A Comparative Analysis of Gender Recognition Laws:
A Research Report Conducted by Trinity FLAC in Association with TENI

TABLE OF CONTENTS

A. Introduction

> *"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."* [1]
>
> - McKechnie J.

In 1992, the European Court of Human Rights ('ECtHR') ruled that Article 8 of the European Convention on Human Rights[2] ('ECHR) had been violated due to the refusal of French authorities to amend the civil status register in accordance with the wishes of a trans woman.[3] The fact that her legal gender, and not her preferred gender, was stated on documents was held not to be compatible with the respect due to her private life. This case was a landmark one for the rights of LGBT* people as previous cases regarding Gender Recognition had not succeeded in the ECtHR.[4] However, the struggle of trans people to achieve full gender recognition continues.

The case of Christina Goodwin in the European Court of Human Rights and the subsequent case of Lydia Foy in Ireland were hailed as major breakthroughs. However, undoubtedly there are still major issues regarding gender recognition laws in Europe, and Ireland has not yet enacted legislation that sets out the law regarding Gender Recognition, even though the State was found to have breached its positive obligations under Article 8 of the ECHR in 2007. The proposed new law is flawed in various ways, however it also has some positive elements and its introduction should be celebrated as a step forward for the Trans community.

1. Discrimination faced by the Trans Community

The National Transgender Discrimination Survey described the problems faced by Transgender people in everyday life.[5] This survey questioned 6,450 Transgender people, making it the largest ever survey undertaken regarding Transgender people. It was completed by academics and Transgender rights activists in America. The report found that 41% of Transgender people had attempted suicide, compared with 1.6% of the general population. Transgender people were found to be living in extreme poverty as against the rest of the population. This is due to the likelihood of unemployment being twice as high for Transgender people. This greater likelihood is unsurprising since 90% of Transgender people have experience of harassment, discrimination or mistreatment at work due to their Transgender past. Worryingly, 16% of individuals who were Transgender had to resort to the underground illegal economy, for example, selling drugs in order to survive.

The knock-on effects of job loss faced by Transgender people were also described in the report. These included increased risks of incarceration, homelessness and of contracting HIV. 19% of respondents reported being discriminated against in housing as a result of their Transgender status and 53% reported being disrespected when looking for public accommodation. 22% reported being discriminated against by a government agency and 29% experienced police discrimination or disrespect. One surprising fact that came to light as a result of the survey is that Transgender people of colour generally feel the effects of discrimination much more strongly than people who are of a Caucasian ethnicity. Harassment

---

1 *Foy v An tArd-Chláraitheoir, Ireland and The Attorney General* [2007] IEHC 470.

2 Providing for the right to private and family life.

3 *B v France* [1992] 2 FLR 249.

4 *Rees v United Kingdom* (1986) 9 EHRR 56; *Cossey v United Kingdom*[1991] 2 FLR 492.

5 National Centre for Transgender Equality and the National Gay and Lesbian Task Force, *Injustice at Every Turn : A Report of the National Transgender Discrimination Survey* (Washington, 2011) http://endtransdiscrimination.org/report.html.

and discrimination were common when presenting official documents. 63% of those surveyed felt they had been the victims of a serious act of discrimination, affecting their quality of life. TENI has also completed a report recently on hate crimes against Transgender people in Ireland, entitled STAD: Stop Transphobia and Discrimination.[6] It found that 88% of Transgender people had experienced verbal insults at some point and 19% had experienced physical violence. 13% of people were victims of property damage due to their Transgender past. It is clear from these findings that discrimination is very common for Transgender people and through legal recognition of their Gender Identity the State can assist these individuals by sending out a clear message that Transphobia is unacceptable.

In February 2014, Amnesty released a report entitled "The State decides who I am: lack of legal gender recognition for Transgender people in Europe."[7] The report detailed how in Finland, Norway, Germany, Ireland Belgium, France and Denmark there are fundamental flaws in the way transgender people are treated with regards to their Gender Recognition in the law and on their official documents. The study also illustrated the problems faced by Transgender people in everyday life. One major problem faced by these people was the fact that their documentation often revealed the fact that their legal gender differed to that of their appearance and preferred gender. This leaves Transgender people open to discrimination and often unwanted attention, preventing them from ever truly forgetting the fact that they were born in a body that contradicts their true Gender Identity. The reports also describe how some people do not feel completely aligned to any one gender. For example in Belgium only 55% of people felt they could ascribe themselves wholly to one gender. States should take this into account when creating law regarding Gender Recognition, in order to respect the Gender Identity of these individuals.

People interviewed in the Amnesty report described ordeals when claiming social welfare, attempting to procure adequate housing, applying for jobs, travelling through airports and even travelling on public transport. They also described various ordeals that Transgender people have experienced, one example being in Greece in 2012 where dozens of Transgender people were arrested and forced to undergo testing for HIV. In many European countries, the report found that in order to have their gender legally changed they must undergo invasive surgery, for example in Finland where the surgery would also leave the Transgender person infertile. This forces young Transgender people to make a decision that will have unnecessarily adverse consequences later in life. In some countries there is a requirement for the person who wishes to change their legal gender to also get a divorce. This interferes with a person's private and family life and forces them to choose one aspect of themselves (their home life with their spouse and family) over another (their true gender identity). Transgender people often find it difficult to procure adequate healthcare, with the report finding that many doctors and psychologists were ill-equipped to deal with the needs of Transgender people. In some countries, Transgender people can only legally change their gender after a psychiatrist has successfully evaluated them.Without the approval of this psychiatrist, their whole application can be in jeopardy. Arguably the difficulties in legally changing gender in these countries is so insurmountable (need to undergo invasive surgery, sterilisation, wait period) that the right to express their true gender legally is only there in part, somewhat illusory in nature. Ireland should strive to succeed where these countries have failed and endeavour to protect the basic human rights of all those involved.

---

6 TENI, *STAD: Stop Transphobia and Discrimination Report* (Dublin, 2011) http://www.teni.ie/attachments/95628615-9aea-4abb-86f4-5687da0e7335.PDF.

7 Amnesty International, *The State decides who I am: lack of legal gender recognition for transgender people in Europe* (London, 2014) http://www.teni.ie/attachments/2b686f0f-76c0-4b94-a548-ec957ca4f7bd.PDF.

The report described the ordeal of one transgender young person who felt forced to leave his school because of discriminatory behaviour due to his Transgender past. The report detailed how a Transgender persons' documentation left them open to discrimination in an interview process as their Transgender past was exposed to the interviewer via the legal name, something that they had no control over. By ensuring that legal Gender Recognition is accessible and systemised, we can deter discrimination. In the Amnesty report one young person stated that for him, legal gender recognition was important in order to back up his gender identity in the eyes of others and ensure that people accept his true gender.

2. Outline and Aim of this Research Project

This project will focus on the current Irish position regarding Gender Recognition law, and consider the merits and demerits of the proposed Gender Recognition Bill. Comparative analysis will be conducted regarding the Gender Recognition laws in Argentina and Denmark, with the aim of deriving suggestions as to how the current Irish Bill can be improved and reformed. The overarching aim of this project is to suggest necessary improvements to the new Bill proposed in Ireland, and also to raise awareness of the problems faced by Transgender people in everyday life due to lack of legal recognition of their Gender Identity.

B. Ireland

1. Current Legal Position

(a) The Beginning of the Journey

In March 1993, Dr Lydia Foy, a transgender woman, applied to the Irish Registrar of Births, Deaths and Marriages for a new birth certificate to match her female gender. She had already changed her name by deed poll, and had been able to obtain a driving licence and a passport in her female name and gender. However, she wanted a birth certificate because they are commonly requested as proof of identity, and it would amount to official recognition of her status as a woman. By applying for a new birth certificate, Foy had taken the first tentative steps in what would become an arduous and protracted public interest campaign - one that would make her the face of transgender recognition in Ireland.

(b) High Court Proceedings

The Registrar's office denied her application. Four subsequent years of correspondence with the office proved futile, and eventually, represented by the Free Legal Advice Clinic (FLAC), Foy initiated legal proceedings in the High Court in April 1997.

The case was heard over fourteen days in October 2000. Foy argued that she was a woman both mentally and physically, and should be recognised as such. To this end, intimate aspects of her personal life were considered and detailed medical evidence was submitted. Foy argued that failure to recognise her acquired female gender by issuing her with a new birth certificate was in breach of her rights under the Constitution and the ECHR.

Judgment was reserved and eventually handed down in July 2002: her claim had been rejected. McKechnie J could find nothing in domestic law or in ECHR jurisprudence that would allow her to change the gender in which she had originally been registered.[8]

He considered himself bound by *Corbett v Corbett*,[9] a decision of the British High Court. In that case, Mr. Corbett had applied to annul his marriage to a transgender fashion model who had been born with male characteristics but had undergone surgery to give him all the external characteristics of a female. She had been issued with a national health card and passport in her female gender. Mr Corbett argued that she was still male. The judge held that it is the biological sex of a person that is relevant for the purposes of marriage, and that is

8 *Foy v An tArd Chlaraitheoir* [2002] IEHC 116.

