

Submission of FLAC to the Review Group on the current operation of the Gender Recognition Act 2015

FLAC, January 2018

About FLAC

FLAC (Free Legal Advice Centres) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. FLAC focuses on the use of law as a tool for social change and on the protection of economic, social and cultural rights. FLAC is an affiliate member of the FIDH.

In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence. FLAC was also a partner of the JUSTROM programme.

You can download/read FLAC's policy papers at

<http://www.flac.ie/publications/policy.html>

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Summary of recommendations

- ***Any proposals to amend the provisions within this legislation or further monitoring mechanisms for the Gender Recognition Act 2015 must be mindful of obligations under the public sector duty imposed by Section 42 of the Irish Human Rights and Equality Commission Act 2014 to promote equality of opportunity, eliminate discrimination and promote human rights.***
- ***The Review must ensure that the operation of the Gender Recognition Act 2015 for those under 18 who wish to access gender recognition must be in compliance with international human rights obligations in relation to children and vindicate those rights.***
- ***FLAC recommends that children age 16 and 17 be able to avail of gender recognition as if they were 18; that children under 16 be able to avail of gender recognition on basis of a simplified process in the District Court based on an application made by a parent or guardian with the child's consent, with the Court being required to hold the best interests of the child as the paramount consideration in decision making concerning the application.***
- ***FLAC recommends that the Equal Status Acts and the Employment Equality Acts be amended to expressly prohibit discrimination based on gender identity, and gender expression. Gender identity should be defined to include protection for those that identify as intersex or non-binary.***
- ***FLAC recommends that sex characteristics are included in non-discrimination law.***
- ***FLAC recommends the Irish government work with governments in Northern Ireland and UK to ensure full access to the provisions of the Gender Recognition Act 2015 for all Irish citizens.***
- ***FLAC recommends that the Minister ensures that documents issued using the Register of Gender Recognition do not disclose or compel a person to disclose their status as a transgender person. FLAC further recommends that staff as part of the roll out of the public sector duty are fully trained in relation to the right to privacy of transgender individuals and that all processes and procedures are reviewed to ensure this right.***
- ***FLAC recommends introducing a third gender option such as an 'X', for non-binary persons and intersex persons on identity documents including passports, and provision of recognition for intersex and non-binary identities***

- ***FLAC recommends that a review of non-therapeutic genital “normalising” surgeries on children be undertaken with a view to making further appropriate proposals***
- ***FLAC recommends that the Gender Recognition Act 2015 be amended to allow for recognition of non-binary gender identities.***

1. Introduction

FLAC (Free Legal Advice Centres) is a human rights organisation which exists to promote equal access to justice for all. We offer basic legal information through our telephone information line and free legal advice through a network of 80 volunteer evening advice centres. FLAC also campaigns on a range of issues including personal debt, social welfare law, and civil legal aid.

FLAC has made a number of submissions and presentations to the Government and others in the past concerning transgender rights in Ireland.¹

FLAC has represented transgender woman Dr. Lydia Foy since 1996, after she had begun her long and difficult struggle to secure recognition of her female gender identity by the issuing of a birth certificate that accurately reflected her gender identity. This involved the initiation of three different sets of High Court proceedings. It is in this capacity that FLAC makes this Submission to the Review Group on the current operation of the Gender Recognition Act 2015 and possible future operational and policy considerations. We welcome the opportunity to make a submission on the operation of the current legislation. We particularly welcome the commitment of the Minister for Employment Affairs and Social Protection to look closely at the recommendations made by transgender young people.²

This submission is informed by the Yogyakarta Principles and the Yogyakarta Principles Plus 10, which outline a set of international principles relating to sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics respectively.³ They are a universal guide to human rights which affirm binding international legal standards with which all States must comply. The Yogyakarta Principles are considered an authoritative synthesis of the human rights of persons with diverse sexual orientations and gender identities.⁴

¹ These submissions are accessible at <https://www.flac.ie/publications/>

² Press Statement: Minister Doherty announces launch of consultation process under review of the Gender Recognition Act 8th January 2018, <http://welfare.ie>

³ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2006) Hirschfeld-Eddy-Stiftung. Available at: <https://yogyakartaprinciples.org/> (Accessed January 2018)

⁴ The OHCHR, UN Special Procedures, UN human rights treaty bodies and the Council of Europe Commissioner for Human Rights have referenced the Yogyakarta Principles.

We note that while progress has been made since the introduction of the Gender Recognition Act 2015 in providing an avenue for legal recognition for transgender people, we also recognise the difficulties for those who fall outside of the scope of the current law – in particular transgender young people who are age 16 and 17 and do not have the support of their parent or guardian, and those who are under 16 and without a legal pathway to recognition of their self-identified gender.

We note that during the progress of the Gender Recognition Act 2015 through the Dáil many substantial changes were made as a result of consultation and engagement with transgender persons, representative organisations and bodies like FLAC. We are hopeful that similar progress can be made in this current review process.

