Submission to Gender Recognition Advisory Group

Public Consultation on Gender Recognition Legislation

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Free Legal Advice Centres

17th September 2010

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Introduction:

1. Free Legal Advice Centres (FLAC) is a legal human rights organisation dedicated to securing access to justice for disadvantaged and vulnerable persons. FLAC represented Dr. Lydia Foy, a transgender woman, between 1997 and 2010 in her legal challenge to secure recognition in her acquired female gender. Her success in that case led to the Government commitment to introduce Gender Recognition legislation.

2. We welcome the Government's commitment to introduce legislation to provide for legal recognition of transgender persons in their acquired gender and their right to marry or enter into civil partnerships in that gender. We also welcome the establishment of the Gender Recognition Advisory Group to advise on this and to propose appropriate Heads of a Bill, and the decision to hold a public consultation on this issue.

3. During the course of Dr Foy's legal proceedings it was necessary for FLAC to become familiar with legal developments in relation to transgender issues in the UK, Europe and elsewhere and we base this Submission on our knowledge in that area.

4. We were very conscious in the course of Dr Foy's proceedings that legal issues constituted only one dimension of the problems facing transgender persons and that there were other areas, notably the medical and psychological dimension and, in particular, the lived-in experience of transgender persons themselves, that are vital to fully understanding this question.

5. As a result, we feel that the input and involvement of medical/psychological experts and, most of all, of transgender persons themselves is crucial to developing appropriate and comprehensive legislation on this issue. This was stated very clearly recently by the Council of Europe Human Rights Commissioner, Thomas Hammarberg, in his weekly Human Rights Comment for the first week of September, which dealt with transgender rights[1]. We respectfully agree with Commissioner Hammarberg's view

[1] ***"Forced divorce and sterilisation – a reality for many transgender persons", Council of Europe Commissioner's Human Rights Comment, 31st August 2010; http://commissioner.cws.coe.int/tiki-view_blog.php?blogId=18bl=y***

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and would like to see representatives of transgender persons and experts in the area included in the Advisory Group. Failing that, however, we would suggest that the Department of Social Protection establish a consultative panel involving transgender representatives and experts to whom they could refer their proposals for comment and suggestions.

6. We understand that the UK authorities consulted and actively involved both transgender persons and experts in the area in the process of drafting the UK Gender Recognition Act, 2004 and we suggest that a similar process here would be of considerable benefit and would help to avoid future problems which might only be evident to those directly involved.

7. To conclude this Introduction, we note that various terms are used to describe members of the transgender community, including 'transsexuals' and 'trans' persons, and that sometimes the term 'transsexual' is used to refer specifically to persons who have had gender reassignment surgery. To avoid confusion about terminology, we will use the term 'transgender persons' throughout this Submission to refer persons at all stages in the process of transition to their acquired gender, or what transgender persons regard as their true gender.

The Road to Recognition:

8. "*I am profoundly conscious of the humanitarian considerations underlying Mrs Bellinger's claim. Much suffering is involved for those afflicted with gender identity disorder. Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their re-assigned gender can cause them acute distress*".[2]

9. Those were the words of Lord Justice Nicholls giving judgment in the UK House of Lords in 2003 in the case of Elizabeth Bellinger, a transgender woman who was challenging the failure of UK law to recognise her in her acquired female gender and to recognise her subsequent marriage. It is a good summation of the trauma faced by transgender persons and of the need for gender recognition legislation. The House of

[2] ***Bellinger v. Bellinger [2003] UKHL 21, 10th April 2003***

Lords held that they could not recognise Mrs Bellinger's gender identity or her marriage under existing UK law. Instead they declared that the UK law was incompatible with the European Convention on Human Rights, using the Human Rights Act, 1998, on which our European Convention on Human Rights Act, 2003 was modelled. The British government then brought in the Gender Recognition Act, 2004 to provide for official recognition of transgender persons and allow them to marry in their acquired gender. This was in response as well to adverse decisions by the European Court of Human Rights as set out below.

10. The pre-2004 UK legislation in this area was almost identical to the existing legislation in this jurisdiction and we suggest that the Gender Recognition Act, 2004 provides a useful template or guide for drawing up new legislation here. In the six years in which it has been in operation, however, problems have arisen with certain sections of that Act, and we now have an opportunity to deal with some of those problems in drafting our own legislation.

11. Transgender persons have always been here but they were the most hidden of minorities until fairly recently. The first real move towards recognition in Europe came in 1978 when the German Constitutional Court allowed transgender persons to change their civic status and their record of birth[3].

12. There was then a series of cases taken by transgender persons against the UK in the European Court of Human Rights at Strasbourg from 1986 on. They all failed until 2002 when an increasingly impatient Court finally and unanimously declared: " *In the 21st century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable*"[4]. The Court held that the UK was in breach of the European Convention on Human Rights for failing to legally recognise transgender persons.