9 [1971] 2 All ER 33.

determined at birth by purely physical and biological criteria, like sexual organs and chromosomes, as opposed to psychological factors, the individual's own perceived gender identity and the effects of gender reassignment surgery. Thus, it was held that a post-operative transsexual could not marry someone of the sex in which he or she was born, and the marriage was annulled.

Despite upholding *Corbett* and rejecting Foy's claim, McKechnie J was sympathetic to her case. He acknowledged that lack of official recognition gave rise to immense suffering for transgender persons and their families, noting the Foy's claims are "of deep concern to any caring society." With this in mind, he called on the Irish Government "to urgently review the matter."

(c) *Goodwin v UK*

A mere two days after McKechnie J's judgment was handed down, the European Court of Human Rights unanimously held in *Christine Goodwin v United Kingdom* that the United Kingdom's failure to recognise gender reassignment for legal purposes infringed Article 8 and Article 12 of the European Convention of Human Rights.[10] In this landmark case, the European Court stated that there was now "clear and uncontested evidence of a continuing international trend in favour, not only of increased social acceptance of transsexuals, but of legal recognition of the new sexual identity of post-operative transsexuals."[11]

The Court was satisfied that the UK Government, which had refused to amend the birth certificates of two transgender women, was now an outlier in Europe, with most other Convention states providing for such recognition since the last time the European Court addressed the issue in *B v France*.

Goodwin gave Foy another chance. Under ECHR jurisprudence, Transgender persons now had a right to recognition in their preferred gender. If the UK had been branded an outlier amongst Convention states, then Ireland was clearly included in this regard. Its governmental attitude and legislation mirrored that of the UK, and so was arguably also in breach of the ECHR.[12]

(d) The 2003 Act

Foy appealed McKechnie J's decision, but at the time, European Court decisions were only binding if given in a case against Ireland. However, the European Convention of Human Rights Act was passed in 2003 – modelled on the UK's Human Rights Act 1998, this brought the Convention into Irish law more directly and allowed people to vindicate their human rights domestically. Section 3 of the Act stipulated that organs of the State were obliged to comply with the ECHR. Where such bodies were prevented from complying by Irish law, the High Court could grant a declaration of incompatibility with the ECHR. The Taoiseach would then be obliged to report the decision to the Oireachtas, and the Government would have to decide how to respond. If nothing was done, it would be open to the applicant to rely on the declaration of incompatibility and complain to the European Court in Strasbourg.

(e) Second High Court Case

Foy issued new proceedings in January 2006, this time seeking, *inter alia*, a declaration of incompatibility under the 2003 Act. Not only was this new legislation being used to push for gender recognition rights; its scope and potential as a protective mechanism were also being tested. The new application came before the High Court in April 2007, some ten years after her initial legal challenge. Both sides agreed to ask McKechnie J to hear it again. Foy relied chiefly on the 2003 Act and *Goodwin*, but also referred in her submissions to other decisions

10 *Goodwin v United Kingdom* [2002] 35 EHRR 18.

11 [2002] 35 EHRR 447, at [85].

12 The UK Government responded quickly to the *Goodwin* decision: their Gender Recognition Act 2004 was introduced within two years of that judgment and provided for full legal recognition of transgender persons.

of Strasbourg and common law countries like the US, New Zealand and the UK that were favourable to transgender persons' recognition rights. She sought to demonstrate that there was a growing trend towards transgender recognition in Europe and abroad.
In October 2007, judgment was handed down. McKechnie J rejected the arguments on constitutional and administrative law grounds, but held that *Goodwin* "changed dramatically and irreversibly the position of transsexuals under the Convention". He held that Ireland had breached Foy's Article 8 rights to respect for private and family life by refusing to supply her with a new birth certificate. Noting that the State had taken no heed of his call for urgent action in 2002, McKechnie J did little to mask his frustration with its inertia:

> It is very difficult to see how this Court, even still allowing for some "margin of appreciation," in this sensitive and difficult area, could now exercise further restraint, grant even more indulgence, and afford yet even more tolerance to this State … [I]n my humble opinion, this Court cannot with any degree of integrity, do so. Consequently I must conclude that by reason of the absence of any provision which would enable the acquired identity of Dr Foy to be legally recognised in this jurisdiction, the respondent State is in breach of its positive obligations under article 8 of the convention.

As no remedy was available under Irish law, McKechnie J declared, pursuant to section 5(1) of the ECHR Act 2003, that the relevant sections of the Civil Registration Act 2004 were incompatible with the Convention. This was the first declaration of incompatibility to be granted in Ireland. Adding that in regard to this issue "Ireland as of now is very much isolated within the member states of the Council of Europe," he made it clear that he expected the Government to respond to the declaration.

(f) Aftermath and Lobbying

The Government appealed to the Supreme Court, putting a stay on the operation of the declaration of incompatibility. Faced with a possible wait of up to four years for a hearing in the Supreme Court, FLAC began to lobby and campaign to get the State to drop its appeal. At this point, numerous human rights groups had taken an interest in the case. The Transgender Equality Network had found
In April 2008, the Council of Europe Human Rights Commissioner, Thomas Hammarberg, welcomed the Foy decision. He called on the Government to "change the law on birth registration in such a way that Transgender persons can obtain a birth certificate reflecting their actual gender."
Three months later, the UN Human Rights Committee, which monitors states' compliance with the International Covenant on Civil and Political Rights, issued its Concluding Observations on a report by Ireland about its human rights record. It also called for recognition for trans persons in Ireland in no uncertain terms: "The State party should also recognise the right of Transgender persons to a change of gender by permitting the issuance of new birth certificates"
In the meantime, earlier in 2008, a new Passports Act had been passed which provided for the issue to transgender persons of passports in their acquired gender, giving rise to a situation where a person could have a passport showing one gender and a birth certificate showing the opposite gender
The Transgender Equality Network Ireland had begun to find its voice at this point too.
International pressure mounted. In October 2009 the then Government committed itself to introducing Gender Recognition legislation in its "Renewed Programme for Government."[13]
In June 2010 the Irish Government withdrew its appeal against the declaration of incompatibility, which became final. A new Government was elected in February 2011, and

13 Department of An Taoiseach: Renewed Programme for Government, 10 October 2009, page 19.

promised to bring in Gender Recognition legislation as a priority. By now Ireland was the only state in the EU that made no provision for recognising Transgender persons. In November 2012, Nils Muiznieks, the new Human Rights Commissioner, wrote to the new Government calling for legal change, saying: "five years of non-implementation of the High Court's judgment finding Ireland in breach of the ECHR sends a very negative message to society at large."

When no legislation had been introduced by 2013, twenty years since Foy had first requested a new birth certificate, she issued new legal proceedings, once again represented by FLAC. This time she sought to enforce the 2007 judgment by compelling the State to introduce the requisite legislation, or to have the court declare that the ECHR Act 2003, intended to incorporate the ECHR, is simply incapable of providing an effective remedy for Convention breaches.

After two Private Members' Bills had been proposed in the Irish Parliament, Minister for Social Protection Joan Burton finally published heads of a Gender Recognition Bill in July 2013. Foy's new action was settled on the basis of the Government's "firm intention" to enact the necessary laws "as soon as possible in 2015". That Bill and its implications will be considered below.

(g) Conclusion

In the meantime, Lydia Foy has still not received an amended birth certificate, twenty-two years after her initial application for one. Where a declaration of incompatibility has been made, Section 5 of the ECHR Act provides that a person whose rights have been infringed as a result of the incompatible legislation can apply to the Government for *ex gratia* compensation. In November 2014, she was awarded damages of about €50,000 from the State in compensation for suffering as a result of the State's continuing failure to enact the requisite laws.

The *Foy* case put the spotlight on transgender issues, both legal and in the wider media and has worked towards the advancement of transgender rights in law. *Foy* has also demonstrated the effectiveness of the ECHR Act 2003 as a human rights protection-mechanism that can fill gaps in our human rights provisions.

2. Gender Recognition Bill

(a) Outline of the Bill

Ireland is currently the only country in the EU that has no laws that provide for the legal recognition of Trans persons, or any law that contains provisions for trans people to transition to their preferred gender. The proposed Gender Recognition Bill is an attempt to amend this deficiency through the issuing of a gender recognition certificate by the Department of Social Protection.

This will allow a person's preferred gender to be recognised by the State, giving them, among other things, the right to marry or enter a civil partnership, and the right to receive a new birth certificate stating their preferred gender.

