended birth certificate was made to the Registrar in light of the events outlined above. This was again refused. This second refusal was brought to the High Court for judicial review – hence the second set of pleadings. The two cases were heard jointly.

In essence, the core of the argument in the second *Foy* case was that if the new system of registration introduced under the *Civil Registration Act, 2004* did not permit an amendment of the birth certificate to reflect her preferred gender identity then this amounted to a breach of the plaintiff's rights under Article 8 of the ECHR. In considering this argument, Justice McKechnie found that there are currently no legal formalities required prior to undergoing gender reassignment surgery applied (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEHC 470, at para 64(1)). He re-iterated that legal sex is determined by the biological temporal test outlined in *Corbett*, and re-enforced under the 2004 Act (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEHC 470, at para 64 (4-5)). He further stated that the fact that a person's psychological gender may differ from his/her biological sex is not a ground for issuing a corrective birth certificate (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEHC 470, at para 64(6)). Finally, he found that the birth register is a record of historical fact, a snapshot of events on a particular day: 'It is

not intended to and does not record any other major event in a person's existence or even in death. In particular it is not intended to be a document of current identity although in practice this has not always been the case' (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEH 470, at para 64(8)). Thus a person's legal sex is determined by the entry on the birth register and no subsequent event, including gender reassignment surgery, can alter the sex recognised by the law.

Consequently, Justice McKechnie found that the case before him raised two questions: do the rights contained in Article 8 include a right to have one's acquired gender legally recognised? If so, has the Irish State provided an effective means for upholding that right (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEHC 470, at para 94)? Answering these questions McKechnie J stated that if he was prepared to follow the *Goodwin* case, then unless Dr Foy's case was distinguishable from that case, he would be obliged to find that she had a right to legal recognition of her acquired gender. Responding to submissions from the State he found that at the time of the *Goodwin* case, the legal situation in the UK was 'virtually identical' to the present Irish position (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEHC 470, at para 96). Thus McKechnie J concluded that the two domestic legal frameworks were so 'strikingly similar' that the *Goodwin* decision should be considered highly influential in the Irish context, and subject to the margin of appreciation doctrine, the *Goodwin* decision reflects the law in Ireland (*Foy v An tArd Chlaraitheoir & Ors(No 2)* [2007] IEHC 470, at para 96).

McKechnie J commented on the differing reaction of the UK and Irish authorities to the *Goodwin* decision. In the UK, two years after the decision, the *Gender Recognition Act, 2004* (GRA) was passed. This legislation sets up a scheme whereby those who have been diagnosed with Gender Identity Dysphoria and intend to live forever in the gender opposite to that in which

they were born can have that preferred gender legally recognised. The legislation concerns not only those personally affected by transsexualism, but all those who might be affected by that person's change of gender. Furthermore, from a judicial perspective, in 2003 the House of Lords issued a declaration that s11(c) of the *Matrimonial Causes Act, 1973* was incompatible with Articles 8 and 12 of the Convention in *Bellinger (Bellinger v Bellinger [2003] UKHL 21)* thus giving practical effect to the *Goodwin* decision. Therefore within two years of the decision the UK had responded both legislatively and judicially to the *Goodwin* case (*Foy v An tArd Chlaraitheoir & Ors(No 2) [2007] IEHC 470, at para 99*).

By contrast Ireland had failed to respond at any level, even the most exploratory, to the issue of gender recognition. McKechnie J noted that the silence from the Government on the issue indicated that it had taken no significant steps to address the difficulties which continue to exist. He considered that the *Civil Registration Act, 2004* would have been a most suitable legislative vehicle for this purpose and that the failure to include any consideration of these issues in that legislation, must cause one to question whether the State is deliberately refraining from addressing these problems. Concluding that Ireland was 'disconnected from mainstream thinking' he stated: 'Indeed it could be legitimately argued that Ireland's right to stand on the margin of appreciation, is as of today, significantly more tenuous than the position of the United Kingdom was, at the time of the *Goodwin* decision' (*Foy v An tArd Chlaraitheoir & Ors(No 2) [2007] IEHC 470, at para 100*).