2. Positive Duty

FLAC notes that the Terms of Reference for the Review Group on the Gender Recognition Act 2015 do not explicitly mention human rights or equality obligations.⁵

We also note that the Irish Human Rights and Equality Commission Act 2014 contains a specific provision which seeks to mainstream human rights and equality through the creation of a positive duty on a broad range of public and statutory bodies to promote equality of opportunity and protect the human rights of their staff and people to whom they provide services. The public sector duty is a stand-alone mandatory requirement which applies to government departments, including the Department of Employment Affairs and Social Protection, to take cognisance of human rights and equality standards in their work; to ensure compliance with those standards; and to promote their development in a proactive way. The duty covers any activities undertaken pursuant to a power or duty and also many of the operational aspects of the work of the relevant public body. This means that the review process for the Gender Recognition Act 2015 falls within the realm of the duty.

As an initial step towards meeting the requirements of the public sector duty, the Department should identify clearly the human rights and equality issues relevant to the Act and its reform and plans and actions that are already in place or proposed to be put in place to address these issues.⁶

Recommendation:

- ***Any proposals to amend the provisions within this legislation or further monitoring mechanisms for the Gender Recognition Act 2015 must be mindful of obligations under the public sector duty imposed by Section 42 of the Irish Human Rights and Equality Commission Act 2014 to***

Dominic McGoldrick; The Development and Status of Sexual Orientation Discrimination under International Human Rights Law, *Human Rights Law Review*, Volume 16, Issue 4, 1 December 2016, Pages 613–668, <https://doi.org/10.1093/hrlr/ngw030>

⁵ DEASP, Terms of Reference of the Review of the Gender Recognition Act 2015: <http://welfare.ie>

⁶ Section 42, Irish Human Rights and Equality Commission Act, 2014.

promote equality of opportunity, eliminate discrimination and promote human rights.

3. International Human Rights Law and Children

There are a number of international instruments relevant to the question of young people's gender identity and their ability to obtain legal recognition of their preferred gender. These must be examined in the course of reviewing the current legislation.

UN Convention on the Rights of the Child

FLAC notes that while the UN Convention on the Rights of the Child does not explicitly address transgender or intersex children or young people, Article 2 requires States to respect and ensure the rights set out in the Convention to each child without discrimination, with prohibited grounds of discrimination including race, colour, sex, birth or other status. The UN Committee on the Rights of the Child has since clarified that transgender young people are protected by Article 2 with "gender identity" falling within the "other status" criteria.⁷

Article 3 of the Convention requires that in all actions concerning children, the best interests of the child shall be a primary consideration. As a result, there is an obligation on the State to demonstrate how these best interests have been examined and assessed, and what weight has been given to them. Further, the UNCRC requires the State to undertake a continuous process of child rights impact assessment to predict the impact of any law on children and on their rights under the Convention.

Under Article 6 of the UNCRC States Parties are required to ensure to the maximum extent possible the survival and development of the child and measures used to implement this must be aimed at achieving the optimal measures for all children. Therefore the State is required to consider whether legal recognition of a child's self-identified gender will go towards ensuring the optimal development of that child.

Article 8 of the UNCRC requires the States Parties undertake to respect the right of the child to preserve his or her identity, including but not limited to issues of nationality, name and family relations as recognised by law. While not explicitly naming the issue of a child's gender identity, Article 8 indicates a recognition within the Convention that identity is a core factor within children's rights.

The Child's Right to Be Heard

Article 12 of the UNCRC requires the State to give due weight to the views of the child who is capable of forming his or her own views in accordance with age and maturity of the child. Further, the Convention states that the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body.

⁷ UN Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4 (20 October 2008), at para 24-25 7

As Ireland is a dualist legal system, the UN Convention on the Rights of the Child has not been directly incorporated into domestic law so that it may be directly relied upon in the Irish courts. However, elements of the UNCRC are contained within the Constitution (Article 42A) and in the area of child protection and welfare, the Child Care Act 1991 remains the primary piece of legislation. The Child Care Act 1991 requires the Child and Family Agency (Tusla) and the Courts to regard the welfare of the child as the first and paramount consideration when performing its functions and further requires that the CFA give due consideration, having regard to their age and understanding, to the wishes of the child.

The Committee on the Rights of the Child in its General Comment on Article 12 has stated that there are a number of essential steps in order to ensure children and young people are effectively heard.⁸ The Comment states that those responsible for hearing the child have to ensure that the child is informed about their right to express their opinion in all matters affecting them, and, in particular, in any judicial and administrative decision making-processes. The Comment explicitly states that the child must be heard if the matter under discussion affects the child and that this basic condition *“has to be respected and understood broadly.”*⁹

Clearly Article 12 does not require the views of the child to be conclusive in any dispute, but it does require that their views are heard, and that these views are given consideration according to the maturity of that child. As noted by the Law Reform Commission in relation to consent for medical treatment by under-18s, *“giving children a voice in matters that affect them does not require that they be given the sole responsibility for all decisions.”*¹⁰

The Committee has also noted that Article 12 of the UNCRC makes it clear that age alone cannot determine the significance of a child’s views and that their levels of understanding are not uniformly linked to their age. It stated; *“Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child’s capacities to form a view.”*¹¹

In one study of the child’s right to be heard in the courts, it was found that chronological age was by far the most common determining factor for the majority of children entering courts when the question arose of how much weight to give their opinion and that there was no specific agreement or criteria used to decide that age

⁸ UN Committee on the **Rights of the Child (CRC)**, **General comment No. 12(2009)**: The **right of the child** to be heard, 20 July 2009, **CRC/C/GC/12** at para 41 available at: <http://www.refworld.org/docid/4ae562c52.html> [accessed 2 February 2018].