The substantive parts of the Bill address the lack of recognition given to those from the Transgender community, and addresses how this will be amended under the proposed Bill. Section 9 of the Bill outlines the requirements of those who can apply for a gender recognition certificate. The Bill, as it stands, compels a person seeking an amendment to their preferred gender to be single (not married or in a civil partnership) and must have a "settled and solemn intention" to live in their preferred gender for the rest of their life. They must also have a certificate from their primary treating medical practitioner to affirm that they are in the process of transitioning to their preferred gender. In Section 12, the procedure for the application to receive a gender recognition certificate is outlined for Transgender persons

who are sixteen or older, but younger than eighteen. It details that a young person must have parental or guardian consent, and must be assessed by a medical professional to have "attained a sufficient degree of maturity to make the decision to apply for gender recognition." They must also have a court order exempting them from the requirement of having reached the age of eighteen when applying for a gender recognition certificate. Speaking on the effects of the Bill, Minister of State at the Department of Social Protection Kevin Humphreys stated, "the arrangements provided for in this Bill have at their core a genuine commitment on the part of the Government to enabling Transgender persons to be recognised for all purposes in their preferred gender".

While this commitment is admirable, and the Government deserves credit for bringing forward this Bill, there are a number of key weaknesses that threaten to severely detriment those from the transgender community. More worryingly, many of these deficiencies are not present in comparable laws across the EU and beyond, and suggest that the Minster and the Department of Social Protection did not give adequate consideration to the issues at hand.

(b) Problems

(i) Age Requirement

One of the fundamental weaknesses with the Bill is the minimum age requirement for applying for a Gender Recognition certificate. As described above, while a Transgender person can apply for a court order to exempt them from the age requirement, this process is only effective upon turning sixteen. Even then, the process is rigorous, with the person being forced to get the opinion of two medical practitioners (one of their own usual practitioner, and the other from an independent doctor) to agree that they have reached sufficient maturity and that they fully understand the consequences of their decision. They must also have parental or guardian consent. While the issue of the need for medical affirmation will be addressed later, it is important here to note how difficult it will be for young people to effectively have their preferred gender recognised if aged sixteen, and impossible if below this arbitrary benchmark. It is clear that in our society, where most aspects of education, sports and activities are gendered, the inability of young Transgender and Intersex people to have their preferred gender recognised effectively excludes them from being able to engage in school life and other recreational activities that young Cisgender people are able to take for granted.

This issue has been repeatedly addressed as the Bill has progressed through the legislative process. The Ombudsman for Children addressed this issue as far back as October 2013, stating that if the proposed Bill, still in its embryonic form, failed to address the unique problems younger members of the transgender community faced, "the challenges already faced by Transgender young people will endure, perhaps sharpened by the fact that adults wishing to obtain recognition of their preferred gender will be able to do so."[14] The report warns that this will only add to the ignorance of the general public to the struggles faced by Transgender youths, and will undermine other positive developments in our society with regard to our treatment of the transgender community by public bodies, employers and schools.[15]

Indeed, the lack of recognition for young transgender people in school and sports communities, while an under-researched area, is still discussed by some academics as a very alienating issue. Jayne Caudwell has concluded, "Transgender does not always fit the traditional binary systems, which upholds both gender norms and dominant sport cultures. Sport and PE, as well as governance and policy of sport and PE, fails to recognise

---

14 Ombudsman for Children, *Advice of the Ombudman for Children on the General Scheme of the Gender Recognition Bill 2013* http://www.oco.ie/wp-content/uploads/2014/03/OCOAdviceonGenderRecognitionBill2013.pdf.

15 *Ibid*.

multiplicity and the wonderful messiness of gender and sexuality."[16] It can often be the case that young Transgender people cannot engage properly in sporting organisations due to confusion around perceptions of their gender. This is why the certainty provided for by the extension of the Gender Recognition Bill to those below the age of sixteen is of considerable importance to the physical and emotional well-being of Transgender young people.
On 5th March 2015, in the second stage of the Bill's passage through the Dail, a number of TDs expressed concern that the Bill failed to effectively recognise the problems faced by Transgender young people. For instance, Maureen O'Sullivan TD expressed her concern thusly:

> Under the Yogyakarta principles, 'gender identity' is defined as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth'.....One drawback relates to children under the age of 16, who are being denied the legal right to their gender identity even if they have parental support for that identity. I suggest this will lead to further stress, distress and marginalisation.

The Yogyakarta principles were published in 2007 to clarify the obligations of states surrounding the protection and provision of human rights on the basis of sexual orientation and gender identity.[17] There is a cogent argument to be made that in denying children below the age of sixteen the right to be recognised by their preferred gender, the Bill could be in contravention of these principles. The Bill may also face challenges under Article 8.1 of the European Convention of Human Rights, for similar reasons.
The Social Protection sub-committee put forward amendments to the Bill on 10 March 2015, focused mainly on removing any mention of a minimum age requirement before one can apply for a gender recognition certificate. They called for the deletion of large portions of the Bill, specifically those that made reference to any formal age requirement of individuals applying for a gender recognition certificate.[18]
There is a clear sense that to continue with the Bill in its current state would unfairly discriminate against transgender teenagers during the tumultuous period of puberty when gender and sexual identity arguably matter most.

ii) Single Status Requirement

An issue that we believe is also detrimental to the Bill's positive impact, and undermines any claim to be progressive, is the requirement that to apply for a gender recognition certificate, one must be divorced or single. We believe that this section of the Bill is flawed in its logic. Firstly, the Irish constitution is one that contains uncharacteristically robust protections and provisions for married couples and the family. Article 41(3)(1) states, "the State pledges itself to guard with special care the institution of marriage, on which family is founded, and to protect it against attack." The requirement, in section 9(2)(c) effectively acts as an attack on marriage, forcing its dissolution if either spouse decides to switch gender. This removes any possibility that a family in which one spouse switches gender could perhaps survive. While it is true that marriages often struggle to survive when one spouse reveals the intention to change their legally recognised gender, this isn't a foregone conclusion. Some therapists, like Sandra Sammons, argue, "each person may become more fully him/herself and may know

16 Jayne Caudwell, "[Transgender] Young Men: Gender subjectivities and the physically active body" (2012) 19 (4) *Sport Education and Society* 398, at 414.
17 Yogyakarta Principles http://www.yogyakartaprinciples.org/principles_en.pdf.
18 Seanad Éireann, *Committee Amendments to the Gender Recognition Bill* http://www.oireachtas.ie/documents/bills28/bills/2014/11614/b11614d-scn.pdf.

more fully the other person. This can lead to enhanced intimacy and a closer relationship."[19] The presumption that a marriage cannot survive one member applying for a gender recognition certificate is pessimistic at best, and unconstitutional at worst.

The government has attempted to address these concerns by claiming that, if the marriage equality referendum passes, this will effectively trump the obligation to get a divorce. This is because their current concern is that currently married applicants for a gender recognition certificate could continue in a same-sex marriage, something that would be currently untenable under Irish law. This is logically flawed, and the government should not be permitted to use a future referendum, not guaranteed to pass, to act as an excuse against flawed legislation.

Indeed, this clause in the bill seems directly at odds with the Yogyakarta Principle that states, "no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity". The Bill clearly contravenes this principal, making marriage an insurmountable hurdle to the obtaining of a gender recognition certificate, leaving the government in a position where this onerous standard is at odds with the expert consensus and with most international and European practice. For instance, Argentina, Uruguay, New Zealand and 15 European countries do not require a trans person to end their marriage or civil partnership in order to obtain legal recognition of their preferred gender.[20] Despite the July 2014 decision of the ECHR in *Hämäläinen v Finland*,[21] which effectively stated that there where a State, in this case Finland, proscribes that a marriage must be dissolved before they can gain legal recognition of their preferred gender, this is not in violation of the Transgender person's right to privacy and family life, we feel that established European practice places Ireland within a small group of countries whose laws remain regressive.

Indeed, while the claim in *Hämäläinen v Finland* failed, the comments in the minority judgment can be used to outline the reasons why the proposed Irish Gender Recognition Bill falls short by dictating that the applicant must be single. They stated, "while we acknowledge that the protection of the traditional family may be justified by certain moral concerns, we consider that the protection of morals does not provide sufficient justification for the restriction of the applicant's rights in this case." The minority strongly argued that they could not see any situation where it is justifiable to rely on social or moral concerns to prevent the applicant of a gender recognition bill having to remain single. They also referred to the problem that by enforcing this idea that applicants must be single, the government is reinforcing the stigma attached to those who are transgender: "we refer to the recent judgment of the Indian Supreme Court, which noted that society ill-treats Transgender individuals while "forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mind-set which we have to change." As one author has put it, society's problematic "yuck factor" concerning Transgender individuals is not a normative idea that should be supported by the law.[22]

It seems that while not currently in contravention of the ECHR, the proposed Bill is still vulnerable to the criticism that despite ending the long wait in Ireland for a gender recognition bill, it doesn't do enough to effectively advance the position of the Transgender community in Ireland, and is a bill with a scope that is much more limited than most European countries.

