‘A story of great human proportions’

Lydia Foy and the struggle for Transgender Rights in Ireland

CONTENTS

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FOREWORD by Peter Ward, SC

This report is about a strong, brave and resilient person, Lydia Foy, who became involved in difficult and complex litigation which spanned twenty years and resulted in radical reform of the law on gender recognition and a fundamental change in how the state and society view gender and identity. FLAC is very proud of the support it provided for this challenging case over two decades.

FLAC has a long history of engaging in strategic litigation as a means of challenging unjust laws, increasing public awareness of pressing legal needs and bringing about effective change in law and practice. In the 1980s FLAC secured equality of treatment for thousands of married women who had been denied payments as a result of the State's failure to implement the Equal Treatment Directive in the social welfare code. We have secured a number of recent significant judgements and outcomes in cases on social welfare, direct provision, imprisonment for debt and homelessness. FLAC has also represented EPIC, a small American privacy NGO, which appeared as an *amicus curiae* ("friend of the court") in the *Schrems v Facebook* case, which raises issues on privacy and data protection of fundamental concern to millions of people.

FLAC recently made a submission to the Court Service's Review of the Administration of Civil Justice with a particular focus on making courts more accessible to the public. This submission draws on the unique insights gained by an organisation which has worked at the coalface of access to justice for almost fifty years. This account of Lydia's case highlights the very particular difficulties faced by a trans person as a litigant in the courts system when seeking to assert rights in relation to core issues of identity.

We would like to acknowledge the very generous contribution of the many people involved in the case, including expert witnesses and members of the media. In particular we wish to acknowledge the work of the entire legal team consisting of seven FLAC solicitors, Mary Johnson, Maureen Maguire-Gourley, Moira Shipsey, Rioghnach Corbett, Eleanor Edmond, Michael Farrell and Sinead Lucey and barristers Bill Shipsey SC, Eileen Barrington SC, Siobhan Phelan SC and Gerard Hogan SC (as he then was before being appointed to the High Court and Court of Appeal).

In addition, numerous members of FLAC staff and interns made a significant contribution. It is not possible to name everyone involved over its twenty year history. However it is important to recognise that this was done under the leadership of Catherine Hickey, Director of Funding and Development, who was involved from Lydia's first court hearing in 2000 until the file closed in 2017, and Noeline Blackwell who was Director General from 2005 until 2016. We also wish to thank Yvonne Woods, who was Communications Manager from 2003 until 2017, Caroline Smith and Stephanie Lord who have finalised this report, and Gráinne Murray who designed and edited it.

We would also like to express our gratitude to the Transgender Equality Network Ireland (TENI) who worked very closely with FLAC to secure legal recognition for trans people. We also thank Martin O' Brien and The Atlantic Philanthropies for their support in producing this report, without which it would not have been possible.

Lydia's perseverance and determination in taking on the state in order to have her identity recognised is a testament to the resilience of the human spirit. Because of her, transgender people can now have their correct gender recognised in Irish law. However, there is more work to do. FLAC recently made a submission to the Department of Social Protection's review of the Gender Recognition Act 2015 with a view to making improvements for transgender young people who wish to access legal gender recognition. Thanks to Lydia Foy and the legal team in FLAC, we have made significant progress towards ending the social exclusion of transgender people in our society.

Finally we wish to pay tribute to Michael Farrell, who worked expertly and tirelessly on Lydia's behalf for over a decade, and who has provided in this publication a vital and compelling narrative of Lydia's historic legal battle.

Peter Ward SC

Chairperson

FLAC

‘A story of great human proportions’

Lydia Foy and the struggle for transgender rights in Ireland *Michael Farrell**

> *“Behind this legal case… there is a story of great human proportions which unfortunately this judgment … in a court of law is unable to adequately portray or properly recreate.”*
>
> - Mr Justice Liam McKechnie giving judgment in the Irish High Court in the case of **Lydia Foy v an t-Ard Chláraitheoir & Others**, July 2002.[1]

Lydia Foy, circa 1997

The Lydia Foy case: The beginning

When the Irish media began reporting a High Court case taken by a transgender woman called Lydia Foy in the late 1990s, it was probably the first time most people in the country had even heard of the word ‘transgender’. The trial judge, Mr Justice McKechnie, said quite frankly in his judgment that *“prior to the start of this action, my knowledge and therefore my understanding of transsexualism was, as I now know, utterly uninformative ”.*[2]

Lydia Foy was born in Westmeath in the Irish Midlands in 1947 and was registered at birth as male. From her early years she felt uncomfortable and ill at ease as a boy. Over the years she tried to conform to a male role and eventually married and had two children. But she had always felt inherently female. She had grown increasingly unhappy and wanted to live in what to her was her true, female, gender. In 1992 she had gender reassignment surgery in the UK and from then on she has lived exclusively as a woman.

Michael Farrell

It was a hard and very painful journey for her. Her marriage broke up and the courts refused her access to her children. She lost her job as a Health Board dentist, her own health deteriorated and she was very isolated and alone in a conservative society that afforded little understanding or support to transgender (trans) persons, or anyone else outside the rigid, stereotyped gender roles of the time. It was not until 1993, a year after Lydia Foy’s gender reassignment surgery, that ‘homosexual conduct’ was decriminalised in Ireland. A constitutional ban on divorce was not lifted until 1995.

After she lost her Health Board position, Lydia Foy could not get another job as a

** Michael Farrell was the senior solicitor with Free Legal Advice Centres from 2005 to 2015 and dealt with the Lydia Foy case throughout that period. He is currently the Irish member of the European Commission Against Racism and Intolerance (ECRI) and a member of the Council of State of Ireland.*

dentist. She was never employed again and was reduced to very poor circumstances, but was determined to secure official recognition of her female gender. In March 1993, she wrote to the Registrar of Births and Marriages (in Irish the title is *An t-Ard Chláraitheoir*) seeking a new birth certificate giving her female name and showing her sex/gender as female. Official recognition of her gender was crucially important as a new birth certificate would avoid being outed as a trans person whenever proof of her identity was required.[3]

Her application was refused in a series of letters from the Registrar General and a complaint to the Ombudsman was rejected as well in 1994, in the meantime she managed to change her name by deed poll and, oddly enough, was issued a passport showing her gender as female.

In January 1995, frustrated by these refusals, Lydia Foy filed a complaint herself to the European Commission of Human Rights[4] in Strasbourg without legal assistance. The Strasbourg process was slow, however, and in May 1996 she wrote to Mary Johnson, the solicitor working for Free Legal Advice Centres (FLAC). She wanted to challenge the Registrar General's refusal in the courts but she had no money to do so. In a letter to Lydia dated 11 July 1996, Mary Johnson writes *"It was agreed that the issue of seeking to amend your birth certificate is of interest to FLAC by virtue of its human rights dimension"*. FLAC agreed to take on her case.

The first legal case

Mary Johnson wrote a series of letters to the Registrar General and got the same reply Lydia Foy had received: that under the Registration Acts it was not possible to change the description of her gender. On 14 April 1997, Bill Shipsey SC, and Eileen Barrington BL, instructed by FLAC, applied to the Irish High Court for leave to take Judicial Review proceedings against An t-Ard Chláraitheoir (the Registrar General), Ireland and the Attorney General. Three months later, in July 1997, the European Commission of Human Rights dismissed Lydia Foy's complaint. The Commission said that she had not exhausted the legal remedies available to her in Ireland to challenge the Registrar's decision. She had also complained about the Irish courts' refusal to allow her access to her children but the Commission said this fell within the margin of appreciation or leeway the Court of Human Rights accorded to governments on certain issues.

In the meantime, the High Court had granted her leave to challenge the Registrar's decision but it was going to be an uphill struggle. There had been no Irish case law on this issue and the only legal precedent was a 1970 English case called *Corbett v Corbett,*[5] which was not at all helpful. Mr Corbett was a wealthy socialite who had married April Ashley, a transgender model who had appeared in Vogue, Britain's leading fashion magazine. When they married, Mr Corbett had been fully aware that she was a trans woman. They split

Lydia Foy, circa 1987

Lydia Foy Case Timeline

1992 Lydia has gender reassignment surgery.

1993 She applies to Registrar General for a birth certificate reflecting her true gender but is refused.

1995 She files a complaint with the European Commission of Human Rights in Strasbourg but is refused.

up soon afterwards and, presumably to avoid having to pay substantial alimony, Mr Corbett applied to the court to annul the marriage on the grounds that Ms Ashley had never really been female.

The judge in the Corbett case, Mr Justice Ormrod, dismissed evidence called by Ms Ashley about the role of psychological factors in determining sex or gender. Using language and ideas that now seem profoundly heterosexist and offensive, he said: "Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria [for determining a person's sex or gender] must in my view be biological", in other words, purely physical characteristics. He went on to say that no "degree of transsexualism" in someone formerly classed as a male could "reproduce a person who is naturally capable of performing the essential role of a woman in marriage", which he said was to bear children. He held that Ms Ashley was still legally male and the marriage was annulled.[6]

The judgment of Mr Justice Ormrod was subsequently used for many years to come to reject a series of transgender cases in the UK and other Common Law countries (except the United States); it was also cited in cases rejecting a right to same-sex marriage, including the case of *Zappone and Gilligan*[7] in Ireland, where the High Court refused to recognise the Canadian marriage of a lesbian couple in 2006, helping to spark off the campaign that ultimately led to the successful Marriage Equality referendum in 2015.

"When her case came before the Irish High Court in October 2000, Lydia Foy argued that she had been born transgender... She asked the court to quash the Registrar General's refusal to amend the Register of Births and issue her with a new, female, birth certificate."

It was not going to be easy to overturn this categorical rejection of the very existence of transgender people.

The hearing and the judgment

When her case came before the Irish High Court in October 2000, Lydia Foy argued that she had been born transgender, i.e. someone with "gender identity dysphoria", as it was called at the time. She had undergone gender reassignment surgery in 1992 and was now female both physically and from a psychiatric point of view. She asked the court to quash the Registrar General's refusal to amend the Register of Births and issue her with a new, female, birth certificate.

1996 Lydia approaches FLAC for legal help

1997 FLAC issues legal proceedings seeking legal recognition of Lydia's gender and a birth certificate to reflect same – the Foy No. 1 case.

> *"[The State] argued that the Register of Births could only be amended in cases of clerical errors of mistakes of fact and that the Registrar's refusal had been correct. They denied her rights to dignity, equality or privacy had been breached."*

The State, in its Defence, refused to admit that Ms Foy was a transgender woman, that she had undergone gender reassignment surgery or that she was female at any stage. They argued that the Register of Births could only be amended in cases of clerical errors or mistakes of fact and that the Registrar's refusal had been correct. They denied that her rights to dignity, equality, or privacy had been breached. Counsel for Lydia Foy's daughters, who had been joined to the case, also raised concerns about whether legal recognition would affect their family status.

The hearing lasted for 14 days and the FLAC legal team called evidence from leading medical experts in the UK and the Netherlands who stated that there could be a difference between a person's 'brain sex', or psychological gender, and their physical sexual characteristics and that the psychological gender should be regarded as the real gender.

The State relied heavily on the *Corbett v. Corbett* decision and argued that gender or sex should be decided only by physical characteristics. Lydia Foy had already been required by the State to undergo an invasive and humiliating medical examination and now she had to endure a painful and distressing examination of her personal life. There was lurid, intrusive and belittling coverage by sections of the media. She was jeered at and abused by some passers-by when leaving the court and pestered at home by some of the tabloid press. It was a harrowing experience for someone who had already lost her family, her job and most of her friends.

There was a long and nerve-wracking delay until judgment was given by Mr Justice Liam McKechnie on 9 July 2002. The result was deeply disappointing. Judge McKechnie stated that there was no authority under the Registration Acts to change the gender registered at birth except for purely clerical errors. He said the evidence about psychological gender was too speculative for him to conclude that Lydia Foy's constitutional rights had been violated by the refusal to recognise her in her preferred, female gender. He dismissed her case.

However Judge McKechnie had been moved by Lydia Foy's story. He said: "*[T]he evidence in this case, irrespective of legal outcome, shows without dispute or debate that this is an established and recognised condition...*

Transsexual to appeal case to Supreme Court

DR Lydia Foy, the transsexual who lost her case in the High Court seeking to have her birth certificate amended, will appeal to the Supreme Court, her legal team has confirmed, *writes Carol Coulter.*

Meanwhile, the European Court of Human Rights in Strasbourg yesterday found in favour of a British transsexual who had claimed that her right to privacy and to marry and start a family were infringed by the British authorities. Ms Christine Goodwin, a 64-year-old former bus driver, had, like Dr Foy, been married and a father before her gender reassignment operation in 1990.

2000 Foy Case No.1 heard over 14 days in the High Court by Mr Justice Liam McKechnie.

2002 Judgment given against Lydia but judge expresses sympathy for her position and calls on government to take action to help transgender persons.

and that those inflicted suffer greatly, usually for long periods, in relative isolation and frequently without understanding".

While saying that this issue would be best dealt with by the Oireachtas (the Irish Parliament) rather than the courts, he added a personal plea for speedy government action to provide some form of recognition of transgender persons, saying: "*Could I adopt what has been repeatedly said by the European Court of Human Rights and urge the appropriate authorities to urgently review this matter?*".

The decision was a serious blow for Lydia Foy, coming ten years after her gender reassignment surgery in 1992 and nine years after her first application to the Registrar General. However, with hindsight it is clear that the case, which was widely reported, even if some of the reporting was hurtful and sensationalist, had greatly raised awareness of the position of trans persons in Ireland. It had also led to a firm and clear acknowledgement by the Court of trans persons and their right to recognition, albeit in language that might be rejected by transgender persons today.

Mr Justice McKechnie had specifically called upon the authorities to take urgent action to assist transgender persons. He had also declined to make an order for costs against Lydia Foy, contrary to the general rule that the losing party is required to pay the costs of the case. That in itself was an acknowledgement that Lydia Foy had raised a serious issue and had been justified in taking it to the courts.

Lydia outside court, November 2005. Photo: Courtpix.

The European Court of Human Rights

In his closing remarks, Judge McKechnie had referred to calls by the European Court of Human Rights in Strasbourg for measures to recognise transgender persons. He did not know just how central to Lydia Foy's case decisions by that court would become.

During the High Court hearing, the FLAC legal team representing Lydia Foy had argued that the failure to recognise her female gender was in breach of her rights under Article 8 of the European Convention on Human Rights (ECHR), which guarantees respect for private and family life, and Article 12, which protects the right to marry.

By the time Lydia Foy's case was heard, the Strasbourg Court had considered six transgender cases, four of them against the UK. In one of the non-UK cases, *B v. France*,[8] which was decided in 1993, the Court had held in favour of the applicant, a trans woman, largely because, under the French system, a person's sex or gender was recorded on her/his identity card and people were required to produce their identity cards all the time. As a result, trans persons were liable to be outed every time they had any dealings with officialdom.

2005 Supreme Court remits case back to High Court. In November, Lydia makes new application to the Registrar General.

2006 Lydia's application refused and she issues new proceedings, relying on the European Convention on Human Rights (ECHR) Act – the Foy No. 2 case.

Dentist tries again to have birth registered as female

MARY CAROLAN

A dentist who underwent a sex change operation has begun a further stage of a 10-year legal battle to be registered as female at birth.

Lydia Foy has asked the High Court to rule that the failure to provide a system of birth registration that would allow her to be registered as female places the State in breach of the European Convention on Human Rights Act.

Although the European Court of Human Rights unanimously ruled five years ago in favour of two UK transgendered residents and the Irish High Court had urged the Government at that time to address the registration situation of transgendered persons, the State had done nothing since to make provision for its transgendered citizens, Bill Shipsey SC, for Ms Foy, said.

