

# **General Scheme of Gender Recognition Bill 2013**

**Submission by FLAC  
to Joint Oireachtas Committee on  
Education & Social Protection**

**September 2013**

## About FLAC

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all.

## FLAC Policy

Towards achieving its stated aims, FLAC produces policy papers on relevant issues to ensure that government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies drawing on its legal expertise and bringing in a social inclusion perspective.

You can download/read FLAC's policy papers at <http://www.flac.ie/publications/policy.html>

For **more information**, contact us at

FLAC,

13 Lower Dorset Street, Dublin 1

01-8873600 | [info@flac.ie](mailto:info@flac.ie) | [www.flac.ie](http://www.flac.ie) | [fb.me/flacireland](https://fb.me/flacireland) | [@flacireland](https://twitter.com/flacireland)

## **Introduction**

Free Legal Advice Centres (FLAC) is an independent legal NGO which provides legal advice without charge at centres across the State which are staffed by legal practitioners on a voluntary basis. FLAC also provides policy analysis, campaigns on issues of law reform and takes a limited number of strategic public interest legal cases which may help to change the law in its priority areas and establish or protect the rights of vulnerable and disadvantaged groups.

FLAC has represented transgender woman Dr Lydia Foy ever since she commenced legal proceedings in 1997 seeking formal recognition in her acquired or preferred female gender and continues to represent her in new legal proceedings issued in January 2013 seeking to enforce the ruling of the High Court given in her favour in October 2007.

In the course of representing Dr Foy over the last 16 years we have become familiar with the legal provisions for the recognition of transgender persons in a variety of countries and with the decisions of the European Court of Human Rights and the highest courts of a number of European countries on this issue. This Submission draws upon our knowledge and experience in the legal sphere. Other groups which represent transgender persons directly, such as Transgender Equality Network Ireland (TENI) and BeLongTo can speak with more knowledge and authority about the lived-in experience of transgender persons in Ireland today and about health and other issues.

In this Submission we will concentrate largely upon the proposals relating to transgender persons who had already married in the gender in which they were originally registered and who now wish to obtain recognition in their preferred gender but to remain married to their spouses. We will also make some comments on the proposed minimum age for recognition of transgender persons, the proposed requirement for applicants for recognition to supply a statement by a treating physician, and the question of extending the protection of the Equality Acts to specifically cover transgender persons.

## **The Legal Requirement for Legislation**

Dr Lydia Foy took legal proceedings in 1997 to get An t-Ard Chlaraitheoir to issue her with a new birth certificate showing her female gender as a way of securing legal recognition as a female. In a case against the UK in 2002, the European Court of Human Rights held that the UK authorities had violated the rights of two transgender women by failing to recognise them in their acquired or preferred gender<sup>1</sup>. Since then the Human Rights Court has several times repeated that states that are parties to the European Convention on Human Rights are obliged to recognise transgender persons.

The European Convention on Human Rights Act, 2003 incorporated the Convention into Irish law and Dr Foy relied upon it in her legal proceedings. In October 2007, the High Court held that the State had

---

<sup>1</sup> *Christine Goodwin v. UK* 35 EHRR 447; *'I' v. UK* [2002] ECHR 592

violated her rights under the Convention by failing to grant her recognition and that Irish law in this area was incompatible with the Convention<sup>2</sup>. The State appealed this decision but withdrew its appeal in June 2010 and the judgment of the court became final and binding on the State.

Since then Ireland has been under a clear legal obligation to provide legal recognition to transgender persons. The UK changed its law within two years of the decision of the Human Rights Court in 2002 and Ireland is now the only member state of the EU that has no provision for officially recognising transgender persons in their preferred gender.

The previous (Fianna Fail-Green Party) Government pledged in its Renewed Programme for Government in October 2009 that it would introduce legislation to recognise transgender persons and the current Government in its Programme for a Government of National Recovery also promised to provide legal recognition and to provide protection for transgender persons under the Equality Acts.

Failure to introduce legislation until now has left Ireland in breach of its obligations under the European Convention on Human Rights and has given the impression that we do not take those obligations seriously. It has also called into question the effectiveness of the European Convention on Human Rights Act, 2003. The enactment of legislation recognising transgender persons is not an option anymore; it is a binding obligation.