---

19 Sandra Sammons, "Can this Marriage be saved? Addressing male-to-female transgender issues in couples therapy" (2009) 24 (2) *Sexual and Relationship Therapy* 152, at 162.

20 Open Society Foundations, *Licence to Be Yourself* (New York, 2014), at 19 http://www.wpath.org/uploaded_files/140/files/license-to-be-yourself-20140501.pdf.

21 *Hämäläinen v Finland (2014)* (Application no. 37359/09).

22 *Ibid*.

(iii) Medical Practitioner Validation Requirement

Section 10(1) of the proposed Gender Recognition Bill (2014) stipulates a number of preemptory requirements. An applicant for a gender recognition certificate must fulfill all of these requirements to eligible for that certification. Section 10(1)(g) stipulates that applicants must furnish the Minister with a certificate in writing, from a medical practitioner, certifying (a) that he or she is the applicant's primary treating medical practitioner and (b) that in the professional medical opinion of the medical practitioner (i) the applicant has transitioned or is transitioning to his or her preferred gender, and (ii) the medical practitioner is satisfied that the applicant fully understands the consequences of his or her decision to live permanently in his or her preferred gender.

The Bill defines the term "medical practitioner" as "a medical practitioner who is for the time being registered in the register of medical practitioners" and "primary treating medical practitioner" as "a person's primary treating endocrinologist or psychiatrist in relation to the matter the subject of an application for a gender recognition certificate." "Psychiatrist" is defined as a "medical practitioner who is registered in the Specialist Division of the register of medical practitioners under the medical specialty of "Psychiatry" or under the medical specialty of "Child and Adolescent Psychiatry" and an "endocrinologist" is defined as a "medical practitioner who is registered in the Specialist Division of the register of medical practitioners under the medical specialty of "Endocrinology and Diabetes Mellitus."

Section 10(1)(g) is potentially problematic for a number of reasons. These issues can be classified as 'procedural' and 'substantive.'

Procedural

How Section 10(1)(g) should be interpreted is potentially unclear.

Firstly, it fails to define the relationship required between the applicant and their medical practitioner in substantive terms. Is this physician (a) the person who primarily deals with the applicant's case or is it (b) the most senior physician on the team? What happens in a situation where the applicant is seen by a number of physicians or where the applicant primarily deals with one physician and then another to a much smaller degree? Will physicians need to detail their relationship with the applicant or merely state that it exists? Moreover, transitioning is not a wholly medical endeavour and it does not follow a simple pattern of problem identification and solution like many medical situations. It can often be an interdisciplinary undertaking over a long period of time with numerous interactions with various persons and bodies. It requires specialist knowledge, can involve breaks, treatments carried out abroad or treatment with illicitly obtained drugs. Parties transitioning may not consider their situation to be medical in nature and the medical elements may be viewed as peripheral to the real issue. This means that applicants may not always have the kind of relationships with a medical practitioner envisioned by the bill and they will presumably be forced to attempt to create this relationship to qualify for recognition of their new gender. This begs the question of what level of contact is required to create this relationship - can a single visit suffice? While it may seem straightforward initially, the provision requires a relationship between two parties and merely describes who those parties are. It does not give any indication the substance of that relationship leaving it open to multiple interpretations and various applications.

On a superficial level this may seem like an unconvincing criticism. However, it presents a serious legal issue in that the legislation offers us a defined term, which is couched in vagueness. This has the potential to be extremely relevant in the administration of the clause and on appeals where applications are rejected for not meeting the requirements of section 10(1)(g). The Minister is empowered by Section 3 of the act to make regulations for its enforcement. This power to the office of the Minister for Social Protection does not give them any authority to redefine, expand upon or do violence to the defined terms of the Bill. The Minister's power cannot be interpreted as prescriptive as this is a legislative power (for

example, they cannot define what primary is or set time requirements). This, in turn, creates a situation where any clarifying regulation would be *ultra vires*[23] and the provision is perpetually unclear. This presents the problem of potentially inconsistent application of the provision. With no guidance, the Minister will required decide what constitutes an appropriate relationship on a case-by-case basis. This creates a risk of arbitrary decision making, unwritten or ad hoc rules not provided for in legislation and an anomalous system. The logical progression of requiring a relationship to credit a certification as legitimate is to offer some minimal guidance as to what that relationship is.

Substantive

Section 10(1)(g) requires applicants to seek the certification by a medical professional that they understand the ramifications of their decision to transition. The number of medical professionals qualified to make this certification is an extremely small fraction of physicians. This creates a potential issue wherein a successful transition that is legally recognised depends on a seal of approval from a medical professional. It is conceivable that issues may arise around the personal prejudices of individual physicians, and there may be language barriers, which would lead to misunderstanding that would not arise under a self-identification system. This represents a paternalistic incursion into the gender identity of the applicant by the State. This problem becomes magnified when there are only a small number of individuals who are qualified to certify a transition. A parallel concern is the fact that, since there is a small number of qualified physicians, this will create unnecessary work for a small number of health professionals, placing strain on limited health sector resources.

Moreover, couching this recognition in medical terms reinforces negative cultural biases that the LGBT community, particularly transgender individuals, are ill in some way. This inaccurately portrays transition as the fixing of some kind of disorder rather than the expression of an applicant's true identity and a vindication of who they are. This medical differentiation as abnormal connotes a problem, that LGBT people are less, and vindicates the position of those who seek to oppress sexual and gender minorities. It is arguable that such a step is regressive. The bill attempts to remove the stigma of mental illness and wrongness from gender transition but its emphasis on medicalisation undermines that effort.

The above begs the question as to why such a requirement is necessary. This Bill deals with adults - adults often make life-changing decisions in their day-to-day lives and do not routinely require medical certification that they are in their right mind making that decision. This criterion requires an anointed third party to effectively determine the authenticity of an individual's gender identity and places this decision-making in the hands of the physician. It ignores the fact that the people with the best understanding of their gender identity are themselves.

Also, transition seems to merely refer to the medical process of transitioning from one gender to another in a physical sense. This option is not available to all transgender persons for medical or financial reasons and some may not wish to pursue it at this time but this does not mean they have not transitioned to their true gender. The term is not defined in the act and this creates a grave risk of excluding and isolating members of the Trans community, effectively rendering them as second-class Transgender individuals. Physical transition is not the only type of meaningful transition for Trans individuals and this Bill fails those individuals.

(iv) Gender Binary Issue

The proposed Gender Recognition Bill fails to take into account people who do not fall into the parameters of the typical Heteronormative gender binary. Intersex individuals are classically defined as having both male and female sexual characteristics whereas

23 *Clarke v SDCC* [2006] 1 IEHC 84.

Genderqueer individuals define themselves neither as male or female. It actively excludes intersex and Genderqueer individuals from legal recognition in the same way that the current law excludes Trans individuals from legal recognition. It forces a number of individuals to live in a society, officially, as a gender they do not identify with. The very purpose of this bill was to do the opposite and those individuals will suffer every single problem that this bill was designed to combat. Genderqueer and the Intersex individuals themselves must grapple not only with the fact that their physical bodies, and sometimes also gender identities, do not fit neatly into our concepts of either 'man' or 'woman,' 'male' or 'female,' but also with potential stigma in the way others have treated them and their condition throughout their lives. This bill fails these individuals. number of countries such as Australia, Germany, Nepal, India, New Zealand, Pakistan and Thailand make legal provision for indeterminate or third genders. It is unfortunate that Ireland has not followed their example.

C. Argentina

1. Background/Lead-up to Legislation

Argentina's Gender Identity Law is considered the most progressive piece of transgender legislation in the world. Enacted in 2012, it paved the way for similar reform in countries such as Denmark and the Netherlands, based primarily on the principle of self-determination. In 2010 Argentina became a pioneer for LGBT rights in South America, becoming the first nation on the continent to legalise same sex marriage, and 10th in the world.

With the rise of LGBT activism in the 1970s, Argentina was home to the first gay rights group in South America, *Grupo Nuestro Mundo*. Since then, Argentine NGOs have been the driving force behind the socialisation of norms for sexual orientation rights since the 1970s. Though stifled for a brief period of dictatorship during the 1980s,[24] these advocacy groups flourished again from the 1990s onwards, adopting "a strategy combining casework and legislative lobbying to campaign for equal rights."[25]

As Argentina is a staunchly Catholic country, it is an excellent comparator to the Irish experience. A significant example is the campaign for same sex marriage. Though marriage equality was met by vehement opposition from the Cardinal Jorge Bergoglio, the Archbishop of Buenos Aires (who later became Pope Francis),[26] this opposition was overpowered by court-led activist change. Despite the conservative environment of Argentina, NGOs succeeded in planting the seeds for change by publicising normative statements on LGBT rights and campaigning for their legal recognition, through lobbying the government and initiating court cases involving discrimination laws.