He was opening proceedings by Dr Foy (39), of Ashe, Co Kildare, who was born with male genitals and was registered at birth as a male. The action is being heard by Mr Justice Liam McKechnie and is expected to last several days.

Dr Foy, who is being represented in the action by the Free Legal Advice Centres, suffers from a syndrome known as gender dysphoria, a recognised psychiatric condition under which a person's individual sexual identity is at odds with their physical sexual indicators.

She married in 1977 and fathered two daughters, the last listed as a female since a 1990 and underwent male-to-female gender reassignment surgery in 1992. The marriage ended in the 1990s and in 1999 Dr Foy changed her name by deed poll.

In the High Court in July 2002, Mr Justice McKechnie refused to grant orders directing the registrar of births to describe Dr Foy as female on her birth certificate. He ruled on the basis of his findings from medical and scientific evidence, that Dr Foy was born male with conforming biological structures.

However, the judge appealed to the legislature to keep the situation of transgendered persons under constant review and to consider meeting their needs through legislation.

Two days after his decision, the European Court of Human Rights, in the Goodwin and "I" cases, ruled that the UK's refusal to recognise officially transgendered persons and give them new birth certificates breached their rights to marry and to respect for privacy under the convention.

In 2004, the European Convention on Human Rights Act, 2003, which requires all public authorities to act in accordance with the convention, came into effect here. Dr Foy made a fresh application for a female birth certificate in light of that. That second application was also refused in late 2005 and she initiated proceedings challenging that refusal.

In these latest proceedings, Dr Foy contends the European court decisions in the Goodwin and I cases mean the High Court should hold the State, in failing to provide for her registration as female at birth, to be in breach of her rights under the convention.

She claims she is entitled to be registered as female and that this could be achieved without her daughters losing their existing birth certificates.

Yesterday, when opening the case, Mr Shipsey said the failure of the state to address the requirements of transgendered citizens was compounded by the fact that the State had carried out a full review of the system of registration of births, marriages and deaths prior to enacting the Civil Registration Act, 2004.

During that review, the needs of adopted and divorced persons and those who secured decrees of nullity of marriage were addressed, but not the needs of transgendered persons, he said.

Dr Foy's lawyer will call two daughters who are opposing Dr Foy's applications and claim that, if the birth register is altered, this would have an adverse effect on their succession and other rights.

Lydia Foy outside the High Court yesterday, where she launched a fresh legal case to have the register of births record her birth as female. Photograph: Arthur Carron/Collins

Irish Times, 18 April 2007

In the other cases, the Strasbourg Court, while acknowledging the difficulties faced by trans persons, had found no violation of the ECHR because, in its view, there was still not enough evidence of the key role played by psychological gender and there was no consensus about recognising trans persons among the states that were parties to the ECHR. The Court held that in these circumstances, decisions on whether to recognise trans persons in their preferred gender were within the 'margin of appreciation', or leeway, allowed to states on sensitive issues.

But the size of the majority against finding a violation of Article 8 of the ECHR in trans cases was shrinking steadily – from 12 judges to three in the first UK case, *Rees v UK,*[9] which was decided in 1986, to 11 judges to nine in the case of *Sheffield and Horsham v UK,*[10] which was decided in 1999, just before the hearing of the Foy case. And the Court had strongly urged the UK to allow recognition of transgender persons.

In his judgment in the Foy case Judge McKechnie had noted the closeness of the margin in the *Sheffield and Horsham* case and had summarised with considerable sympathy the arguments of the dissenting judges who had voted to find a violation of the ECHR. He had also remarked on evidence submitted in that case to the effect that a survey of 37 European countries found that only four of them had no provision at all for recognising trans persons in their preferred gender. The four were Albania, Andorra, Ireland and the UK. It was clear that opinion in Europe was moving steadily towards recognition of trans persons and this obviously influenced Judge McKechnie's decision to call on the Irish authorities to urgently review the position.

But by the time Judge McKechnie delivered his judgment on 9 July 2002 and despite the number of cases taken against the UK, there had been no decision by the Strasbourg Court in favour of trans persons in the United

Lydia outside Four Courts, April 2007. Photo: Courtpix

2007

APRIL – Foy No.2 case heard in High Court.

OCTOBER – Judge McKechnie finds for Lydia and finds State in contravention of ECHR for failing to provide for gender recognition. He criticizes government for delay in dealing with this issue.

2008

FEBRUARY – The court issues first Declaration of incompatibility with the ECHR in Lydia's case; State appeals decision. Council of Europe Human Rights Commissioner, UN Human Rights Committee and EU Fundamental Rights Agency highlight Foy case and lack of transgender recognition legislation in Ireland.

Kingdom, where the law was almost identical to that in Ireland. By an odd quirk of fate the Strasbourg Court delivered its decision in two further cases from the UK, *Goodwin v. UK* [11] and *'I' v UK,* [12] two days later, on 11 July 2002.

In both cases, the Court unanimously held that the UK had breached the rights of trans women Ms Christine Goodwin and Ms 'I', by failing to recognise them in their female gender and by refusing to let them marry in that gender.

The decision of the Strasbourg Court was clearly a result of the growing trend across Europe towards recognition of trans persons and of the Court's frustration at the UK government's failure to respond to its repeated expressions of concern about what it described as "*the serious problems facing transsexuals*".[13]

Call for reform of sex-change legislation

Commission seeks changes to rights for transgendered

THERE IS a need for urgent reform of Irish law relating to transgendered people, according to the Irish Human Rights Commission (IHRC).

Transgendered people are those who have had gender reassignment surgery and treatment, having being diagnosed with gender identity disorder. This is a recognised medical disorder where a person's psychological identity and physical characteristics diverge.

Under current law a transgendered person cannot have a birth certificate issued with his or her new gender, and does not have the right to marry in that identity. However, in 2008, following a High Court case, the Oireachtas enacted the Passports Act 2008 which recognised a person's right to have a passport issued in his or her new gender.

tion of the rights of transgendered persons, and is being presented today. The IHRC submission does not specifically refer to the Foy case, but examines the law and jurisprudence under the ECHR.

It points out that the European Court of Human Rights has found, in a succession of cases, that laws restricting or preventing transgendered people from obtaining birth certificates or marrying in their new gender breach human rights in failing to recognise the person's new gender.

Referring to the situation in the UK, including Northern Ireland, the president of the IHRC, Dr Maurice Manning, said: "Prior to the adoption of the gender recognition act in 2004 by the British government it convened an interdepartmental working group on transsexual persons to consider the need for legislation and what form that legislation should take. This

The decisions of the Court of Human Rights in the *Goodwin* and *'I'* cases moved away from its previous emphasis on medical criteria and stressed instead the need to maintain a dynamic and evolutive approach in interpreting the ECHR and to look at the position in light of present day conditions. In other words, the Court should take account of changing attitudes in European society and of any new consensus that was emerging. It made clear that there was no longer any question about the right of trans persons to legal recognition. The only 'margin of appreciation', or leeway, that was left to states bound by the ECHR was about the way in which they should provide for the recognition of trans persons in their preferred gender.

This was a dramatic change in the Strasbourg Court's position on the issue. What would have happened if it had given its decision a few months or even weeks earlier? We will never know, but coming just two days after the dejection and demoralisation that followed the dismissal of Lydia Foy's case, this gave new hope to her and to the FLAC legal team representing her.[14]

> *"[The Court] made clear that there was no longer any question about the right of trans persons to legal recognition."*

2009

OCTOBER – Renewed Programme for Government (Fianna Fail & Green parties) promises to "introduce legal recognition of the acquired gender of transsexuals".

Appeal & New Developments

Lydia Foy appealed the decision in her case. In the three-year period before the appeal was listed for hearing in the Irish Supreme Court, there were some significant developments. Following the *Goodwin* decision by the Strasbourg Court, the UK House of Lords (*now the UK Supreme Court*) in 2003 held that the UK's marriage legislation was incompatible with the ECHR because it made no provision for trans persons to get married in their preferred gender.[15] The UK quickly passed the Gender Recognition Act 2004, which provided for the recognition of trans persons in their preferred gender and allowed them to marry in that gender as well.

In Ireland, the Oireachtas (Parliament) passed the European Convention on Human Rights Act 2003 (ECHR Act), which came into force at the end of that year. The Act, which was modelled on the UK Human Rights Act 1998, was intended to give greater effect to the ECHR within Irish law. It required public bodies to carry out their functions, as far as possible, in compliance with the ECHR and required the courts to interpret legislation, also as far as possible, in line with it also. The EHCR could not overrule domestic legislation where there was a conflict between that legislation and the provisions of the ECHR, but where there was such a conflict, the Irish courts could issue a declaration that the legislation in question was incompatible with the ECHR

Following the UK model, a Declaration of Incompatibility could not affect the validity of the domestic law or anything done in compliance with it, but the making of the declaration had to be notified to the Taoiseach (Prime Minister) and the Oireachtas, who would be expected to take action to bring the legislation into line with the ECHR. This system worked reasonably well in the UK, where there was a fast-track procedure for amending the law in response to such declarations and where, until recently, there has been a willingness by government to respond positively in most cases. Changes have been made in the law in the UK in response to all but one or two of the 20 or 21 Declarations of Incompatibility made to date under the Human Rights Act. Under the Irish legislation, however, there was no fast track procedure and it remained to be seen how the Government would respond to a Declaration of Incompatibility.

Lydia Foy's case was listed for hearing by the Supreme Court in November 2005. Following the *Goodwin* decision by the Strasbourg Court and the passing of the ECHR Act in Ireland, her legal team[16] applied to the Supreme Court to amend her appeal to include an application for a Declaration of Incompatibility with the ECHR under the new ECHR Act. The Supreme Court remitted the case back to the High Court to deal with this application.

2010

JUNE – The Government drops its appeal and sets up the Gender Recognition A dvisory Group (GRAG) to report on possible legislation. Lydia is chosen as Grand Marshal of Dublin Pride Parade.

Lydia with Tánaiste and Minister for Social Protection Joan Burton TD at the launch of the Gender Recognition Advisory Group report, 14 July 2011. Photo: Damien Eagers Photography

The Foy No. 2 case

To make sure that the case would come under the new ECHR Act, Lydia Foy also made a new application for a birth certificate in her female name and gender in November 2005, pointing out the new obligation under the Act requiring public bodies to carry out their duties in compliance with the ECHR, and referring to the decision of the Strasbourg Court in the *Goodwin* case that failure to recognise trans persons was a breach of the ECHR.

The Registrar General refused again on the grounds that he had no power under the Registration Acts to do what was requested.

Lydia Foy appealed this decision to the High Court in January 2006 and this time she also sought a declaration that the relevant sections of the Registration Act were incompatible with the ECHR. This became known as the *Foy No. 2* case.

It was agreed by all sides to the case that the issue remitted to the High Court by the Supreme Court and the *Foy No. 2* case should be consolidated and heard together by Mr Justice McKechnie because he was already familiar with the case and so the hearing could proceed largely based on the transcripts of the evidence heard by him over 14 days in 2000. The case was heard in April 2007.

The FLAC legal team, now joined by senior counsel Gerard Hogan[17] and junior counsel Siobhan Phelan, relied heavily on the *Goodwin* decision and the 2003 decision by the UK House of Lords in the case of *Bellinger v Bellinger*, where the UK's most senior court had issued a Declaration of Incompatibility under the UK Human Rights Act. But they also cited another subsequent decision against the UK by the Strasbourg Court,[18] decisions upholding trans rights by the Court of Justice of the European Union (the ECJ),[19] decisions by courts in other European countries and in Common Law jurisdictions like the US, and particularly Australia.[20]

The State relied on the negative decision in the *Foy No. 1* case and denied that the refusal to amend the Register of Births was in breach of the ECHR or the ECHR Act. They sought to distinguish the Foy case from the Strasbourg Court's decision in the *Goodwin* case, arguing that the Court had not dealt with the possible effects of legal recognition of transgender persons on family members, especially children, and that Ireland should be given more leeway or "margin of appreciation" on such issues because of the Irish Constitution's strong protection of marriage.

They argued as well that a birth certificate was a record of a single event in time and should not be amended to reflect other developments in its holder's life. Further they claimed that Lydia Foy had not suffered as much abuse and hardship as Ms Goodwin.

Lydia Foy's legal team responded that she did not want to affect the status or rights of her children in any way and that the orders she sought would not affect the validity of anything done before the date of her gender transition including the validity of her marriage. She was already legally separated from her wife.

Mr Justice McKechnie heard the case over seven days in April 2007 and gave his decision on 19 October 2007.

In a lengthy judgment[21] that dealt with both the *Foy No. 1* case, which had been referred back to

2011

FEBRUARY – New government elected: Fine Gael/Labour coalition. New Programmefor Government promises transgender recognition legislation.

JULY – The GRAG Report recommends very restrictive legislation.

2012

FEBRUARY – Lydia applies for compensation under ECHR Act

NOVEMBER – Human Rights Commissioner of the Council of Europe, Nils Muiznieks, writes to Irish Government Ministers criticising delay in changing the law.

the High Court, and the appeal against the Registrar General's new refusal in December 2006 – the *Foy No. 2* case – Judge McKechnie repeated that there was nothing in Irish law or the Irish Constitution that would require or allow amendment of the record of Lydia Foy's birth and the issue of a new birth certificate.

He held that the *Goodwin* judgment by the Strasbourg Court could not affect his earlier decision because at that time, prior to the passing of the ECHR Act, 2003, decisions of the Court of Human Rights were not binding on the Irish State unless they were delivered in a case taken against Ireland. He held that the ECHR Act, which did require the Irish courts to take account of decisions of the Strasbourg Court, was not retrospective in its effect and could not apply to Lydia Foy's earlier application for a new birth certificate.

So there was no change in respect of *Foy No. 1*.

But when he came to the *Foy No. 2* case – the appeal against the 2006 refusal by the Registrar General – it was a different story. Here the ECHR Act clearly applied and the judge relied to a great extent on the *Goodwin* case, supported by a subsequent Strasbourg decision that a trans woman whose female gender had been recognised by the UK authorities should qualify for a pension at the earlier age allowed for women.[22] He referred as well to the decisions by the European Court of Justice cited by Lydia Foy's team and an Australian case which categorically rejected the *Corbett v Corbett* decision that had been used to oppose trans recognition for so many years.[23] Judge McKechnie noted that the range of the cases quoted to him "*form part of an expanding base of broad judicial opinion supporting the fundamental claims of transsexual persons*".

He dismissed the arguments that the *Goodwin* case did not apply, stating that the Strasbourg Court had given adequate consideration to the effects of gender recognition on family members and that the only margin of appreciation that should apply was in relation to the way in which the government should provide for gender recognition, not whether they should do so.

Judge McKechnie went on to hold that the failure to provide for a mechanism that could recognise Lydia Foy's preferred gender was in breach of her rights under Article 8 of the ECHR which protects private and family life. As there was no other remedy available under Irish law, he would make a Declaration that the relevant sections of the Registration Acts were incompatible with the ECHR. It was the first ever Declaration of Incompatibility to be issued under the ECHR Act 2003.

The judge added for good measure that if Article 12 of the ECHR, protecting the right to marry, had been applicable in this case, he would have made a Declaration of Incompatibility in relation to it as well. Article 12 did not apply because Lydia Foy was not divorced at that stage and so would not have been in a position to marry again. At the time her marriage had broken down, divorce was still prohibited in Ireland.

2013

JANUARY – Lydia issues new proceedings to compel government to legislate – the Foy No. 3 case.

MAY/JUNE – Senator Katherine Zappone and Sinn Féin party publish Private Members Bills to recognise Transgender identity.

JULY – Government publishes Heads of Bill on Gender Recognition.