⁹ UN Committee on the **Rights of the Child (CRC)**, **General comment No. 12(2009)**: The **right of the child** to be heard, 20 July 2009, **CRC/C/GC/12** at para 26 available at: <http://www.refworld.org/docid/4ae562c52.html> [accessed 2 February 2018].

¹⁰ Law Reform Commission Children and Medical Consent p28

¹¹ UN Committee on the Rights of the Child (CRC), **General comment No. 12(2009)**: The right of the child to be heard, 20 July 2009, **CRC/C/GC/12** at para 29 available at: <http://www.refworld.org/docid/4ae562c52.html> [accessed 2 February 2018].

was an indication of a child's maturity or understanding.¹² The same study identified a number of aspects of current child care proceedings in Ireland which appeared to be non-compliant with international human rights standards as set out by Article 12 of the UNCRC given that very young children were facilitated in participating (either directly or indirectly) in child care proceedings in Ireland to a significantly lesser degree than older children – given that age should not be the sole factor in assessing the weight of their views.¹³ This is relevant given that the Committee on the Rights of the Child discourages States from introducing age limits in law or practice that would serve to restrict the views of younger children being heard, indicating that any legislation enforcing this would not be UNCRC compliant if age limits were included.

The Child's Right to Be Heard in Domestic Law

Article 42A.1 of the Constitution provides a broad statement recognising that children have rights and pledges to protect those rights by law. This provision allows the courts to identify rights for children on a case-by-case basis. This broad acknowledgement of children's rights may provide a means by which rights protected under the CRC are vindicated before the Courts.

Article 42A 4.2° of the Constitution makes provision for the child's right to be heard in proceedings concerning adoption, guardianship, custody, and access to that child.¹⁴ While this constitutional provision is limited in its scope, it does recognise that children are able to develop views concerning their own wellbeing and welfare that should be listened to and taken into consideration by the courts with regard to their age and maturity. This is placed on a statutory footing by the Child and Family Relationships Act 2015.

Under Article 12 of the UNCRC, the State is obliged to consider the views of children in all matters affecting them with due weight given to their age and maturity. The UN Committee has noted that the voices of children are a powerful force in preventing violations of children's rights and that they should be consulted in relation to the formulation of policy and legislation that affects them.¹⁵ In order to be fully compliant with Article 12 of the Convention, the State – and the Review Group – must ensure that children are afforded the opportunity to express their views on the legislation and that due consideration is given to these views. If a Gender Recognition Certificate were sought on behalf of a child with an intersex condition, then the child's views would have to be sought in relation to this.

ECHR, UNCRC, and ICCPR Rights

¹² Parkes, A.; Shore, C.; O'Mahony, C.; Burns, K. (2015). The Right of the Child to Be Heard: Professional Experiences of Child Care Proceedings in the Irish District Court. *Child and Family Law Quarterly* 27(4), 423-444

¹³ *Ibid.*

¹⁴ *Bunreacht na hÉireann* (Constitution of Ireland, enacted in 1937), Article 42A 4.2°

¹⁵ 13 UN Committee on the Rights of the Child, General Comment No. 12 (2009) on the right of the child to be heard CRC/C/GC/12, at para 122.

Article 8 of the European Convention on Human Rights,¹⁶ Article 17 of the International Covenant on Civil and Political Rights¹⁷ and Article 16 of the UNCRC provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, home or correspondence. Ireland has previously been criticised under the ICCPR provision for failing to provide for gender recognition mechanisms for adults and it has been suggested by the Ombudsman for Children that there is no reason why the UNCRC using the equivalent article would not afford similar protection to children. The Ombudsman further noted that the manner in which a State chooses to vindicate a right may well differ for adults and children, but it cannot deny that the same right exists for both.¹⁸ Article 8 of the ECHR has been central to the recognition of transgender persons across Europe. In *Foy v An tArd-Chláraitheoir and Others*, the High Court held that certain provisions of the Civil Registration Act 2004 were incompatible with the plaintiff's rights to gender recognition stemming from Article 8 of the ECHR.¹⁹ It has further been suggested that the minimum age of 18 for independent applications for a Gender Recognition Certificate is incompatible with the Convention given that it does not encompass an age requirement for the protection of private and family life and includes children and young people within its scope and providing for gender recognition of both adults and children.²⁰

While the right to gender recognition may not be vindicated in the same way for both children and adults, Article 8.2 clearly stipulates the limits of the State's ability to interfere with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²¹ Having regard to the margin of appreciation applied to the State and the differing capacities of children under 18, the complete exclusion of

¹⁶ **Article 8** *Right to respect for private and family life* 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

Council of Europe, **European Convention** for the Protection of **Human Rights** and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 5 February 2018]

¹⁷ **Article 17** - 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 5 February 2018].

¹⁸ Office of the Ombudsman for Children, Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013, October 2013

¹⁹ [2012] 2 IR 1

²⁰ Office of the Ombudsman for Children, Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013, October 2013

²¹ Council of Europe, **European Convention** for the Protection of **Human Rights** and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 5 February 2018]

children under 16²² from accessing gender recognition in Irish law is not necessary for the national security, public safety, economic well-being of the country, protection health or morals, or the protection of the rights and freedoms of others in Ireland.