Therefore, on February 14th 2008, Justice McKechnie formally issued an order declaring that sections of the *Civil Registration Act, 2004* were incompatible with the European Convention on Human Rights because they do not make any provision for recognising the new gender identity of transgendered persons.

The initial response of the State was to appeal the case to the Supreme Court. However, in June 2010, it was announced that the State was to withdraw this appeal. This followed the establishment in May of that year of an interdepartmental committee known as the Gender Recognition Advisory Group (GRAG) ‘to advise the Minister for Social Protection on the legislation required to provide for legal recognition by the State of the acquired gender of transsexuals’ (GRAG: 6). The GRAG report was delivered to the Minister in June 2011. Prior to analyzing some of the recommendations contained in that report, this chapter will very briefly turn to a consideration of the evolving human rights discourse on this issue which provides a lens through which the report will be analysed.

Human Rights Discourse on the Right to Gender Recognition

The past twenty years has seen a growth in the number of claimants petitioning the courts for legal recognition in their preferred gender identity (Sharpe, 2002; Whittle, 2002). In the European context, a notable trend in these cases, particularly since the adoption of the *Human Rights Act, 1998* in the United Kingdom, has been the assertion, by plaintiff’s of a right to legal recognition in their preferred gender identity (Ní Mhuirthile, 2008). More recently, with the publication of the *Yogyakarta Principles (Yogyakarta Principles, 2007)*, the discussions surrounding draft UN Declarations (2008) and the Resolution of the UN Human Rights Council (2011), evidence moves towards explicitly recognising gender identity rights, including that to legal recognition in one’s preferred gender, as normative human rights. This chapter now turns to an examination of these international developments.

In March 2007, the *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity* were launched by an international group of human rights experts. The *Yogyakarta Principles* consist of ‘a set of principles on the application of international human rights law in relation to sexual orientation and gender identity’ (*Yogyakarta Principles*, 2007). The Principles ‘collate and clarify State obligations’ (*Yogyakarta Principles*, 2007: 7) by relating sexual orientation and gender identity rights issues to established human rights norms, and thereby seek to establish a legal framework for assessing such claims. The Principles also urge UN bodies to integrate sexual and gender rights issues into their procedures through the inclusion of specific recommendations for the UN (*Yogyakarta Principles*, 2007, 32). They were celebrated as a crucial tool (O’Flaherty & Fisher, 2008: 238), but without official sponsorship from sovereign states or a multilateral organisation, the Principles were non-binding and did not immediately address the legal status of those who question the heteronormative understanding of sex/gender. Nonetheless the Principles use existing international human rights conventions to insist that states are obliged to protect sexual minorities from the vast majority of abuses that they face – not as a minority, but as human beings entitled to human rights.

The *Yogyakarta Principles* are the most comprehensive statement on sexual and gender rights yet produced. They encompass a wide range of issues including non-discrimination, legal recognition, security of person, privacy, access to justice, work, social security, housing, education, health, freedom of expression, immigration and refugee issues, founding a family, public participation and effective redress. Furthermore, the Principles are not designed as an abstract or theoretical statement, but are intended to be practically implemented. As Sanders argues, the drafters of the Principles ‘did not want an aspirational document. They did not want

to produce a “where we should be going” sermon’ (Sanders, 2008: para 7). Instead, the Principles clearly ‘affirm the primary obligation of States to implement human rights’, and specifically aim to ‘bring greater clarity and coherence to States’ human rights obligations’ (Sanders, 2008: para 7). Each broad human rights provision enshrined by the Principles is accompanied by detailed information on the responsibilities of potential state parties, and recommendations for the practical implementation of the Principles at a domestic level.

The Principles have ‘met with a surprising degree of success’ in international fora (O’Flaherty & Fisher, 2008: 239). Since their launch in 2007, the Principles have significantly influenced discussions and interpretations of sexual and gender rights at the UN. Several states have drawn on the Principles in domestic policy-making (O’Flaherty & Fisher, 2008: 238; Sanders, 2008). Additionally, the Principles have been endorsed by several human rights organisations, including those which represent the interests of sexual and gender minorities. Therefore, they have relevance to the individuals and communities affected by sexual and gender rights violations, are sufficiently detailed to have potential for practical implementation, and their congruence with the existing human rights framework has resulted in a considerable level of international acknowledgement and acceptance.