13. Ironically, just two days beforehand, the High Court here had rejected Dr. Lydia Foy's action seeking legal recognition in her acquired gender. But by the time Dr. Foy's case came back before the High Court – and the same judge, Mr Justice McKechnie – in

[3] ***'Transsexual case', BVerfGE 49, 286, Constitutional Court 1978***
[4] ***Christine Goodwin v. United Kingdom, 35 EHRR 447, 11th July 2002***

2007, there had been decisions in favour of transgender persons in Australia and New Zealand and in further cases in the Strasbourg Court, and nearly every other country in Europe had brought in legislation recognising transgender persons.

14. In September 2007, in a case against Lithuania, the Strasbourg Court stated very clearly: "*States are required ... to implement recognition of the gender change in post-operative transsexuals through, inter alia, amendments to their civil status data with ensuing consequences*"[5].

15. A month later, the High Court in Dr. Foy's case declared that "*Ireland as of now is very much isolated within the Member States of the Council of Europe ... [and] must be even further disconnected from mainstream thinking [in relation to recognising transgender persons]"*[6]. Mr Justice McKechnie declared 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*", Ireland was in breach of Article 8 of the Convention (respect for private and family life). And he added that if the issue had been before him, he would have found that the State was in breach of Article 12 (the right to marry) as well. He subsequently issued a Declaration under the European Convention on Human Rights Act, 2003 to the effect that the current law in this areas was incompatible with the European Convention. This was the first such Declaration made under the 2003 Act.

16. In June of this year, the Government withdrew an appeal against this Declaration, which now stands as the definitive position of the Irish courts on this issue. There is thus a clear and definite obligation on the State to bring in legislation providing for legal recognition of transgender persons and a firm indication that any failure to provide for the marriage of transgender persons as well would lead to a further Declaration of Incompatibility.

Discrimination:

17. There is a further obligation on the State under European Union law, which arises from a number of cases taken against the UK in the European Court of Justice, (the EU Court) in recent years[7]. The Court held that discrimination against transgender persons

[5] ***L. v. Lithuania, Application No. 27527/03, 11th September 2007.***
[6] ***Foy v. An t-Ard Chlaraitheoir, [2007] IEHC 470, 19th October 2007***
[7] ***Case C-13/94, P. v. S. and Cornwall County Council, ECR [1996] I-2143; Case C-117/01, K. B. v. National Health Service Pensions Agency and Secretary of State for Health, ECR [2004] I-00541; Case C-423/04, Sarah Margaret Richards v. Secretary of State for Work and Pensions, ECR [2006] I-03585***

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in relation to employment and pension entitlements amounted to discrimination on grounds of sex or gender under EU law. In a similar case in relation to the pension entitlements of a transgender woman, the Court of Human Rights also held against the UK[8].

18. Following the cases in the EU Court, the EU "Gender Recast Directive" of July 2006, stated specifically in Recital 3 of its Preamble: "*The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person*"[9].

19. The Directive is binding on all member states of the EU and best practice would indicate that gender identity or transgender status should now be expressly included in the prohibited grounds of discrimination under the Equality Acts. It would seem appropriate to include an amendment to this effect in the proposed Gender Recognition Bill and we suggest that this may properly be considered as something which is "*consequent on the main provisions of the Bill*", as referred to in the Consultation Paper. A similar provision is included in the UK Gender Recognition Act, 2004 at Section 14.

Submissions on the Proposals:

We will set out our submissions or comments on the proposals in the Consultation Document in the order in which they appear in the document.

Outline of the Process and Principles

20. We are in broad agreement with the outline of the process for dealing with applications for legal recognition of transgender persons and with the guiding Principles outlined.

[8] ***Grant v. United Kingdom [2006] ECHR 548, 23rd May 2006***
[9] ***Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)***

Qualification Criteria:

21. The first and most obvious criterion is that applicants should be transgendered persons. This overlaps with the Acceptance Criteria and raises an important preliminary issue, namely the definition of a transgender person for the purposes of the proposed legislation. Should recognition be confined to persons who have undergone gender reassignment surgery, or persons undergoing hormonal treatment? Or should recognition be available to anyone who is diagnosed as suffering from Gender Identity Dysphoria or Disorder and meets the other criteria dealt with below? **Note:** *We note here that the term Gender Identity 'Disorder' is disliked by some transgender persons because, combined with the fact that evidence is generally sought from psychiatrists or psychologists, they feel that the impression may be given that they suffer from some kind of mental illness, which is quite incorrect.*

22. So far the decisions of the European Court of Human Rights in transgender cases have all dealt with persons who had undergone gender reassignment surgery or were seeking such surgery, and gender recognition legislation in some countries requires that applicants have undergone surgery and even sometimes that they have been rendered permanently infertile.