The origins of this policy were in statements by the Gender Recognition Advisory Group, who stated it was to protect the best interests of children who “*may not have formed a stable view regarding their gender identity*”.²³ However, any action that they may take must be proportionate and necessary in attempting to achieve a legitimate aim. Under the terms of this legislation, even where it can be shown that it is in the *best interests* of a child under 16 to access gender recognition, a legal pathway to recognition is unavailable to them regardless of circumstances or parental support or potential detrimental impact of not allowing gender recognition. As outlined by the Ombudsman for Children “*It is doubtful whether a blanket prohibition on obtaining gender recognition in all of these situations could be regarded as a necessary and proportionate interference with the young people’s rights under Article 8.2.*”²⁴

Necessary and Proportionate

Even if there was a reasonable prospect of young people seeking recognition of their gender identity in appropriate circumstances, it is not clear why it is felt necessary and proportionate to respond with a blanket ban on access to gender recognition for children under 16. During the initial discussions on the Gender Recognition Act, the Ombudsman for Children requested that alternative legislative arrangements be examined that allowed some mechanism for children who fell outside of the age requirement and noted the absence of this may leave the legislation vulnerable to challenge under Article 8 of the ECHR. Should the current legislative framework remain in place, this vulnerability will remain.

Transgender children under 18 in other jurisdictions

Austria, Germany, Croatia, Switzerland, Moldova and Norway have all introduced processes to allow transgender young people under 18 access legal gender recognition. In Norway, a person age 16 or over may apply for gender recognition based on self-determination. For those age between 6 and 16, one or both parents may apply for gender recognition on behalf of their child. Where there is a disagreement between parents concerning the application, the deciding body will base their decision on the best interests of the child.²⁵ The Netherlands allows for children over 16 to apply for gender recognition in their own right.²⁶

²² Young people aged 16-17 can also be legally recognised in their preferred gender, though the process is more onerous requiring the consent of the Circuit Family Court.

²³ Department of Employment Affairs and Social Protection, *Report of the Gender Recognition Advisory Group*, June 2010.

²⁴ Office of the Ombudsman for Children, *Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013*, October 2013

²⁵ Prop 74 L (2015-2016) Proposition to the Storting (proposal for a legislative decision) i The Legal Gender Amendment Act Recommendation of the iiMinistry of Health and Care Services March 18th 2016, approved by the iiiNorwegian Council of State on the same day. (The Solberg Government)

²⁶ Best practices from The Netherlands OHCHR request as follow-up to Res. 27/32 (“Human rights, sexual orientation and gender identity”) Accessed at: <https://rm.coe.int/16801e8db8>

The legislation in Argentina allows for gender recognition applications to be made in respect of young people under 18 through their legal representative with the consent of that young person. The process requires the decision-maker looking at the application to take into consideration the best interests and the evolving capacity of the child, in accordance with the UNCRC.²⁷

The Maltese Gender Identity, Gender Expression, and Sex Characteristics Act 2015 allows for a minor (defined as a person under 18) to access gender recognition where an application is made to a Court by parents or guardians on behalf of the minor. This legislation requires the Court to ensure that the best interests of the child as expressed in the UNCRC are the paramount consideration, and in so far as is practicable, due weight is given to the views of the minor having regard to the minor's age and maturity.²⁸ Further, the legislation also allows for parents or guardians to postpone the inclusion of a gender marker on the birth certificate until the child's gender identity is determined allowing for the child itself to make an informed decision concerning their own gender.²⁹

The GIGESC Act in Malta allows adults to access gender recognition by undertaking a simplified procedure where a notary requires a simple declaration based on a person's self-determination. It further prohibits requests for medical information and the entire process lasts a maximum of 30 days.³⁰

4. Arrangements for children aged 16 to 17 years;

Section 12 of the Gender Recognition Act 2015

Under Section 12 of the Gender Recognition Act of 2015, an application for a Gender Recognition Certificate may be made on behalf of a child who has attained the age of 16 but not 18 years. This application may only be considered if furnished with an order from the Circuit Family Court.³¹ While the Act states that the application may be made informally, may be heard and determined otherwise than in public and shall not have a fee charged in respect of it, it is still a cumbersome task for 16 or 17 year olds to attempt to avail of. The application for gender recognition on behalf of a minor may be granted where the court is satisfied that the child's parents, surviving parent or guardian consent or consents to the making of the application. The child must present a certificate in writing of a medical practitioner attesting to the child's maturity and ability to make the decision concerning their gender and consequences of same, and that the child has transitioned or is currently transitioning; and a certificate from an endocrinologist or psychiatrist who has no connection to the child stating that their opinion concurs with that of the medical practitioner mentioned previously. Requiring parental consent, evidence from two medical practitioners and a court order will be a costly and prohibitive process, not to mention so arduous that it is unlikely many trans children or young people age 16 or 17 would be able to

²⁷ *Identidad de Género, Ley 26.743, Establécese el derecho a la identidad de género de las personas.*, Argentina, 2012

²⁸ Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (XI of 2015) (Cap. 540), Malta.

²⁹ Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (XI of 2015) (Cap. 540), Malta.

³⁰ Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (XI of 2015) (Cap. 540), Malta.