Discontent from the Catholic Church did not cause much set back and the passing of same sex marriage laws in Argentina was welcomed by president, Cristina Fernández de Kirchner, who promoted it as a sign of less discriminatory social atmosphere of the country. This initial accomplishment paved the way for the granting Trans people the right to recognition of their identities.

The need to lobby the government for trans recognition was borne from a deep rooted marginalisation of trans people. This is particularly evident in two areas - health and education. The Gender Identity Law sought to remedy these societal issues by utilising legal reform as a tool for social change.

---

24 Stephen Born, "Con discriminacion y Repression No Hay Democracia: The Lesbian and Gay Movement in Argentina" in Corrals and Pecheny eds., *The Politics of Sexuality in Latin America*, at 86.

25 Christine Bonomo, "Case Studies in the Advancement of Sexual Orientation Rights and the Role of Developing International Legal Norms: Argentina and Brazil" 14 *Chicago Journal of International Law* 259.

26 Edward Pentin, "Cardinal Bergoglio Hits Out at Same-Sex Marriage" http://www.ncregister.com/blog/edward-pentin/cardinal_bergoglio_hits_out_at_same-sex_marriage.

Before the Gender Identity Law was enacted, it was reported that trans people in Argentina had a life expectancy as low as 32-35 years.[27] Trans people would avoid medical care out of shame, due to burdensome identification procedures in hospitals. Thus, many would not seek treatment for poor health, leading to disastrous consequences. Risky bodily intervention practices at home were also common, until the Gender Identity Law provided free medical provision for such procedures as set out below.

Many Transgender people begin their transition during adolescence. However, a lack of confidentiality procedures resulted in many young Trans people being 'outed' unwillingly, and discriminated against in school. In response to such discrimination, a trans school called Mocha Celis (named after a trans person who was killed) opened at the beginning of 2012. It accepts both Trans and Non-Trans students with the aim of fostering understanding and respect between pupils, however it only enrols less than 30 students.[28] This solution lacked visibility - and so more concrete, long term change was needed. This resulted in the Gender Identity Law enshrining a confidentiality guarantee as set out below.

The Argentine LGBT Federation (FALGBT) and the ATTA (*Asociación de Travestis, Transexuales y Transgéneros de Argentina)* were at the forefront of the campaign for trans rights, which invoked a multi-faceted approach to change as they:

- launched a media campaign to raise awareness of the proposed law and garner public support. The campaign emphasised the recognition of gender identity without the need of medicalisation and the subsequent involvement of psychiatric or surgical procedures.
- utilised the example of the high-profile case of popular Argentine comedian Florencia Trinidad, who won her court case to get her documents changed to reflect her true identity.[29]
- played a central role in shaping the legislation[30] by participating in the congressional debates on the issue.[31]

The result was the Gender Identity Law, which has been described by transgender advocates internationally as "cutting edge".[32] The measure passed with more ease than the same sex marriage law, which highlights how societal norms in Argentina are rapidly progressing. It passed unanimously on a 55-0 vote.[33] President Fernández de Kirchner welcomed the new law as a "new standard" in safeguarding minority rights.[34]

The Gender Identity Law has made great strides in eliminating the fear of discrimination in the transgender community and bolstering the autonomy of the individual through solidification of the right self-determine one's own identity. It came into effect on 4 June 2012.

2. Gender Identity Law

(a) Outline

There are three substantive rights enshrined in the Gender Identity Law:

---

27 Celina Andreassi, "Transsexuals: Democracy's Forgotten" http://www.argentinaindependent.com/socialissues/humanrights/transsexuals-democracys-forgotten/.

28 *Ibid*.

29 Marcela Valente, "Argentina: Progress in the Fight for Gender Equality" http://www.ipsnews.net/2011/02/argentina-progress-in-the-fight-for-gender-identity/.

30 Note how TENI emulated this approach by getting involved in the drafting process in Ireland.

31 Flavia Dzodan, "Argentina's Big Step Towards True Sexual Equality" http://www.theguardian.com/commentisfree/2011/sep/02/argentina-sexual-equality-trans-people.

32 Emily Schmall, "Transgender Advocates Hail Law Easing Rules in Argentina" *New York Times*, May 25 2012.

33 12 members of parliament declared themselves absent and 1 abstained.

34 David Austin, "Sexual Orientation and Gender Identity" (2013) 47(1) *International Lawyer*.

- Right to Gender Identity;
- Right to Free Personal Development;
- Right to Dignified Treatment;

There are also procedural mechanisms contained therein to facilitate the full realisation of one's gender identity.

(i) Right to Gender Identity

Gender identity is defined as follows:

> [T]he internal and individual way in which gender is perceived by persons, that can correspond or not to the gender assigned at birth, inkling the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological, surgical or other means, provided it is **freely chosen**. It also includes other expressions of gender such as dress, ways of speaking and gestures.[35]

This definition of gender identity is significant, as it encompasses the concepts of self-determination, free choice, freedom of expression and dignity for both Cisgendered and transgendered persons. it has been argued that it is still very binary, however it is submitted that self-determination allows for fluidity of gender and intersexuality.[36]

Under the umbrella of the Right to Gender Identity the follow rights are protected:

- The recognition of one's gender identity,
- Free development of one's person according to gender identity,
- Treatment according to one's gender identity, particularly on documentation.[37]

(ii) Right to Free Personal Development

This is the right to adjust one's body, surgically or otherwise, to one's **self-perceived** gender identity without requiring any authorisation from medical, judicial or administrative bodies. It removes any need to prove the will to have a **total or partial** reassignment in order to access hormonal treatment. (Note the added bold to highlight the support this provision has for intersexuality.) The only requirement to undergo any modifying treatment is informed consent of the applicants themselves. The legislation enshrines a guarantee to free healthcare to the end of developing one's gender identity regardless of the provider. This includes a right to free gender reassignment surgery. Whether one utilises state, private or trade union run health insurance systems, it will be free.[38]

(iii) Right to Dignified Treatment

This is a mandate that everyone, in both the public and private spheres, must respect the gender identity adopted by the individual.[39] The right to dignified treatment leads to the prohibition of any future law enforcing a narrow access to the rights set out in the Act. "Every norm, emulation or procedure must respect the human right to gender identity."[40]

Note this may imply anti-discrimination protection, however there is no explicit anti-discrimination laws on Transphobia or Homophobia grounds in Argentina, which is a point of contention for critics.

(iv) Procedural rights

35 Article 2, English translation of *Ley de Identidad de Género* aka The Gender Identity Law https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf.

36 TENI agree with this interpretation.

37 *Ibid*., Article 1

38 *Ibid*., Article 11

39 *Ibid*., Article 12

40 *Ibid*., Article 13

The legislation lays down the requisite steps to allow full realisation of rights on a procedural basis. It is open to all persons to request a change to their first name and listed gender to reflect their true gender whenever they want.[41] Thus it is evident that the provisions of the Gender Identity Law are easily accessible as there are no barriers to changing one's gender in Argentina. The only conditions needed to validate a request are that the applicant must be over 18, and must provide to the National Bureau of Vital Statistics details of their new first name and a picture to ensure consistent amendment of birth certificate, public records, and issue of a new identity card.[42]

Argentina does not forbid applicants under the age of 18,[43] however there are special procedures in place and more steps to fulfill if the applicant is a minor. Special procedures include the need for the minor to request gender recognition through legal representatives. If lawyers refuse, the application will go to court and judges will consider the capacity of the child. Ensuring the "best interests of the child" is the principle at the core of these extra requirements.[44] The age requirement of the Gender Identity Law strikes the right balance between the best interests of the child without being overly paternalistic, and should the court refuse the application, solace can be found in the complete freedom to utilise the legislation once the person reaches the age of 18.

Once these requirements are met a new birth certificate and a new identity card will be issued incorporating said changes.[45] It is a quick and easily accessible process. Any reference to the Gender Identity Law in the amended documents is forbidden. This provision ensures utmost protection and dignity of the individual. The amendment to their identity will not affect the rights and obligations of person registered under their previous name, or alter any familial ties such as adoption or marriage. The fact that their national identity number remains the same on their documents ensures this.[46] The Gender Identity Law enshrines a strong confidentiality clause, which respects the individual's right to privacy. Only those authorised by the document holder or who have written and well-founded judicial authorisation can request access to the person's original birth certificate. An exception to the confidentiality rule is that the Statistical Bureau may notify other public bodies e.g. the electoral registry of the amendment to the birth certificate.[47] Second amendments to one's documents under the Gender Identity Law can only be made with judicial authorisation.[48]

(b) Positive Elements

This law has been hailed as the "most progressive gender identity law in history"[49] and contains many positive aspects for the Argentine transgender community such as: the self-determination aspect; the absence of a surgery requirement; the provisions made for transgender people under the age of 18; the right to personal development and dignified treatments for trans people; and the right to gender identity itself. The Oireachtas could take much inspiration and guidance from this Argentine statute when making changes to the Irish legislation on this matter.