23. Other countries, notably the UK, Spain and Hungary, do not require surgery as a precondition for recognition in the applicant's acquired gender. And South Africa last year (2009) amended its transgender law to remove the necessity to prove that the applicant had undergone surgery. Commissioner Hammarberg has also strongly criticised the requirement for surgery as a precondition for recognition of transgender persons (*see Note 1 above*).

24. There are substantial reasons for opposing a compulsory surgery requirement. There are transgender persons for whom, because of age or health problems, the highly invasive and traumatic surgery involved, or even intensive hormone treatment, would be dangerous and would be advised against by their medical practitioners. It would be unreasonable and disproportionate to require such people to undergo potentially dangerous treatment as the price of securing recognition of their gender identity. In addition there would be the problem of deciding exactly what degree of surgery or what level of hormone treatment would be required to meet the qualification standard.

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25. It also appears wrong in principle that the State should make invasive surgery that is not otherwise medically required for the person concerned, a pre-condition for legal recognition of their gender identity. The UK Act simply requires a diagnosis of Gender Identity Dysphoria by two medical practitioners and a period of living in the acquired gender to qualify for legal recognition. This does not appear to have caused any problems in the UK and we suggest that this be the standard adopted here as well.

Minimum Age:

26. We would agree with a minimum age of 18, the age of majority, for applying for a gender recognition certificate but we would suggest that where a young person has been diagnosed as transgendered and has lived 'in role' for some time before reaching the age of 18, this should be taken into account towards fulfilling the living in role requirement, so that an 18 year old applicant would not be required to commence the whole process on reaching that age, thus putting back actual recognition for another period.

Irish Residents:

27. We would agree generally with a requirement that applicants should be ordinarily resident in the State, rather than a scheme that would only apply to persons whose births are registered here. The latter requirement would exclude the very substantial number of non-Irish nationals now living here, including those who have acquired Irish citizenship, and could lead to significant difficulties in the future.

28. We assume that the words "ordinarily resident" would be given their natural and ordinary meaning[10] and would simply require the applicant to have lived here for a period of say 12 months. We would caution against any requirement that "resident" should have a specialised meaning like "legally resident", which might exclude persons in the asylum process or even family members of migrant workers. In the case of persons in the asylum process, they can often be in the State for four or five years before their status is determined and it would be invidious and disproportionate to exclude transgender persons in that situation from obtaining recognition in their acquired gender where they would otherwise qualify.

[10] ***R. v. Barnet London Borough Council, ex parte Shah [1983] 1 AER 226***

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29. This proposal does not mention the situation of persons from outside the State who have already been recognised in their acquired gender by the authorities in their own country or a third country. It would be grossly unfair and disproportionate to require such persons to officially revert to their pre-transition gender and commence the recognition process all over again on coming to the State. The UK Gender Recognition Act expressly provides for the issue of Gender Recognition Certificates to such persons where they have been granted recognition in a country whose assessment procedures have been accepted as being equally rigorous as those in the UK. We would suggest a similar process here and that persons in this position should be able to apply for recognition on arriving in the State and should be issued with Irish Gender Recognition Certificates on verifying their original certificates.

Existing Marriage/Civil Partnership:

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

30. In a number of European countries, including the UK, where persons had married in their previous gender but subsequently transitioned, and now seek recognition in their acquired gender, the legislation requires them to end the marriage, even if neither partner wishes to do so. Similar requirements apply to civil partnerships situations are not likely to arise here for some time and we will concentrate on the question of marriage.

31. This requirement in the UK has caused hardship and distress to the small number of persons affected, some of whom have been married for many years, are deeply committed to each other and want to continue in that relationship. It has been argued that such couples can simply divorce and enter into a civil partnership instead and that this process could be fast-tracked. However, the UK experience appears to be that the transition from divorce to civil partnership has not been a smooth or seamless one. Couples have had to go through formal divorce proceedings, with consequent arrangements for division of property, pensions etc., all at considerable cost.

32. There is not a complete equivalence between marriage and civil partnership even in the UK and there will be more significant differences under the Civil Partnership scheme here, when it comes into operation. The rights of the transgender partner in relation to custody of any children could also be affected. In fact "A Guide for Users" issued by the Gender Recognition Panel in the UK specifically warns potential applicants: "*If you*

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are married, you will have to weigh up the benefits of legal recognition in your acquired gender against the disadvantages of ending your marriage"[11].

33. The reason given for requiring the dissolution of an existing marriage is to avoid creating a category of same-sex marriages where that is not allowed under domestic law. However, the number of people involved would be very small and it would not exactly provide a backdoor to same sex marriage as people could only access this situation where they had already been involved in a heterosexual marriage and one party had later acquired a different gender.