³¹ Gender Recognition Act 2015

complete the process before they reach 18. This results in transgender children potentially completing their secondary and possibly entering third level education without having the legal recognition of their identified gender.³² Of the 295 Gender Recognition Certificates that have been issued since the introduction of the Act in 2015, it is not clear how many were issued to young people age 16 or 17.³³

Section 23 of the Non-Fatal Offences against the Person Act 1997

Section 23 of the Non-Fatal Offences against the Person Act 1997 provides for consent by a minor over 16 years to surgical, medical and dental treatment stating that their consent is as effective as it would be were they of full age and that it shall not be necessary to obtain any consent on their behalf from their parent or guardian for the purposes of criminal law.³⁴ Section 23(2) sets out that surgical, medical or dental treatment includes any procedure undertaken for the purposes of diagnosis and any procedure which is ancillary to that treatment.

Given that children age 16 and over can now seek, obtain and consent to medical services as part of their transition process as if they were a person over the age 18, it is inconsistent that they are not considered to have an equivalent level of maturity when it comes to making an application for gender recognition and still require the consent of their parents or guardian. It is not clear whether children under 16 will be considered able to consent to medical treatment in their own right however the UK uses the “Gillick competence” framework arising from a court decision in which it was held that “As a matter of Law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed.”³⁵

FLAC notes that Mr. Thomas Hammarberg during his tenure as Commissioner for Human Rights stated that legal recognition of trans children’s gender remains a huge hurdle in most countries and underlined that that children have rights and their views must be taken into account in decision making that concerns them.³⁶ The Parliamentary Assembly of the Council of Europe in its Resolution 2048 (2015), has also emphasised that “*the best interest of the child are a primary consideration in all decisions concerning [them]*” in relation to legal gender recognition.³⁷

Recommendation:

- ***FLAC recommends that children age 16 and 17 are able to access the same Gender Recognition Process as persons over 18.***

³² TENI/BelongTo, National Trans Youth Forum Report 2015

³³ Figures contained in Parliamentary Question Reply Tuesday, 30 January 2018 Department of Employment Affairs and Social Protection Question Heading for question(s) 578 Ref [3961/18]

³⁴ Note on Law Reform Commission recommendation that this be extended to civil law

³⁵ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112

³⁶ “LGBTI children have the right to safety and equality”, Commissioner’s Human Rights Comment, 2 October 2014. www.coe.int/en/web/commissioner/-/lgbti-children-have-the-right-to-safety-and-equality.

³⁷ Parliamentary Assembly Resolution 2048 (2015), paragraph 6.2.5

5. Arrangements for children aged under 16 years

FLAC recalls previous advice from the Ombudsman for Children's Office and notes its view that the exclusion of children under 18³⁸ was unlikely to achieve the government's then stated aim of safeguarding children from negative consequences of having their preferred gender recognised when they had not formed a stable view of their gender identity. The OCO Submission set out the "extraordinary adversity and barriers to living with dignity for transgender and intersex children" in particular in relation to their ability to access education and lack of recognition of their identities.³⁹ If the Gender Recognition Act 2015 is to continue in its current form, then the Minister for Employment Affairs and Social Protection must be aware of the challenges currently faced by transgender young people and the impact of maintaining the law in its' is current form.

Recommendation:

- ***The Review must ensure that the operation of the Gender Recognition Act 2015 for those under 18 who wish to access gender recognition must be in compliance with international human rights obligations in relation to children and vindicate those rights.***
- ***FLAC recommends that children age 16 and 17 be able to avail of gender recognition as if they were 18; that children under 16 be able to avail of gender recognition on the basis of a simplified process in the District Court based on an application made by a parent or guardian with the child's consent, with the Court being required to hold the best interests of the child as the paramount consideration in decision making concerning the application.***

Arrangements for intersex people

FLAC notes that there is no explicit reference to intersex persons within the Gender Recognition Act 2015. The legislation provides no facility for recognition of intersex persons who may fall outside of the scope of traditional male and female gender binaries. Although it is intended that the Act covers intersex persons, the lack of express acknowledgment of intersex conditions means that intersex persons may only be recognised as either male or female. During debates on the Gender Recognition Bill, a Government Minister stated that should intersex persons need to avail of it, there is provision within Section 63 of the Civil Registration Act 2004 which

³⁸ In the Gender Recognition Bill 2015 As Initiated, the framework originally excluded children ages 16 and 17 from accessing gender recognition.

³⁹ TENI, Transforming the Classroom: Supporting Trans Young People in Schools (2016)

allowed for “*the correction of errors....where a child within an intersex condition has been assigned the wrong gender.*” Currently the Civil Registration Act 2004 also provides no recognition of anything other than “male” and “female” with no recognition for intersex identities.

An intersex person may seek to change their registered gender, however the options available to them under the Gender Recognition Act 2015 are the same for those who are non-intersex given that there is no facility to recognise a third category. For an intersex person seeking to change their gender within the binary options, they may do so once they have turned 18, or once they are over 16 with a court order. An intersex person under 16 has no access to change their gender until they turn 16 and can secure the relevant parental consent and court order. Research conducted by the European Agency for Fundamental Rights found that 21 EU countries, including Ireland carry out “normalising” surgery on intersex children.⁴⁰

The birth of a child must be registered before they are three months old according to section 19 of the Civil Registration Act 2004, and this registration must include the sex of the child. For children who are born intersex, the definitive sex of the child may not be clear at that stage, however there is a legal obligation to make a recording on the registration of birth, while parents and guardians or the child themselves cannot apply to have this registration amended until they are 16.