Council of Europe Commissioner for Human Rights Nils Muiznieks, Michael Farrell and Lydia at the ILGA conference in Dublin, 17 October 2012. Photo: Louise Hannon Media

OCTOBER – Oireachtas Committee on Justice & Equality holds hearings on the Heads of Bill.

The Declaration of Incompatibility

The State's legal team had also objected to the issue of the Declaration of Incompatibility, and in response Judge McKechnie dealt with two significant points. He rejected an argument that a Declaration of Incompatibility could only be made where some legal provision expressly prevented the exercise of a ECHR right, and not in relation to a failure to protect or provide for such a right. He held that Article 8 of the ECHR imposed a positive obligation on the State to provide for the recognition of Lydia Foy's preferred gender and that it had failed to do so.

Judge McKechnie also rejected an argument that a Declaration of Incompatibility should not be issued because it would be of no practical value to Lydia Foy since it would not change the law. He noted that the Taoiseach would be obliged to lay a copy of the Declaration before both Houses of the Oireachtas and he said, somewhat ironically in light of subsequent events, that if one of the superior courts (the High Court or the Supreme Court) made such a Declaration, that Court "*can have a reasonable expectation that the other branches of government ... would not ignore the importance and significance of the making of such a declaration*". He also pointed out that following the making of a Declaration, a person whose rights had been curtailed by the operation of the impugned legislation could apply for compensation under Section 5 of the ECHR Act 2003.

> *"[Judge McKechnie]... held that Article 8 of the Convention imposed a positive obligation on the State to provide for the recognition of Lydia Foy's preferred gender and that it had failed to do so."*

Dr Lydia Foy outside the High Court in Dublin yesterday after the ruling that the State's failure to provide for "meaningful recognition" of her new female identity violates the European Convention on Human Rights. Photograph: Frank Miller

'Maybe now we can really begin to respect diversity'

Lydia Foy has been fighting for her rights for the last decade, writes **Carl O'Brien**

2014

JANUARY – Oireachtas Committee issues its report, criticising the Heads of Bill.

JULY – UN Human Rights Committee criticises Heads of Bill.

DECEMBER – Bill published with promise to introduce in Oireachtas in January 2015.

Mr Justice McKechnie also expressed his evident frustration at the Irish government's failure to take any steps to assist the transgender community following his plea for them to do so at the end of his 2002 judgment. In very trenchant terms, he said:

> *This State ... has failed or declined to produce evidence of any movement, even at an initiating, debating or investigative level on the plight of transsexual persons in this country [...] [I]t is very difficult to see how this Court ... could now exercise further restraint, grant even more indulgence, and afford yet even more tolerance to this State some five years after both the decision in Goodwin and the July 2002 judgment. In fact, in my humble opinion, this Court cannot, with any degree of integrity, do so.*

When the decision was delivered, Lydia had to sit through a lengthy judgment that began by repeating the negative conclusions of the previous verdict in 2002. It was not until towards the end of the proceedings that it became clear that the court was going to find in her favour. The result was a great success for her and the first positive result she had received since she first applied for a new birth certificate fourteen years previously. Unfortunately, however, the euphoria did not last very long.

The Declaration of Incompatibility was not formally issued until 14 February 2008. It stated:

> *Sections 25, 63, and 64 of the Civil Registration Act, 2004 are incompatible with the obligations of the State under the European Convention on Human Rights by reason of their failure to respect the private life of the Applicant as required by Article 8 of the said Convention in that there are no provisions which would enable the acquired gender identity of the Applicant to be legally recognised in this jurisdiction.*[24]

The State promptly appealed to the Irish Supreme Court, which put a stay on the next step in the procedure envisaged by the ECHR Act, where the Taoiseach would lay a copy of the Order of the Court before the Houses of the Oireachtas. It meant that Lydia was going to have to face another lengthy wait before she could get her new birth certificate. Not surprisingly, she was deeply disappointed by the government's decision to appeal.

Gender recognition Bill violates human rights law

Michael O'Flaherty

Opinion

The gender Bill should be amended significantly to respect the freedom and dignity of transgender people

The Bill draws on the outdated legislation of some states to establish in Ireland a gender recognition framework that is disrespectful to transgender persons, out of line with international good practice and at odds with our international human rights commitments

2015

JANUARY – Gender Recognition Bill introduced in Seanad

MAY – Marriage Equality referendum carried.

It is easy to forget the toll that ground-breaking legal cases can take on the people involved. Lydia Foy was a reluctant campaigner. When she wrote to the Registrar General in 1993 it was to quietly obtain a new birth certificate that reflected who she really was, and get on with her life.

Instead she became a focus of unwelcome attention, pilloried by some and simply having her privacy invaded by others. There were attacks on her home and abuse in the streets of the small town where she lived. She had a few good friends who helped her but for much of the time there was no transgender group to support her and she had to bear this burden on her own.

It took real courage for Lydia to keep going and the State's appeal after so many years of struggle was a body blow to her, but she carried on, aided by a quirky sense of humour, the emergence over time of a trans community to back her, and the work of a number of journalists and media outlets that consistently supported her.

Lydia with Ken Murphy, Law Society Director General, and Noeline Blackwell, FLAC Director General, July 2009. Photo: Audra Melton /Atlantic Philanthropies.

Campaigning

In preparation for the hearing of the *Foy No. 2* case, FLAC had contacted human rights and equality institutions and NGOs around the world to get information about trans rights cases and developments in different countries and before various international institutions. FLAC had made a lot of contacts and had kept them informed about the progress of the Lydia Foy case.

Shortly before the hearing, FLAC had prepared briefing notes about the case to raise awareness among the media and interested organisations and explain the issues involved so as to try to avoid some of the ill-informed, hurtful and offensive comments and reports that marked the first hearing in 2000.

JUNE – Government drops requirement for medical certification.

JULY – Gender Recognition Act is passed.

Lydia and Michael Farrell outside Leinster House after the Gender Recognition Bill was passed in the Seanad, 15 July 2015

The contacts made and the experience gained in trying to explain the issues to the media were to become more important after the state's appeal against the Declaration of Incompatibility. At that stage there were long delays in obtaining dates for hearing in the Supreme Court and FLAC was informed by the Courts Service that it could be 3½ or 4 years before the appeal would be heard, with the possibility of further delays before the judgment would be delivered.

It was also unlikely that the government would do anything about the issue until the appeal was concluded. Lydia Foy had already spent 14 years seeking legal recognition. It was unacceptable that, even if the State's appeal was eventually rejected, she should have to wait another four years before work would even begin on changing the law.

FLAC is an advocacy body campaigning for social and legal reform as well as a legal advice organisation: Now its dual role came into operation.

Armed with a clear and unequivocal decision by the Irish High Court that the State was in breach of its obligations under the ECHR in its treatment of trans persons, FLAC began to regularly brief international human rights bodies as well as the media about the situation. There was active support for the rights of trans persons from the Irish Human Rights Commission and Equality Authority and, most importantly, from the trans community itself. While there had been a few, quite isolated, trans activists at the time of the *Foy No.1* case, the second case and the preparations for the hearing helped greatly to mobilise members of the trans community.

Appeal against transgender ruling withdrawn

Government decision ends 13-year struggle

JAMIE SMYTH
Social Affairs Correspondent

THE GOVERNMENT has withdrawn its appeal against a landmark ruling by the High Court that Irish law on transgender rights is in breach of the European Convention on Human Rights.

The decision brings to an end a 13 year legal battle against the State by Dr Lydia Foy, a former dentist who was registered as male at birth and fought for legal recognition to live as a woman.

It also paves the way for the Government to propose new legislation giving transsexuals the right to obtain birth certificates showing their acquired sex and the entitlement to marry in that gender.

Dr Foy, who began High Court proceedings to secure recognition of her acquired gender in 1997, said she was delighted the long legal battle was finally over. "I hope this achievement will help others who have endured the pain, abuse, isolation, humiliation and fear that have been the lot of those who are transgendered," she said.

Transgendered people are those who have had gender reassignment surgery and treatment, having been diagnosed with gender identity disorder. This is a recognised medical disorder where a person's psychological identity and physical characteristics diverge.

Support groups estimate at least 600 people suffer from gender identity disorder in the Republic. This number could be higher as people may choose not to come forward due to the stigma associated with the disorder.

Under current law a transgendered person cannot have a birth certificate issued with his or her new gender, and does not have the right to marry in that identity.

However, in October 2007 the High Court, in a case brought by Lydia Foy, stated that Irish law on issuing identity documents to transgendered people was incompatible with the European Convention on Human Rights (ECHR).

Mr Justice McKechnie ruled that the lack of a provision in Irish law for recognising Dr Foy's new gender identity was a breach of her rights under Article 8 of the ECHR, which protects private and family life. "In this regard, Ireland as of now is very much isolated within the member states of the Council of Europe," he added.

This landmark judgment overturned a previous ruling by the same judge of the High Court in July 2002, who found physical and biological indicators should be used to determine sex/gender.

Just two days after this ruling was delivered, the European Court of Human Rights in Strasbourg found in favour of recognising transsexuals' right to legal recognition. A year later the Oireachtas enacted the 2003 ECHR Act, which incorporated the European Convention on Human Rights into Irish law and created the conditions for Ms Foy's eventual legal victory in 2007. The Government's decision to withdraw its appeal against the 2007 decision by the High Court means it will have to reply to that judgment.

Under section 5 of the ECHR Act 2003 the Taoiseach must bring to the attention of the Dáil and Seanad Éireann a declaration of incompatibility issued by the High Court within 21 sitting days.

In anticipation of the withdrawal of the legal appeal the Government has set up an inter-departmental committee on the legal recognition of transsexuals.

The gender recognition advisory group held its first meeting on May 6th and is due to make recommendations on legislation within six months. Under its terms of reference it is to propose heads of a Bill to provide for:

- A process for legal recognition of the acquired gender of persons suffering from gender identity disorder who have made transition from one gender to another;
- To set up a gender recognition register for such persons. The certificates issued by this register should be indistinguishable from birth certificates and not refer to the fact a person has acquired a new gender;
- An entitlement to transsexuals to marry in the legally recognised reassigned gender.

Michael Farrell, senior solicitor for Free Legal Advice Centres, who represented Ms Foy in the case, called on the Government to act quickly to introduce legislation.

Irish Times, 22 June 2010

Lydia with her birth certificate, September 2015. Photo: Paula Geraghty

SEPTEMBER – Gender Recognition Act commenced. Lydia Foy receives first Gender Recognition Certificate, followed by new birth certificate.

2015 *continued*

A well organised and effective group seeking to improve conditions and advance the rights and equality of trans people and their families called Transgender Equality Network Ireland (TENI)[25] was established in 2005 and soon began to make its presence felt.

Following an official monitoring visit at the end of 2007, the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, issued a major report on Ireland in April 2008. He had been well briefed about the *Foy* case by FLAC, TENI and other bodies and his report welcomed the High Court decision and the Declaration of Incompatibility. He said he expected *"that legislation bringing the current birth registration law into line with ... the standards of the European Convention on Human Rights will be in place soon"*.

Recommendation 20 of his Report went on urge the Irish government to "*Change the law on birth registration in such a way that transgender persons can obtain a birth certificate reflecting their actual gender."* [26]

The UN Human Rights Committee reviewed Ireland's compliance with the International Covenant on Civil and Political Rights in July 2008. Once again the Committee was well briefed and recommended that "*Ireland should also recognise the right of transgender persons to a change of gender by permitting the issue of new birth certificates."*[27]

"The UN Human Rights Committee reviewed Ireland's compliance with the International Covenant on civil and Political Rights in July 2008. Once again the Committee was well briefed and recommended that 'Ireland should also recognise the right of transgender persons to a change of gender by permitting the issue of new birth certificates."

Later in 2008, a major report on LGBT issues by the European Union's Fundamental Rights Agency also highlighted the Foy case and the lack of gender recognition legislation in Ireland.[28] It too had been kept informed of the position by FLAC, TENI and other groups.

With growing awareness of trans issues and of what Mr Justice McKechnie had described as Ireland's "*increasing isolation"* from the rest of Europe on this issue, sections of the media and civil society had also begun to take the matter up and there was now increasing pressure on the government to respond to the High Court's Declaration of Incompatibility and the concerns expressed by the international human rights bodies.

OCTOBER – Lydia is honoured by the European Parliament in Brussels for her work for transgender rights.

Group attending the presentation of a European Parliament medal of honour to Lydia in Dublin, 25 September 2015. Photo: Paula Geraghty

The end of the appeal & the establishment of the Gender Recognition Advisory Group

Eventually, in October 2009, when the then Irish government (a coalition of Fianna Fail – one of the two major traditional parties – and the Green Party) published a mid-term "*Renewed Programme for Government*", it included a commitment that "*We will introduce legal recognition of the acquired gender of transsexuals.*" [29]

FLAC and TENI pointed out the inconsistency between this pledge and the government's continuing appeal against the Declaration of Incompatibility in the Lydia Foy case and in June 2010 the government withdrew its appeal against the Declaration of Incompatibility, which thereby became final.

The government also set up an inter-Departmental 'Gender Recognition Advisory Group' (GRAG) to advise on the legislation that would be required in order to recognise trans persons in their preferred gender. Remarkably, however, there was no member of the transgender community, or even anyone who worked with that community, on the advisory group.

FLAC, having taken on Lydia Foy's case not only because of the injustice done to her, but because of the wider injustice to all trans persons, and having in the process learned a lot about gender recognition legislation in other countries, decided to engage with the GRAG committee to try to ensure that the proposed legislation would be as inclusive as possible and would end the discrimination and prejudice that the trans community had experienced for so long.

For FLAC, the Lydia Foy case had by then developed its own momentum and grown into an almost classic example of strategic public interest litigation, building on a single strategic case to change the law in an important area and trying to do so by litigation, awareness-raising and campaigning in close cooperation with the representatives of the disadvantaged group in question.

FLAC, TENI and other bodies like the Irish Human Rights Commission and Equality Authority all made written and oral submissions to the GRAG committee.[30] FLAC concentrated on the legal aspects of the proposed legislation while TENI, speaking for the trans community and reflecting their lived experience, took the lead on issues like the criteria for gender recognition. Ironically, most of the submissions would have settled at that stage for fairly modest reforms that would have been a lot less radical than the ultimate outcome.

However, when the GRAG committee reported in June 2011 the result was deeply disappointing. While it recommended legislation to recognise and support trans persons, its proposals were very restrictive. It recommended that only someone who had been diagnosed by a psychiatrist as suffering from Gender Identity Disorder, or who had undergone gender reassignment surgery, could qualify for recognition.[31]

Married trans persons or those in civil partnerships – which had been introduced in Ireland in 2010 – would have to divorce or dissolve their partnerships, whether they or their spouses wanted to, or not, and there was no provision for recognition or support for children or young people under 18.

Social attitudes in Ireland on issues like sexual orientation and gender identity were changing very rapidly at this time. Civil partnership for lesbians and gay men had been introduced with minimal opposition

and there was growing support for same-sex marriage. Old taboos were being ignored and long suppressed minorities were finding their voice and were being listened to. The GRAG report might have been accepted a few years earlier, but now it was widely criticised for not going far enough.

The single status or '*compulsory divorce*' requirement was particularly resented. The reason given for it was to ensure that the new legislation would not result in same-sex marriages where one partner in a heterosexual marriage transitioned to the opposite gender but the couple wished to stay together. The courts had held that the Constitution restricted marriage to heterosexual couples.