34. To insist on the dissolution of existing marriages would be to force people to choose between obtaining recognition of their acquired gender, where the alternative could be seriously detrimental to their health and well-being, and formally ending a loving relationship which may have lasted for many years in circumstances where the trauma and expense involved might seriously endanger that relationship.

35. We also suggest that it would be unfair and unreasonable to withhold recognition of a transgender person's acquired gender solely on the basis of a matter which is not in fact relevant to the determination of the gender identity of the person concerned. Put another way, whether a person is married or what sort of relationship s/he is in has nothing to do with the factual question of whether s/he is transgendered and living in her/his acquired gender.

36. The European Court of Human Rights has so far rejected complaints about the divorce requirement. In the case of one British couple where one partner had had gender reassignment surgery but where both parties wished to continue in the marriage, the Court acknowledged that "*the legislation clearly puts the applicants in a quandary – the first applicant must, invidiously, sacrifice her gender or their marriage*"[12]. Nevertheless, it rejected the complaint and another similar one[13] as inadmissible on the basis that such a requirement was within the UK's margin of appreciation, i.e. the leeway allowed to states when there is no consensus among the states parties to the Convention. The court was influenced by the possibility of entering into a civil partnership in the UK, but a third case, this time from Finland, where civil partnership

[11] ***'Gender Recognition Act, 2004, Explanatory leaflet – A Guide for users', Tribunals Service, Gender Recognition Panel, paragraph 3, page 4***
[12] ***Parry v. United Kingdom, Application No. 42971/05, Admissibility Decision, 28th November 2006***
[13] ***R. and F. v. United Kingdom, Application No. 35748/05, Admissibility Decision, 28th November 2006***

is also available, is currently under consideration[14]. It may be that, as happened in relation to the overall issue of recognising transgender persons, the Court will change its position as more European states move towards legalising same-sex marriages.

37. We suggest that a divorce requirement would be unnecessary to deal with a potential anomaly affecting a very small number of persons, truly a minority of a minority. Couples who do not wish to stay together can divorce before or after the granting of a Gender Recognition Certificate to one of them. Those who want to stay married should be allowed to do so.

Acceptance criteria:

Evidence:

38. We have already dealt with the question of whether an applicant should be required to have had gender reassignment surgery as a pre-condition of recognition.

39. We suggest that the evidence required to issue a Gender Recognition Certificate should be similar to that required by the UK Gender Recognition Panel, i.e. evidence from two medical practitioners that the applicant suffers from Gender Identity Dysphoria and is determined to live in her/his acquired gender; and evidence that the applicant has lived as fully as possible in the acquired gender for a significant period – the UK legislation prescribes two years. The doctors' evidence will presumably include details of any treatment the applicant has undergone or is undergoing, but such treatment should not be a pre-condition.

40. The UK Act also requires a commitment from the applicant to live permanently in the acquired gender. Such a commitment is unenforceable, however, and we suggest that the medical practitioners' assessment of the applicant's seriousness about living in the acquired gender should be sufficient.

41. We note at this stage that it can be very difficult for a transgender person to live fully in her/his acquired gender prior to obtaining legal recognition and that there is a need for a code of conduct and guidelines for public bodies, employers, schools etc. on how to treat post-diagnosis but pre-recognition transgender persons. The Equality Acts should also cover such persons. We suggest that the Gender Recognition Panel or the

[14] ***H. v. Finland, Application No. 37359/09, Statement of Facts, 1st April 2010***

Department of Social Protection should also have a role in raising awareness of the situation of transgender persons and in preparing and distributing codes of conduct and good practice guidelines in relation to the treatment of pre- and post-recognition transgender persons. The UK Gender Recognition Panel/Tribunals Service have produced very useful Explanatory Leaflets for potential applicants for gender recognition.

The Decision Making Process:

42. We suggest that applications should be considered by an independent quasi-judicial panel or tribunal similar to the Equality Tribunal or the Employment Appeals Tribunal rather than a court. Such a body would be less formal than a court and less off-putting to applicants already coping with an already stressful situation. The UK Gender Recognition Panel is a tribunal which comes under the auspices of the Tribunals Service, which administers a large number of such bodies. The panel should be able to deal with applications on paper where appropriate but it should also be able to hold oral hearings, which should probably be the norm as they give applicants an opportunity to explain their case as fully as possible. Written reasons should be given for all decisions.

43. We welcome the proposal for an appeals process. We suggest that this could be to another quasi-judicial body or to the circuit Court sitting in camera and with power to consider both matters of fact and of law. The UK Act allows appeals only to the High Court on a point of law, which we feel is too restrictive.