---

41 *Ibid*., Article 3

42 *Ibid*., Article 4

43 Note a 6 year old successfully utilised this legislation to change her documents to reflect her true gender: Donna Bowater, "Six Year Old Becomes First Transgender Child to Change Identity" http://www.telegraph.co.uk/news/worldnews/southamerica/argentina/10339296/Six-year-old-becomes-first-transgender-child-in-Argentina-to-change-identity.html.

44 *Ibid*., Article 5

45 *Ibid*., Article 6

46 *Ibid*., Article 7

47 *Ibid*., Article 9

48 *Ibid*., Article 8

49 Transitioning Africa, "Celebrating Argentina" http://www.transitioningafrica.org/.

(i) Self-Determination

The Argentine statute provides that transgender people can use self- determination when deciding to apply for a different gender identity to the one assigned at birth. There is no need for any surgical treatment or for a diagnosis of a mental illness. More generally, there is no legal need for involvement by a doctor or physician.[50] TENI believes that the proposed 'Physician's Statement Requirement' in the Irish legislation is unfair and unworkable, as it means that the Irish Transgender community does not have the right to self-determine their preferred legal gender and will place many difficult obstacles in the way of gender identity recognition. The Argentine Bill removes the pathologisation (medicalisation of transgender identities e.g. gender dysphoria) of transgender people. This pathologisation is harmful to Trans communities as it suggests that Trans people cannot make their own decisions and that being Transgender is an illness.[51] The former Council of Europe Commissioner on Human Rights, Thomas Hammarberg, has said that "for gender recognition, an individual's opinion and experience as to their own gender identity must be given priority"[52] like it is in the Argentine statute. Thus, the Argentine Bill has clearly been far more effective in protecting human rights than the proposed Irish legislation. Even the HSE, the body responsible for providing the physician statements has endorsed "a gender recognition process which places the responsibility for self-declaration on the applicant rather than on the details of a medical certificate/diagnosis." [21] The HSE considers this process to be better and more practical and considers and works for transgender people of many different backgrounds.[53] These obstacles are removed in the Argentine Bill.

Some commentators on the Argentine legislation were concerned that no medical statements could give rise to abuse of the law. However, TENI reports that "there have been no reported cases of individuals either (a) being refused legal gender recognition or (b) being accused of having accessed recognition through fraud." [21] It is therefore clear that the Argentine Gender Identity Bill is extremely progressive in its emphasis on self-determination. The Bill also provides no need for transgender people to have to carry around certificates This right to self-determine recognises that transgender people know best what their own gender identity is and can adequately make their own decisions as well as recognising that being transgender is not an illness or disorder which removes much stigma regarding transgender communities. This provision is thus very respectful of transgender people and their rights and avoids the many issues and impractialities that arise when there is a need for physician intervention in the recognition of gender identity.

(ii) TENI Gender Recognition and Transgender Young People

The Argentine Bill makes provision for transgender minors and young people under 16, as they are able to apply for gender recognition using the consent of their family and a children's lawyer. This is a very positive element of the statute as research shows that most transgender people are aware of their gender identity from an extremely young age: "Evidence suggests that this expression usually takes place by age 2-3 years. The gender role may not necessarily be well defined by five years of age although, in some cases, it is evident earlier."[54]

Research tests conducted on young children displaying signs of being transgender shows that they quickly and often implicitly respond to their expressed gender.[55] This very early awareness points to strict age requirements as being unnecessary and unfair. Legal documents

50 TENI Press Release "Argentina leads World with Ground- Breaking Gender Identity Law" http://www.teni.ie/news-post.aspx?contentid=578.

51 TENI, *Policy Brief on the Medical Criteria in the Gender Recognition Bill 2014* (TENI, 2015) http://www.teni.ie/attachments/21529117-797e-4dc6-b009-3df66c29cc92.PDF.

52 TENI, *Legislation Based on Human and Civil Rights is Key* (TENI, 2014), at 13

53 TENI, "TENI addresses Joint Oireachtas Committee on Health and Children" July 4 2013.

54 Shuvo Ghosh, "Gender Identity" http://emedicine.medscape.com/article/917990-overview.

causing confusion and embarrassment, school enrolment, bullying, harassment and isolation are all instances that will be alleviated by the Argentine law. The Convention on the rights of the Child have many provisions on the right of children and young people to have their best interests taken into consideration at all times and that their identity must be respected and preserved. A key requirement of the Convention is that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary Consideration."[56]Article 8 also provides that the right of the child to preserve his or her identity is guaranteed by the Convention and that this must be respected and taken into consideration in the assessment of the child's best interests. The Committee on the Rights of the Child has also reinforced this view.[57] The Argentine statute makes provision for the rights of young people as well as recognising that research has shown that transgender children are aware of their expressed gender and identify with it from a very young age. This legislation is thus both respectful of and strongly informed by transgender rights and the relevant statistical evidence, as well as being respectful of the rights of young people in general as laid down by the Convention on the Rights of the Child.

(iii) Other Positive Elements of the Argentine Bill

The Argentine Bill contains many other positive and progressive elements. The Bill itself and the right to gender identity that it protects and vindicates demonstrates an understanding of the right of trans people to be able to identify with and live as their expressed gender, and the importance of this to trans communities.[58] This Bill demonstrates that the Argentine legislature is bringing recognition and inclusivity to the Argentine transgender community and allowing their integration into society, something that TENI have stated is incredibly important to transgender people.[59] This statute also provides for the right to free personal development of transgender people by removing the need for surgery or a medical opinion and thus allowing them to express their gender however they choose[60] and also provides the right to dignified treatment for transgender people; this means that transgender people in Argentina must always be treated with the same respect given to a non-transgender person and their chosen first name will be used on any official documents, clearly respecting the right of the people to live as transgender and to be treated as their desired gender.[61] The legislation always provides much choice to the person applying to change their gender identity officially, allowing them to provide their own preferred first name as well as choosing whether or not they wish to undergo any surgical or hormonal treatment - how they express their gender identity is entirely their choice.[62] This choice is respectful of the differing wishes of different transgender people and recognises that not all Trans people will wish to express their gender identity in the same way. This provision is also respectful of the fact that transgender people are completely capable of making their own decisions and do not

55 Association for Psychological Science, "Transgender kids show consistent gender identity across measures" http://www.eurekalert.org/pub_releases/2015-01/afps-tks012915.php.

56 Convention on the Rights of the Child, Article 3.1.

57 Committee on the Rights of the Child General Comment 14: The right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1), para. 55, 2013.

58 Argentina's Gender Identity Law, English Translation https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf Article 1.

59 TENI, "Legal Gender Recognition in Ireland" http://www.teni.ie/page.aspx?contentid=586.

60 Argentina's Gender Identity Law, English Translation Article 11 https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf.

61 *Ibid*., at Article 12.

62 *Ibid*., at Article 4.

need or want the State or medical professionals to make these important personal decisions for them. This legislation also explicitly states that it will not change the existing rights of applying for a legal change of gender identity and will not alter their existing rights as derived from their familial relationships.[63] This ensures that no one shall lose any of their existing personal rights through their application for a new legal gender identity and families will not have to undergo major change or divorce in order for a transgender member of the family to avail of a new legal gender identity. The Argentine Bill also promises complete confidentiality as regards any legal changes made to a person's documents – there shall be no publication of any changes made to legal documents of anyone applying for a new gender identity, meaning that publication of this change is completely the choice of the applicant themselves, thus respecting their privacy and personal choices.[64]

3. Conclusion

The Argentine Gender Identity Bill 2012 clearly earns its description as one of the most if not the most progressive Bill for transgender people in the world. As discussed above, there are many extremely positive provisions in the Bill for transgender people living in Argentina and this legislation demonstrates a thorough respect and understanding of transgender rights and it is clear that the legislators have listened to and taken into account the opinions of Transgender people, Transgender focus groups and general Transgender research. Ireland would do extremely well to look to Argentina for inspiration in amending our own Gender Recognition Bill.