In its submissions to the GRAG, FLAC had specifically cited a decision by the German Constitutional Court in 2008 striking down a similar '*compulsory divorce*' requirement in the German Transsexuals Act, even though German law did not allow same-sex marriage. The Constitutional Court held that it was unfair and disproportionate to force trans persons and their spouses to give up their right to remain married as a condition for recognising the preferred gender of the trans spouse.[32]

The German judgment was part of a series of decisions by which the Constitutional Court removed most of the restrictive provisions of the original Transsexuals Act, which had been introduced in 1980. FLAC argued for the introduction of tolerant and inclusive legislation from the beginning rather than having to dismantle unnecessary restrictions slowly and painfully over nearly 30 years as the German courts had to do.[33]

A new government

A new Irish government had been elected in February 2011, before the publication of the GRAG Report. A coalition of Fine Gael and the Labour Party, the new administration promised in its Programme for Government that it would "*ensure that transgender people will have legal recognition and extend the protection of the Equality legislation to them.*"[34] At the launch of the GRAG Report in June 2011, the new Minister for Social Protection, Labour Deputy Joan Burton TD, whose department was responsible for the registration of births and marriages, pledged to introduce Gender Recognition legislation as a high priority.

Irish Times, 15 July 2011

Transgender people to be recognised in law

Legislation to be published next year

CAROL COULTER
Legal Affairs Editor

LEGISLATION TO provide for the recognition of the new acquired gender of transgender people will be published in the next year by Minister for Social Protection Joan Burton.

It follows the successful legal action taken by Lydia Foy.

The Minister announced her plan when she published the report of an interdepartmental group set up in May 2010 to advise the government on the implications of a High Court ruling that the failure to provide such recognition contravened the European Convention on Human Rights.

Transgender people have a condition called gender identity disorder, where their psychological identity is different from that suggested by their physical characteristics.

According to the report of the interdepartmental group, there are an estimated 300 people with the condition in Ireland, of whom the majority are males wishing to transition to females.

The High Court case was taken by Dr Foy, and was the culmination of a 14-year battle on her behalf to secure official recognition as a woman, despite having being born with male physical characteristics, and having lived her early life as a man.

Her first case, seeking a new birth certificate, failed in the High Court. Within days of that decision the European Court of Human Rights ruled that a similar case in the UK contravened the European Convention on Human Rights.

She then sought a High Court declaration that absence of legal recognition for transgender people in Ireland contravened the convention.

In the first such declaration under the Human Rights Act, Mr Justice McKechnie ruled in her favour in 2007 and the government set up the interdepartmental committee in 2010, chaired by Oliver Ryan, retired assistant secretary in the Department of Social Protection.

Its main recommendations are that an independent three-member gender recognition panel, made up of a medical and a legal specialist, and chaired by an independent person from outside these disciplines, would be set up to examine applications from people seeking recognition of their acquired gender.

If people met certain criteria they would be issued with a gender recognition certificate, which would have the effect of legally recognising their acquired gender. They would be entitled to a new birth certificate in their acquired gender, though the original birth certificate would remain on file.

They would be entitled to marry a person of the opposite sex to their acquired gender or enter into a civil partnership with a person of the same gender.

Dr Lydia Foy: took High Court case that prompted change

In order to qualify they would have to meet a number of conditions, including that they had lived in their acquired gender for at least two years; that they had provided either a formal medical diagnosis of their condition or had had gender reassignment surgery; that they were over 18; and that they were not in a subsisting marriage or civil partnership.

There was some criticism of the decision to require a married transgender person to divorce in order to qualify for official recognition, but Ms Burton said it would be unconstitutional otherwise, as it would be open to challenge for permitting same-sex marriage.

The Free Legal Advice Centres, which represented Dr Foy in her battle for legal recognition in her female gender, said the committee's report and the promise to change the law were a significant milestone in the struggle for legal recognition and inclusion of transgender persons in Irish society.

"While we have concerns about some of the report's recommendations, we welcome it as an official acknowledgement and acceptance of the transgender community and a recognition of their right to dignity and respect."

However, the legal group said it was concerned about the proposal that a person already married would have to divorce to secure recognition, a point echoed by the Irish Council for Civil Liberties.

"It will force applicants to make an impossible choice between their life partner and recognition in their preferred gender," said council deputy director, Tanya Ward.

Broden Giambrone of the Transgender Equality Network Ireland welcomed the report, but was critical of the restrictive nature of the proposed criteria for recognition.

"...when there was still no sign of the Heads of the Gender Recognition Bill, FLAC wrote to the State warning that if Lydia Foy was not issued with a new birth certificate very shortly, she would have no option but to issue new legal proceedings seeking to vindicate her rights as declared by the High Court in the Foy No. 2 case."

Lydia Foy: Long legal fight.

Foy meets EU commissioner

Council of Europe human rights commissioner Nils Muiznieks yesterday met transgender woman Lydia Foy in Dublin.

At the annual meeting of the International Lesbian and Gay Association, he noted that Ms Foy was still awaiting recognition of her female gender identity after litigation that had gone on for over a decade.

In 2007, the High Court found Irish law was incompatible with the European Convention on Human Rights because it fails to legally recognise transgender persons.

Irish Examiner, 19 October 2012

After the publication of the GRAG Report, the issue went back to the Department of Social Protection to draft the 'Heads', or scheme, of a Gender Recognition Bill. Another working group was established, which held more consultations with FLAC, TENI and other interested parties, but nothing happened for some time.

In February 2012, 4½ years after the High Court decision in the *Foy* case and with no sign of the Heads of Bill appearing, Lydia Foy made a formal application under Section 5 of the ECHR Act 2003 for compensation for the violation of her rights under the ECHR, as found by the High Court in October 2007. This was the first such application to be made under the ECHR Act. The Chief State Solicitors Office responded by saying that, nine years after the passing of the ECHR Act, no procedure had yet been established for dealing with such applications.

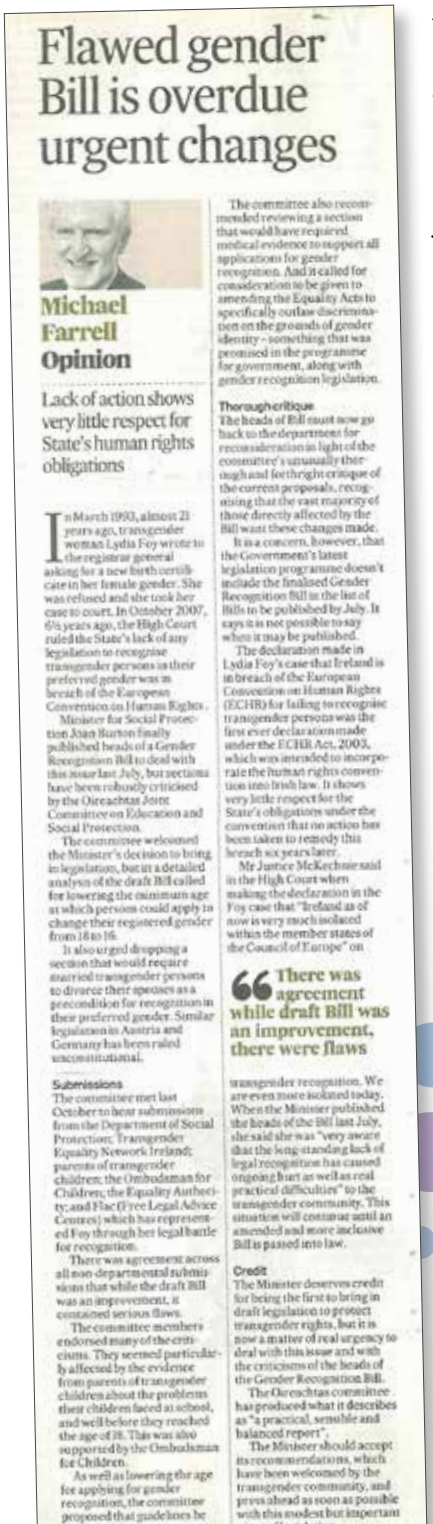
Some months later, when there was still no sign of the Heads of the Gender Recognition Bill, FLAC wrote to the State warning that if Lydia Foy was not issued with a new birth certificate very shortly, she would have no option but to issue new legal proceedings seeking to vindicate her rights as declared by the High Court in the *Foy No.2* case. By then it was 20 years since Lydia Foy had begun to live exclusively as a woman and she was deeply frustrated at the continuing lack of action.

However, after two High Court cases, with all the accompanying stress and anxiety and the intrusive media attention she had experienced, Lydia Foy had no desire to get involved in yet another legal battle if it could be avoided. She held off taking further action over the summer of 2012 in the hope that there would be some movement by the government. In October 2012, Minister Burton spoke at a conference of Transgender Europe,

the European Alliance of Trans groups, which was held in Dublin, and again promised early publication of the Heads of the Gender Recognition Bill.

In the meantime, lobbying and campaigning on the issue was stepped up and international human rights bodies were briefed again about the delays. In November 2012, following a visit to Dublin when he met Lydia Foy and FLAC, the new Council of Europe Commissioner for Human Rights, Nils Muiznieks, wrote to Minister Burton stating that *"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."*[35] He repeated the call made four years earlier by his predecessor Thomas Hammarberg for speedy action to bring in the legislation.

Irish Times, 5 February 2014



Flawed gender Bill is overdue urgent changes

Michael Farrell

Opinion

Lack of action shows very little respect for State's human rights obligations

In March 1993, almost 21 years ago, transgender woman Lydia Foy wrote to the registrar general asking for a new birth certificate in her female gender. She was refused and she took her case to court. In October 2007, 6½ years ago, the High Court ruled the State's lack of any legislation to recognise transgender persons in their preferred gender was in breach of the European Convention on Human Rights.

Minister for Social Protection Joan Burton finally published heads of a Gender Recognition Bill to deal with this issue last July, but sections have been robustly criticised by the Oireachtas Joint Committee on Education and Social Protection.

The committee welcomed the Minister's decision to bring in legislation, but in a detailed analysis of the draft Bill called for lowering the minimum age at which persons could apply to change their registered gender from 18 to 16.

It also urged dropping a section that would require married transgender persons to divorce their spouses as a precondition for recognition in their preferred gender. Similar legislation in Austria and Germany has been ruled unconstitutional.

Submissions

The committee met last October to hear submissions from the Department of Social Protection, Transgender Equality Network Ireland; parents of transgender children; the Ombudsman for Children; the Equality Authority; and Flac (Free Legal Advice Centres) which has represented Foy through her legal battle for recognition.

There was agreement across all non-departmental submissions that while the draft Bill was an improvement, it contained serious flaws.

The committee members endorsed many of the criticisms. They seemed particularly affected by the evidence from parents of transgender children about the problems their children faced at school, and well before they reached the age of 16. This was also supported by the Ombudsman for Children.

As well as lowering the age for applying for gender recognition, the committee proposed that guidelines be

The committee also recommended reviewing a section that would have required medical evidence to support all applications for gender recognition. And it called for consideration to be given to amending the Equality Acts to specifically outlaw discrimination on the grounds of gender identity – something that was promised in the programme for government, along with gender recognition legislation.

Thorough critique

The heads of Bill must now go back to the department for reconsideration in light of the committee's unusually thorough and forthright critique of the current proposals, recognising that the vast majority of those directly affected by the Bill want these changes made.

It is a concern, however, that the Government's latest legislation programme doesn't include the finalised Gender Recognition Bill in the list of Bills to be published by July. It says it is not possible to say when it may be published.

The declaration made in Lydia Foy's case that Ireland is in breach of the European Convention on Human Rights (ECHR) for failing to recognise transgender persons was the first ever declaration made under the ECHR Act, 2003, which was intended to incorporate the human rights convention into Irish law. It shows very little respect for the State's obligations under the convention that no action has been taken to remedy this breach six years later.

Mr Justice McKechnie said in the High Court when making the declaration in the Foy case that "Ireland as of now is very much isolated within the member states of the Council of Europe" on

"There was agreement while draft Bill was an improvement, there were flaws"

transgender recognition. We are even more isolated today. When the Minister published the heads of the Bill last July, she said she was "very aware that the long-standing lack of legal recognition has caused ongoing hurt as well as real practical difficulties" to the transgender community. This situation will continue until an amended and more inclusive Bill is passed into law.

Credit

The Minister deserves credit for being the first to bring in draft legislation to protect transgender rights, but it is now a matter of real urgency to deal with this issue and with the criticisms of the heads of the Gender Recognition Bill.

The Oireachtas committee has produced what it describes as "a practical, sensible and balanced report".

The Minister should accept its recommendations, which have been welcomed by the transgender community, and press ahead as soon as possible with this modest but important

The Foy No. 3 Case & the Heads of the Gender Recognition Bill

When there had been no further developments by January 2013, Lydia Foy finally issued new proceedings in the High Court, known as the *Foy No. 3 case*. The new proceedings sought:

- a declaration that the Irish government was under a legal duty to make provision for issuing her with a new birth certificate;
- a declaration that the failure to do so was in breach of her rights under Articles 3 (inhuman and degrading treatment) and 13 (right to an effective remedy) of the ECHR; and
- a declaration that, if the ECHR Act could not provide an effective remedy for the now admitted violation of her rights and if the government could simply ignore a Declaration of Incompatibility issued by the courts, then the Act itself was incompatible with the ECHR.

Lydia Foy also sought damages for the continuing breach of her rights following the High Court decision in 2007. By this time, the long drawn out Foy case and the lack of gender recognition provision in Ireland were attracting wider attention across Europe and beyond. The Transgender Europe conference in Dublin had alerted trans groups and their supporters all over Europe to the lack of Gender Recognition legislation in Ireland. The International Commission of Jurists (ICJ) also contacted FLAC in December 2012 expressing an interest in intervening as an *amicus curiae* (friend of the court) in the new legal proceedings.

The ICJ was interested not only in the Irish government's failure to introduce gender recognition legislation but also in its failure to act to remedy a clear breach of the ECHR as found by the Irish courts. At a time when the

Lydia with President Michael D Higgins at the Irish Human Rights Commission annual human rights conference. 10 December 2012. Photo: Derek Speirs

European Court of Human Rights was almost overwhelmed by the number of complaints it received from all over Europe, the ICJ and other human rights organisations were concerned that the ECHR and the Strasbourg Court could survive only if national courts in each state enforced the ECHR and provided effective remedies when it was breached. The Irish government officially supported this position, but its failure to respond adequately to the first Declaration of Incompatibility made by the Irish courts was seen as setting a bad example for other European governments with much worse human rights records than Ireland.

In December 2013 the ICJ was granted leave by the Irish High Court to intervene in the *Foy No.3* case on the issue of the obligation on states to provide effective domestic remedies for violations of the ECHR.

Meanwhile, in May and June 2013, growing frustration at the continued failure to publish even the Heads of legislation led to Private Members' Bills to provide for gender recognition being proposed in Dáil Eireann (the Lower House of Parliament) and in Seanad Eireann (the Upper House). The Dáil Bill was proposed by Sinn Féin with input from TENI and was based on law that had recently been introduced in Argentina. The Seanad Bill was proposed by Independent Senator Katherine Zappone[36] with input from both FLAC and TENI and assistance from the Public Interest Law Alliance (PILA).[37] Both Bills proposed to dispense with the requirement for specialist medical evidence as a condition for recognition and with the '*compulsory divorce*' requirement. They also included provision for young persons under 18. The Private Members' Bills did not progress any further but they highlighted the long delay in producing even a draft of a government Bill and they provided a template for more tolerant and inclusive legislation.

At last in July 2013, some 20 years after Lydia Foy's first application for a new birth certificate and nearly six years after the Declaration of Incompatibility, the government published the Heads of the Gender Recognition Bill. They followed closely the recommendations of the Gender

Recognition Advisory Group (GRAG) with its strong emphasis on medical evidence, the '*compulsory divorce'* requirement and the lack of any provision for children and young people under 18.