44. There should be no fee or only a nominal fee for applications and appeals so as to make the process as accessible as possible. In the UK there is currently a fee of £140 for applicants but this can be reduced or waived for persons on low incomes. Consideration should also be given to requiring that the Legal Aid Board provide advice and assistance to persons applying for recognition of their acquired gender and that provision be made for financial assistance towards the cost of obtaining the necessary medical reports.

Gender Recognition Certificates and Recording of Data:

45. We agree with the general outline of the procedures in respect of the issuing of Gender Recognition Certificates and the recording of data. We agree that rights and

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responsibilities arising before the date of recognition should remain unaffected and, in particular, responsibilities in relation to family members.

46. We suggest that where a positive decision is made, the date of recognition should be backdated to the date when the application was made unless the evidence leading to the positive decision was only produced subsequent to the date of application.

47. We agree that the issue of Gender Recognition Certificates in respect of persons born in the State should be notified to the Registrar General, who would then create an entry for the person concerned in a Gender Recognition Register and issue a new birth certificate based on that entry. We suggest that the Gender Recognition Panel should also indicate to successful applicants that it will notify the Revenue Commissioners, the HSE and the Department of Social Protection, if they (the applicants) wish. Once the Gender Recognition Certificate is issued, the applicant should thenceforth for all purposes be, and be treated as, a person of the gender indicated on the certificate.

48. We also suggest that a duty of confidentiality and an offence of unauthorised disclosure should be created covering all persons who become aware of the existence of applications for and the issue of Gender Recognition Certificates, and the issue of new birth certificates to transgender persons. This would be similar to provisions in the UK Gender Recognition Act, 2004.

17th September 2010

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Supplementary Submission to the Gender Recognition Advisory Group
Following Consultation with Group on 20th October 2010

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Ms Siobhan Doyle,
Secretary,
Gender Recognition Advisory Group,
Department of Social Protection,
Aras Mhic Dhiarmada,
Dublin 1

27th October 2010

Dear Siobhan,

I would like on behalf of FLAC to thank yourself and the Chairperson of the Gender Recognition Advisory Group, Mr Oliver Ryan, for giving us the opportunity last week to discuss our submission to the Group on proposals for affording official recognition to transgender persons.

There are two issues which came up during the discussion concerning which I thought it might be useful to supply some further information. I apologise if this is material with which you are already familiar.

One issue was the question of married couples where one spouse changes gender and whether they should be required to divorce before the transgender spouse's acquired gender is recognised. Our view was that this should not be made a requirement.

This issue has been considered in some other countries with legal systems broadly similar to ours. The Austrian Constitutional Court in 2005 held that an existing marriage could not be an obstacle to recognition of gender change. We attach an English language report of this decision but unfortunately we are not currently aware of any subsequent developments concerning this issue in Austria.

(*The Austrian Administrative High Court on 27 February 2009 also ruled that gender reassignment surgery was not a pre-requisite for legal recognition of gender change –* ***BverfG, 1 BvL 3/03 vom 6. 12. 2005***).

In Australia the ***Same Sex Relationships (Equal Treatment in Commonwealth Laws) Act, 2008***, which came into force in July 2009, appears to have had the effect that a marriage where one of the parties changes gender will not be regarded as void because of this – or to clarify that this has always been the position. We attach a report about this issue from the newsletter of the Marriage Equality group in Australia and copies of an exchange of correspondence between Ms Kathy Noble, an official of an Australian transgender support group and the federal Attorney General's office about this matter.

While the wording of the letters from the Attorney General's office is somewhat confusing, they do say clearly: "*A transgender individual who remains married after surgery will not be deemed to be no longer married as a result of the reforms*" and "*It has always been the case that a validly solemnized marriage would continue, irrespective of whether one of the parties subsequently underwent gender re-assignment surgery*".

The other issue we want to deal with is that of transgender young persons. At our meeting we mentioned the need for the development of guidelines and protocols for dealing sympathetically and supportively with young people in this very difficult situation and mentioned that there was important Australian jurisprudence in this regard.

The key case here is ***Re: Alex***, where in 2004, the then Chief Justice of the Family Court of Australia authorised hormonal treatment for a 13 year old female to male transgender young person and ordered that his name and gender be changed to male on his birth certificate and that he be enrolled in school under a male name.

In 2009, the current Family Court Chief Justice Diana Bryant made further orders allowing Alex, then aged 17, to have a double mastectomy to bring his body more closely in line with his male identity. The judgments indicate the sympathetic way in which not only the courts but the school authorities and the social services dealt with Alex's case. There have also been a number of other similar cases in Australia in recent years. We attach copies of the two judgments in Alex's case and an article on that case and how the Family Court of Australia has dealt with transgender issues.

We would suggest that regardless of whether full formal recognition of acquired gender is restricted to those over 18, arrangements should be made for practical recognition and support of transgender young persons during a particularly difficult period of their lives.

