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# Gender Identity, Intersex and Law in Ireland

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## I. Introduction

The introduction of the Gender Recognition Act 2015 ('2015 Act') represented a seismic shift in the Irish legal landscape as regards the legal recognition of people whose preferred gender does not correspond with the sex noted upon the register of births. The 2015 Act is notable as it represents a loosening of the rigid division between the male and female gender. In essence, it maintains the need for a binary categorisation by gender of people but the boundary has become permeable and movement between the gender categories is now permissible.

Questions of identity go to the core of a person's dignity and thus are central to the inalienable rights we all enjoy as human beings.<sup>1</sup> This chapter will consider the circumstances leading to the introduction of the 2015 Act. It will examine how the legislative scheme evolved during its passage through the Oireachtas and analyse both the enacted legislation and the manner in which it is operationalised. Thus, it will consider whether the manner in which the right to recognition was realised in the 2015 Act fully respects the rights and dignity of those who may wish to avail of its provisions.

## II. The *Foy* Cases

The requirement to formally declare a sex or gender for recognition by the law is a relatively recent development. It first appeared in the required particulars for Form A of the Act for the Registration of Births and Deaths in Ireland 1863. Prior to this date, there was a degree of flexibility evident in the law. Writing in the late 1600s, the then Lord Chief Justice, Sir Edward Coke, noted that 'Every heire is either a male, or female or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgynous) – shall be heire, either as male or female, according to that kind of the sexe which doth prevaile.'<sup>2</sup>

<sup>1</sup> Making this precise point in his decision in *Sheffield & Horsham v UK*, Judge Van Dijk noted that it 'is at the basis of several of the rights laid down [in the European Convention on Human Rights]. Moreover, it is a vital element of the "inherent dignity" which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.' *Sheffield & Horsham v UK* [1999] 27 EHRR 163, 207.

<sup>2</sup> E Coke, *The First Part of the Institutes of the Law of England* (Robert H Smith, 1853) 225.

It was not until the case of *Foy v An tArd Chlaraitheoir (No 1)*<sup>3</sup> that the law in Ireland was required to define what precisely was meant by the terms male and female, or man and woman. The question arose in the context of a judicial review brought by a transgender (trans) woman, Dr Lydia Foy, who wished to amend the registration of her birth so that she could be recognised legally as a woman. Despite the fact that this was the first occasion upon which a court had to consider how to frame a legal test for recognition of gender, there is no discussion in the judgment of what that test might be.

Courts in other common law jurisdictions had developed two contrasting approaches. The first, a biological temporal test originated in the English case of *Corbett v Corbett*.<sup>4</sup> Here, the English court ruled that legal gender is determined by the congruence of the chromosomes, gonads and genitals at the moment of birth. This is determined as a question of law and, thus, once the congruence is present at birth, the legal gender is fixed.<sup>5</sup> The second approach, developed in *MT v JT*<sup>6</sup> considered gender to be a question of fact that is resolved at the moment when gender becomes legally relevant. Thus, once the anatomical sex of a person has been made to conform to their psychological gender, this harmonisation must be recognised by the law and the legal gender is the harmonised one.<sup>7</sup>

The Irish High Court in *Foy (No 1)* did not examine these alternative approaches. Rather it adopted the *Corbett* biological approach as the test in Ireland. It considered that the birth certificate was never intended to be an indicator of current legal status but rather functions as “a snapshot” of matters on a particular day.<sup>8</sup> The Court concluded that the entire system of birth registration would be undermined – rendered ‘inoperable’ – if it had to await the potential development of a trans identity, or not, prior to completion of the sex box on the register.<sup>9</sup>

Dr Foy’s legal team advanced arguments drawing on both constitutional and European Convention on Human Rights (ECHR) entitlements, although neither were successful. The judgment of McKechnie J is compassionate and empathetic, but he concluded that applying the *Corbett* test did not enable the recognition of the preferred gender identity of the applicant. He noted that the question of how best to frame a scheme for gender recognition in Ireland was one best suited to the legislature and called upon the Oireachtas ‘to urgently review the matter’.<sup>10</sup> Two days after the decision in *Foy (No 1)* the legal landscape shifted significantly with the decision of the European Court of Human Rights (ECtHR) in *Goodwin v UK*.<sup>11</sup>

The ECtHR had first considered the question of gender recognition in the case of *Van Oosterwijck v Belgium*.<sup>12</sup> The Court acknowledged that the right to recognition of preferred gender identity was an intrinsic, inseparable part of a person’s status and person, and thus

<sup>3</sup> *Foy v An tArd Chlaraitheoir (No 1)* [2002] IEHC 116.

<sup>4</sup> *Corbett v Corbett (Otherwise Ashley)* [1970] 2 All ER 33.

<sup>5</sup> T Ní Mhuirthile, ‘Legal Recognition of Preferred Gender Identity in Ireland: An Analysis of Proposed Legislation’ in M Leane and E Kiely (eds), *Sexualities and Irish Society: A Reader* (Dublin, Orpen Press, 2014) 138.

<sup>6</sup> *MT v JT* [1976] 140 NJ Super 77.

<sup>7</sup> *ibid* 87.

<sup>8</sup> *Foy v An tArd Chlaraitheoir (No 1)* [2002] IEHC 116, [170].

<sup>9</sup> *ibid* [171].

<sup>10</sup> *ibid* [177].

<sup>11</sup> *Goodwin v United Kingdom* (2002) ECHR 588.

<sup>12</sup> *Van Oosterwijck v Belgium* (1980) 3 EHRR 557.

is a general principle of law.<sup>13</sup> However, in both this case and the ensuing line of cases until *Goodwin v UK*, the claim to recognition was unsuccessful: the lack of consensus among Member States enabling the margin of appreciation to operate to defeat such claims. Yet throughout the dissenting judgments, a growing minority of judges reasoned that the right to recognition, found in the Article 8 right to respect for private and family life, was an inherent part of the right to self-determination and respect for the innate dignity of the person.<sup>14</sup> This dissonance between the majority decisions and the increasing minority reasoning was resolved in *Goodwin*, where the Grand Chamber ruled unanimously that the persistent refusal of the respondent State to recognise the gender of the applicant was 'no longer sustainable'<sup>15</sup> and amounted to a violation of her Article 8 rights.

As a direct result of this decision, together with the incorporation of the ECHR into Ireland's domestic legal system through the passage of the European Convention of Human Rights Act 2003 ('ECHR Act 2003') and the changes made to the system of civil registration by the Civil Registration Act 2004, Dr Foy brought an appeal of the 2002 decision to the Supreme Court. As these three matters had not been considered by the High Court, the case was remitted back to the lower court for an initial judgment. Independently, Dr Foy sought, and was refused, a change of gender on her birth certificate on the basis that a mistake had been made in the recording of her birth and that this mistake should be corrected under sections 25, 63, 64 and 65 of the Civil Registration Act 2004. She then initiated judicial review proceedings of the refusal. Given the similarity within the cases, the remitted action and the new review were heard together. Unusually, the parties agreed that the conjoined cases would once again be adjudicated upon by McKechnie J, in light of his familiarity with the extensive expert testimony.<sup>16</sup> Dr Foy lost the remitted action as the three main grounds supporting it had not been law on the date of judgment. However, in the second case, her rights-based argument, centring on the *Goodwin* precedent, was successful.