It was hard to fathom why it had taken so long to produce Heads of a Bill which differed so little from the GRAG Report of two years earlier. In the meantime, however, FLAC, Lydia Foy and TENI had mounted an effective media campaign and public opinion was moving steadily in favour of a less restrictive and more supportive regime for trans persons, while in other European countries there were growing calls for the removal of the requirement for medical evidence as a pre-condition for legal recognition.

The Heads of Bill were discussed by an all-party Oireachtas (Parliamentary) Committee in October 2013. The Committee took its job very seriously, holding public hearings with contributions from FLAC, TENI and other trans groups, including parents of trans children, the Equality Authority and the Ombudsman for Children. A number of the Committee members were sharply critical of the restrictive provisions in the draft Bill, including the lack of provision for under 18 year olds. They were strongly influenced by the contributions from parents of trans children and the Ombudsman for Children. FLAC suggested the issue of temporary or interim gender recognition certificates for under 16s with parental consent and guidelines for schools and agencies dealing with young people that would enable them to be accepted, respected and protected in their preferred gender.

The Report of the Oireachtas Committee[38] was not published until January 2014. It called for a number of changes to make the Bill more inclusive, suggesting that there should be provision for 16 to 18 year olds to apply for recognition, and guidelines for schools to help and support trans children. It called for a less medicalised process for trans persons applying for recognition and for a reconsideration of the '*compulsory divorce*' requirement.

In the meantime, the campaign for legal recognition of trans persons was given a major boost when the President of Ireland,

Irish Times, 28 March 2014

High Court

Lydia Foy asks for her action against State to go ahead

Lydia Foy has asked for her High Court action against the State to proceed given its continuing failure to enact laws recognising her rights as a transgendered person despite a declaration six years ago its inaction breached the European Convention on Human Rights, a judge was told yesterday.

However, in court yesterday Nicholas Butler SC, for the State, asked that the application to fix a trial date be adjourned to the next law term so the State can continue to bring legislation forward.

Dr Foy wants a birth certificate in her acquired female gender and is also seeking damages for breach of her rights, personal injuries and humiliating and degrading treatment. As the European Convention on Human Rights Act 2003 provides a mechanism for compensating people whose rights are transgressed, the Government has appointed Eoghan Fitzsimons SC to deal with that aspect, with a meeting to be held shortly, Mr Justice Paul Gilligan was told.

The judge, after noting arguments by the State it is moving to enact the legislation, fixed a provisional hearing date of November 7th. The case will proceed on that date if matters are not "regularised" by then, he said.

Dr Foy's bid for a birth certificate in the female gender, dates back 21 years to March 1993 when she first wrote to the registrar general for that certificate.

Last July, Minister for Social Protection Joan Burton published heads of a Gender Recognition Bill.

MARY CAROLAN

Former Council of Europe Commissioner for Human Rights Thomas Hammarberg with Lydia and FLAC Chairperson Peter Ward at the FLAC annual Dave Ellis Memorial Lecture, 13 December 2012. Photo: Derek Speirs

Michael D Higgins, welcomed Lydia Foy and representatives of TENI and FLAC to Aras an Uachtarain (the President's residence) in November 2013.

Eventually, 21 years after Lydia Foy's first application to the Registrar General, revised Heads of the Gender Recognition Bill were approved by the Cabinet in June 2014. They included some minor changes. Sixteen to 18 year olds would be able to apply for recognition in their preferred gender but only on very strict conditions, including parental consent, reports from two medical consultants and an order from the Circuit Court exempting them from the minimum age limit of 18. However, the '*compulsory divorce*' provision would remain, a letter from a medical consultant would still be required from the adult applicants and there was still no provision for children under 16.

The revised Heads of Bill were then sent for further drafting, a process that was likely to take several months more.

Shortly afterwards, in July 2014, the UN Human Rights Committee, prompted by briefings from a wide range of civil society organisations, including FLAC and TENI, expressed concern about the inclusion of the '*compulsory divorce*' requirement in the Heads of the Gender Recognition Bill and called for effective consultation with the trans community to ensure that their rights would be fully guaranteed in the new legislation.[39]

By then the High Court had fixed 4 November 2014 for hearing the *Foy No.3* case. On the other hand, the government's lawyers had indicated that there would be no hearing or exchange of views over Lydia Foy's compensation claim. It appeared that the government would simply decide on a figure and offer it on a 'take it or leave it' basis. Such an approach seemed clearly in conflict with the rights to a fair hearing and an effective remedy guaranteed by the ECHR.

Settlement in the Foy case and publication of the Gender Recognition Bill

In the *Foy No. 3* case the State's Defence, delivered in May 2013, had acknowledged "the defects identified by the Declaration of Incompatibility" and said that Lydia Foy met all the requirements for recognition as recommended by the government's own advisory group. It admitted that the delay in introducing legislation and in compensating Lydia Foy had been lengthy but claimed this was due to complex drafting and was not unreasonable and asserted that the proceedings had been brought prematurely.

The Defence stated that progress in changing the law would be made quickly but by October 2014, almost 18 months after the Defence had been served, very little had happened.

Suddenly, three weeks before the date for hearing the *Foy No. 3* case, the State's legal team indicated that they wanted to settle the proceedings and that they would also make an offer of compensation for the breach of Lydia Foy's rights through the failure to recognise her female gender.

After intense discussion and a couple of adjournments, terms were agreed. Counsel for the State would confirm in open court that

> *"It is the firm intention of the Government to secure the enactment into law of the Gender Recognition Bill 2014. This would enable the Plaintiff to obtain a new birth certificate reflecting her female gender in accordance with the legislation....*
>
> *".... [I]t is the expressed intention of the Government to publish the Bill by the end of the year.*
>
> *"It is the firm intention of the Government to introduce the Bill into the Oireachtas and have it enacted as soon as possible in 2015".*

Compensation of an agreed amount would be paid for the continued breach of Lydia Foy's rights up to the date of the settlement. The terms were announced in court on 28 October 2014,[40] and it was agreed that the case would be adjourned until 29 January 2015 to allow time for the government to deliver on its commitments. If they did so, the proceedings would be struck out by consent. If not, the case could be resumed.

The Gender Recognition Bill was published on 18 December 2014 and introduced in Seanad Éireann on 21 January 2015 with a timetable that would enable it to pass all stages in the Oireachtas very speedily. Compensation was paid. The terms of the settlement had been implemented and the case was struck out on 29 January 2015.

It was a major victory for Lydia Foy. After 21 years of struggle she would finally get the birth certificate she had requested in her letter to the Registrar General in March 1993, and now the entire transgender community would benefit as well. It was a little disappointing that the issue of the need for effective remedies under the ECHR Act was not specifically dealt with, but the settlement itself was a clear acknowledgement by the Irish government, however belated, of its obligation to act upon Declarations of Incompatibility made by the courts.

Irish Examiner, 29 October 2014

Foy case wins transgender recognition

by Ann O'Loughlin and Dan Buckley

Dr Foy's case was aimed at securing a birth certificate in her acquired female gender.

The Gender Recognition Bill was still controversial in some respects. While the principle that trans persons were entitled to be recognised in their preferred gender was finally conceded, adult applicants would still have to produce a letter from a medical consultant and 16 to 18 year olds would still face extremely onerous requirements. There was no provision for younger persons and married or civil partnered applicants would still have to split up with their spouses. However, these issues were outside the scope of the Lydia Foy case as none of them applied to her and they would have to be dealt with through the debate on the Bill.

On the '*compulsory divorce*' requirement, the government also pointed to the fact that a date had been set for a referendum on same-sex marriage or 'Marriage Equality' on 22 May 2015. They undertook that if the proposal was carried, the offending requirement would be removed from the gender recognition legislation.

Gender recognition Bill flawed, say lawyers

LORNA SIGGINS
Western Correspondent

Leading human rights lawyers have described the Government's gender recognition Bill as "flawed" and "very disappointing" and have urged that it be brought into line with international best practice.

Transgender woman Dr Lydia Foy, who led the legal challenges on gender recognition in Ireland, has welcomed the Bill, but has said it includes "unnecessary obstacles".

"I am delighted we have reached this stage, but it seems crazy to confine legal recognition of gender to single people, when we are holding a referendum on civil partnerships," Dr Foy said. She was speaking at a public seminar at NUI Galway's Irish Centre for Human Rights.

Dr Foy also expressed concern that it would exclude young transgender people at a very difficult and vulnerable time in their lives.

"We don't want to slavishly copy legislation that is wrong in other countries," she said.

The Bill, on which debate began in the Seanad last month, is intended to bring Ireland into line with Europe as the only EU member state that does not permit legal recognition of transgender people.

A High Court ruling in 2007 found the State to be in breach of its positive obligations under article 8 of the European Convention on Human Rights in failing to recognise Dr Foy in her female gender and failing to provide her with a new birth certificate.

However, the legislation is "inadequate" and very disappointing and does not reflect well on Ireland's commitment to human rights, Irish Centre for Human Rights director Prof Michael O'Flaherty said.

"We have an opportunity now to make it a model of international good, rather than international also-ran, practice," Prof O'Flaherty said.

Free Legal Advice Centre senior solicitor Michael Farrell, who represented Dr Foy, said the Bill had flaws which would force married transgender people to divorce if they sought official recognition. It did not cater adequately for children under 16 years of age, who were often bullied and victimised in school, he said.

Mr Farrell said while he was glad in "principle" the Bill had been published, it was "unfortunate" the Government could not have come up with a better document.

Irish Times, 3 February 2015

Irish Times, 3 February 2015

The change in Irish attitudes on issues like divorce and homosexuality had gathered speed even since the introduction of civil partnership in 2010. By early 2015 the government and every major political party supported a 'Yes' vote in the Marriage Equality referendum and opinion polls were showing a substantial majority in favour of change. Attitudes towards trans people were also increasingly tolerant and welcoming.

The debate on the Bill

The debate in the Seanad on the Gender Recognition Bill in January and February 2015 was serious and remarkably free of partisanship. There was considerable criticism of the medical evidence requirement, the '*compulsory divorce*' provision, the very restrictive conditions for 16 to 18 year olds, and the lack of any provision for younger children to at least protect them from abuse and bullying at school. Calls for change were led by Independent and Opposition Senators but there was considerable support from government Senators as well.

Outside the Oireachtas there was debate in the media and at meetings in almost all the universities. TENI and a group of parents of transgender children mounted a very effective campaign of lobbying individual TDs (for *Teachta Dála*, also called Deputies; these are members of the Lower House of Parliament) and Senators and getting them to meet with trans families, which had a major impact on the human level.

Before the debate ended in the Seanad, the government made a number of concessions. They promised that the Minister for Education would meet with parents of trans children to discuss ways of enabling children to safely express their gender identity in schools. They undertook

to speak to doctors about reducing the medical evidence required and amended the Bill to include a review after two years so that any remaining controversial issues could be revisited if necessary.

The Bill was approved by the Seanad without a vote and was introduced in Dáil Eireann (the Lower House) on 5 March 2015. An unusually large number of TDs spoke – all in favour of the principle of the Bill. Several government TDs called for further amendments to remove the remaining restrictions and a number of Deputies said that they had originally opposed the Bill, or parts of it – but had changed their minds after meeting trans families and hearing their difficult and painful stories.

It was clear that there was a demand from all sides for further changes and the debate was adjourned for further consultation by the Minister.

The Marriage Equality Referendum & the passing of the Gender Recognition Act

By then the campaign for the Marriage Equality referendum was in full swing and the trans community and their allies in the broader LGBT movement[41] were heavily involved in campaigning for a Yes vote, alongside the government parties and opposition TDs and Senators. The referendum was passed on 22 May 2015 and the strength of the Yes vote, at 62% for to 38% against, confirmed that there had been a major shift in public opinion towards accepting and welcoming diversity in matters of sexual orientation and gender identity. Of course, the approval of same sex marriage defused the controversy over the 'compulsory divorce' requirement in the Gender Recognition Bill.

Irish Times, 9 September 2015

Transgender people can get updated birth certs

SARAH BARDON
Political Reporter

Transgender people can now get a birth certificate which reflects their preferred gender.

The new law will allow over-18s to have their preferred gender legally recognised by the State.

Tánaiste Joan Burton said it had been a hard and long battle by those in the transgender community.

"I believe the legislation we have is among the most progressive in Europe," Ms Burton said.

"This marks a hugely significant and historic day for the transgender community, for their families, friends and, indeed, for all of Irish society."

From this week, people can apply for a Gender Recognition Certificate from the Department of Social Protection.

It means the person's preferred gender will be fully recognised by the State for all purposes, including in dealings with public bodies.

A new birth certificate can be issued to show the preferred gender and new name, if the person changes their name.

Those aged between 16 and 18 will have "a route to recognition", which will involve an endocrinologist.

Tribute

Ms Burton paid tribute to the work of Dr Lydia Foy who has fought for more than two decades to have her chosen gender recognised.

Dr Foy has lived as a woman since 1991. In April 1997, after a number of years' unsuccessful correspondence with the Registrar General's office, Dr Foy initiated High Court proceedings to compel the registrar to issue her with a new birth certificate.

Speaking yesterday, Dr Foy said this was the start of a bright new life for those caught in the trap of transgender.

She said: "I hope nobody in Ireland will have to go through such pains and such a long-winded approach to the law.

"We were getting rather impatient and Europe was looking over our shoulders as well. It is a wonderful day."

No surgery

The Dáil and Seanad approved the Gender Recognition Act 2015 in July.

Ireland is the fourth country to allow transgender people to legally change their gender without surgery and other medical interventions.

The Tánaiste said the Minister for Education Jan O'Sullivan would host a group this month to look at issues as they arise in education.

She added: "We have built in a review period to see if other issues arise."

■ Tánaiste Joan Burton with Sara R Phillips, Transgender Equality Network Ireland chair, Lydia Foy and Fiac solicitor Micheal Farrell at the launch of the Gender Recognition Certificate.
PHOTOGRAPH CYRIL BYRNE

Discussion on the Bill did not resume in the Dáil until 17 June 2015 but in the circumstances no-one complained too much about the delay. When the discussion did resume, the government had clearly been emboldened by the referendum result. Minister Kevin Humphreys who was leading the debate, announced, to the surprise and delight of trans rights campaigners, that the government was dropping the requirement for any medical certification. They would now accept self-certification from applicants for Gender Recognition Certificates, which would then be used to enable the issue of new birth certificates.

With one move the government had placed Ireland among the small number of countries with the most advanced and liberal gender recognition laws in the world.[42] The Minister reiterated that the government would also make attempts to find ways of accommodating and protecting trans children before the two-year review that was provided for under the Bill.

The Bill completed its passage through the Dáil on 9 July 2015 and went back to the Seanad for final approval on 17 July in a rare atmosphere of cooperation and good will on all sides.

The Gender Recognition Act was signed into law by President Higgins on 22 July 2015 but it did not come into effect immediately. The government wanted to commence the Marriage Equality legislation first, so that the '*compulsory divorce*' requirement would become redundant. However, a legal challenge was mounted to the referendum result and it was not until 29 August, after the legal challenge had been dismissed by the courts, that the President signed the Marriage Equality amendment to the Constitution into law.

Lydia with TENI's Vanessa Lacey at TENI's Community Event in her honour as part of the TRANSFUSION festival, 12 June 2015. Photo: Babs Daly

Recognition at last

The commencement order for the Gender Recognition Act was signed on 3 September 2015 and at long last the way was open for Lydia Foy to receive the birth certificate that she had first applied for so many years earlier. The sections of the Act requiring that trans persons seeking recognition must not be married or in a civil partnership were simply not commenced and became a dead letter.

On 8 September 2015, at Government Buildings in Dublin and in the presence of Lydia Foy and members of FLAC and TENI, the Minister for Social Protection, Ms Joan Burton TD, officially launched the application process for Gender Recognition Certificates that would confirm the legal recognition of trans persons in their preferred/true gender. They would then be entitled to new birth certificates in that gender.