Yours sincerely,

Michael Farrell

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Supplementary Submission to Gender Recognition Advisory Group
By
Free Legal Advice Centres

Should persons in an existing marriage or civil partnership be excluded *[from the proposed scheme for recognition of the acquired gender of transgender persons]*?

Introduction

This Supplementary Submission deals only with the above question and is made in addition to the comments on this issue already made by us in our original Submission to the Advisory Group and our subsequent letter to the Group dated 27th October 2010.

Following our meeting with members of the Advisory Group, we felt that the question posed above, which was contained in the Group's Consultation Document, was an important and complex one and that we would like to do some more research on it and make a further Supplementary Submission specifically on this topic.

We regret the delay in making this additional Submission and hope that it is acceptable to the Advisory Group and is of assistance in the Group's work. Although the above question refers to both marriage and civil partnership, we have confined this Submission to the question of marriage as it is marriage which seems likely to raise more issues at least in the short to medium term.

We would like first of all to refer to the very clear recommendation of the Council of Europe's Commissioner for Human Rights, Mr Thomas Hammarberg, on this issue. In his recent Issue Paper on "Human Rights and Gender Identity", Commissioner Hammarberg calls on member States of the Council of Europe to

> "*Remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender*".[1]

The Yogyakarta Principles drawn up by a group of UN and international human rights experts in 2006 also state at Principle No. 3

> "*…No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity…y*"[2].

In our original Submission we made some general comments on this issue and in our letter of 27th October we referred to a decision of the Austrian Constitutional Court in

[1] **Human rights and Gender Identity, Issue Paper by Commissioner for Human Rights, Council of Europe, Strasbourg, July 2009, reprinted 2010**

[2] **The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, sponsored by the International Commission of Jurists and the International Service for Human Rights**

2005, which held that where a person was in an existing opposite sex marriage, and subsequently underwent gender reassignment, the pre-existing marriage should not act as an obstacle to recognition of his/her acquired gender[3].

We also referred to Australian legislation in 2008 which indicated that an existing marriage would not be invalidated by gender change by one of the spouses[4]. We understand as well that the Netherlands does not impose any requirement for divorce as a precondition for recognition of gender reassignment[5].

We want in this Supplementary Submission to refer to an important decision by the German Constitutional Court and to make some comments on the Constitutional and European Convention on Human Rights aspects of this question.

The German Constitutional Case

On 27th May 2008, the German Constitutional Court held in case ***BVerfG 1 BvL 10/05*** that

> "Section *8, paragraph 1, no. 2 of the Transsexuals Act [Transsexuelengesetz (TSG)] is incompatible with Article 2, paragraph 1 in conjunction with Article 1, paragraph 1 of the Basic Law and Article 6, paragraph 1 of the Basic Law, because it requires a married post-operative transsexual seeking recognition of their new gender under civil status law to have their marriage dissolved first*" (*English language summary taken from the Explanatory Memorandum to 'Draft Law on Changing of Forenames and Determination of Gender Identity' proposed by the Green Party in the German Bundestag in June 2010)*[6].

In our view this decision is particularly significant because the legal position which was being considered by the German Constitutional Court had similarities to the position in this jurisdiction. As in Ireland, the institution of marriage is protected under the German Basic Law (effectively the German constitution), and marriage has been defined as being between opposite sex partners.

The German Transsexuals Act adopted in 1981, required persons seeking legal recognition of their acquired gender to be unmarried and in practice it required already married transgender persons to divorce or dissolve their existing marriage as a pre-condition for recognition of their acquired gender. The reason given for this requirement was to avoid the appearance of creating a category of same sex marriages where this was not permitted under German law, although Germany does have a category of civil partnerships for same sex couples.

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[3] **Austrian Constitutional Court, BverfG, 1 BvL 1/04 (18 July 2006)**

[4] **Same Sex Relationships (Equal Treatment in Commonwealth Laws) Act, 2008 and correspondence between Ms Kathy Noble and the office of the Attorney General of the Commonwealth of Australia.**

[5] **Re: Transgender Policy, letter from the Minister of Education, Culture and Science to the Speaker of the Dutch House of Representatives, 1 October 2009**

[6] **Draft Law tabled by Members of the German Bundestag Volker Beck … and the Alliance 90/The Greens Parliamentary Group, Printed Paper 17/, German Bundestag, 17th Electoral Term**

Like Ireland, Germany also required a couple seeking to divorce to live apart for a period of time (three years) to establish that the marriage had definitely broken down or, as the Irish Constitution puts it, there is 'no reasonable prospect of a reconciliation between the spouses'.

The German case involved a 79 years old transgender woman who had been married as a male in 1952. The couple had three grown-up children. The transgender spouse was transitioning with the support of her (female) partner and both wished to continue in the marriage, which had not broken down in any way.