Justice McKechnie found that the inability to recognise her gender of preference breached Dr Foy's Article 8 rights.<sup>17</sup> In those circumstances, the only legal remedy available to him was to issue a Declaration of Incompatibility under section 5 of the ECHR Act 2003. This McKechnie J did,<sup>18</sup> reiterating his call upon the Oireachtas to legislate in this area. He concluded by stating that:

Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life. All persons by virtue of their being are so entitled.<sup>19</sup>

Thus, the Court found that there is an obligation, based in human rights law and grounded upon the inherent respect and dignity that all people enjoy as members of the human race,

<sup>13</sup> *ibid* 577.

<sup>14</sup> T Ní Mhuirthile, 'Article 8 and the Realisation of the Right to Legal Gender Recognition' in S Egan, L Thornton and J Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin, Bloomsbury, 2014) 201.

<sup>15</sup> *Goodwin v United Kingdom* (2002) ECHR 588, [90].

<sup>16</sup> *Foy v An tArd Chlaraitheoir & Ors (No 2)* [2007] IEHC 470.

<sup>17</sup> *ibid* [102].

<sup>18</sup> *ibid* [110].

<sup>19</sup> *ibid* [118].

on the State to recognise the preferred gender identity of people subject to the law. The precise manner in which this recognition was to be realised was left to the legislature to resolve.

### III. Following *Foy*: The Route to Regulation of Recognition

The Declaration of Incompatibility issued by McKechnie J in *Foy (No 2)* was the first such Declaration to be made under the ECHR Act 2003. Hopes were high that this would prompt the introduction of a legislative scheme for recognition. Such had been the impact of an equivalent declaration of the UK's House of Lords in *Bellinger v Bellinger*,<sup>20</sup> which resulted in the introduction of the Gender Recognition Act 2004 in that jurisdiction. Things did not proceed quite so smoothly in Ireland.

Following the formal issuing of the Declaration of Incompatibility on Valentine's Day 2008, the State responded by appealing the decision to the Supreme Court, which paused the activation of the Declaration. Finally, in May 2010, the Government announced the establishment of a Gender Recognition Advisory Group (GRAG) which was charged with advising the Minister for Social Protection on how best to introduce legislation to enable recognition of preferred gender identity.<sup>21</sup> The following month in June 2010, the State announced it would withdraw the appeal.<sup>22</sup> The GRAG undertook an extensive public consultation and its report was published in July 2011.

The scheme recommended by the GRAG was, in essence, a carbon copy of the scheme in force in the UK under the Gender Recognition Act 2004 ('GRA 2004'). That legislation had been broadly welcomed when it was first introduced. The GRA 2004 was hailed for moving away from sex as the defining characteristic of legal status, and embracing gender as its champion.<sup>23</sup> Trans activists praised the introduction of a recognition scheme that relied on diagnosis of gender identity disorder rather than requiring that applicants be sterilised as a prerequisite to recognition.<sup>24</sup> Yet, since its introduction, a number of critiques of the 2004 GRA scheme had emerged and there were some specific jurisdictional issues that rendered its transplantation to the Irish context problematic.

Reflecting that of the GRA 2004, the GRAG proposed a scheme whereby an applicant of at least 18 years of age and whose birth was registered in Ireland, who had lived for at least two years in their preferred gender and had a clear and settled intention permanently to live in that gender, could make an application for that preferred gender to be recognised. In support of their application, applicants would have to 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

<sup>20</sup> *Bellinger v Bellinger* [2003] UKHL 21.

<sup>21</sup> Gender Recognition Advisory Group, *Report of the Gender Recognition Advisory Group* (Dublin, Stationery Office, 2011) 6.

<sup>22</sup> T Ní Mhuirthile, 'Legal Recognition of Preferred Gender Identity in Ireland: An Analysis of Proposed Legislation' in E Kiely, and M Leane (eds), *Sexualities in Irish Society: A Reader* (Dublin, Orpen Press, 2014) 144.

<sup>23</sup> S Cowan, "'Gender is No Substitute for Sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 *Feminist Legal Studies* 67, 75.

<sup>24</sup> Press for Change, 'Transsexual Leaders Welcome Draft Bill to Allow Legal Change of Gender' (previously available online at [www.pfc.org.uk/node/546](http://www.pfc.org.uk/node/546)).

jurisdiction. Furthermore, married or civilly partnered applicants would be excluded from the application process.<sup>25</sup>

There were three aspects of this proposed scheme that drew most criticism: the diagnostic criterion, the requirement to be single, and the age restriction. From the late 2000s, international human rights law had begun to stress that medical diagnosis should not serve a gate-keeping function in terms of access to legal rights.<sup>26</sup> Consequently the proposed scheme was criticised for pathologising access to legal rights. Furthermore, framing the medical certification in the context of a diagnosis of GID ensured that people with intersex variations,<sup>27</sup> who might well require access to legal gender recognition, were precluded from accessing those rights.<sup>28</sup>

The second criticism centred around a complication of constitutional compliance when importing the requirement that applicants be single from the 2004 UK GRA scheme. Effectively, this required married or civilly partnered applicants to dissolve their unions. It was argued that this would amount to an undue interference with the special constitutional position of the family based on marriage, as contained in Article 41.3.1° of the Constitution,<sup>29</sup> particularly in the context of a marriage that had survived the transition of gender. The third aspect of critique was the lack of provision for would-be applicants under the age of 18 years. Given that the majority of schools in Ireland remain single-sex, the impact that lack of recognition of preferred gender could have on access to education was a particular concern, especially in the context of children with intersex variations.<sup>30</sup>

It took some time following the publication of the GRAG report before Government-sponsored legislation emerged.<sup>31</sup> In the meantime, in the first half of 2013, two different Private Members Bills were presented on the floors of the Oireachtas on the matter. Aonghus Ó Snodaigh introduced the Gender Recognition Bill 2013 (Ó Snodaigh's Bill) in the Dáil on 22 May 2013 and Katherine Zappone introduced the Legal Recognition of Gender Bill 2013 (Zappone's Bill), in the Seanad on 27 June 2013. Inspiring both these legislative schemes was the recently enacted Argentinian Gender Identity Act 2012, which had introduced a simple administrative system of gender recognition that was based on self-declaration by

<sup>25</sup> Gender Recognition Advisory Group, *Report of the Gender Recognition Advisory Group* (Dublin, Stationery Office, 2011).

<sup>26</sup> Council of Europe Commissioner for Human Rights, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (Strasbourg, Council of Europe Publishing, 2011); *Yogyakarta Principles on Sexual Orientation and Gender Identity* (2007) <https://yogyakartaprinciples.org/>.