It was an emotional occasion. It was the first time in the lifetime of Lydia Foy and the other trans persons present that the Irish State had officially acknowledged them in the gender in which they live their daily lives.

A few days later, Lydia Foy received the first Gender Recognition Certificate to be issued in Ireland and a fortnight after that she received the birth certificate that she had fought so hard to obtain since 1993. She said: "*This is a great*

day for me and for the trans community in Ireland. With this piece of paper and after 22 years of struggle, my country has finally recognised me for who I really am, not for what other people think I should be."[43]

A month later, on 14 October 2015, Lydia Foy was honoured by the European (EU) Parliament when she was presented with the European Citizen's 2015 Award and Medal for Ireland at a ceremony in Brussels. She had been honoured in an Irish ceremony to mark the award on 25 September 2015 in Dublin. In January 2016, she was presented with an award by the Lord Mayor of Belfast for her work for trans rights and in July 2016 she was honoured by the Councillors of her home town in County Kildare, an award that in some ways meant more to her than more prestigious honours because it came from her neighbours and the community among whom she lives.

The Gender Recognition Act 2015 is not perfect. There is still the extremely restrictive regime for 16 to 18 year olds and the need to make provision for younger children as well. There is also a need to provide for intersex persons, who have some of the characteristics of both sexes or genders. This raises different considerations, but it would be a pity to resolve the situation of trans persons and not take the opportunity to protect another very vulnerable group as well. However, the provision for an early review of the working of the Act has provided an opportunity to resolve these outstanding problems.

The Lydia Foy case and the campaign for gender recognition were ultimately successful and they have resulted in a much more liberal and inclusive regime than the procedures still in operation in many countries that introduced gender recognition legislation well before Ireland did. But no-one should have had to wait so long and be placed under such emotional stress as Lydia Foy had to endure while seeking to obtain what the government and the Irish people now accept as a basic human right.

By the end of 2017, 295 trans persons had received Gender Recognition Certificates under the new Act. They and all those who come after them owe a debt of gratitude to Lydia Foy whose very long and painful struggle has made it so much easier for successive generations of trans persons who will follow her.

Irish Examiner, 15 October 2015

Transgender pioneer wins prize in Brussels

Ann Cahill
Europe Correspondent

Dr Lydia Foy whose 22-year battle forced the Government to change the law on transgender people, received the prestigious Citizen's Prize from the European Parliament in Brussels.

With her were many members of her family and solicitor Michael Farrell from FLAC, the free legal advice centres, who fought against a system that refused to recognise the existence of trans people in Ireland.

Dr Foy, a retired dentist appealed for Irish people to "treasure diversity".

She was nominated for the award by the four Sinn Féin members of the European Parliament — Martina Anderson, Lynn Boylan, Liadh Ní Riada and Matt Carthy.

Despite trans people being able to have their true gender on their birth certificate — she was the first in Ireland to receive her's last month — she said while the legal battle has been won, there is still much to do.

"Society has to catch up now, to be inclusive and totally open", she said. People must adopt a more tolerant attitude, including in rural areas, and especially parents who are estranged from gay or lesbian children.

While Ireland is frequently quick to sign European law, the State is often slow to enact it, and she is particularly anxious that the needs of transgender children be provided for.

The legislation makes Ireland one of just four countries that allows trans people to be recognised on the basis of self-determination, and means that trans people "are no longer reliant on a psychiatrist to tell us who we are". But it made it almost impossible for young people to have their true gender recognised until they reach their majority, she said.

She said she and her solicitor, Mr Farrell, in fact had two achievements — the first was finding the State contravened the European Convention on Human Rights despite facing the "worst form of adversarial legal system".

Several members of TENI, the Transgender Equality Network Ireland, were at the ceremony. Director Broden Giambrone said that while legislation is incredibly important, in reality people's lives can be very difficult.

School can be really tough for transgender children and adults face discrimination with only 51% of trans people in work, he said.

The TENI members meet MEPs today for discussions, just a week after the parliament's main political group, the European People's Party, of which Fine Gael is a member, voted against supporting transgender people in an equality report.

Munster MEP Deirdre Clune said she went against the party whip and voted in favour, calling for more support for transgender people.

"The majority of European countries require transgender people to undergo surgery and sterilisation, or be diagnosed with a mental disorder and get divorced, to have their desired gender legally recognised", she said.

Lydia Foy receiving the European Citizen's Prize 2015 in Brussels from parliament vice president Sylvie Guillaume MEP, left, and Lynn Boylan MEP, right, who with her fellow Sinn Féin MEPs nominated Lydia for the honour.

Some conclusions

Some lessons for future campaigns for social change can be learned from this long drawn out struggle. One is that Lydia Foy would not have succeeded in her case without the European Convention on Human Rights. The Irish Constitution as it has been interpreted over the years did not offer her any support. Nor indeed did the European Court of Human Rights until the *Goodwin* decision in 2002. However, the ECHR and the "evolutive", or evolving and "living instrument" approach to it taken by the Strasbourg Court has proved more flexible and open to change in a time of rapidly changing social values than the Irish Constitution or the rights protection mechanisms in some other countries.

On the other hand, a situation where the provisions of the ECHR still cannot be directly enforced in Ireland, and where a declaration by the Irish courts that domestic law is incompatible with the ECHR can be effectively ignored for eight years, does not offer a real or meaningful remedy to persons whose rights have been violated.

President Michael D Higgins greeting Lydia at TENI's 10th anniversary celebration at Áras an Uachtaráin, 23 November 2016. Photo: Maxwells Photo Agency

Further, it is not satisfactory that there is no clearly laid down procedure for applying for compensation under the ECHR Act, and where any award is made on an *ex gratia* basis there is no explanation of how it is arrived at and no procedure to challenge it if it is not satisfactory.

The ECHR Act 2003 needs to be re-visited and amended to make it much more effective, including:

- An obligation on government to respond to a Declaration of Incompatibility and indicate its proposals for change within a limited time frame;
- An open and transparent method of compensating persons whose rights under the ECHR have been violated; and
- A provision, similar to the one in the UK Human Rights Act, that requires Ministers when introducing legislation to certify whether it complies with the ECHR.

Given the weakness of the enforcement mechanism in the ECHR Act, the Declaration of Incompatibility in the Lydia Foy case might have been ignored for even longer if FLAC had not worked to raise awareness of the case and the issues involved, and made use of international human rights instruments and agencies to put pressure on the Irish government to respond to the Declaration.

And while the international mechanisms and their criticisms of the Irish authorities had a significant effect, that by itself might

not have been sufficient to motivate government to take action to protect the rights of a small, marginalised group of people with no political clout. But that is where FLAC's advocacy role and the work of TENI and other trans groups allied with them played an essential part.

There was a clear need for an effective media campaign to keep the position of trans persons and the violation of their rights under the ECHR, together with the decisions of the Irish courts and international human rights bodies, in the public eye. But in order to win substantial public support for change, that campaign needed to be reinforced by advocacy bodies rooted in the trans community, which could tell the human story of the pain and isolation endured by trans persons. As some government Deputies stated in the Dáil debates, it was actually meeting trans persons and their families that convinced them to support the Gender Recognition Bill and work to make it more inclusive.

"As some government Deputies stated in the Dáil debates, it was actually meeting trans persons and their families that convinced them to support the Gender Recognition Bill and work to make it more inclusive. And when it came to the detail of the proposed legislation, it was essential to have trans voices to the fore in the discussion to indicate what exactly are the needs of the trans community."

And when it came to the detail of the proposed legislation, it was essential to have trans voices to the fore in the discussion to indicate what exactly are the needs of the trans community. It was important too that the trans community was able to draw on the strong support of the wider LGBT movement, which had a wealth of experience of campaigning and lobbying over the years, culminating in the Marriage Equality referendum in 2015.

On a visit by TENI/FLAC to Áras an Uachtaráin on 13 November 2013: Louise Hannon, Victoria Mullen, Yvonne Woods, Vanessa Lacey, Darrin Matthews, Orlaith O'Sullivan, Ben Power, Lydia Foy, Broden Giambrone, Sara R. Phillips.

The Lydia Foy case as strategic litigation

Litigation, as in the Lydia Foy case, can be a very important agent for securing justice and social change, both through the decisions of the courts and the awareness raising and mobilising effect of the arguments made in court. But by itself litigation is rarely enough. It is at its most effective when allied with a social movement involving the persons whose rights are under threat.

The Lydia Foy case did not tick all the boxes for a textbook example of strategic public interest litigation at the beginning. It was not part of an already established movement for gender recognition. There was no concerted media strategy to spread awareness of the issues raised by the case and there was no clear plan to use international human rights mechanisms to pressure the Irish government into changing the law.

FLAC learned as it went along. The cases in the High Court, the unfairness of the treatment of Lydia Foy and the arguments made by her legal team created public awareness of the issue and began the mobilisation of the trans community. International contacts were built up initially as part of the quest for more information about transgender jurisprudence in other countries or before international bodies, but they were then used to create pressure on the Irish authorities. Political lobbying was developed when the government did not respond to the Declaration of Incompatibility in 2007. By the end of the saga, the case had all the ingredients of textbook strategic litigation – and it worked.

The model is there to be followed and adapted to the differing requirements of other cases as well.

Above all, the Lydia Foy case has been a story "*of great human proportions*" as Mr Justice McKechnie put it in his judgment in the *Foy No.1* case in 2002, reflecting on the sad, lonely and painful journey experienced by Lydia Foy in simply seeking to be allowed to live and be accepted as the person she really is. And when Judge McKechnie so described Lydia Foy's case in 2002 and called for urgent action to assist her, he could not have anticipated that it would take another 13 years before she would finally receive the birth certificate she had first applied for so many years before.

It is a sad reflection on Irish social attitudes – and on the lack of due respect for the European Convention on Human Rights – that Lydia Foy had to spend half her adult life fighting a legal battle for acceptance and for vindication of her rights. But the result of that struggle has been to save future generations of trans people from having to suffer the pain, isolation and rejection that Lydia and her generation experienced. Hopefully, Lydia Foy's case may also lead to more effective and generous implementation of the ECHR by the Irish State and encourage others to use the ECHR and other Council of Europe, EU and international instruments and mechanisms to fight for the rights of other vulnerable groups in our society.

As for Lydia Foy herself, she is living quietly at her home in Athy, accepted and respected by her neighbours and fellow townsfolk for who she really is.

Members of Lydia's legal team, 25 September 2015: Bill Shipsey SC, Siobhán Phelan SC, Lydia, Maureen Maguire-Gourley, Michael Farrell.

In her own words: Lydia Foy

Lydia Foy looks back on her experience 'coming out' as a transgender woman and her long drawn-out legal battle to secure a new birth certificate and legal recognition in her true gender.

Lydia Foy, as an infant.

"I realised very early as a child that I was a girl, even though I had been designated male. Physically, I was a small fair haired child known as *'Alannah Bán'* and my brothers were tall and dark. Compared to my brothers I wasn't interested in 'boyish' pursuits, though they were a source of distraction for me and I had to toughen up for survival. However the prevailing society meant I followed the path laid down for me and tried to fit in as best as I could. There was a high personal cost when I finally came out later in life. For me, being transgender means being myself, maybe hybridised, but me. I hope even that label of 'transgendered' will dissolve in time. For me being transgender just means being Lydia.

I grew up in Westmeath in the 1950s. It is hard to get it across to people nowadays just how conservative, depressed, and repressed Ireland was in those days, especially outside of Dublin. Sex education didn't exist; people didn't talk about such things. My parents were vaguely aware that I was different and my father used to take me shooting and fishing to make me more manly. They had never heard of trans persons and the idea that I was really a girl would have been beyond their understanding at that time. I was in another world floating and flying and bashed at school being called *"scatterbrained."*

I first sought a change to my birth certificate in 1993. I had been in the family courts prior to that and I felt I was treated very poorly. I was trying to access my civil rights but I had no legal aid, very little support and felt I was being treated like a criminal. To make matters worse, my story was being reported on in the papers in a very sensationalist manner. I felt like I was silenced as I couldn't respond to what the media were saying about me because the matters were ongoing in the courts.

I tried to ask a lot of people for help in having my birth certificate changed and at one point, I took a case to Strasbourg by myself. You have to exhaust all of the courts in Ireland first and this is obviously enormously difficult unless you have a goldmine because the costs are so high. It was daunting but I was determined and I had valid points to make – I wanted to be treated as an equal citizen.

Lydia Foy, circa 1997

Lydia and Michael Farrell outside Four Courts, July 2009. Photo: Audra Melton

In 1997, FLAC began to provide assistance with my case. The High Court ruled against me in 2002 but they had to look at it again in 2007 following developments in the European Court of Human Rights and the introduction of legislation in Britain to recognise a person's correct gender. The Court found the government in violation of its obligations under the European Convention on Human Rights but it wasn't until 2010 that the government dropped its appeal to the Supreme Court. The Gender Recognition Act was eventually passed in July 2015.

FLAC were very good at listening to what I was saying and asking the right questions.

It was a difficult process because I felt I was in an adversarial legal system. I was subjected to all sorts of requests including being sent to a public clinic to have a transvaginal ultrasound, blood tests, and psychiatric assessments, all the while being subjected to ridicule in the papers. I had to go to maternity hospitals to take my blood tests instead of my GP. It was tough to go through this system and have these barriers continually placed in front of me. All of those tests I was put through really made me resentful of the whole legal system. It was a painful experience and I felt spending that much money just to delay things was a very poor way of going about things. I was unable to get legal aid from the state and it is very disempowering to face these types of obstacles without having any financial resources at all. It was also frustrating to hear people saying that the way I was treated, the discrimination, was justified in law.

When I first began my case, homosexuality was still illegal in Ireland – that may remind people of the atmosphere that prevailed at the time. The barriers seemed endless. The legal process also suits people with resources because people with the means to, as well as the state, can prolong and block cases. If you have money, you can go to the Supreme Court and then Strasbourg if you like. Within the courts, you have to learn a new language because a lot of the time it feels like they are just talking over your head and you may as well not even be able to speak English. I felt the whole process was designed to disempower you. The wigs are intimidating and the guys in black are looking down on you from their pedestals. I remember one

"When I first began my case, homosexuality was still illegal in Ireland – that may remind people of the atmosphere that prevailed at the time. The barriers seemed endless. The legal process also suits people with resources because people with the means to, as well as the state, can prolong and block cases."

day when I felt like my rights were being denied to me I stood up, was shouted at to sit down or they would imprison me! That sort of intimidation was incredibly intense. The whole system is stacked against the litigant. But for the fact I had a right of reply through FLAC I would have been completely alone. FLAC kept listening to me though and I feel there are many things for the courts and legal professionals to learn from my case.

When legislation is required by the state in order to comply with the European Convention on Human Rights, it should be provided for immediately in the Oireachtas rather than just appealing for the sake of it. Challenging a case without financial support is incredibly risky to the individual. There has to be a better system of doing this.

To make it easier for lay people, there should be a clarification of the way the courts deal with social reform and other cases. There should be a system where the court recognises what they're dealing with and what the case is actually about before it even starts. It is an intimidating arrangement for people who are already isolated.

Maureen Gourley, FLAC solicitor, with Lydia at the press conference to announce the government's dropping of its appeal in Lydia's case for transgender recognition, 21 June 2010

The proceedings would have been very long for any person, but with no knowledge of the law, this was clearly a very daunting legal journey. I can tell you it is even more difficult when you are from a more vulnerable group on the fringes of society.

Nevertheless, my voice was heard loud and clear throughout Ireland and Europe, thanks to all FLAC's energetic young folks and Michael Farrell's skills and contacts in Europe, like the Council of Europe Commissioners.