The transgender spouse also suffered from anxiety and panic attacks which rendered her dependent on her partner and meant that it was not feasible for them to live apart for three years as required under German divorce law. The couple said as well that they could not afford to set up separate households or the legal and other costs of obtaining a divorce. And they regarded it as an insult to ask them to divorce after 56 years of marriage.

The Constitutional Court held that because the couple had been validly married, their marriage was protected by the Basic Law[7]. Accordingly, if the two spouses did not wish to terminate the marriage, the State could not do so, or force them to do so, without violating their rights. The Court noted in addition that the requirement that the transgender spouse should terminate the marriage affected the rights of the non-transgender spouse as well.

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

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

The Constitutional Court declared that this section of the Transsexuals Act was in breach of the Basic Law and gave the German government until August 2009 to amend it to remove the unconstitutionality. The EU Fundamental Rights Agency has stated in a very recent report that the German law was amended in July 2009 to remove the requirement that persons seeking legal recognition of their gender reassignment must be unmarried[8].

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[7] **We have not located an English translation of the judgment of the Court but a full account of it is given in 'Transsexual Law Unconstitutional: German Federal Constitutional Court demands reform of law because of fundamental rights conflict' by Gregory A. Knott in the St. Louis University Law Journal, Spring 2010; 54 St. Louis L. J. 997**

[8] **'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity', 2010 Update, European Union Agency for Fundamental Rights, Luxembourg, Publications Office of the European Union, 2010, page 16**

The Constitutional Position in this Jurisdiction

What would be the Constitutional position here if legislation providing for the recognition of the acquired gender of transgender persons was to restrict that recognition to persons who are not married, thus requiring those who are married to terminate that marriage?

Article 41.3.1 of the Irish Constitution states:

> "*The State pledges itself to guard with special care the institution of marriage, on which the Family is founded, and to protect it against attack*".

In ***B v. R*** in 1995, the then President of the High Court stated that "*marriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life*"[9]. As a result it might appear that a measure intended to prevent the occurrence, however infrequently, of same sex marriages would be in accord with the Constitution.

However, in the German Constitutional Court transgender case, where the couple concerned had originally married as persons of the opposite sex or gender, the marriage was regarded as valid and so it attracted the protection of the Basic Law. In any such cases which arise here, it seems likely that the original marriage will have been valid as well, thus qualifying for protection under Article 41.3.1 of the Constitution and placing the State under a constitutional obligation to "*protect it against attack*".

The Constitution was, of course, amended in 1995 to allow the dissolution of marriage by divorce, but only on condition that the spouses have lived apart for a period of four years out of the previous five and that "*there is no reasonable prospect of reconciliation between the spouses*"[10]. And an application for divorce must be made by one of the parties to the marriage.

It is likely that in the case of the majority of transgender persons who were married in their former gender but have since transitioned to the opposite gender, the marriage will have broken down by the time the transgender spouse wishes to apply for gender recognition. However, experience in other jurisdictions has shown that there is also likely to be a small number of cases where the spouses wish to stay together and continue in the marriage, and the non-transgender spouse wishes to assist her/his partner through this difficult and traumatic experience.

In those circumstances, the fundamental conditions for divorce would not be present, namely that the marriage has broken down, the parties have lived apart for four years and

[9] **B v. R [1995] 1 ILRM 491**
[10] **Bunreacht na h-Eireann, Article 41.3.2. i and ii**

that there is no "reasonable prospect of a reconciliation between the spouses". And, of course, neither spouse would wish to apply for a divorce.

There is no provision whereby any third party can apply for the granting of a divorce where the parties themselves do not want to divorce.

There is provision in some circumstances for a third party to seek a declaration that a marriage is void but a marriage can only be void if it did not fulfil the requirements for a valid marriage from the beginning. In the German case referred to above and in most cases where this issue seems likely to arise in this jurisdiction, the marriage will originally have been between two parties who believed themselves to be and were regarded in law as being of the opposite sex and it will have been valid and in accordance with the law. Generally the transgender partner will not have been aware or will not have accepted at that stage that s/he was transgendered and there will be no grounds for declaring the marriage void.

Marriages can be voidable for impotence and for inability to sustain a normal marital relationship. The Supreme Court has held that a marriage could be voided under this heading where one party was homosexual but his partner was unaware of this when they married[11]. It could perhaps be argued that because Gender Dystrophy is an inherent condition, which is not always realised or accepted by the person concerned until later in life, this could provide grounds for voiding a marriage where one partner transitions after some time.

However, marriages are only voidable at the instance of one of the parties to the marriage, so this question could not arise where the two spouses actually wish to remain together.

There appears to be no provision whereby a marriage that was validly entered into in the beginning can be invalidated because of subsequent events and in particular because one partner had changed gender.