Similarly, the inclusion of sexual orientation and gender identity rights, including the right to legal gender recognition has been the subject of debate by both the UN General Assembly and the UN Human Rights Council. On the 18 December 2008, a landmark statement was issued by Argentina at the United Nations General Assembly (Argentina letter to UN General Assembly, 2008). Supported by 66 member states, the draft UN *Declaration on Sexual Orientation and Gender Identity* affirmed that ‘all human rights [must] be applied to all human beings, regardless of their sexual orientation or gender identity’ (Argentina letter to UN General

Assembly, 2008: para 3), and ‘condemned all human rights violations based on sexual orientation or gender identity, whenever or wherever they might occur’ (Argentina letter to UN General Assembly, 2008: para 6). This was a milestone in UN history. For the first time, the issue of gender identity had been formally placed on the General Assembly’s human rights agenda. However, immediately following the Declaration, an Alternative Statement was issued by Syria on behalf of 57 member states, opposing the mention of the ‘so-called notions of sexual orientation and gender identity’ (United Nations General Assembly, 2008a). Thus, there was no definitive statement from the UN on the issue. However in 2011, the UN Human Rights Council passed a resolution which expressed its ‘grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity’ (UN Human Rights Council, 2011). Consequently it commissioned the UN High Commissioner on Human Rights to undertake a study documenting such incidents and make recommendations which it undertook to implement. Furthermore, the Council decided to ‘remain seized of this priority issue’ (Human Rights Council, 2011).

The *Yogyakarta Principles* together with the debates on the issue at the UN confirm the approach by the ECHR in *Goodwin* that there is a right to be legally recognised in one’s preferred gender, and that this right exists as part of the normal human rights of all people. With this in mind, this chapter now turns to a consideration of the proposals put forward in the GRAG report to ascertain whether the potential scheme for gender recognition in Ireland would respect and vindicate the rights of trans people.

Recognition of the Preferred Gender Identities of Trans People: Recommendations From the GRAG

As stated above, the GRAG report was published on 15 June 2011. The report proposes establishing a scheme where a person whose birth is registered in Ireland, is at least 18 years of age, has a clear and settled intention to live in the preferred gender permanently and has lived in that gender for at least two years can apply to be legally recognised. In addition to these criteria the applicant must supply evidence of diagnosis of gender identity disorder (GID), or evidence of having undergone gender reassignment surgery, or evidence of legal recognition of preferred gender identity by another jurisdiction. Furthermore persons in an existing valid marriage or civil partnership are excluded from the scheme (GRAG, 2011).

Effectively this amounts to an adoption of the scheme available in the United Kingdom under the *Gender Recognition Act, 2004*. There are a number of difficulties with these proposals. This chapter will critique the two most controversial aspects of the proposed scheme: the requirement for medical diagnosis or surgical intervention and the marriage issue.

The Diagnosis Issue

The GRAG report proposes that in order to be recognised one must either have a diagnosis of GID, or have undergone gender reassignment surgery, or be legally recognised in another jurisdiction. Encapsulated in this requirement are two issues which cause tension: surgical alteration and diagnosis. The question of the requirement for surgical alteration has long been a bone of contention. Gender reassignment requires more than one surgical intervention, thus the question of when sufficient surgeries have been undertaken to enable recognition is relevant. For example in *Rees v UK* (*Rees v UK* (1986) 9 EHRR 56) the dissenting judgment

made much of the pain and anguish that Rees had undergone to acquire a male body and that this evidenced ‘how real and intense was his desire to adopt a new sexual identity as far as possible’ (*Rees v UK*, 1986: 69). Sharpe criticises this judgment for inexorably linking ‘authenticity’ of transsexual identity to bodily change: ‘[T]hose unwilling and/or unable to undergo surgical procedures are depicted as ‘inauthentic’ and therefore undeserving. In other words, surgical intervention is important not only for the bodily change it effects in the present but also for what it signifies about the past’ (Sharpe, 2001: 54).