<sup>27</sup> 'Intersex' is an umbrella term for a variety of conditions where a person's body combines both male and female biological traits, or where the body does not develop along typical male or female lines.

<sup>28</sup> Gender Identity Disorder is defined in the Diagnostic and Statistical Manual of Mental Disorders (Edition 4). One of the diagnostic criteria is that the patient cannot have a physical intersex condition and experience gender identity disorder. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edn (Text Revision) (American Psychiatric Publishing, 2000).

<sup>29</sup> T Ní Mhuirthile, 'Legal Recognition of Preferred Gender Identity in Ireland: An Analysis of Proposed Legislation' in E Kiely, and M Leane (eds), *Sexualities in Irish Society: A Reader* (Dublin, Orpen Press, 2014) 150–52.

<sup>30</sup> See *S v An Bord Uchtála*, Unreported, High Court, Sheehan J, 9 December 2009. This case was a judicial review of the refusal of the Adoption Board to amend the gender marker of an intersex child on the Register of Intercountry Adoptions. The High Court granted the amendment in an ex tempore judgment. For analysis, see T Ní Mhuirthile, 'Building Bodies: A Legal History of Intersex in Ireland' in J Redmond et al (eds), *Sexual Politics in Ireland* (Newbridge, Irish Academic Press, 2014) 154.

<sup>31</sup> See T Ní Mhuirthile (ed), '5th Anniversary of Decision in *Foy v An tArd Chlaraitheoir* (No 2) [2007] IEHC 470' (Human Rights in Ireland, 9 October 2012) [www.humanrights.ie/civil-liberties/5th-anniversary-of-decision-in-foy-v-an-tard-chlaraitheoir-no-2-2007-iehc-470/](http://www.humanrights.ie/civil-liberties/5th-anniversary-of-decision-in-foy-v-an-tard-chlaraitheoir-no-2-2007-iehc-470/).

the applicant as to their gender.<sup>32</sup> Neither Private Members' Bill required applicants to be single, both included some form of recognition for minors: Ó Snodaigh's Bill enabled child applicants to apply to the District Court for recognition in section 6, while Zappone's Bill had a process, for 16–17 year olds, which enabled parents and guardians to make an application on behalf of their child in section 2(4), and enabled children between the ages of 16 and 18 to make an application on their own initiatives without the need for parental consent in section 2(5).<sup>33</sup>

Shortly after the publication of these Bills, in July 2013, the Minister for Social Protection published the General Scheme of the Gender Recognition Bill 2013 (the 2013 General Scheme). The legislation proposed in this General Scheme mirrored that outlined in the GRAG report. It was among the first pieces of legislation to undergo pre-legislative consideration by the Joint Oireachtas Committee on Education and Social Protection (the Joint Committee) in October 2013. As part of this process, the Joint Committee held two days of public hearings where it heard from trans people and parents of trans children, the civil servants leading the drafting process, medical professionals, academic lawyers, NGOs and civic society groups. The ensuing report on the 2013 General Scheme was published in January 2014.<sup>34</sup>

In this report, the Joint Committee engaged with the critiques of the scheme outlined above. On the diagnosis issue, the Joint Committee was cognisant that requiring a diagnosis would amount to an official labelling of applicants as mentally disabled and recommended the wording be reconsidered to reduce the stigmatisation of applicants.<sup>35</sup> Regarding married applicants, the Joint Committee found 'that the fact that a person is in an existing marriage or a civil partnership should not prevent him or her from qualifying for a Gender Recognition Certificate, and urge[d] the Minister to revisit this issue.'<sup>36</sup> Finally, the Joint Committee recommended that the minimum age for applicants be reduced to 16 years for the grant of a Gender Recognition Certificate and that measures should be put in place to address the day-to-day concerns of the under-16s.<sup>37</sup>

Six months later, in June 2014, the Minister published a Revised General Scheme of Gender Recognition Bill 2014 (the 2014 Revised Scheme).<sup>38</sup> That the Department had reconsidered the proposed approach to recognition in light of the Joint Committee's report was evident. While the Revised Scheme maintained the requirement that applicants be single,<sup>39</sup> it did propose changes on the other two contentious issues: diagnosis and age.

<sup>32</sup> An English translation of Argentina's gender identity law, as approved by the Senate of Argentina on 8 May 2012, is available on the Transgender Europe website; Transgender Europe, 'English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on May 8, 2012' [www.tgeu.org/argentina-gender-identity-law/](http://www.tgeu.org/argentina-gender-identity-law/).

<sup>33</sup> For an analysis of the Zappone Bill, see T Ní Mhuirthile and F Ryan, 'Ní Mhuirthile and Ryan on the Legal Recognition of Gender Bill 2013' (Human Rights in Ireland, 3 July 2013) [www.humanrights.ie/gender-sexuality-and-the-law/ni-mhuirthile-ryan-on-the-legal-recognition-of-gender-bill-2013/](http://www.humanrights.ie/gender-sexuality-and-the-law/ni-mhuirthile-ryan-on-the-legal-recognition-of-gender-bill-2013/).

<sup>34</sup> Joint Oireachtas Committee on Education and Social Protection, *Report on the General Scheme of a Gender Recognition Bill 2013* (Houses of the Oireachtas, 2014).

<sup>35</sup> *ibid.* 37.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> (Revised) General Scheme for Gender Recognition 2014 [www.welfare.ie/en/downloads/Revised-General-Scheme-of-the-Gender-Recognition-Bill-2014.pdf](http://www.welfare.ie/en/downloads/Revised-General-Scheme-of-the-Gender-Recognition-Bill-2014.pdf).

<sup>39</sup> *ibid.* Head 5.

Under the Revised Scheme, applicants would no longer need to supply evidence of diagnosis of GID; rather, they would submit supporting statements from two treating physicians. Head 7 of the Revised Scheme concerned applicants of less than 18 years of age. It proposed that those applicants aged 16 and 17 could apply to the Circuit Court for an exemption to the age criterion. Parents and guardians would be required to consent to the application. In addition, applicants would need to provide supporting statements from two medical professionals. There was no proposal contained in the Revised Scheme for children under 16 years of age. The Irish Human Rights and Equality Commission (the Commission) published a detailed analysis of the Revised Scheme.<sup>40</sup> While welcoming the revisions pertaining to trans young adults,<sup>41</sup> the Commission noted the limitation of the proposed legislation as regards persistent pathologisation, mandating marriage breakup, and the absence of provision for children under 16.

The Gender Recognition Bill 2014 ('2014 Bill') was finally published in December 2014 and introduced into the Seanad in January 2015. In the time between the publication of the Revised Scheme and the final text of the 2014 Bill, the scheme had undergone further mutation. In this iteration of the legislation, the medical evidentiary requirement had shifted once again, subtly but significantly. Now applicants would be required to present two supporting statements from medical practitioners 'following medical examination'. The insertions of these three words changed the emphasis of this evidence from a statement of support to what was termed on the floor of the House as 'diagnosis by any other name'.<sup>42</sup> The requirement for 'medical evaluation' was removed when the 2014 Bill came to Report Stage in the Seanad and the new text of section 10(1)(g) merely required medical certification.