### **Comments on the General Scheme of the Gender Recognition Bill**

FLAC welcomes the publication of the Scheme of this Bill as a further, though belated, step in the process of providing recognition of transgender persons in Ireland. We also welcome the fact that it does not propose to require gender reassignment surgery or other specified medical treatment as a pre-condition for recognition. We understand that it is intended that the proposed legislation will also cover the position of intersex persons and we welcome this but we have no particular experience in this area.

We have a number of concerns about the Scheme of the Bill, however, and in particular the requirement for married transgender persons to divorce as a pre-condition for recognition; the minimum age limit of 18 for recognition; and the requirement for a statement by an applicant's treating physician confirming that he or she has transitioned or is transitioning to the preferred gender.

We will deal with these in order:

---

<sup>2</sup> *Foy v. An t-Ard Chlaraitheoir & Others [2007] IEHC 470*

## Head 5: Qualification Requirements for a Gender Recognition Certificate

*The Minister shall only issue a gender recognition certificate to persons who ...*

*(d) are not in an existing valid marriage or civil partnership*

We will concentrate here on the question of marriage but the concerns raised also apply, with the appropriate changes, to civil partnership as well.

A small number of transgender persons will have married in their originally assigned gender before realising or coming to terms with the fact that they identify with the opposite gender and proceeding to transition to that gender. In many cases the strains involved will lead to the break-up of the marriage, but in other cases the non-transgender partner will support the transgender partner and they will wish to remain married.

Head 5 (d) of the Scheme of the Bill would require these loving couples to divorce as a condition of recognising the transgender partner in her/his preferred gender. The reason given for this requirement is to avoid the creation of same-sex marriages when such marriages have been held not to be permitted under current Irish law.

A number of other European countries, including the UK, have or had similar provisions but they have become irrelevant in those countries, again including the UK, that have decided to allow same-sex marriages.

This issue was considered by the Constitutional Courts of Austria and Germany in 2006 and 2008 respectively<sup>3</sup>. Both countries had provisions for recognising transgender persons but did not allow same-sex marriage and both required married transgender persons to divorce as a pre-condition to recognition in their acquired or preferred gender, similarly to what is proposed in Head 5 (d) of this Bill. Like Ireland, both countries also required a period of prior separation of the couple and irretrievable break-down of the marriage as a pre-condition to divorce. The equivalent provision here in relation to irretrievable break-down is that “*there is no reasonable prospect of a reconciliation between the spouses*”. This condition could not, of course, be met if the couple actually wished to stay together.

In both Austria and Germany couples where one spouse had transitioned to the opposite sex challenged the requirement to divorce before that spouse could obtain recognition in her/his preferred gender.

The German Constitutional Court summed up the position:

*“... [A] marriage has only failed when the marital cohabitation no longer exists, and it cannot be expected that the spouses will wish to re-establish it. The spouses must therefore have the*

---

<sup>3</sup> *Austrian Constitutional Court, Verfassungsgerichtshof B947/05 (21.06.2006); German Federal Constitutional Court, 1B v. L 10/05 (27 May 2008); Letter from FLAC to Niall Egan, Working Group on Gender Recognition Bill, Department of Social Protection, 6<sup>th</sup> June 2012.*

*intention to separate permanently. This is, however, not true in the case of a transsexual who wishes to maintain his/her marriage as a legally safeguarded partnership. A marriage cannot be dissolved unless it has failed. This means that a married transsexual cannot achieve legal recognition of his/her acquired gender by first obtaining a divorce, unless he/she feigns an intention to separate permanently from his/her spouse. Both options are unacceptable. Either the transsexual is barred from achieving legal recognition of his/her perceived and adopted gender, or alternatively he/she would be required to make an untrue statement before the court”.*

The Constitutional Court held that the relevant section of the Transsexuellengesetz or German Transsexual Law was unconstitutional and it was repealed in 2009. As a result a number of married transgender persons in Germany have now been recognised in their preferred gender and their marriages have continued without interference.