Of course, if either of the spouses feels that the reassignment of the gender of one of them totally undermines the relationship, then s/he can apply for a divorce and that would appear to be the appropriate remedy in the circumstances.

Restricting Gender Recognition to Unmarried Persons

The restriction of recognition of gender change to unmarried persons in German law was intended to prevent the development of a category of same sex marriages, which would have been contrary to public policy – though public opinion on that issue appears to be changing rapidly in a number of European countries. A similar provision requiring previously married transgender persons to divorce before recognition can be granted is also included in the UK legislation for the same reasons.

[11] **U. F. (otherwise C) v. J. C. [1991] 2 IR 330**

If such a provision was included in legislation here, it would effectively amount to putting pressure on married transgender persons to dissolve their marriages in circumstances where neither they nor their spouses wish to do so. The pressure would spring from denying the transgender spouse the right to recognition of her/his gender identity. It would also involve putting pressure on the non-transgender partner in relation to a matter over which s/he has no control.

In addition, such a policy would appear to involve state agencies in seeking to undermine valid and subsisting marriages in breach of the State's constitutional duty to "*guard with special care*" the institution of marriage.

Indeed, in a situation where the spouses themselves did not want to divorce, the State would be seeking to bring about the dissolution of the marriages in question on spurious grounds, given that divorce may only be granted where there is a breakdown of the marital relationship and there is no prospect of a reconciliation between the spouses,

Proportionality

As we mentioned in our original Submission, some complaints were made to the European Court of Human Rights against the divorce requirement in the UK legislation but they were rejected[12]. The Court of Human Rights held that the disadvantage to the complainants was not very substantial because they could if they wished enter into a civil partnership, which the Court said provided similar legal rights and obligations to those created by marriage. The Court also held that the UK legislation fell within the State's 'margin of appreciation', i.e. the leeway the Court gives to states where there is no firm consensus among European countries on a particular issue.

However, the UK Gender Recognition Act envisaged that divorce applications would be fast-tracked by the granting of an interim Gender Recognition Certificate, which would act as a ground for divorce, and the couple concerned could then enter into a civil partnership within days of obtaining the divorce.

There is no requirement in UK law for a four-year separation before a divorce can be granted, and the issue of an interim gender recognition certificate obviates the need to prove breakdown of the marriage. In our view couples in this jurisdiction where one partner transitions after an opposite sex marriage are in a radically different situation.

While the UK provisions may amount to a significant inconvenience and insult to couples who wish to stay together, we suggest that a requirement to separate for four years prior to divorce would amount to an intolerable imposition on the couple involved and would be very likely to undermine an existing committed relationship, as well as making no allowance for one spouse being dependent on the other as in the German case. In

[12] **Wena & Anita Parry v. UK, Application No. 42971/05, 28 November 2006 and R. & F. v. UK, Application no. 35748/05, 28 November 2006**

addition there is the constitutional requirement for the breakdown of the marriage relationship, which would not be met by couples who do not wish to split up.

In the circumstances, we suggest that the European Court of Human Rights would be likely to find that such a requirement in this jurisdiction would constitute a disproportionate interference with the lives of the couples concerned and would not be justified by the objective sought to be achieved, or fall within the State's margin of appreciation.

Our Response to the Question Posed

We acknowledge that where there is no provision for same sex marriage in this jurisdiction, recognition of gender change by one partner in a valid and continuing marriage would give rise to an anomaly whereby the marriage would then consist of two persons of the same gender. However, this is likely to apply to only a handful of people and would not become a backdoor to same sex marriage, for those who are concerned about this.

It could only arise in the case of persons who had originally entered quite lawfully into an opposite sex marriage; where one partner subsequently transitioned to the other gender; and where her/his relationship with the non-transgender partner remained unaffected by this.

If the alternative to this anomaly in a small number of cases is to pressure married couples into a four-year separation against their wishes, followed by a spurious divorce, this would appear to be in breach of the State's constitutional obligations and probably in breach of the European Convention on Human Rights. It would also be likely to cause a great deal of hardship and pain to married couples who are deeply committed to each other.

In our view, resolution of the constitutional difficulties that would arise from such a solution might require an amendment to the Constitution to dissolve marriages on the grounds of gender change even where the marital relationship has not broken down and the parties themselves want to stay together. This would appear grossly disproportionate given the tiny numbers involved. In addition, the courts have also held that there is a constitutional right to marital privacy[13]. It is arguable that the State has no business inquiring into how two people who are validly married conduct their relationship thereafter and that an amendment to dissolve marriages in this category would lead to a conflict of constitutional rights.

We would suggest that people in an existing marriage – or civil partnership - should not be excluded from obtaining official, legal recognition of their acquired or reassigned gender.

[13] **McGee v. Attorney General [1974] IR 284**

Submitted on behalf of Free Legal Advice Centres

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