On 25 May 2015, the Marriage Equality referendum was passed. Fortuitously, the 2014 Bill was still making its way through the Dáil, and the hope was that the requirement to be single would now be removed from the draft legislation. However, this hope was soon dashed and the Bill was enacted with the requirement for applicants to be single intact (as noted elsewhere in this volume, the result of the referendum was subject to legal challenge, see Chapter 5). Soon afterwards, however, section 24 of the Marriage Act 2015 amended the Gender Recognition Act 2015 to remove the requirement to be single. On a more positive note, the passage of the referendum did embolden the Government to omit a diagnosis requirement from the 2015 Act (although the referendum result did not specifically require this). Section 10 of the statute no longer requires any form of medical certification or support and, thus, the legislation adopts an approach to gender recognition based on a self-declaration model.

#### IV. Provisions of the Legislation

The Gender Recognition Act 2015 is revolutionary. It established a simple administrative system whereby applicants who are of at least 18 years of age can apply to the Minister

<sup>40</sup> Irish Human Rights and Equality Commission, *Observations on the Revised General Scheme of the Gender Recognition Bill 2014* (Irish Human Rights and Equality Commission, 2014).

<sup>41</sup> *ibid* 2–3.

<sup>42</sup> Sen David Norris, quoting Sara Philips, Chair of Transgender Equality Network Ireland, Seanad Debate, 3 February 2015, Vol 237, Col 7.

for Social Protection to have their preferred gender recognised for all legal purposes. The process is open to those whose births are registered in Ireland and who appear on either the register of births,<sup>43</sup> the adoption register,<sup>44</sup> foreign births register<sup>45</sup> or the register of intercountry adoptions.<sup>46</sup> People who are ordinarily resident in Ireland and whose births are either registered in accordance with the system of civil registration in their country of birth if there is one,<sup>47</sup> or whose birth is not so registered if there is no such system in their country of birth,<sup>48</sup> may also make an application under this process.

Section 10 of the 2015 Act sets out the evidentiary requirement which must be satisfied in support of such an application. Applicants must furnish the Minister with their name, PPS number and contact details;<sup>49</sup> the forename and surname by which they wish to be known;<sup>50</sup> proof of their identity;<sup>51</sup> proof of birth in accordance with the relevant system identified in section 9;<sup>52</sup> and non-nationals must provide proof that Ireland is their place of ordinary residence.<sup>53</sup> Finally, applicants must swear a statutory declaration that they have a settled and solemn intention of living permanently in the preferred gender;<sup>54</sup> understand the consequences of the application;<sup>55</sup> and make the application of their own free will.<sup>56</sup>

As discussed above, the 2015 Act makes provision for those aged 16 and 17 to make an application to the Circuit Court for an exemption on the lower age limit to enable them to apply to the Minister for recognition.<sup>57</sup> The application is not made directly by the person seeking recognition but rather by their 'next friend'.<sup>58</sup> In order to grant such an application, the Circuit Family Court must be satisfied that the child's parents or guardians consent to the application.<sup>59</sup> In addition an application must be accompanied by certification from the child's primary treating medical practitioner (understood in the legislation to be the endocrinologist or psychiatrist under whose care the applicant is being treated).<sup>60</sup> This certificate confirms that, in the professional medical opinion of the certifier, the young person is sufficiently mature to make an application for recognition;<sup>61</sup> understands the consequences of this decision;<sup>62</sup> makes the decision freely;<sup>63</sup> and has transitioned or is transitioning to the preferred gender.<sup>64</sup> A second endocrinologist or psychiatrist, who is not connected with

<sup>43</sup> Gender Recognition Act 2015, s 9(1)(a)(i).

<sup>44</sup> *ibid* s 9(1)(a)(ii).

<sup>45</sup> *ibid* s 9(1)(a)(iii).

<sup>46</sup> *ibid* s 9(1)(a)(iv).

<sup>47</sup> *ibid* s 9(1)(b)(i).

<sup>48</sup> *ibid* s 9(1)(b)(ii).

<sup>49</sup> *ibid* s 10(1)(a).

<sup>50</sup> *ibid* s 10(1)(b).

<sup>51</sup> *ibid* s 10(1)(c).

<sup>52</sup> *ibid* s 10(1)(d).

<sup>53</sup> *ibid* s 10(1)(e).

<sup>54</sup> *ibid* s 10(1)(f)(ii).

<sup>55</sup> *ibid* s 10(1)(f)(iii).

<sup>56</sup> *ibid* s 10(1)(f)(iv).

<sup>57</sup> *ibid* s 12.

<sup>58</sup> *ibid* s 12(2).

<sup>59</sup> *ibid* s 12(4)(a).

<sup>60</sup> *ibid* s 2.

<sup>61</sup> *ibid* s 12(4)(b)(i)(II)(A).

<sup>62</sup> *ibid* s 12(4)(b)(i)(II)(B).

<sup>63</sup> *ibid* s 12(4)(b)(i)(II)(C).

<sup>64</sup> *ibid* s 12(4)(b)(i)(II)(D).



the person seeking recognition, must also certify the same points.<sup>65</sup> The Court process is informal, *in camera* and an applicant will not be required to pay court costs.<sup>66</sup> The Court must make a determination based on the best interests of the child.<sup>67</sup> This includes making a determination to dispense with the consent of a parent or guardian in circumstances where that person cannot be identified or found, or where it would be unsafe for the child to seek them out.<sup>68</sup>

A Gender Recognition Certificate (GRC) attests the preferred name, gender and the date of birth of the individual who possesses it.<sup>69</sup> Henceforth this gender and name are those by which the bearer is legally known and they shall be treated as such for the remainder of their life.<sup>70</sup> In so doing it does not affect any action or responsibilities undertaken before recognition.<sup>71</sup> Thus, section 19 confirms that the fact that a person has been issued a GRC does not affect their status as mother or father of a child born prior to the date of issue of the certificate. Similarly, any entitlements arising under a will or other instrument are not negatively impacted upon.<sup>72</sup> Indeed, personal representatives and trustees are not permitted to make enquiries as to whether persons have been issued GRCs or whether such GRCs may have been revoked.<sup>73</sup> Where an expectation in relation to the disposal or devolution of property has been defeated as a result of a GRC being issued, the High Court may make any appropriate orders where it is satisfied that it is just to do so.<sup>74</sup> The only exception to this is in cases of gender-specific offences where that offence could only be committed or attempted by a person of the original gender.<sup>75</sup> The fact that the preferred gender has been recognised will not prevent the prosecution of such an offence. This echo of original gender persists in relation to both those who may commit or attempt such a gender-specific offence,<sup>76</sup> and those who may be the victim of a gender-specific offence.<sup>77</sup> For the elimination of doubt in this context, the 2015 Act confirms that a surgically constructed body part is the same as a body part that has not been surgically constructed.<sup>78</sup>

## V. Critiques of the Act

The 2015 Act has been broadly welcomed by the community it was intended primarily to serve. Transgender Equality Network Ireland (TENI) heralded its introduction as ‘an incredible day and a historic moment for the trans community in Ireland’.<sup>79</sup> Recalling

<sup>65</sup> *ibid* s 12(4)(b)(ii).