Even after my experience of the legal system, I still feel that the case resulted in great progress – perhaps more in relation to society and in perceptions than in regards to resolving issues in law. Looking back now, the case helped me explain being transgender to people. Many people tired of the issue and lost interest rapidly, thinking I had no chance. However the staying power and empathy of FLAC along the line helped a lot, as did the barristers involved, in staying by me the full time without telling me to give up.

The case achieved a lot and is great for many, many people, particularly to give reassurance to young people. Nonetheless, gender recognition was only one of a number of problems and issues on a list that I had. I feel one day that people who treated me so inhumanely should be called to reflect. I didn't get an apology of any kind from anybody involved. Though I will not let it dominate my life, the facts remain with the scars. The process was much too long – I am now 70 and this struggle has taken up nearly a third of my life!

Getting my birth certificate was great vindication. I know then, as always, that my identity should be valid and recognised by the State.

People sometimes ask me about labels but my name is Lydia, and this case was about having an acknowledgement of me as an equal citizen of the state.

I finally have that now.

Lydia at home, April 2017

Dr Lydia Foy: A Hero to the Trans Community

Broden Giambrone, former Chief Executive of TENI

> "In 1993, Lydia asked for her birth certificate to be changed to recognise her identity and for her legal gender to be listed as female. This simple request for State recognition began a journey that ended 22 years later with the passage of the Gender Recognition Act in 2015."

Lydia's struggle for legal recognition was marked by courage, stubbornness, frustration, jubilance, set-backs, victories and delays. She began her journey for legal recognition in a very different Ireland. In the 1990s, there were very few visible trans people. When Lydia embarked on this case, she found herself, and her personal details, splashed across the news. Her private information was disclosed and her narrative was twisted and sensationalised. At the time, there was no trans organisation and the trans community, if that's what it could be called, was in its early stages of development.

In most ways, Lydia was alone. She had no back-up or support until FLAC took up her case and provided pro bono legal assistance.

While Lydia's case made its way through the Irish courts, she faced many legal set backs. In 2007 she finally won. Justice McKechnie found the State to be in breach of its positive obligations under Article 8 of the European Convention on Human Rights in failing to recognise Lydia in her female gender and provide her with a new birth certificate. Yet, it was not until 2010, when the Irish Government eventually withdrew its appeal. It took another five years for the law to be passed.

What had changed in that time was that the trans community had gone from being a nascent, loose group of individuals, into a young movement with a national organisation. In 2006, Transgender Equality Network Ireland (TENI) was born and in the years that followed, TENI joined Lydia's struggle for legal recognition.

TENI staff at their 10th anniversary celebration in Aras an Uachtarain, 23 November 2016: Vanessa Lacey, Catherine Cross, Lydia Foy, President Michael D Higgins, Tauryn Glavin, Sam Blanckensee, Broden Giambrone and Gordon Grehan. Photo: Jonathan Ho.

The ability to change legal documentation is vitally important to trans people. Having incorrect identification can lead to being outed, discrimination and even violence. We use our birth certificate at key moments in our lives. For instance, when we go to school or college, get a PPS number, get married and it is even linked to our death certificate. For this reason, legal recognition is vital for trans people to safely move through our lives and enjoy our rights. However, it is also about so much more. It is about the State recognising that trans people exist.

As Lydia fought her legal battle, the trans community got organised. Her case forced the Government to legislate but it did not say what or when. As TENI rowed in behind Lydia, political advocacy and lobbying helped shape the law that was finally introduced. Lydia's fight was about her birth certificate but it also grew much larger. The struggle for legal recognition became about how the Irish State viewed trans people and because of this, the concept of self-determination was crucial in this political struggle. The fight for trans rights became the fight for recognition that trans people were the arbiters of our own identity, we were the experts of who we are and the State was there to honour, not question, this process.

Lydia's case represents the power of strategic litigation when it is bolstered by a strong political campaign. As Lydia navigated the legal system with the support of FLAC, TENI and trans activists met and lobbied politicians and pressured the Government not just to introduce legislation but to ensure it was the right legislation. This complementary and conjoined approach was incredibly successful.

When the Gender Recognition Act passed in July 2015, self-determination was at the centre

of this law. Trans people over 18 did not need a doctor or psychiatrist to sign off on our identity, we did not need to show a diagnosis or prove we had surgery. We simply needed a statutory declaration saying we are who we say we are. On this sunny day in July, Lydia, FLAC representatives, TENI members and the trans community celebrated alongside our allies. We popped open a bottle of champagne and toasted to Lydia's struggle and the work of so many activists and allies. In the weeks that followed, Lydia received the first gender recognition certificate and then her new birth certificate. Her legal battle had finally come to an end.

Lydia's tenacity in the face of adversity makes her a hero to the trans community. Her struggle for her right to be legally recognised has motivated many individuals in Ireland and much farther abroad to demand their own rights. Through this process, Lydia has always remained down to earth and generous with her time. She has consistently spoken out and shared her own experiences. It is this strength and courage, at great personal cost, which provides inspiration to the trans community.

Victoria Mullen,Tanaiste and Minister for Social Protection Joan Burton TD, Lydia Foy, Sam Blanckensee, Minister of State Kevin Humphreys TD, Sara R Phillips, Broden Giambrone, Michael Farrell. Photo: TENI

The legal impact of the Foy case

Donncha O'Connell, Professor of Law, NUI Galway

At the time of enactment of the ECHR Act in 2003-2004 there were sharp criticisms of the draft legislation from NGOs, the Law Society, the Bar Council, the newly-established Irish Human Rights Commission and academics. The focus of much of the criticism was on the indirect mode of 'incorporation' used in the Bill and the heavily qualified interpretative obligation contained in Section 2 with the apparently limp but novel remedy of a declaration of incompatibility provided for in Section 5.

The fact that the interpretative obligation underpinning the declaratory remedy was applicable only in so far as is possible and subject to any other rule of interpretation and that the entire scheme of the ECHR Act was to operate at a 'sub-constitutional' level added to the scepticism of critics. Furthermore, the declaration of incompatibility could be resorted to only where no other remedy was adequate and available. It would be a far less legally potent remedy than, for example, a declaration of constitutional invalidity and would not affect the continuation in force of the impugned legislative provision. All that a declaration would require was that the Taoiseach inform both Houses of the Oireachtas within a specified time period that such a declaration had been granted by a court leaving it to the political system to choose how to respond or if to respond at all. There was provision for a successful litigant to apply for an *ex gratia* payment of compensation. The performative obligation on 'organs of the state' contained in Section 3 was also viewed as lacking in bite whereas

the duty on courts, contained in Section 4, to have due regard to European Court of Human Rights decisions, although probably no more than formal recognition of judicial notice requirements, gave some hope to those who saw the Act as foreclosing the possibility of judges at all levels refusing to hear ECHR-based arguments.

It is, therefore, no great surprise that only four declarations of incompatibility have been granted by the Irish courts since the coming into effect of the ECHR Act in 2004, but even this is probably worse than the most pessimistic predictions made at the time of its passing. The critics of the ECHR Act were not just idealists who saw it as a missed opportunity for robust incorporation of international human rights obligations. There were also those who saw the whole exercise as a bit unnecessary and little more than a gesture of inconvenient symbolism required – politically more than legally – under the Good Friday/Belfast Agreement of 1998. As this view was expressed, at times forcefully, by some judges and influential practitioners it may well have dampened the adventurism of public law practitioners after the coming into effect of the legislation, although it would be churlish not to acknowledge that recourse to the ECHR and its case law is now a routine and unremarkable aspect of domestic litigation.

Michael Farrell explains with great care elsewhere in this publication that the first declaration of incompatibility granted under the ECHR Act was granted by the High Court in the Lydia Foy case. The case is interesting both substantively and procedurally. It illustrates the added-value that can be gained by invoking a provision of the ECHR upon which the European Court of Human Rights has adjudicated definitively when, clearly, the Irish Constitution 1937 provides inadequate rights protection for a claimant.

This is not to be under-estimated for certain minorities such as transgender persons where, for a variety of reasons, international standards might be more protective than those enshrined in domestic law and where the positive obligations of states can be invoked not just where there has been an active violation of human rights but also where such rights have been violated passively or by omission.

As a model for the advancement of human rights through international public interest litigation, the Strasbourg case law on transgender people is similar, in some respects, to the earlier so-called 'homosexual cases' taken by people like Geoffrey Dudgeon, David Norris and Alexandros Modinos. In the Norris case taken against Ireland, for example, the applicant complained of a pre-1937 statute criminalising certain forms of male homosexual conduct where a domestic challenge to the constitutionality of that legislation had failed. Lydia Foy's case hinged on an omission or refusal by the state to allow for the correct gender recognition of transgender people and the case was dealt with entirely at the domestic level where the applicant failed in her constitutional challenge.

However, developments in Strasbourg – in, for example, the *Goodwin* and *'I'* cases – were directly relevant to the finding in Foy No.2 that the state's failure to recognise the post-operative gender of the applicant was incompatible with the ECHR.

These important European Court of Human Rights decisions were the culmination of a long process of strategic litigation – mainly by UK transgender people – resulting in a narrowing of the margin of appreciation afforded to Member States and the clear articulation of a common European standard on the gender recognition of transgender people. Although Lydia Foy did not, like David Norris, have to go to Strasbourg to vindicate her rights the finding by an Irish court based on Strasbourg case law did provide invaluable leverage at the political level to bring about the kind of legislative change required. It is almost certainly the case that, even allowing for delay, the Gender Recognition Act would not have been passed without the declaration of incompatibility being granted in the Foy case. Invoking the need to comply with Strasbourg rules established in cases taken against another country, even though those rules applied to Ireland, would have had less catalytic impact in the political domain than addressing the imperative of responding to an actual declaration by an Irish court that Irish law was incompatible with the ECHR.

The Foy case is also interesting procedurally as its protracted implementation phase – including the period when the state appealed to the Supreme Court – was used not just to press for legislative reform but also to highlight the core deficiencies of the ECHR Act itself, most notably in the bold assertion that the section of the ECHR Act providing for a declaration of incompatibility was itself incompatible with the ECHR!

Giving further effect to the ECHR in Irish law by passing the ECHR Act 2003 has been a disappointment to many but it has not been an entirely pointless exercise. The fact that Irish courts are now more comfortable with arguments based on the ECHR and the jurisprudence of the European Court of Human Rights opens up possibilities for enhanced judicial dialogue. This may take on an even more positive dimension as the European Court of Human Rights develops its advisory jurisdiction under Protocol 16 to the Convention. A more active scrutiny by elected legislators (in both Houses of the Oireachtas) of draft legislation for compliance with ECHR standards drawing on the freely available expertise of bodies such as the Irish Human Rights & Equality Commission is also an essential indicator of seriousness of purpose. In fact, if legislators were more proactive in this connection it would not fall to individuals like Lydia Foy to draw heroically on their inner reserves pushing their personal resilience to its limits to vindicate what are, by any measure, basic human rights.

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THE LONG ROAD TO GENDER RECOGNITION:

A timeline of key legal cases & legislation on the status of transgender persons

The earliest recorded transgender court decision in modern times was very positive. A court in Switzerland allowed a transgender woman to change her legal status from male to female in 1945. After that things did not go so well. The next significant decision was in the case of *Corbett v Corbett* in 1970, when a UK court used a crude test of purely physical characteristics to hold that transgender woman April Ashley/ Corbett was really male and that her marriage was invalid.

For years afterwards, the *Corbett* decision blocked attempts to secure recognition of trans persons in their preferred gender in many countries but gradually it was chipped away by decisions by courts in the US, Australia, New Zealand and eventually by a key decision by the European Court of Human Rights in the case of Christine Goodwin in 2002. The European Court had been very slow to protect the rights of trans persons because of a lack of consensus among the member states of the European Convention on Human Rights. However, after a series of cases from the UK which had ignored all attempts to get it to accommodate trans persons, the European Court finally decided to put aside medical and anatomical arguments and accept that gender identity should be a matter for self-determination by trans people themselves.

By then other European countries had also begun to recognise trans persons in their preferred gender and legal decisions increasingly began to deal with issues like the marriage of trans persons, pension rights and employment discrimination, and whether minors should be allowed to obtain hormone and other medical treatment before they reached the age of 18. This list sets out some of the key cases that have led to the increasingly widespread recognition and acceptance of trans persons.

1945 ***In re Leber*, 8 Recueil de Jugements du Tribunal Cantonal de la Republique et Canton de Neuchatel 536:** A court in the Canton of Neuchatel in Switzerland granted a petition by a post-operative trans woman to change her civic status to female and her name from Arnold Leon to Arlette Irene Leber. The court also rejected an application to prohibit her from marrying as a female.

1950 **European Convention on Human Rights:** The Convention was drafted by the Council of Europe after World War 2 as a broadly stated charter of human rights, with a court to enforce it. All Council of Europe member states must sign up to and ratify the original Convention and must uphold the rights and freedoms protected by it. There are a further 15 protocols to the Convention to which member states can sign up as wished, some of which expand on the rights to be protected. Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court but must go through the domestic legal system first. Where

Key legal cases and legislation in the evolution

2002 Lydia Foy v An t-Ard Chlaraitheoir & Others (No. 1) [2002] IEHC 116

2011 Louise Hannon v First Direct Logistics Ltd. Equality Tribunal of Ireland (DEC-E2011-066)

2015 Marriage Equality Act 2015 (Ireland)

2007 Lydia Foy v An t-Ard Claraitheoir & ors (No. 2) [2007] IEHC 470

2015 Gender Recognition Act 2015 (Ireland)

2007 L. v. Lithuania (Application No. 27527)

2006 V 4/06-7/ 1BvL 1/04 (Austria)

1992 B. v. France: (1992) 16 EHRR 1

1976 M.T. v J.T [1976] 140 NJ Super 77, Superior Court of New Jersey

1950 European Convention on Human Rights

1945 In re Leber, 8 Recueil de Jugements du Tribunal Cantonal de la Republique et Canton de Neuchatel 536, *Switzerland.*

1970 Corbett v Corbett (UK) [1970] 2 All ER 33

1986 Rees v. United Kingdom (1986) 9 EHRR 56

1990 Cossey v United Kingdom (1990) 13 EHRR 622

1996 P. v. S. and Cornwall County Council (C-13/94).

1997 X, Y & Z v. United Kingdom (1997) 24 EHRR 143

1999 Sheffield & Horsham v. United Kingdom (1999) 27 EHRR 163

2002 Goodwin v UK & 'I' v. UK (2002) 35 EHRR 18

2003 Bellinger v Bellinger (UK) [2003] UKHL 21

2004 Gender Recognition Act (UK) 2004

2006 Richards v Secretary of State for Work and Pensions (C-423/04)

2006 Grant v. UK (ECHR App. No. 32570/03)

2010 Equality Act (UK)

# of Transgender recognition internationally

1978
Transsexual case BVerfGE 49 (Germany)

2003
Van Kück v Germany [2003] ECHR 285

2008
1BvL 10/2005 (Germany) 2009

2007
Yogyakarta Principles – *Indonesia*

2001 Re Kevin (Validity of Marriage of Transsexual) (Australia) [2001] FamCA 1074

2008 Alex, Family Court of Australia 42 FamLR 645 – granted the application

1995 Attorney General v Family Court at Otahuhu, [1995] 1 NZLR 603, *New Zealand*

the court finds a state in violation of the Convention, its judgments are binding on the States concerned but sometimes it can be difficult to enforce them.

1970 ***Corbett v Corbett* (UK) [1970] 2 All ER 33:** On the failure of the marriage between model and trans woman April Ashley and Arthur Corbett, Mr Corbett gave as grounds for divorce that the marriage could never have been legal in the first place, since April had been registered as a boy at birth. The judge held that sex or gender could be determined solely by physical characteristics at birth and annulled the marriage. This test was to stand for over 30 years and formed the basis of establishing gender for most purposes relevant to trans people in the UK and other Common Law countries and prevented legal recognition.