Sharpe’s comments illustrate the difficulty which might arise where a person has not completed all possible surgeries which would effect a gender reassignment. Male phalloplasty is a particularly difficult procedure and therefore is not always undergone by trans men.^x Thus the success of an application for gender recognition from a trans man under the scheme as proposed by the GRAG, may depend on whether he has undergone phalloplasty, which in practical terms may result in the exclusion from the scheme of a significant number of trans men. It was the exclusive requirement of a diagnosis of GID which resulted in the almost universal acclaim for the *Gender Recognition Act, 2004* in the UK. Dispensing with any requirement for medical or surgical intervention ‘[T]he G.R.A., intentionally or otherwise, interrupts the orthodoxies of gender that the law has peddled to a greater extent than any other development in recent times’ (Sandland, 2005: 44). The GRA does not include a definition of GID. In practice the Gender Recognition Panels have turned to definitions from the medical community and particularly that from the Diagnostic and Statistical Manual of Mental Disorders (DSM) which defines GID as a registered mental disorder evidenced by the congruence of five criteria.^{xi} These are:

1. There must be evidence of a strong and persistent cross-gender identification.

2. This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex.
3. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.
4. The individual must not have a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia).
5. There must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.

There are a number of difficulties with this as a definitional determinate. Firstly, it problematises those who wish recognition in a gender other than male or female. Recognition depends on diagnosis, therefore unless an applicant is willing to be labelled or stigmatised as mentally ill, recognition will not be forthcoming. Secondly, it impliedly perpetuates the binary gender paradigm, one must have cross-gender identification i.e. one must want to be of 'the other sex' (Criterion 2 from DSM definition of GID). Finally, one must 'not have a concurrent physical intersex condition' (Criterion 4 from the DSM definition of GID). Thus the right to recognition, expressed in the *Goodwin* case as grounded in a common humanity and thus accessible to all regardless of their gender, is frustrated as intersex individuals cannot exercise this right under this piece of legislation. As is evidenced in the *Yogyakarta Principles*, the Committee of Ministers of the Council of Europe Recommendation CM/Rec(2010)5, and the Recent report of the Council of Europe Commissioner for Human Rights (Council of Europe

Commissioner for Human Rights, 2011), there is a move away from the requirement to have undergone some form of medical and/or surgical intervention prior to granting recognition within international human rights discourse. Furthermore, those EU member states that have most recently introduced, or amended their legal gender recognition mechanisms have dispensed with the need for such interventions (ILGA Europe Rainbow Map and Gender Identity Index, 2011). Most recently, the Senate of Argentina passed a Gender Identity law which specifically states that '[i]n no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place [for recognition to be granted]' (GATE, 2012: Article 4). The Argentinian law simply relies on a self-declaration by the applicant as to their gender identity (GATE, 2012; Article 4). Thus the proposal put forward by the GRAG requiring medical evidence is out-of-step with best international practice on this question. Recognition of preferred gender which follows the Argentinian example and relies on a declaration from the person seeking recognition as to their gender identity would better ensure the vindication of the rights of trans people.

The Marriage Question

The second, and more problematic, issue among the GRAG recommendations which this chapter will focus on is that of the requirement that an applicant be single prior to making an application. This is not a unique requirement and mirrors that contained in the UK's GRA (*Gender Recognition Act, 2004; s5*)

The difficulty arises because at present marriage in Ireland is only available to opposite sex couples (*Hyde v Hyde*). Same-sex couples can formalise their relationships by Civil Partnership which does not enjoy the same status as marriage (*Civil Partnership and Certain*

Rights and Obligations of Cohabitants Act, 2010). Therefore, the concern is that if married trans people were to be legally recognised in their preferred gender, this would result in what would ostensibly be a same sex marriage and thereby create an inequality for same sex couples where one party is not a trans person.