<sup>66</sup> *ibid* s 12(3).

<sup>67</sup> *ibid* s 12(6).

<sup>68</sup> *ibid* s 12(5).

<sup>69</sup> *ibid* s 13(1).

<sup>70</sup> *ibid* s 18(1).

<sup>71</sup> *ibid* s 18.

<sup>72</sup> *ibid* s 20.

<sup>73</sup> *ibid* s 21.

<sup>74</sup> *ibid* s 22.

<sup>75</sup> *ibid* s 23(1).

<sup>76</sup> *ibid* s 23(3)(a).

<sup>77</sup> *ibid* s 23(3)(b).

<sup>78</sup> *ibid* s 23(4).

<sup>79</sup> Press Release: ‘Trans People Finally Exist in the Eyes of the State’, Transgender Equality Network Ireland, 8 September 2015 [www.teni.ie/news-post.aspx?contentid=1421](http://www.teni.ie/news-post.aspx?contentid=1421).

the slow evolution of the legislation, Broden Giambrone, former CEO of TENI, noted that the introduction of the 2015 Act marked the end of Dr Lydia Foy's 22-year journey to be recognised. Calling the legislation compassionate, progressive and rights-affirming, Giambrone stated that adopting a self-declaration model was critical and 'marks an incredible shift in Irish society' towards protecting and honouring trans people.<sup>80</sup> However, Giambrone did not shy away from highlighting limitations within the legislative framework: 'There is still more work to be done to ensure that young, intersex and non-binary people will also be afforded rights.'<sup>81</sup>

Towards the end of the legislative process, the 2015 Act evolved quickly and dramatically. Between the publication of the final scheme in December 2014 and its enactment seven months later in July 2015, the process was de-pathologised entirely and medical gatekeepers were removed for adults. A limited process for the recognition of young people aged 16 and 17 years was introduced. The 2015 Act was passed with a requirement that applicants be single or divorced. However, as noted above, the passage of the Marriage Act 2015, 14 weeks later, removed this precondition from the legislative scheme.

Given the overhaul of the legislation in response to the Marriage Equality referendum, it seems particularly mean-spirited that the single requirement was maintained. Sharpe has suggested that homophobia is the unconscious subconscious of law.<sup>82</sup> While not an entirely relevant reflection on the 2015 Act as amended, enacting the 2015 Act with such single criterion to guard against potential same-sex (or seemingly same-sex) relationships suggests a latent legal heterophilia. That the scheme was not fully comprehensive was acknowledged during the legislative process. This is evidenced in the inclusion of a review of the Act as part of the scheme.<sup>83</sup> Introducing the review provision on the floor of the Seanad, Minister of State, Kevin Humphries TD (who had direct responsibility for the 2015 Act), stated that it was 'critical that the impact and effectiveness' of 'new and significant legislation such as this' be carefully assessed over time.<sup>84</sup>

In November 2017, the Minister for Employment Affairs and Social Protection, Regina Doherty TD, announced the establishment of a Group to review the 2015 Act.<sup>85</sup> The Group was charged with reporting back on the operation of the 2015 Act; arrangements for children aged 16 to 17 years; children aged under 16 years; non-binary people; and intersex people.<sup>86</sup> The Group invited submissions from the public on these points.<sup>87</sup> From a review of the submissions a number of points emerge.

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London, Cavendish Publishing, 2002); A Sharpe, *Foucault's Monsters and the Challenge of Law* (Abingdon, Routledge, 2010).

<sup>83</sup> Gender Recognition Act 2015, s 7.

<sup>84</sup> Minister Kevin Humphries, Seanad Debate, 5 March 2015, Vol 870 No 3.

<sup>85</sup> Press Release: 'Minister Doherty Announces Moninne Griffith as Chair of Gender Recognition Act Review Group' (3 November 2017) [www.welfare.ie/en/pressoffice/Pages/pa031117.aspx](http://www.welfare.ie/en/pressoffice/Pages/pa031117.aspx). [Note, the author of this chapter was appointed to this Group. At the time of writing, the Group has not yet reported to the Minister and thus the comments made are confined to those already in the public domain through the publication of the submissions that the Group received as part of the consultation process and are the opinion of the author who is not writing in the capacity as a member of the Group.]

<sup>86</sup> Press Release: 'Minister Doherty announces launch of Consultation Process under the Review of the Gender Recognition Act' (8 January 2018) [www.welfare.ie/en/pressoffice/Pages/pr080118.aspx](http://www.welfare.ie/en/pressoffice/Pages/pr080118.aspx).

<sup>87</sup> All submissions received can be viewed online at [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx).

## VI. General Operation of the Act

Recent publicly available figures indicate that, since the introduction of the 2015 Act, 295 people have sought and been granted recognition,<sup>88</sup> nine of whom availed of the exemption process for 16 and 17 year olds.<sup>89</sup> In general, the feedback from those who engage with the system identifies it as a simple, efficient and quick service, the average processing time for GRCs in Client Identity Services is two to three days.<sup>90</sup> The Department of Social Protection notes that one of the most important aspects of process applications relations is quality data management, noting that 'Confidentiality is a vital component'.<sup>91</sup> Yet, it is difficulties with confidentiality that comprise the majority of the critiques contained in submissions regarding the operation of the 2015 Act generally. These issues with confidentiality have arisen in two ways: pre-recognition information being available to officials post-recognition and requiring proof of identification that inherently serves to out the applicant's trans status permanently.

In relation to the first point, Sub036 (Submission 036 to the Group) explains that, when visiting the local office of the Department to obtain a new Public Services Card following recognition, the administrator behind the desk had access to the original birth certificate of the submitter, thus their status as trans was revealed.<sup>92</sup> According to Minister Regina Doherty, in response to a parliamentary question on this very point: 'Only a small number of specifically trained officers [who] process these [GRC] applications ... can access an individual's historical data after a Gender Recognition Certificate has been issued. System checks are in place to ensure that no other officers in the Department can access this data.'<sup>93</sup> Yet, the experience of the service user in Sub036 indicates that these system checks are not robust. Administrative 'echoes' of original sex undermines the confidentiality that was so important at the processing stage of the application and directly contradicts the policy of respecting privacy that purportedly underpins the entire gender recognition process.

The replacement birth certificate that a recognised person receives differs from original birth certificates in two ways. First, prior to 2002, the information on birth certificates was hand written and thus any certificate obtained of a birth registered prior to computerisation is a scan of the handwritten entry.<sup>94</sup> Therefore, when a replacement certificate is issued following a GRC, the information is typed rather than handwritten, which is unusual and

<sup>88</sup> Minister Regina Doherty, Written Answers to Parliamentary Question 578 to Minister for Employment Affairs and Social Protection (30 January 2018) [www.oireachtas.ie/en/debates/question/2018-01-30/578/?highlight%5B0%5D=gender&highlight%5B1%5D=recognition](http://www.oireachtas.ie/en/debates/question/2018-01-30/578/?highlight%5B0%5D=gender&highlight%5B1%5D=recognition).