1976 ***M.T. v J.T* [1976] 140 NJ Super 77, Superior Court of New Jersey:** A trans woman married to a male sued for maintenance when they divorced. As in *Corbett v Corbett* (above), her ex-husband argued that the marriage had not been valid because she was still really a male. The court rejected the *Corbett* reasoning and held that the plaintiff was genuinely a female and the marriage had been valid. This was one of the first cases to reject *Corbett* and one of the first judgments recognizing trans identity in the US.

1978 ***Transsexual case BVerfGE 49* (Germany):** The German Constitutional Court ruled that transgender persons should be able to amend their birth certs to reflect their true identity, leading to a 1980 law on gender recognition.

1986 ***Rees v. United Kingdom* (1986) 9 EHRR 56:** In this case before the European Court of Human Rights, a female-to-male trans person complained that UK law did not confer on him a legal status corresponding to his actual condition. The court held that there had been no violation of Article 8 (right to respect for private and family life) or of Article 12 (right to marry and found a family). It found that the traditional concept of marriage was based on union between persons of opposite biological sex. States had the power to regulate the right to marry.

1990 ***Cossey v United Kingdom* (1990) 13 EHRR 622:** Ms Cossey, a trans woman, was refused recognition in her female gender by the UK authorities and took her case to the ECtHR. The court held there was no violation of her rights under the Convention because there was no consensus among European states about the issue and so it fell within the 'margin of appreciation' or leeway allowed where there was no consensus. There were some strong dissenting judgments, however.

1992 ***B. v. France*: (1992) 16 EHRR 1:** In this case, the European Court of Human Rights concluded for the first time that there had been a violation of Article 8 of the European Convention because of the refusal of the French authorities to recognise B's female gender. It observed that in France, many official documents revealed "*a discrepancy between [the] legal sex and [the] apparent sex of a transsexual*", which also appeared on social security documents and payslips. The Court held that the refusal to amend B's gender in the civil status register had placed her "*in a daily situation which was not compatible with the respect due to her private life*".

1995 ***Attorney General v Family Court at Otahuhu*, [1995] 1 NZLR 603:** In this case the Attorney General of New Zealand sought a ruling from the High Court about the validity of a marriage where the female partner was a trans woman who had had gender re-assignment surgery. The court cited the *M.T. v J.T.* decision in the US and rejected the reasoning in *Corbett v Corbett*. It held that a trans woman should be accepted as female and that inability to procreate did not invalidate a marriage.

1996 ***P. v. S. and Cornwall County Council (C-13/94):*** This European Court of Justice case established that the discrimination ground of 'sex' in EU law encompassed the gender-reassignment process. P, a trans woman, had informed S., her employer at Cornwall County Council, that she intended to undergo gender reassignment surgery After taking sick leave for initial surgery, she was dismissed. The Court found that S had discriminated against P under the EU Equal Treatment Directive.

1997 ***X, Y & Z v. United Kingdom* (1997) 24 EHRR 143:** X, a transgender man, was living in a permanent and stable union with Y, his female partner. By agreement with X she had a child, Z, by artificial insemination by donor. The UK authorities refused to recognise X as the child's father as they would have done with another couple in the same circumstances. The European Court of Human Rights declined to find a violation of X's rights under Article 8 of the Convention on Human Rights (right to respect for private and family life) although it did acknowledge the existence of family life between a trans person and his partner's child.

1999 ***Sheffield & Horsham v. United Kingdom* (1999) 27 EHRR 163:** In this case, the UK had refused to recognise two trans men in their male gender but the European Court of Human Rights held that there had been no violation of the Convention because of the state's 'margin of appreciation'. However the decision was by the narrowest of margins (11 to 9) and the court stated that this issue 'needs to be kept under permanent review by the Contracting States", in the context of "increased social acceptance of the phenomenon and increased recognition of the problems which post-operative transsexuals encounter".

2001 ***Re Kevin (Validity of Marriage of Transsexual)* (Australia) [2001] FamCA 1074:** In this case, a transgender man and his wife went to the Family Court of Australia to have their marriage legally recognised. The court rejected the *Corbett v Corbett* decision and recognised Kevin's male gender, holding that physical characteristics alone were not determinative of gender and that 'brain sex' had a significant impact on a person's view of their own innate sexual identity. The court referred to the growing number of countries that recognised trans people and held that the marriage of Kevin and his partner was valid.

2002 ***Lydia Foy v An t-Ard Chláraitheoir & Others* (No. 1) [2002] IEHC 116:** The Irish High Court upheld the refusal of the Registrar General to recognise trans woman Lydia Foy in her female gender, relying partly on the *Corbett* decision, but expressed some sympathy for her situation.

2002 ***Goodwin v UK & 'I' v. UK* (2002) 35 EHRR 18:** The European Court of Human Rights finally held in both these cases that the UK government's failure to amend the birth certificates of two transgender women or to allow them to marry in their acquired gender was in breach of the European Convention. These landmark decisions prompted the UK government to introduce a Gender Recognition Act in 2004.

2003 ***Bellinger v Bellinger* (UK) [2003] UKHL 21:** A post-operative transgender woman appealed against a decision that she was not validly married to her husband as the law still viewed her as a man. The House of Lords held that part of the UK Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12 of the European Convention in so far as it made no provision for the recognition of gender reassignment.

***Van Kück v Germany* [2003] ECHR 285**: Ms. van Kück sued her health insurance provider for refusing to pay for her gender reassignment treatment on the basis that she had not proved that it was medically necessary. The German courts found against her but the European Court of Human Rights upheld her claim saying that it was not for the German courts to decide whether she needed gender reassignment treatment and that they had imposed a disproportionate burden of proof upon her and infringed her right to self-determination of her own gender.

2004 **Gender Recognition Act (UK) 2004:** The UK Gender Recognition Act became law on 10 February, providing for full legal recognition of change of gender. The Act made clear that transgender people must be treated in their new gender for all legal purposes including health and social care. The Act provided for the issuing of new birth certificates to trans people showing their acquired gender and allowed them to marry in that gender.

***K.B. v. NHS Pensions Agency* (C-177/01):** In this European Court of Justice case, KB and her transgender male partner had been unable to marry under UK law (this was before the Gender Recognition Act) and found that as a result KB was unable to pass on benefits from her pension scheme on death. The Court found that KB and her partner were treated less favorably than other couples whose right to marry would allow them to benefit from the pension scheme.

2006 ***Richards v Secretary of State for Work and Pensions* (C-423/04):** In this case, the EU Court of Justice ruled that a British trans woman was discriminated against when she was treated as a man and refused a state pension at the earlier age reserved for women. And in ***Grant v. UK (ECHR App. No. 32570/03)*** where a trans woman registered as female on her national insurance card was refused a pension at the female retirement age of 60, the European Court of Human Rights found the UK government in breach of Article 8 of the European Convention.

***V 4/06-7/1BvL 1/04* (Austria):** A trans woman's application for recognition of her female gender was denied on the grounds that she was married. The Austrian Constitutional Court found that recognition of a person's gender could not be impeded by her subsequent marriage, irrespective of the legality of that marriage.

2007 **Yogyakarta Principles:** In 2006 a distinguished group of international human rights experts, including former Irish President Mary Robinson and current head of the EU Fundamental Rights Agency Michael O'Flaherty, met in Yogyakarta, Indonesia to draw up a set of international principles relating to sexual orientation and gender identity. The resulting Yogyakarta Principles are a universal guide to human rights standards in this area.

***Lydia Foy v An t-Ard Claraitheoir & ors* (No. 2) [2007] IEHC 470:** The Irish High Court found that the State's failure to legislate for the recognition of trans people was in breach of the European Convention on Human Rights. The judge also issued the first "Declaration of Incompatibility" with the Convention to be made by an Irish court.

L. v. Lithuania *(Application No. 27527):* The European Court of Human rights found Lithuania in breach of the European Convention due to its failure to legislate for gender reassignment surgery and to provide for legal recognition of transgender persons.

2008 ***1BvL 10/2005* (Germany):** The German Federal Constitutional Court struck down a provision in the country's Transsexuals Act that required trans persons who were already married to divorce as a condition of recognition in their acquired gender. This was part of a series of decisions by which the Constitutional Court removed most of the restrictive provisions of the original 1980 Act.

2009 ***In re Alex*, Family Court of Australia 42 FamLR 645:** Alex was a 17 year old who was registered at birth as a girl but had identified for years as a boy. He was in state care and in earlier proceedings in 2004 a court had allowed him to change to a male name and commence hormone treatment. In this case the Department of Human Services applied to the court on his behalf for permission for him to have a double mastectomy. The Chief Justice noted Alex's maturity and that all the agencies dealing with him agreed that this was the best course for him. The court granted the application.

2010 **Equality Act (UK):** The Act provided that a person may not be discriminated against because of transgender identity. No specific gender re-assignment treatment or surgery is required to qualify as a trans person under the Act.

2011 ***Louise Hannon v First Direct Logistics Ltd.* Equality Tribunal of Ireland (DEC-E2011-066):** Ms Hannon, supported by the Irish Equality Authority, claimed discrimination and constructive dismissal by her employer after she began transitioning to her female identity. The Tribunal found in her favour under the Employment Equality Acts on the grounds of gender and disability and awarded her compensation.

2015 **Gender Recognition Act 2015 (Ireland):** This Act was among the most progressive transgender recognition laws in Europe, allowing gender recognition based on self-certification by the applicant.

Marriage Equality Act 2015 (Ireland): This law allowed for same-sex marriage in Ireland, removing any obstacles to people in subsisting marriages or civil partnerships being recognised in a different gender.

ENDNOTES

1. *Foy v An t-Ard Chláraitheoir & Others [2002] IEHC 116.*
2. The term 'transsexual' was used in Lydia's court cases, however, many transgender or trans people dislike the term 'transsexual' and prefer to use 'transgender' instead. We will use 'transgender' or 'trans' in this report except when quoting other parties or references.
3. There is no system of compulsory identity cards in Ireland and birth certificates are regularly requested as proof of identity.
4. At that time the European Court of Human Rights had a two-stage process with complaints being dealt with first by the Commission of Human Rights.
5. *Corbett v Corbett [1970] 2 W.L.R 1306.*
6. April Ashley was finally recognised as female by the UK authorities 35 years later, after the passing of the UK's Gender Recognition Act in 2004. She was awarded an MBE in 2012 for her services to transgender equality.
7. *Zappone and Gilligan v Revenue Commissioners & Others [2006]* IEHC 404.
8. *B v France (1993)* 16 E.H.R.R 1.
9. *Rees v UK (1987)* 9 E.H.R.R. 56.
10. *Sheffield & Horsham v UK (1999)* 29 E.H.R.R. 163.
11. *Goodwin v UK (2002)* 35 E.H.R.R. 18.
12. *I v UK (2003)* 40 E.H.R.R.967.
13. *Goodwin,* paragraphs 74 & 75.
14. A new solicitor, Maureen Maguire Gourley, had taken over in FLAC before the hearing of the case.
15. *Bellinger v Bellinger [2003]* UKHL 21.
16. Michael Farrell, the writer of this report, was appointed as FLAC Senior Solicitor in July 2005 and was responsible for the Foy case from then until the end of 2015 when he retired and Maureen Maguire-Gourley took over finalising the case.
17. Now a judge of the Irish Court of Appeal.
18. *Grant v. UK (Application No. 32570/03)* 23 May 2006.
19. P. *v. S. and Cornwall County Council (C-13/94)* 30 April 1996; *K.B. v. NHS Pensions Agency (C-177/01)* 7 January 2004; *Richards v. Secretary of State for Work and Pensions (C-423/04)* 27 April 2006.
20. *Re Kevin (Validity of Marriage of transsexual) [2001]* FamCA 1074, Australia.
21. *Foy v. An t-Ard Chláraitheoir & Others [2007]* IEHC 470.
22. *Grant v. UK (Application No. 32570/03)* 23 May 2006.
23. See Notes 19 and 20.
24. Order of the High Court in *Lydia Annice Foy v. An t-Ard Chláraitheoir & Others,* Record No. 2006/33SP, 14 February 2008.
25. Read more about TENI and its work at www.teni.ie.
26. Council of Europe CommDH(2008)9 *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on His Visit to Ireland, 26-30 November 2007,* paragraph 81 and recommendation 20.
27. UN Human Rights Committee: *Concluding Observations on the Report of Ireland under the International Covenant on Civil and Political Rights; CCPR/C/IRL/CO/3* July 2008.
28. EU Agency for Fundamental Rights: *Homophobia & Discrimination on Grounds of Sexual Orientation in the EU Member States, Part 1 – Legal Analysis, 2008.*
29. Department of An Taoiseach: *Renewed Programme for Government,* 10 October 2009, page 19.
30. In fact FLAC made three written submissions and one oral presentation to the Advisory Group.
31. Gender Recognition Advisory Group: *Report to Joan Burton TD, Minister for Social Protection,* 15 June 2011. Available online in August 2016 at www.welfare.ie
32. German Federal Constitutional Court: *1BvL 10/2005,* May 2008.
33. In February 2015, when a draft of the Gender Recognition Bill was under discussion, FLAC and the UCD Human Rights Network hosted a lecture by Judge Johanna Schmidt-Räntsch, a judge of the German Supreme Court and herself a trans woman, who described the progressive liberalisation of the German Transsexual Law by the German Constitutional Court.
34. The Labour Party: *'TOWARDS RECOVERY' – Programme for a National Government 2011- 2016,* page 54.
35. Nils Muiznieks, Commissioner for Human Rights, to Ms Joan Burton, Minister for Social Protection; Ref: CommHR/SG/sf 118/2012, 16 November 2012.
36. Senator Zappone and her partner Ann Louise Gilligan were the applicants in the *Zappone & Gilligan* case (cited above) seeking recognition of their Canadian marriage. After the Marriage Equality referendum in 2015, they were among the first couples to marry under the new law in Ireland. Ms Zappone became Minister for Children in the next government, elected in 2016. Ms. Zappone was elected to Dáil Éireann in 2016 and became Minister for Children in the government formed after the election. Sadly, Ms Gilligan died in June 2017
37. PILA (Public Interest Law Alliance), a project of FLAC, is a public interest law network that seeks to engage civil society and the legal community in using the law to advance social change. PILA was established to develop public interest law in Ireland in a practical way, and remains one of FLAC's core strategies for increasing access to justice. Read more at www.pila.ie.
38. Houses of the Oireachtas, Joint Committee on Education and Social Protection: *Report on the General Scheme of a Gender Recognition Bill 2013; ESP31011, January 2014.*
39. UN Human Rights Committee: *Concluding Observations on the Fourth Periodic Report of Ireland, Advance Unedited Version, July 2014.*
40. 'Lydia Foy settles transgender birth cert case against State' by Mary Carolan, *Irish Times,* 28 October 2014, available online at http://www.irishtimes.com/news/crime-and-law/courts/lydia-foy-settles-trans gender-birth-cert-case-against-state-1.1979314.
41. The Gay and Lesbian Equality Network (GLEN) had worked closely with TENI for some years and had shared with them the considerable experience GLEN had acquired during the campaigns for decriminalisation of homosexuality and for civil partnership.
42. Only Argentina, Malta and Denmark had similarly liberal provisions at that stage.
43. Free Legal Advice Centres: *FLAC News,* Volume 25, No. 3, 2015.

"A crucial role - one that must never be forgotten in the history of campaigns for equality… Hers was a long journey, requiring much more than patience."

President Michael D. Higgins on the Lydia Foy case

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