In the Austrian case two years earlier, the Constitutional Court had struck down the divorce requirement, saying that someone should not be precluded from obtaining recognition of their preferred gender just because they were married. The lawyer who acted for the applicant in that case, Dr Helmut Graupner, wrote recently to the Minister for Social Protection confirming the situation in Austria and stating that there are now a number of marriages in that country where the spouses were originally of opposite recorded sex but are now of the same sex because one of them had transitioned as a transgender person. This has not caused any significant problem. A copy of the letter is attached<sup>4</sup>.

Complaints about ‘compulsory divorce’ pre-conditions were made to the European Court of Human Rights from the UK and Finland some years ago but the court found no violation of the Human Rights Convention because in both countries divorce could be accessed quite speedily and it was possible to enter into a civil partnership very shortly afterwards. There was no requirement to have lived apart for a substantial period beforehand as there is here and the European Court held that no great hardship was being imposed on the spouses involved.

In the Irish situation where there is a requirement to have lived apart for four years and for the marriage to have irretrievably broken down, and particularly following the judgments of the highly respected German and Austrian Constitutional Courts and the growing trend towards allowing same-sex marriage in European countries, we suggest that the Human Rights Court would be very likely to take a different attitude to the proposed ‘compulsory divorce’ condition and hold that it is in breach of the Convention on Human Rights.

---

<sup>4</sup> **Letter from Dr Helmut Graupner to Joan Burton TD, Minister for Social Protection , 5<sup>th</sup> September 2013**

In that connection, it is notable that both the present Council of Europe Commissioner for Human Rights Nils Muiznieks and his predecessor Thomas Hammerberg have argued strongly against the inclusion of such a requirement in Irish Gender Recognition legislation<sup>5</sup>.

We would also suggest that the reason given for requiring married person to divorce is misconceived. Permitting recognition of the preferred gender of a person who is already married would not be equivalent to allowing persons to enter into a same-sex marriage. The marriage in that case would have been valid at the time it was entered into and recognition of the transitioning spouse would not create a new marriage. The same marriage would continue and it would not be the same as introducing marriages that would be entered into from the beginning by two spouses of the same sex, although we would in fact welcome such a development.

***The Minister shall only issue a gender recognition certificate to persons who...***

***(d) are at least 18 years on the date of application***

In our initial Submission to the Government-appointed Gender Recognition Advisory Group we accepted the suggestion of a minimum age of 18 for full legal recognition of transgender persons. However, since then we have become more aware that many young persons are becoming conscious of their real or preferred gender identity during their teenage years or even younger and that where hormonal treatment is required it may be appropriate and even advisable to begin it at an earlier age.

We suggest that the minimum age for full recognition should be reduced to 16, with the consent of a parent or guardian as well as the applicant her or himself. This is the age at which young persons can consent to medical treatment. Where the consent of a parent or guardian is not available or is refused, we suggest that a court should have authority to decide on an application by the young person concerned with the key consideration being the welfare and the rights of the young person in question. This would be in line with the growing acceptance that, as far as possible, the views of young persons should be implemented in matters that concern them.

We would also suggest that provision should be made for younger children as well where progress towards transition is desired by the young persons themselves, is recommended by relevant professionals, has the support of parents or guardians, and where appropriate safeguards are in place such as a requirement for approval by a court.

Difficulties can arise, particularly in schools, where young persons begin the process of transition but may be subject to bullying and harassment. Regulations and protocols are required for the guidance of school authorities and public authorities such as the HSE and the Garda as to how young transgender

---

<sup>5</sup> ***Letter from Nils Muiznieks, Commissioner for Human Rights, to Joan Burton TD, Minister for Social Protection, 16<sup>th</sup> November 2012; Thomas Hammarberg: Issue Paper, Human Rights & Gender Identity, Council of Europe, July 2009, p.45***

persons should be treated so as to respect their right to their preferred gender identity and to privacy and freedom from bullying.

We suggest that consideration should be given to the creation of a provisional or temporary Gender Recognition Certificate which would allow young persons to have documents issued in their preferred gender and would require schools, doctors, Gardai etc. to treat the holders of such certificates in accordance with their preferred gender identity. Such certificates would require to be renewed or converted into full Gender Recognition Certificates at the age of 16 or 18.