<sup>89</sup> S Rogers, '230 "Gender Recognition Certificates" Issued Since 2015' *Irish Examiner* (Cork, 22 May 2017).

<sup>90</sup> Minister Leo Varadkar, Written Answers to Parliamentary Questions 269 and 270 to Minister for Social Protection (16 May 2017) [www.oireachtas.ie/en/debates/question/2017-05-16/269/?highlight%5B0%5D=gender&highlight%5B1%5D=recognition&highlight%5B2%5D=gender&highlight%5B3%5D=recognition](http://www.oireachtas.ie/en/debates/question/2017-05-16/269/?highlight%5B0%5D=gender&highlight%5B1%5D=recognition&highlight%5B2%5D=gender&highlight%5B3%5D=recognition).

<sup>91</sup> Department of Social Protection, *Annual Report for 2016 of the Gender Recognition Act 2015* (2016) 2, [www.welfare.ie/en/downloads/GRAAnnualReport2016.pdf](http://www.welfare.ie/en/downloads/GRAAnnualReport2016.pdf).

<sup>92</sup> Sub036, Submission 001-088, 22 [www.welfare.ie/en/downloads/Sub001-GRA2015.pdf](http://www.welfare.ie/en/downloads/Sub001-GRA2015.pdf).

<sup>93</sup> Minister Regina Doherty, Written Answers to Parliamentary Question 675 (10 October 2017) [www.oireachtas.ie/en/debates/question/2017-10-10/675/?highlight%5B0%5D=gender&highlight%5B1%5D=gender&highlight%5B2%5D=recognition](http://www.oireachtas.ie/en/debates/question/2017-10-10/675/?highlight%5B0%5D=gender&highlight%5B1%5D=gender&highlight%5B2%5D=recognition).

<sup>94</sup> The system was computerised in the early 2000s. Where a scan of the original entry was illegible, Part V of the Social Welfare (Miscellaneous Provisions) Act 2002 permitted that the relevant information be typed into the database.

may cause the holder of such a document to be asked questions that may lead towards a disclosure of their status as a recognised person. Second, all birth certificates issued carry a registration number. Replacement birth certificates issued do not have such a registration number. In their submission to the Group, FLAC reported anecdotal evidence of trans people experiencing difficulties resulting from this absence when interacting with the Gardaí, which resulted in disclosures of recognised status.<sup>95</sup>

Such inconsistencies in the appearance of documents create the type of encounter that the introduction of a process of gender recognition was intended to prevent. Furthermore, the existence of differences on the face of the two types of birth certificate is in violation of the privacy rights contained in Article 8 of the ECHR. Indeed, the text of the 2015 Act itself notes that the index linking the gender recognition register to the register of births is not open to public inspection and that ‘no information from that index shall be given to any person except by order of a court’.<sup>96</sup> Where the reissued birth certificate draws attention to the potential that information may be on this index, it may itself be ipso facto in violation of the respect for privacy in the 2015 Act. The right to privacy is best respected by ensuring that the documents supplied on foot of a GRC do not inherently require the recipients to out themselves.

This undermining is further exacerbated by the practice in Client Identity Services in relation to a name change as part of the application for a GRC. As discussed above, section 10(1)(b) of the 2015 Act requires that applicants inform the Minister of ‘the forename and surname by which he or she wishes to be known’. Applying the literal rule of legislative interpretation to this section suggests that the application for gender recognition would itself ground a name change. However, this is not how the section has been interpreted by the Department of Employment Affairs and Social Protection. According to its website, there are four methods by which a name change can be effected in Ireland: (1) by proof of two years’ use and repute; (2) following marriage or civil partnership on production of marriage/civil partnership certificate; (3) reverting to pre-marriage/pre-civil partnership name on production of court documentation or correspondence from a solicitor showing that a divorce/dissolution has been initiated; and (4) following enrolment of a deed poll in the Central Office of the High Court.<sup>97</sup> Where an applicant does not satisfy the use and repute requirement, the current system in operation requires that such an applicant must enrol a deed poll with the Office of the High Court. The Deed Poll Register is a public document and is freely accessible online.<sup>98</sup> A system purporting to place a premium on privacy that requires publication of the very information the system is designed to conceal as a precondition to accessing that system is flawed, contradictory and incompatible with the legislative requirements found in the establishing legislation.<sup>99</sup> Thus, practice within

<sup>95</sup> Free Legal Advice Centres, ‘Submission of FLAC to the Review Group on the Current Operation of the Gender Recognition Act 2015’ Sub089, 20 <https://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx> accessed 10 May 2018. See also Sub0013 [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx).

<sup>96</sup> Gender Recognition Act 2015, s 27, inserting s 30D in the Civil Registration Act 2004.

<sup>97</sup> Department of Employment Affairs and Social Protection, ‘Public Services Identity: Changing Your Name’ [www.welfare.ie/en/Pages/Public-Service-Identity.aspx](http://www.welfare.ie/en/Pages/Public-Service-Identity.aspx).

<sup>98</sup> Court Service Ireland, ‘Deed Poll’ [www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/075D7770C94358068025804B005C294B?opendocument&l=en#deed\\_poll\\_register](http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/075D7770C94358068025804B005C294B?opendocument&l=en#deed_poll_register).

<sup>99</sup> Gender Recognition Act 2015, s 27, inserting s 30D in the Civil Registration Act 2004.

the relevant section of the Department should be altered to interpret section 10(1)(b) as establishing a new, fifth, way to effect a name change in Ireland, ie on foot of an application for gender recognition.

## VII. Young People

The 2015 Act introduced a limited form of recognition for those under 18 years. As discussed above, this is based on parental consent, supporting statements from two medical practitioners and with the consent of the court to make an application in these exceptional circumstances (as this is in the best interests of the child, who is aged either 16 or 17).<sup>100</sup> The onerous obligations imposed upon those young people who can access recognition, and the absence of any process for young children, even in circumstances where their parents consent, have been the main causes for criticism of the 2015 Act.<sup>101</sup>

Many of the personal submissions made to the Group note the impact that these restrictions have on the lives of young people. Sub005 (Submission 005 to the Group) discusses having come out as trans aged 14 years and being regularly mis-gendered in visceral terms as ‘making my skin crawl with discomfort’.<sup>102</sup> A parent writing of behalf of their trans son noted that he feels like ‘God made a mistake’ by giving him the wrong body.<sup>103</sup>

That LGBTI+ children have the right to respect for their physical and psychological integrity, gender identity and emerging autonomy, was recently confirmed by the UN Committee on the Rights of the Child.<sup>104</sup> The age restriction of the current scheme and the fact that mature adolescents cannot initiate an application for recognition without their parents contravenes this obligation. Also implicated are the rights of children under Article 5 of the UN Convention on the Rights of the Child to exercise their rights under the direction and guidance of their parents in a manner consistent with their evolving capacities and for these parental responsibilities, rights and obligations to be respected by the State. These international obligations are confirmed by Article 42A of the Irish Constitution. In addition to violating the rights of children, the absence of provisions for young children also violates the rights of their parents under Articles 41 and 42 to make decisions on behalf of their children. The bar to interfere with such rights is set very high. Such interference is permissible only ‘in exceptional circumstances where parents ... fail in their duty towards their children.’<sup>105</sup> Sub023 and Sub042 (Submissions 023 and 042 to the Group) highlighted

<sup>100</sup> Gender Recognition Act, s 12.