D. Denmark

1. Background/Lead up to Legislation

Denmark is viewed as a very progressive society, at least when it comes to their attitude towards the LGBT community. They were the first nation to recognise same-sex partnerships. It was slow, however, to move towards equality for its trans citizens. The leading organisation in Denmark for the community (LGBT Denmark) only included the 'T' in its name in 2008.[65] In 2006 one incident of transphobic discrimination reached media headlines. The incident involved a trans person being refused service and told to leave a Bang & Olufsen hifi-store in the city of Viborg. There was significant media attention and the shop was sued.[66]

2. Outline

Per the Council of Europe:[67]

"On 11 June Denmark passed legislation which allows legal gender recognition for Transgender people based on their self-determination. Legal gender recognition is the process which allows transgender people to change their name and gendered information on official key documents in accordance with their gender identity. According to this legislation, the requirements for legal gender recognition are a minimum age of 18 years and a waiting period of six months. The process will require an applicant to request a change of legal gender and to confirm their application six months later. The process will not require any medical intervention such as sterilisation or hormone treatment, or an opinion or a diagnosis by an external expert."

63 *Ibid*., at Article 7.

64 *Ibid*., at Article 9.

65 Tobias Raun, "Denmark – a Transgender Paradise?" http://trikster.net/4/raun/1.html.

66 Danish Institute for Human Rights, *The Social Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in Denmark* (COWI, 2009) http://fra.europa.eu/sites/default/files/fra_uploads/370-FRA-hdgso-part2-NR_DK.pdf.

67 *Ibid*.

The last section of this repealed a previous law that did require sterilisation to occur. The minimum age barrier has come in for some criticism, as Denmark is the first European country and the second in the world, after Argentina, where regulation on legal gender recognition will be based on transgender persons' right to self-determination. The Netherlands and Ireland are European countries that look set to follow this example.

3. Positive Elements

The Folketing/Parliament approved Denmark's gender recognition legislation in June of 2014. There are some problems with legislation and it is not necessarily the gold standard in terms of vindicating the rights of trans people but it is certainly one of the better legal arrangements in the area of transgender rights in any country.

Previously, the Danish law in this area had been based on the outdated view that trans people are somehow sick and required diagnoses of psychiatric illness and sterilisation. The new legislation is a radical improvement and has made Denmark "one of the most progressive countries on the issue in the world."[68]

TENI, in their 2014 document on "the Physician's Statement Requirement in the Revised Scheme of Gender Recognition Bill 2014," had grave concerns in relation to the pathologisation of Trans people present in Ireland's proposed gender recognition legislation. They pointed to the new Danish legislation as an example to be followed. Denmark no longer requires any statement from a doctor to 'diagnose' somebody with a 'disorder' before they can be recognised as another gender, but allows a person seeking legal recognition of their new gender to essentially self-certify. There is no requirement for a surgical or medical procedure of any kind in order to obtain the certificate and have one's passport, birth certificate and other documents updated.

(c) Negative Elements

(i) Introduction

Denmark's new transgender laws, while an important step forward for the transgender community both in Denmark and around the world, are not without flaws. Paragraph 3, section 6 contains these provisos – "Allocation of a new social security number is conditioned by a submission of a written declaration stating that the application is based on a sense of belonging to the opposite gender. After a reflection period of six months from the application date, the applicant has to confirm the application in writing. It is furthermore a condition that the applicant is 18 years old at the time of submission of the application."[69] Both of these provisions are arguably in contravention of EU recommendations.[70] They work in conjunction to have the effect of undermining the right of a transgender person to self-determine their gender.

(ii) Reflection Period

The six month reflection period would appear to conflict with s.21 of the Recommendation of the Council of Ministers, quoted here in full:

> Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick,

68 Emine Saner, "Europe's Terrible Trans Rights Record: Will Denmark's New Law Spark Change?" http://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-denmark-new-law.

69 Motion to Amend the Act on the (Danish) Civil Registration System http://tgeu.org/sites/default/files/Denmark_Civil_Registry_law.pdf.

70 Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.

In Denmark, each social security card identifies gender, so transgender people whose gender is not yet legally changed may be forced into the exceedingly uncomfortable situation of having to 'out' themselves daily. Paris is set to solve this issue by introducing non-gendered ID cards for citizens. One Danish transgender man stated, "without the legal change you would have to be 'outed' all the time. So whenever you go to a public office or a bank, your CPR (gendered national identity number) will not be the same as you appear and you have to justify who you are. It made daily life very complicated."[71] The six-month waiting period cannot be said to be a 'quick, transparent and accessible way' of legally recognising gender and thus according transgender citizens dignity in everyday life. Transgender Europe explains, "gender recognition goes beyond being an administrative act: it is essential in order for many trans people to be able to live a life of dignity and respect."[72] From a practical perspective, the six month waiting period prevents legal recognition when it may be needed for travel or healthcare purposes, causing unnecessary delay and stress for the applicant. An administrative waiting period could be a valid reason for delay, although this should be reduced to the minimum possible delay in an issue that affects daily life in such an immediate way, but this is not the reason for the waiting period. The six month period is a reflective period, meant for contemplation and to ensure the applicant has fully considered the step they are about to take. This rationale fails to take into account the fact that an applicant will not lightly go through the process and will have already made their final decision before the initial application. Transgender people suffer discrimination that does not need to be prolonged by a waiting period that undermines their right of self-determination and reinforces the misconception that transgender people may be 'confused' about their gender. (TGEU)

(iii) Age Requirement

The age requirement is another flaw in the otherwise progressive legislation. Without legal recognition, transgender children and teenagers must endure obstacles in vital stages of their development, especially puberty. The considerable amount of research done on transgender experiences in early life contradicts the assumption that being transgender is a childhood phase to be outgrown. Many children manifest transgender tendencies in very early childhood and this continues throughout their development. In addition, focusing on the outcome of the adult the child will eventually become inevitably neglects the rights and needs of the child as they grow and mature.[73] It is vitally important for the mental health of children and their future mental health, to ensure that they receive proper and informed support at crucial stages in life. There are problems with schooling transgender children if there is no legal recognition. A same-sex school can refuse a child whom they perceive to be of the 'wrong' gender, even if the school is a perfect fit otherwise. As mentioned above, physical education can also be a difficult lesson time for the transgender child, with changing rooms posing several potential issues. This is what s.31 – "ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity" - and s.32, "providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing

71 Tom Lawson, "Denmark Becomes Second Country to Let Citizens Choose their Gender Without Having Surgery" http://www.yesmagazine.org/people-power/no-surgery-required-denmark-becomes-second-country-to-let-citizens-choose-their-gender.

72 TGEU, "Legal Gender Recognition" http://tgeu.org/issues/legal-gender-recognition/.

73 Karl Bryant, "Making Gender Identity Disorder of Childhood: Historical Lessons for Contemporary Debates" September 2006 3(3) *Sexuality Resarch and Social Policy*.

pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity" - of the Recommendation seek to address. Research conducted by Stephen Whittle in the UK revealed that "64% of natal females with a male identity reported experiencing some kind of harassment or bullying at school and 44% of natal males with a female identity experienced harassment or bullying at school."[74] This bullying often leads to absenteeism, with one survey respondent remembering, "in my first year I was sent to the headmaster's office and humiliated for refusing to wear a skirt. In the end I had no choice. I avoided going to school as much as I could get away with."[75] Legal recognition of the child's chosen gender would alleviate such challenges and further a general awareness and understanding of Transgenderism.

The earlier a child may receive sex-change hormone treatment, the more effective the results will be. Male-to-female transgender teenagers can avoid voice deepening and future extensive electrolysis, and female-to-male teenagers can mature without beginning menstruation or developing breasts. Yet, again, we see repeated the misconception of transgenderism as a phase or confusion by refusing to recognise a child's own testimony as a basis for legal recognition of their true gender identity. Stephen Whittle and Catherine Downs write that there is no clinical basis for refusing treatment because severe gender dysphoria is not susceptible to any treatment other than hormone replacement and gender reassignment.[76] Why refuse legal recognition, which would alleviate the struggles of the current transgender childhood and adolescence ?

(iv) Other Issues

In addition to these issues in the new legislation, Denmark has very restrictive naming laws. Parents are only allowed to choose from a list of 7000 names. 3000 are male names and 4000 are female names. First names are overwhelmingly gender indicative.[77] This reinforces the gender binary, making it more difficult for transitioning men and women to choose a name similar to their birth name, and restricting the options of those who may not have fully transitioned to choose gender neutral names if they so wish. Under previous law, transitioning adults could choose a gender neutral name while undergoing surgery, however this is not mentioned in the new legislation.

4. Conclusion

The problem that has arisen in the Irish context concerning the marriages of Trans people is not relevant to Denmark which has had marriage equality since 2012. Despite some faults, Denmark's legislation is arguably the best gender recognition legislation in Europe. Like Argentina, the principle upon which the legislation is based is the person's right to self-determination. There is no need for doctors or unnecessary hardship or difficulties and it is most unfortunate that the Irish government failed to take the opportunity to advance similarly progressive legislation and instead chose a much more restrictive approach.