The exclusion of those applicants who are married or in a civil partnership raises clear Constitutional questions. It is arguable that to effectively mandate that a happily married couple divorce prior to granting recognition is a direct interference with the special Constitutional position of the family based on marriage contained in Article 41.3.1. The GRAG report, however, was of a different opinion. It contends that as same-sex marriage is currently not provided for in Irish law any attempt to introduce legislation which would have as an effect the acknowledgement of the legality of same-sex marriage would be vulnerable to constitutional challenge (GRAG, 2011: 30). Furthermore, the GRAG draws support for the decision of the Strasbourg Court in *Parry v UK* (*Parry v UK* [2006] ECHR 1157) to argue that it is within the margin of appreciation afforded to states on this issue to exclude married applicants from recognition. Regarding those in an existing civil partnership, the GRAG stated that the effect of transition would be the recognition of opposite sex civil partners whose relationship ‘does not benefit from the full protection afforded to marriage’ (GRAG, 2011: 31). Furthermore it expressed the opinion that failure to require dissolution of a civil partnership when dissolution of a marriage is mandated would potentially result in a constitutional challenge. Additionally, this exclusion seems to run contrary to the second guiding principle purportedly underpinning the proposed scheme that ‘[t]he terms and conditions of the scheme should not deter potential applicants from applying’ (GRAG, 2011: 52). It is submitted that the requirement to divorce or dissolve a civil partnership can only have the practical effect of deterring potential applications.

The situation is further complicated by the provisions governing divorce in Ireland. As enshrined in Article 41.3.2(i), to be granted a divorce, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years prior to the commencement of proceedings. Furthermore, under Article 41.3.2(ii) in order to grant a divorce there must be no reasonable prospect of reconciliation between the spouses. The proposal that recognition only be extended to single persons together with the provisions governing divorce combine to create a situation which is very invidious. Essentially, it requires a trans spouse to apply for a divorce against their wishes, and where the marriage has not broken down, as a condition of recognising their preferred gender. It is submitted that this would be a clear violation of the pledge contained in Article 41.3.1 of the Constitution ‘to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack’ as the couple would presumably be in a validly contracted and subsisting marriage. It would also, of course, constitute an interference with the rights of the non-trans spouse who wants to continue in the marriage. It is also debatable whether a divorce could ever be granted to such a couple as there has been no irreconcilable breakdown of the relationship. Thus married trans people remain caught in a quagmire where, potentially, they can never be recognised in their preferred gender.

A solution would be to abandon the requirement that a person be single prior to being recognised in their preferred gender. This would result in an apparent legal anomaly, as identified by the GRAG (GRAG, 2011), but would only affect a small number of people. As to the concern that it might create a precedent enabling a challenge to either the *Civil Registration Act, 2004* or the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* in the hope of a result in favour of same sex marriage, it is submitted that such a challenge would

not arise, as the anomaly would only extend to those who have contracted a valid heterosexual marriage and one of them had subsequently transitioned to the opposite gender with the agreement of the non-trans spouse. Thus the anomaly is confined to a very particular situation.

The anomaly can be legally justified by drawing an analogy with the legal age for capacity to enter a marriage. In determining whether a person is old enough to marry, it is the age of the party at *the time of marriage* that counts (*Civil Registration Act, 2004* s2(2)(c); *Family Law Act, 1995* s31(1)). The fact that an underage party has, subsequent to the marriage, reached the age of majority, does not render the marriage retrospectively valid.

Correspondingly, an incapacity (such as impotence or a mental infirmity) that develops only *after* a marriage has been validly formed, and that was not present at the time of marriage, does not technically render a marriage invalid. Similarly, it is suggested that where a couple contracts a marriage as opposite sex partners at the time of the marriage, it is validly constituted and is not rendered invalid because one spouse subsequently transitions to the opposite gender.

Conclusion

The issue of whether and how to recognise the preferred gender identity of trans persons has been under consideration in Ireland, either by the courts or the Oireachtas, since 1997. During that time, huge advances have been made in international human rights discourse such that the right to legal recognition in one's preferred gender is generally accepted as existing within international human rights law. In introducing a scheme for legal gender recognition in Ireland, it is important to be cognisant of this obligation and to introduce legislation which respects and vindicates all the rights of trans people. Viewed from this perspective the scheme proposed by the GRAG represents a missed opportunity to learn from problems and challenges exposed

elsewhere, particularly concerning the UK scheme, to produce proposals which would ensure respect for the rights of all those, whether transsexual, transgender or intersex, who might benefit from gender recognition legislation.