<sup>101</sup> Department of Children and Youth Affairs, *LGBTI+ National Youth Strategy: Report of the Consultations with Young People in Ireland* (Department of Children and Youth Affairs, 2017) 34; Ombudsman for Children’s Office, *Department of Employment Affairs and Social Protection: Review of the Gender Recognition Act 2015. Submission by the Ombudsman for Children’s Office* (2018) [www.welfare.ie/en/downloads/Sub053B-GRA2015.pdf](http://www.welfare.ie/en/downloads/Sub053B-GRA2015.pdf); Children’s Rights Alliance, *Submission on the Review of the Gender Recognition Act 2015* (2018) [www.welfare.ie/en/downloads/Sub085-GRA2015.pdf](http://www.welfare.ie/en/downloads/Sub085-GRA2015.pdf).

<sup>102</sup> Sub005, [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx).

<sup>103</sup> Sub0023, [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx).

<sup>104</sup> UN Committee on the Rights of the Child, ‘General Comment No.20 On the Implementation of the Rights of the Child During Adolescence’ (6 December 2016) UN Doc No. CRC/C/GC/20, [33].

<sup>105</sup> Denham J (as she then was) *North Western Health Board v HW* [2001] IESC 90, [212].

the frustration parents feel in circumstances where they cannot achieve recognition of the preferred gender of their child.<sup>106</sup>

A further difficulty with the current scheme is the requirement to support an application for an exemption with certification of the child by two medical practitioners. The pool of potential practitioners who can provide such certification is small as it is confined to endocrinologists and psychiatrists.<sup>107</sup> Waiting lists for access to treating physicians are long and private care is costly. Therefore, some submissions noted that these factors operated as barriers to the exercise of the rights in the scheme.<sup>108</sup> The arguments noted earlier that access to legal rights should not be contingent upon engagement with medical practice are equally valid here in relation to children. This is strengthened by adoption, in 2015, of a 'Resolution on Discrimination Against Transgender People in Europe' by the Parliamentary Assembly of the Council of Europe, which states that recognition processes should be de-pathologised; based on self-determination; be quick, transparent and accessible and, as regards children, should place their best interests at the core.<sup>109</sup> In this context, the fact that issues relating to recognition of the preferred gender of children are central to the terms of reference of the Review Group is to be welcomed.

## VIII. Non-Binary People

As discussed at the beginning of this chapter, at present Ireland operates a binary understanding of sex/gender. One must be declared as either male or female in order to become *sui juris*. In the absence of recognition within this paradigm, the law is not capable of interacting with an individual. The limitations of such an understanding of gender is evident in the decision of the Brisbane Family Court in the case of *In the Marriage of C and D (falsely called C)*.<sup>110</sup> Here, the Australian court recognised that the husband was a person with an intersex variation. Therefore, being neither male nor female, the Court held that the husband had no right to marry anyone at all. Consequently, his marriage was a nullity. Similarly, people who assert an identity outside the male/female dyad are excluded from participation in society on that basis.

The right to recognition outside the gender binary has long been an implied aspect of the right to gender recognition generally. This was explicitly articulated in the recently updated Yogyakarta Principles Plus 10. According to Principle 31 on *The Right to Legal Recognition*, where states continue to register sex and gender, multiple gender markers should be made available.<sup>111</sup>

<sup>106</sup> Sub0023, Sub042 [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx).

<sup>107</sup> Gender Recognition Act 2-15, s 2.

<sup>108</sup> Sub013, Sub042, Sub044, Sub062, [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx).

<sup>109</sup> Parliamentary Assembly of the Council of Europe, 'Resolution 2048(2015) Discrimination Against Transgender People in Europe' (22 April 2015).

<sup>110</sup> *In the Marriage of C and D (falsely called C)* (1979) 35 FLR 340.

<sup>111</sup> The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles (2017) [www.yogyakartaprinciples.org/principles-en/yp10/](http://www.yogyakartaprinciples.org/principles-en/yp10/).

Many of the submissions received by the Review Group highlighted the detrimental impact that this lack of recognition has on the daily lives of non-binary people.<sup>112</sup> The introduction of a third gender marker is not novel. Many countries recognise non-binary people. Australia, Canada and Malta recognise third genders via a self-declaration administrative process.<sup>113</sup> Judicial determinations in both New South Wales and Germany have introduced non-binary recognition.<sup>114</sup> Thus, it is timely that the 2015 Act be amended to include recognition for non-binary people. This could be achieved by the introduction of a third gender marker. 'X' is a marker that has already achieved acceptance internationally and is recognised by the International Civil Aviation Authority. In addition, expanding the suite of honorifics to include a gender neutral 'Mx' would enable recognition of non-binary identities.<sup>115</sup>

## IX. Intersex

Advocacy for intersex rights has two aims: recognition of the preferred gender identity of people with intersex variations and ending non-consensual medicalisation of their bodies. The 2015 Act responds to the first of these needs in a limited manner. By ensuring that the scheme for persons over 18 years of age is de-pathologised, this enables adults with intersex variations to be recognised in their preferred gender. However, children with intersex variations are left in legal limbo. The High Court decision of Sheehan J, in *S v An Bord Uchtála*, acknowledged the need of such children for documentation that reflects the gender in which they are being raised.<sup>116</sup> Yet the current scheme does not make provision for children under 16 years of age. Where a significant number of schools in Ireland are single-sex, this can create difficulties with access to education and other rights.<sup>117</sup> The social expectation that all people will be either male or female contributes to the pressure that parents experience to permit interventions on the bodies of their children with intersex variations.<sup>118</sup> The failure

<sup>112</sup>In particular see submissions Sub017, Sub046, Sub047, Sub049; and Sub088.

<sup>113</sup>Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) [www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf](http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf); Government of Canada, *Request for a travel document with 'X' in the sex field – Adult*, (2017) [www.canada.ca/content/dam/ircc/migration/ircc/english/passport/forms/pdf/pptc633e.pdf](http://www.canada.ca/content/dam/ircc/migration/ircc/english/passport/forms/pdf/pptc633e.pdf); Y Pace, 'Malta Introduces 'X' on Passports, ID Cards and Work Permits' *Malta Today* (San Gwann, 5 September 2017) [www.maltatoday.com.mt/news/national/80228/malta\\_introduces\\_x\\_marker\\_on\\_passports\\_id\\_cards\\_and\\_work\\_permits#.WvjdH6QvzIV](http://www.maltatoday.com.mt/news/national/80228/malta_introduces_x_marker_on_passports_id_cards_and_work_permits#.WvjdH6QvzIV).