## **Head 6: Evidence to be submitted with applications for a Gender Recognition Certificate**

**Head 6 (vi): ...**

**a statement by his/her primary treating physician ... which confirms that the person has transitioned/is transitioning to their acquired gender and that he/she is satisfied that the person fully understands the consequences of his/her decision to live permanently in the acquired gender.**

Head 6 of the Scheme of the Bill suggests that the primary or core document required for the issue of a Gender Recognition Certificate would be a statutory declaration by the applicant, though it rather strangely omits what would seem to be the key element required, namely that the applicant declares her/himself to be of the gender opposite to that in which s/he was registered at birth, and then declares that s/he has a settled and solemn intention of living in that gender for the rest of her/his life.

We welcome this as a move away from treating transgenderism or gender incongruity as a medical disorder and making gender recognition dependent on medical evidence, though we, of course, wish to see the requirement to say that the applicant is not in a marriage or a civil partnership removed.

However, Head 6 (vi) goes on to require a supporting statement from the applicant's "*primary treating physician*", which appears to reinstate the medical evidence requirement. This is resented by many transgender persons as suggesting that they suffer from a medical or psychiatric disorder and puts an undue emphasis on medical treatment. It may also, by its emphasis on transitioning from one gender to another, appear to exclude intersex persons from the reach of this Bill.

We would suggest that if a statement or statements are required to support the statutory declaration of the applicant, such statements could be supplied by one or more of a number of persons with knowledge of the applicant's circumstances, preferred identity and intention to live therein, such as medical practitioners, counsellors, social workers, teachers etc.

This would make clear that the statement in question was intended to be supportive or corroborative of the applicant's statutory declaration, which would be the primary document involved. It would allow

for the inclusion of medical evidence where that was relevant to the particular applicant but would not make it a necessary requirement, and it would allow for the inclusion of intersex persons.

### **Amendment to the Equality Acts**

Finally, we suggest that the Bill should also contain a provision amending the Equality Acts to include Gender Identity among the “discriminatory grounds” listed at Section 6 of the Employment Equality Act, 1998 as amended and Section 3 of the Equal Status Act, 2000, as amended. This proposal was included in the Programme for a Government of National Recovery of the present Government, which promised to “*extend the protections of the equality legislation to [transgender persons]*”.

The proposal was rejected by the Report of the Gender Recognition Advisory Group on the grounds that it was unnecessary because the Equality Tribunal had upheld a complaint by transgender woman in 2011 under the ‘Gender Ground’ – *Hannon v First Direct Logistics Ltd (DEC E 2011 066)*.

There could however be some potential problems in taking cases of discrimination against transgender persons relying on the ‘Gender Ground’ where, for example, a complainant and the person who had allegedly received more favourable treatment were both of the same gender, following recognition of the complainant in her/his preferred gender, or where the complainant was in the early stages of transition and had not yet been recognised in the preferred gender.

There is also the important educational and consciousness raising effect of prohibiting discrimination on a particular ground. It can help to raise awareness of the position of minority groups and their vulnerability and make clear society’s view that they should be treated with respect as well as deterring verbal and physical abuse in addition to discrimination against such groups.

## Summary of Main Points of Submission

- Ireland is currently in breach of the European Convention on Human Rights due to its failure to provide for the recognition of transgender persons in their preferred gender. It has a legal obligation to enact such legislation.

- **Head 5 (d):**

The requirement that applicants for a Gender Recognition Certificate should not be in an existing marriage or civil partnership should be deleted;

The minimum age limit for a full gender recognition certificate should be reduced to 16 with appropriate arrangements for making such applications. Consideration should be given to introducing a provisional or temporary Gender Recognition Certificate or other method of allowing children under 16 to begin transitioning to their preferred gender with appropriate safeguards, and to providing guidelines for their treatment by public authorities.

- **Head 6:**

The requirement for a statement by a primary treating physician should be replaced, if necessary, by a requirement for a statement or statements supporting the applicant's statutory declaration to be made by a doctor, counsellor, social worker, teacher, or other professional with knowledge of the applicant's position and intentions;

- **Equality Acts:**

The Equality Acts should be amended to make Gender Identity a prohibited ground of discrimination.

Free Legal Advice Centres would be happy to meet with the Joint Oireachtas Committee in public session to discuss the Scheme of the Bill.

*Dated 18<sup>th</sup> September 2013*

**Michael Farrell,**

**Senior Solicitor, Free Legal Advice Centres**