FLAC notes that Organisation Intersex International Europe, an umbrella organisation of European human rights based intersex organisations, have called on states to make a range of legislative and policy changes concerning intersex people.⁴¹ These proposals included the need to enact legislative bans on medical interventions on children with variations of sex characteristics on social, psychosocial, cultural and cosmetic grounds and the need to ensure that medical practitioners do not conduct treatments for purpose of modifying sex characteristics which can be deferred until the individual can provide informed consent.

Recommendation:

- ***FLAC recommends introducing a third gender option such as an ‘X’, for non-binary persons and intersex persons on identity documents including passports, and provision of recognition for intersex and non-binary identities***
- ***FLAC recommends that sex characteristics are included in non-discrimination law***

⁴⁰ European Union Agency for Fundamental Rights (2015) FRA Focus Paper: The Fundamental Rights Situation of Intersex People. Vienna p1. Available at: <http://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex-people> (Accessed 26th January 2018)

⁴¹ OII Europe (2017) Statement of the 1st European Intersex Community Event (Vienna, 30st – 31st of March 2017) Available at: <https://oiieurope.org/statement-1st-european-intersex-community-event-vienna-30st-31st-march-2017/> (Accessed 26th January 2018)

- ***FLAC recommends that a review of non-therapeutic genital “normalising” surgeries on children be undertaken with a view to making further appropriate proposals***

Arrangements for those with non-binary identities

The term “gender binary” describes the system in which society views people as belonging to one of two genders - male or female - based on the sex they were identified with at birth. Gender roles corresponding with gender identities shape and constrain people’s experiences and traditional gender roles continue to be enforced by society in general, including in the fields of employment, education and politics. Within contemporary Western cultures there was a longstanding assumption that the binary male and female genders were natural and absolute given that most people conform to the gender they were assigned at birth. However recent decades have seen a recognition that this is not always the case and many people do not conform to the gender that they were assigned at birth, identifying with what is considered the “opposite” gender (i.e. male to female or female to male) or another gender entirely with gender being considered a non-binary spectrum rather than a binary.

While there are mixed definitions of “non-binary”, essentially non-binary is a term to describe a gender identity that is not exclusively male or female. For some people who identify as non-binary, they may experience gender as both male and female, and others may experience it as neither male nor female. Non-binary may also be used as an umbrella term to describe identities outside of the male/female gender binary. Some people who identify as having a non-binary gender may identify as being transgender, but others may not. For example, a transgender non-binary person may be someone who does not identify with the sex that was assigned at birth but they may also have an identity that cannot be defined as exclusively male or female. A non-binary person may not identify with the sex they were assigned as birth but they may have an identity that is not exclusively male or female. People who have non-binary identities may use terms to describe themselves like genderqueer, agender, gender fluid, demigender, bigender, or multigender.⁴²

One survey has indicated that 25%-35% of transgender people identify as non-binary.⁴³ UK research has stated that 0.4% of people in the general population identify as non-binary - one person per 250.⁴⁴

The predominant cultural trend has been to defer to using binary terms (“he or she” for example) and the lack of recognition of non-binary genders can invalidate or undermine a non-binary person’s identity. The current law in Ireland provides a

⁴² While there are broad definitions for each of these terms, some of them overlap and vary across cultures and geographic regions and may be contested in their precise definition.

⁴³ James, S. E., Herman, J. L., Rankin, S., et al. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

⁴⁴ Titman, N. (2014). How many people in the United Kingdom are nonbinary? www.practicalandrogyny.com
TMW (2014). Understanding non-binary people: A guide for the media. www.transmediawatch.org/Documents/non_binary.pdf.

framework for a gender-binary model of citizenship given the lack of recognition of gender-diverse persons.

Under the Gender Recognition Act 2015, a person may identify as male or female but there is no facility to assert an identity outside of the male/female gender binary. While the Act was progressive in that it provided a remedy for the exclusion many transgender people were facing, the law currently fails to recognise the diversity of genders as they are actually experienced and reinforces the male/female binary and may serve to reinforce inequality for those who identify as non-binary. The rights that are afforded under this legislation therefore place an emphasis on 'sameness' rather than equality in the context of difference.⁴⁵

In a study on the experiences of transgender people in Ireland conducted by TENI, 164 transgender persons were asked about their experiences and views regarding their gender. Of the 164, 74% felt that their gender identities were different from the gender usually associated with the sex they were assigned at birth and 9% felt uncertain. Others stated that they had a more fluid identity "so a definitive answer to this question would not be possible."⁴⁶ Many transgender people in the same survey reported complex feelings around gender with 14% and 18% identifying 2 and 3 gender identities respectively, with some identifying up to ten different terms to describe their gender.⁴⁷

Non-binary recognition in other jurisdictions

The German Constitutional Court has recently stated that acknowledgment of genders outside of the male and female binaries is required⁴⁸ and there are a number of jurisdictions that already recognise non-binary identities including Australia⁴⁹ and India.⁵⁰