<sup>114</sup>L Brown and A Brown, 'High Court recognises that "sex" in NSW may be other than male or female' (Human Rights Law Centre, 2 April 2014) [www.hrlc.org.au/human-rights-case-summaries/high-court-recognises-that-sex-in-nsw-may-be-other-than-male-or-female/](http://www.hrlc.org.au/human-rights-case-summaries/high-court-recognises-that-sex-in-nsw-may-be-other-than-male-or-female/); Decision of the German Federal Constitutional Court 1 BvR 2019/16, 10 October 2017 [www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html).

<sup>115</sup>F Warfield and J Brady, 'Submission to Review of the Gender Recognition Act 2015' Sub051 [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx), p 4.

<sup>116</sup>*S v An Bord Uchtála*, Unreported High Court, December 2009.

<sup>117</sup>M O'Connor, *Sé/St Gender in Irish Education* (Department of Education, 2007).

<sup>118</sup>G Davis, *Contesting Intersex: The Dubious Diagnosis* (New York, New York University Press, 2015); A Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York, Basic Books, 2000); S Kessler, *Lessons from the Intersexed* (New Brunswick, Rutgers University Press, 1998); SE Preves, *Intersex and Identity: The Contested Self* (New Brunswick, Rutgers University Press, 2003); SE Sytsma (ed), *Ethics and Intersex* (Dordrecht, Springer, 2006).

of the 2015 Act to provide pathways to recognition for young children contributes to this pressure and fails to protect the bodily integrity rights of such children. This is something of which the Irish State should be cognisant. Increasingly, the treaty bodies of the United Nations are calling upon the Irish State to clarify exactly how it protects medically irreversible and unnecessary sex assignment surgeries on vulnerable intersex children.<sup>119</sup>

In October 2017, the Parliamentary Assembly of the Council of Europe adopted a resolution requiring states to introduce gender recognition processes for people with intersex variations, including children, which are simple and based on self-determination.<sup>120</sup> The scheme created under the 2015 Act in no way meets international legal obligations in this regard.

## X. Irish Citizens Whose Births are Registered in Northern Ireland

Under the Good Friday Agreement, all people born in Northern Ireland may choose to be identified as Irish or British citizens and may carry dual citizenship should they wish.<sup>121</sup> Thus, those born in Northern Ireland are entitled to all the rights of any other Irish citizen. However, due to the way that the 2015 Act is drafted, people born in Northern Ireland are excluded from making an application for a GRC.<sup>122</sup> Under section 9(1)(a), a person may make an application if their birth is registered in the register of births or the foreign births register or if their adoption is registered in the Adopted Children Register or the register of intercountry adoptions. Where a person was not born in the Irish State, but they are ordinarily resident in the State, they may also make an application for recognition under section 9(1)(b). People born in Northern Ireland will not have their births registered on the register of births in the Irish State. Section 27(2) of the Irish Nationality and Citizenship Act 1956, as amended,<sup>123</sup> identifies the births capable of being included in the foreign birth register as those occurring 'outside the island of Ireland'. People born in Northern Ireland, being already Irish citizens, do not require their births to be registered on the foreign births register to access citizenship and all its attendant rights. However, as the birth of a person born in Northern Ireland appears in neither the register of births nor the foreign births register, Irish citizens who were born, and continue to reside, in Northern Ireland are excluded from making applications for recognition under the 2015 Act. They satisfy neither the birth nor residence requirements for making an application.

<sup>119</sup> Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Ireland' (1 March 2016) UN Doc No. CRC/C/IRL/CO/3-4; Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland' (9 March 2017) UN Doc No CEDAW/C/IRL/CO/6-7.

<sup>120</sup> Parliamentary Assembly of the Council of Europe, 'Resolution 2191 (2017) Promoting the Human Rights of and Eliminating Discrimination Against Intersex People' (12 October 2017).

<sup>121</sup> The Northern Ireland Peace Agreement: The Agreement Reached in the Multi-Party Negotiations (10 April 1998) Article 1, Para VI, [www.taoiseach.gov.ie/attached\\_files/Pdf%20files/NIPeaceAgreement.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/NIPeaceAgreement.pdf).

<sup>122</sup> See Sub018 [www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx](http://www.welfare.ie/en/Pages/Review-of-the-Gender-Recognition-Act-2015.aspx).

<sup>123</sup> Irish Nationality and Citizenship Act 2001, s 7(b), amended s 27(2) so that the phrase 'birth outside Ireland' changed to 'birth outside the Island of Ireland' in order to ensure compliance with the Good Friday Agreement.



To ensure such citizens can access their right to gender recognition is a relatively simple matter. Inserting the words ‘whose birth is registered in Northern Ireland, proof of which is a document issued in accordance with the system of birth registration in that jurisdiction’ in section 9(1)(a) of the 2015 Act would ensure that people born in Northern Ireland, who do not live in the Republic, can access recognition.

Such recognition will necessarily have a limited effect. It will enable a recognised person to have a GRC and obtain a new Irish passport. It will not result in the issuing of a new birth certificate reflecting the preferred name and gender of the recognised person, as the Irish State has no competency to issue birth certificates for births not registered within the State. As the requirements under the 2004 Gender Recognition Act, which is in operation in Northern Ireland, are more invasive and restrictive than those in Ireland, it is unlikely that recognition within the Republic will result in recognition in Northern Ireland as the schemes are not equivalent.<sup>124</sup> Nonetheless, Northern Ireland born Irish citizens who reside north of the border may feel that recognition by the Irish State, however limited its practical use in Northern Ireland, is beneficial, and a citizenship right that they wish to exercise.

## XI. Conclusion

The 2015 Act is transformative; it introduced a mechanism that enables trans and intersex people who meet the legislative requirements to be recognised in their gender of preference. The scheme, based on a self-declaration model, is among the best in the world. It respects the rights and dignity of trans and intersex adults. However, there is still room for improvement.

Systems surrounding the administration of the 2015 Act need to be tightened to ensure that the privacy of applicants is maintained. The pathway to recognition for 16 and 17 year olds should be de-pathologised to ensure that it meets the obligations of international human rights law. Pathways to recognise young children under the age of 16 should be introduced. Such an extension of the scheme would ensure that children with intersex variations can avail of recognition. The scheme excludes those who identify outside a binary gender paradigm and those born in Northern Ireland from its ambit. To be compliant with the human rights obligations, the scheme in the 2015 Act should be broadened so that all who would wish to access the rights therein can be recognised as their true selves. As McKechnie J concluded his judgment in *Foy (No 2)*, ‘All persons by virtue of their being are so entitled’.<sup>125</sup>

<sup>124</sup> Gender Recognition Act 2004, s 2.

<sup>125</sup> *Foy v An tArd Chlaraitheoir & Ors (No 2)* [2007] IEHC 470, [118].