At the time of writing, there has been no draft legislation introduced on this issue before the Dáil. The *Gender Recognition Bill* remains on the ‘C list’ of the Legislative Programme for the Summer Session 2012. As such it is a low priority as bills on this list have yet to have ‘heads of bill’ approved by the Government.^{xii} Transgender Equality Network Ireland (TENI) is the major NGO in this area and they have advocated strongly in favour of a legislative framework which is in keeping with international human rights law. Whether this strategy bears fruit remains to be seen.

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ⁱ In Ireland, for example, in the biggest male prison in the State, Mountjoy, cells are overcrowded and there is no in cell sanitation necessitating the use of chamber pots. The women's prison known as the Dochas Centre has single rooms with toilet, shower and wash hand basin. The Centre is arranged as six house units and each house has its own kitchen facilities which inmates can use freely. See Kinlen(2003).

ⁱⁱ See Dept of Education, *Sé/Sí: Gender in Irish Education* (Dublin, Ireland, Department of Education and Science, 2007) which examined the election and performance in all subjects covered by State examinations by gender, based on the 2003 State examination results. This survey revealed that the gender of students sitting the following Leaving Certificate exams: Construction Studies 93.8% male, Technical Drawing 94.1% male, Engineering 95.3% male, Agricultural Science 75.5% male, Home Economics (General) 87% female, Home Economics (Social and Scientific) 86.3% female, Music 77.4% female.

ⁱⁱⁱ The following States all have identity card systems, although it is not compulsory to carry the card in all of the States and in some possession of the card is voluntary. Belgium, Bulgaria, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, Spain and Sweden.

^{iv} Professor Louis J. Gooren is an Emeritus Professor of Medicine at the Hospital of the Vrije Universiteit of Amsterdam, the Netherlands. An endocrinologist, he is internationally renowned as an expert on transgender and was one of the first physicians to treat transgender youth.

^v For the sake of clarity, throughout this chapter the European Convention on Human Rights will be referred to as ECHR, while the European Court of Human Rights will be referred to as the Strasbourg Court.

^{vi} *Goodwin v United Kingdom* (2002) ECHR 583 was the case where the Strasbourg Court held that the right to be recognised in one's preferred gender identity is to be found within the privacy rights contained in Article 8 ECHR. More importantly, it held that the margin of appreciation on this issue had now vanished due to the consensus within the Council of Europe member states is in favour of affording recognition.

^{vii} Strasbourg case law refers to case law originating from the European Court of Human Rights which is based in Strasbourg. Prior to the enactment of the *European Convention on Human Rights Act, 2003* such judgments were not binding on the Irish courts unless Ireland was a party to a particular case. Since the introduction of the 2003 Act, Irish judges are obliged to interpret legislation or caselaw do so in a manner compatible with the ECHR (ECHR Act, 2003: s2).

^{viii} There is a hierarchy of courts in Ireland. When dealing with non-criminal cases it is as follows in descending order of importance: Supreme Court, High Court, Circuit Court and District Court. Each court is bound by decisions of the Courts further up the hierarchy. In other words it must follow the precedent or legal decisions of a higher court. It is, however, free to depart from its own previous decisions and the decisions of lower courts.

^{ix} The margin of appreciation is a doctrine of the Strasbourg Court whereby in the absence of a broad consensus throughout the member states of the Council of Europe on an issue, each state retains 'wriggle room' to decide the matter for itself.

^x Phalloplasty is the term for surgical alteration of the phallus or penis. In the context of female-to-male transmen, it means the creation of a penis.

^{xi} The Gender Recognition Panels established under the GRA, 2004 in the UK administer the system of gender recognition. In other words, they review applications and decide whether or not an individual has met the criteria for recognition. Each panel consists of at least one person with medical expertise and one lawyer.

^{xii} Heads of bill is the term used for the outline of the items to be covered in the bill.

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