Since 2011, the Australian government have allowed passports to be issued with a gender identity marker of X to denote indeterminate, unspecified or intersex identities.⁵¹

In May 2013, the NSW Court of Appeal recognised that sex is not a binary concept and determined that a primary identity document could denote an identity which is neither male nor female and that the New South Wales Registrar had the power to record the sex of a person as nonspecific rather than male or female. The

⁴⁵ Sexuality and Citizenship, Diane Richardson, *Sociology* Vol 32, Issue 1, pp. 83 - 100

⁴⁶ TENI, *Speaking from the Margins Trans Mental Health and Wellbeing in Ireland*, 2013. p14

⁴⁷ TENI, *Speaking from the Margins Trans Mental Health and Wellbeing in Ireland*, 2013. p15

⁴⁸ Civil status law must allow a third gender option Press Release No. 95/2017 of 08 November 2017 Order of 10 October 2017 [1 BvR 2019/16](#), Accessed at

<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>

⁴⁹ Australian Government Guidelines on the Recognition of Sex and Gender, Updated 2015, Accessed at

⁵⁰ National Legal Services Authority v Union of India and Others (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

⁵¹ Australian Government Guidelines on the Recognition of Sex and Gender, Updated 2015

unanimous judgment in the landmark ruling held that “not all human beings can be classified by sex as either male or female”.⁵²

Within Australia there have been a series of recent developments in law and policies that are beginning to create a space for identities beyond male and female in areas related to birth certificates, passport documentation, and government record keeping and anti-discrimination legislation. There have been different approaches in Australia in recognising non-binary identities with some recognising a “third” identity, others by recognising multiple additional identities and others by de-emphasising sex as an identification category entirely.⁵³

FLAC believes that the Gender Recognition Act and Civil Registration Act should be amended to explicitly allow for recognition of a third gender, by allowing for the gender marker ‘X’ to appear on documentation and a facility to allow people to specify their gender identity on birth certificates. This approach would provide legal recognition for gender non-binary and gender non-conforming, and where appropriate intersex individuals. Further FLAC would like to see a cross-departmental examination of the current use and necessity of gender markers on official documentation in general.

Recommendation:

- ***FLAC recommends legislation be introduced to recognise non-binary gender identities.***

6. Any other relevant issues, including issues relating to the operation of the current legislative provisions.

Equality Legislation: Gender Identity and Gender Expression

The Equal Status Acts 2000-2016 and the Employment Equality Acts prohibit discrimination on nine grounds including gender in a range of areas including employment, the provision of goods and services, education and housing. The gender ground is defined “that one is a male and the other is a female” and a person has been discriminated where they were not treated the same as a person of the same gender. However the prohibition on discrimination on the gender ground has been by the CJEU held to apply to discrimination based on gender reassignment.⁵⁴

In the case of *Identoba and Others v Georgia* in the European Court of Human Rights clarified that *all* transgender people are protected against discrimination on grounds of gender identity under article 14 of the Convention (ECHR) and not just

⁵² New South Wales Registrar of Births, Deaths and Marriages v Norrie (2014) 250 CLR 490

⁵³ Bennett, T 2014, 'No Man's Land': Non-Binary Sex Identified in Australian Law and Policy' University of New South Wales Law Journal, vol 37, no. 3, pp. 847-873.

⁵⁴ P v S and Cornwall County Council. Case C-13/94.

persons who have undergone or intend to pursue gender reassignment.⁵⁵ The ECtHR held that the state has a “compelling positive obligation” to protect the LGBT community against foreseeable discriminatory inhuman and degrading treatment. The Court explicitly stated that all transgender people are protected on the ground of gender identity. International research reveals that there are disproportionately higher levels of unemployment and underemployment among transgender people. Many transgender individuals have further reported job losses, demotions, or having to leave their employment due to discrimination at work or other experiences. Many other transgender persons report not transitioning due to fears concerning their employment.

Gender *identity* is the person’s internal experience of gender. A cisgender person has a gender identity consistent with the sex they were assigned at birth. For example, a child whose sex was assigned male on their birth certificate and who identifies as a boy is cisgender. A transgender person has a gender identity that does not match the sex they were assigned at birth. A child may have a non-binary gender identity, meaning they do not identify as a boy or a girl – they may identify as both, or neither, or as another gender entirely. Agender people do not identify with any gender. Gender *expression* is defined as the way in which every human being expresses themselves in genderised terms within the gender spectrum, as in masculinity, femininity, androgyny etc. A person’s gender expression plays a role in social dynamics including those associated with the reinforcement of gender stereotypes. While gender identity is protected within human rights frameworks and implicitly in domestic legislation, human rights violations based on gender expression such as dressing, mannerisms, speech and appearance fall outside of their scope. This is especially important given that gender expression is difficult to hide and many human rights violations are related to perceptions of gender expression that go against cultural stereotypes concerning how masculinity and femininity may be presented. Therefore expanding equality legislation would increase protection for the ways in which people outwardly express their gender.

Because gender expression is a core part of freedom of expression, social devaluation of gender expression can restrict a person’s right to freedom of expression. UN Resolution 2005/38 on the Right to Freedom of Opinion and Expression says that *“the effective enjoyment of freedom of opinion and expression is a clear indicator of the level of protection for all other human rights and fundamental freedoms, bearing in mind that all human rights are universal, indivisible, interdependent and interconnected”*.