---

74 Stephen Whittle, Lewis Turner and Maryam Al-Alami, "Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination" (The Equality Review, 2007) http://webarchive.nationalarchives.gov.uk/20100807034701/http:/archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/transgender.pdf.

75 *Ibid*.

76 Catherine Downs and Stephen Whittle, "Seeking a Gendered Adolescence: Legal and Ethical Problems of Puberty Suppression Among Adolescents with Gender Dysphoria" (Manchester Metropolitan University, 1998) http://www.antijen.org/rebuild/GA.htm.

77 Lizette Alvarez, "Pickled Baby's Name? Not so fast, in Denmark" http://www.nytimes.com/2004/10/08/world/europe/08iht-danes.html?_r=0

E. Conclusion and Proposals for Reform of the Bill

While the forthcoming Gender Recognition Bill has been hailed as a progressive step forward for the Irish trans community, it is hoped that the coming months will see a series of reforms along the lines of the Argentine Gender Identity Law, in order to fully secure the rights of trans people and end their persecution in Irish society. It is crucial that the pathologisation of trans people is stopped, and that their self-determination be given full respect.

Trinity FLAC would like to thank TENI and Shauna Stanley for their assistance with this project. We are also extremely grateful for the exceptional work of our legal researchers, without whom this project would not have been possible:

- *Paul Behan*
- *Emily Costello*
- *Conor Davis*
- *Niall Guinan*
- *Aisling Hourihane*
- *Dominic McGrath*
- *Kieran McNulty*
- *Zoe O'Reilly*
- *Caoilfhionn Sheil*
- *Shauna Stanley*
- *Caoimhe Stafford*

Caoimhe Stafford
Legal Research Officer 2014/2015
Trinity FLAC
flac@csc.tcd.ie
http://trinityflac.wordpress.com

Bibliography

Case Law

- *B v France* [1992] 2 FLR 249
- *Clarke v SDCC* [2006] 1 IEHC 84 (HC)
- *Corbett v Corbett* [1971] 2 All ER 33
- *Cossey v United Kingdom*[1991] 2 FLR 492
- *Foy v An tArd Chlaraitheoir* [2002] IEHC 116
- *Foy v An tArd-Chláraitheoir, Ireland and The Attorney General* [2007] IEHC 470
- *Goodwin v United Kingdom* [2002] 35 EHRR 18
- *Hämäläinen v Finland (2014)* (Application no. 37359/09).
- *Rees v United Kingdom* (1986) 9 EHRR 56

Legislation

- English translation of *Ley de Identidad de Género* aka The Gender Identity Law

  https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-

  law.pdf.
- Convention on the Rights of the Child
- Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on

  measures to combat discrimination on grounds of sexual orientation or gender

  identity.
- UK Gender Recognition Act 2004

Articles

- Lizette Alvarez, "Pickled Baby's Name? Not so fast, in Denmark"

  http://www.nytimes.com/2004/10/08/world/europe/08iht-danes.html?_r=0
- Celina Andreassi, "Transsexuals: Democracy's Forgotten"

  http://www.argentinaindependent.com/socialissues/humanrights/transsexuals-

  democracys-forgotten/
- David Austin, "Sexual Orientation and Gender Identity" (2013) 47(1) *International*

  Lawyer

- Christine Bonomo, “Case Studies in the Advancement of Sexual Orientation Rights and the Role of Developing International Legal Norms: Argentina and Brazil” 14 *Chicago Journal of International Law* 259
- Stephen Born, “Con discriminacion y Repression No Hay Democracia: The Lesbian and Gay Movement in Argentina” in Corrals and Pecheny eds., *The Politics of Sexuality in Latin America*
- Donna Bowater, “Six Year Old Becomes First Transgender Child to Change Identity” http://www.telegraph.co.uk/news/worldnews/southamerica/argentina/10339296/Six-year-old-becomes-first-transgender-child-in-Argentina-to-change-identity.html.
- Karl Bryant, “Making Gender Identity Disorder of Childhood: Historical Lessons for Contemporary Debates” September 2006 3(3) *Sexuality Resarch and Social Policy*.
- Jayne Caudwell, “[Transgender] Young Men: Gender subjectivities and the physically active body” (2012) 19 (4) *Sport Education and Society* 398
- Catherine Downs and Stephen Whittle, “Seeking a Gendered Adolescence: Legal and Ethical Problems of Puberty Suppression Among Adolescents with Gender Dysphoria” (Manchester Metropolitan University, 1998) http://www.antijen.org/rebuild/GA.htm.
- Flavia Dzodan, “Argentina’s Big Step Towards True Sexual Equality” http://www.theguardian.com/commentisfree/2011/sep/02/argentina-sexual-equality-trans-people.
- Shuvo Ghosh, “Gender Identity” http://emedicine.medscape.com/article/917990-overview.
- Tom Lawson, “Denmark Becomes Second Country to Let Citizens Choose their Gender Without Having Surgery” http://www.yesmagazine.org/people-power/no-surgery-required-denmark-becomes-second-country-to-let-citizens-choose-their-gender.
- Edward Pentin, “Cardinal Bergoglio Hits Out at Same-Sex Marriage” http://www.ncregister.com/blog/edward-pentin/cardinal_bergoglio_hits_out_at_same-sex_marriage
- Tobias Raun, “Denmark – a Transgender Paradise?” http://trikster.net/4/raun/1.html.

- Sandra Sammons, "Can this Marriage be saved? Addressing male-to-female transgender issues in couples therapy" (2009) 24 (2) *Sexual and Relationship Therapy* 152
- Emily Schmall, "Transgender Advocates Hail Law Easing Rules in Argentina" *New York Times*, May 25 2012
- Marcela Valente, "Argentina: Progress in the Fight for Gender Equality" http://www.ipsnews.net/2011/02/argentina-progress-in-the-fight-for-gender-identity/

Reports and Official Publications

- Amnesty International, *The State decides who I am: lack of legal gender recognition for transgender people in Europe* (London, 2014) http://www.teni.ie/attachments/2b686f0f-76c0-4b94-a548-ec957ca4f7bd.PDF
- Association for Psychological Science, "Transgender kids show consistent gender identity across measures" http://www.eurekalert.org/pub_releases/2015-01/afps-tks012915.php
- Committee on the Rights of the Child General Comment 14
- Danish Institute for Human Rights, *The Social Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in Denmark* (COWI, 2009) http://fra.europa.eu/sites/default/files/fra_uploads/370-FRA-hdgso-part2-NR_DK.pdf.
- Department of An Taoiseach: Renewed Programme for Government, 10 October 2009
- Motion to Amend the Act on the (Danish) Civil Registration System http://tgeu.org/sites/default/files/Denmark_Civil_Registry_law.pdf.
- National Centre for Transgender Equality and the National Gay and Lesbian Task Force, *Injustice at Every Turn : A Report of the National Transgender Discrimination Survey* (Washington, 2011) http://endtransdiscrimination.org/report.html.

- Ombudsman for Children, *Advice of the Ombudman for Children on the General Scheme of the Gender Recognition Bill 2013* http://www.oco.ie/wp-content/uploads/2014/03/OCOAdviceonGenderRecognitionBill2013.pdf.
- Open Society Foundations, *Licence to Be Yourself* (New York, 2014), at 19 http://www.wpath.org/uploaded_files/140/files/license-to-be-yourself-20140501.pdf.
- Seanad Éireann, *Committee Amendments to the Gender Recognition Bill* http://www.oireachtas.ie/documents/bills28/bills/2014/11614/b11614d-scn.pdf.
- TENI Press Release 'Argentina leads World with Ground- Breaking Gender Identity Law' http://www.teni.ie/news-post.aspx?contentid=578.
- TENI, "Legal Gender Recognition in Ireland" http://www.teni.ie/page.aspx?contentid=586.
- TENI, *Legislation Based on Human and Civil Rights is Key* (TENI, 2014)
- TENI, *Policy Brief on the Medical Criteria in the Gender Recognition Bill 2014* (TENI, 2015) http://www.teni.ie/attachments/21529117-797e-4dc6-b009-3df66c29cc92.PDF.
- TENI, *STAD: Stop Transphobia and Discrimination Report* (Dublin, 2011) http://www.teni.ie/attachments/95628615-9aea-4abb-86f4-5687da0e7335.PDF
- TENI, "TENI addresses Joint Oireachtas Committee on Health and Children" July 4 2013
- TGEU, "Legal Gender Recognition" http://tgeu.org/issues/legal-gender-recognition/.
- Transitioning Africa, "Celebrating Argentina" http://www.transitioningafrica.org/.
- Stephen Whittle, Lewis Turner and Maryam Al-Alami, "Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination" (The Equality Review, 2007) http://webarchive.nationalarchives.gov.uk/20100807034701/http:/archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/transgender.pdf.
- Yogyakarta Principles http://www.yogyakartaprinciples.org/principles_en.pdf.