Persons who are intersex are also not explicitly protected within current legislation. TENI defines intersex individuals by reference to “sex characteristics (such as chromosomes, genitals, and/or hormonal structure).” In Malta, “sex characteristics” are defined as “the chromosomal, gonadal, and anatomical features of a person, which include the primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.”⁵⁶ It is important to note that intersex persons may have characteristics that do not conform to the dominant binary model of gender, with some possessing characteristics of both male or female or of an indeterminate nature.

⁵⁵ *Identoba and Ors v Georgia* Insert ECHR 12 May 2015

⁵⁶ Gender Identity, Gender Expression and Sex Characteristics Act (2015)

While FLAC acknowledges that equality law in Ireland prohibits discrimination by imputation, we agree with the analysis of the Irish Human Rights and Equality Commission that the inclusion of “gender expression” is necessary given the heightened potential for discrimination on the basis of perceived gender or gender identity.

FLAC recommends that both the Equal Status Acts and the Equality Acts are amended to include clear specific protections for transgender people, for the avoidance of doubt in Irish law, Equality legislation should also be amended to cover acts targeted at individuals based on actual or perceived sex characteristics, gender identity and gender expression.

A clear statement of legal protection would ensure that transgender persons, including their employers, service providers and the public in general would understand the protection offered by the law and eradicate any doubts about who may be covered by the law or not. It would also ensure that gender identity and gender expressions are protected from discrimination. Gender expression would further protect those persons who do not identify with a gender or who fall into the non-binary category, or those who present on a hormonal or anatomical basis as non-binary but identify according to a specific binary model.

Recommendation:

- ***FLAC recommends that the Equal Status Acts and the Employment Equality Acts are amended to prohibit discrimination based on gender identity, gender expression and sex characteristics. Gender identity should be defined to include protection for those that identify as intersex or non-binary.***

Irish Citizens in Northern Ireland

The Good Friday Agreement 1998 recognises "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they may so choose", and that "their right to hold both British and Irish citizenship is accepted by both Governments."⁵⁷ This means that persons born on the island of Ireland before 1 January 2005, are entitled to be an Irish citizen.⁵⁸

Although persons born in Northern Ireland may hold Irish citizenship and are entitled to full rights as Irish citizens, they hold UK birth certificates and are unable to be entered on the Foreign Births Register because they are not considered a “foreign birth”. The UK government currently does not recognise Gender Recognition Certificates issued in the Republic of Ireland due to the different requirements for

⁵⁷ The Northern Ireland Peace Agreement The Northern Ireland Peace Agreement The Agreement reached in the multi-party negotiations 10 April 1998, Article 1, Para VI.

⁵⁸ For those born on the island of Ireland on or after 1 January 2005, the right to Irish citizenship depends on parents’ citizenship at the time of birth and the residency history of at least one parent before birth.

gender recognition in Irish and UK law.⁵⁹As a result Irish citizens in Northern Ireland cannot benefit from the provisions of the Gender Recognition Act 2015 and accordingly exercise their full rights as Irish citizens.

Recommendation:

- ***FLAC recommends the Irish government work with governments in Northern Ireland and UK to ensure full access to the provisions of the Gender Recognition Act 2015 and recognise Gender Recognition Certificates issued in the Republic of Ireland.***

Registration Numbers

Under the current framework where a person applies to the General Registrar to be entered in the register of gender recognition, they may apply for a certified copy of an entry on the register where a birth certificate is required. Original birth certificates provided reflecting the assigned sex at birth show a registration number whereas those issued via the gender recognition process do not show a registration number. As a result, FLAC is aware that some transgender persons have encountered difficulty in using their new birth certificate, where Gardaí have queried a birth certificate that does not contain a valid registration number. In turn this may force a person to “out” themselves as transgender in order to explain the lack of a registration number on their birth certificate. Having to reveal transgender identity against their will makes them vulnerable to violations of their right to privacy.

Article 8 of the European Convention on Human Rights clearly stipulates that everyone has the right to respect for private and family life and that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, or for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Noticeable differences on birth certificates clearly would not satisfy these conditions. The Gender Recognition Act itself went some way to attempt to ensure that a person was not forced to out themselves as transgender unnecessarily through the inclusion Section 30 stipulating that, “no information from [the index between register of gender recognition and the register of births] shall be given to any person except by the order of a court”.⁶⁰ In order that the legislation itself be adhered to and the right to privacy of transgender individuals be protected, it is essential that documents issued do not force a person to out themselves.

⁵⁹ In order to apply for gender recognition under the UK Gender Recognition Act 2004, you must have been diagnosed with gender dysphoria, lived in your acquired gender in the UK for at least two years and be unmarried and not in a civil partnership.

⁶⁰ *Gender Recognition Act 2015, Section 30* Ireland. Available at:<http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>

FLAC has also received complaints that transgender people “are outed” when applying for a public services card as the original birth certificate has been retained and displayed on screen in the process.

Recommendation:

- ***FLAC recommends that the Minister ensures that documents issued using the Register of Gender Recognition do not disclose or compel a person to disclose their status as a transgender person. FLAC further recommends that staff as part of the roll out of the positive duty are fully trained in relation to the right to privacy of transgender individuals and that all process and procedures are reviewed to ensure this right.***