

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**



Law Society of Ireland

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**SUBMISSION OF THE HUMAN RIGHTS COMMITTEE OF THE LAW
SOCIETY OF IRELAND
ON THE
PROPOSED GENDER RECOGNITION BILL**

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**Law Society of Ireland: Human Rights Committee
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TABLE OF CONTENTS

Introduction.....	3
Proposals and Recommendations	5
Conclusion	16

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**

Introduction

On the 15th June 2011, the Gender Recognition Advisory Group¹ (GRAG) reported comprehensively to the Minister for Social Protection (Joan Burton T.D.) on the “*legislation required to provide for legal recognition of the changed gender of transsexuals*”. The GRAG Report was commissioned in the wake of a decision of the High Court of Ireland in which the current legal position of transsexuals in Ireland was found to be incompatible with Article 8 of the European Convention on Human Rights.²

While the Society commends the GRAG on their work and on the recommendations espoused in the GRAG Report, the Society continues to have concerns in relation to some of the proposals and would also like to make some additional recommendations. In making these proposals and recommendations the Society has referred to, and been guided by, the submissions of the organisations that responded to the initial consultation process³, the Council of Europe Issue Paper on Human Rights and Gender Identity⁴ and other national, regional and international literature in the area.

This submission outlines the proposals and recommendations of the Society in relation to the following issues:

a) Purpose of the Scheme and Meaning of Recognition

¹ The GRAG is composed of representatives from a number of Government Departments including Department of Social Protection, Registrar General, Office of the Attorney General, Department of Justice, Equality and Law Reform, the Department of Enterprise, Trade and Innovation, Department of Health and Children, Department of Education and Skills, the Department of Community and Gaeltacht Affairs, Department of Foreign Affairs and Trade and the Department of Tourism, Culture and Sport. See Appendix 1 to the Gender Recognition Advisory Group, “Report to Joan Burton, T.D. Minister for Social Protection” 15 June 2011 (hereinafter referred to as “The GRAG Report”) at p. 51.

² *Foy v. An t-Ard Clárúitheoir* [2007] IEHC 470.

³ These include, BeLonG To Youth Service, Free Legal Advice Centre, Gay and Lesbian Equality Network, Gender Identity Disorder Ireland, Irish Council of Civil Liberties, Irish Human Rights Commission, Lash Back Collective, LGBT Noise, LGBT Society University College Cork, Marriage Equality, Ombudsman for Children’s Office, Equality Authority, Transgender Equality Network Ireland and the Union of Students in Ireland. See Appendix 3 of the GRAG Report at p. 55.

⁴ Hammarberg, (Council of Europe Commissioner for Human Rights), *Human Rights and Gender Identity* (Strasbourg, Council of Europe Publications, 2009).

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**

- b) Outline of the Process
- c) Decision-making Body and Decision-making Process
- d) Qualification Requirements
- e) Evidence to be Submitted
- f) Gender Recognition Certificate and Management of Data
- g) Gender Recognition Register and Issue of New Birth Certificate
- h) Appeal Process
- i) Revocation Process

The proposals and recommendations of the Society relate only to matters in which the Society disagrees with the GRAG Report or where the Society is of the opinion that the GRAG Report has omitted an important issue that requires attention. The Society welcomes this unique opportunity to contribute to the development of the law in relation to this very serious human rights issue and looks forward to the inclusion of these proposals and recommendations in the new Bill.

Proposals and Recommendations

2. Purpose of the Scheme and Meaning of Recognition

1.1. Transparency and Certainty

Recommendation 1: The Bill should lay out in detail the various criteria and evidential requirements necessary for making an application under the Bill. This should not be left to the discretion of the Executive through the introduction of Regulations.

There is a danger that a large amount of discretion will be left to the Executive in the Bill. The Bill is intended to provide for a comprehensive scheme “whereby the State recognises the changed gender of persons who are living full-time in the gender that is opposite to that shown in the birth registry of the person”.⁵ The Society is concerned to ensure, in the interests of legal certainty and fairness, that the Bill would contain not only the framework but also the detailed provisions of the law, including the detailed requirements and any evidential requirements that are necessary in order to make an application to the Gender Recognition Panel.

1.2. Non-Discrimination

Recommendation 2: The principle of non-discrimination should permeate the entire Bill. Provision should be made in the Bill for a non-discrimination clause which would provide for amendment to existing Equality Acts and for the introduction of equality proofing for all Bills which may have an impact on the lives of transgendered persons.

Firstly, the Society would recommend the insertion of an equality guarantee into the Bill in line with national, regional and international human rights commitments. At a national level, there is no protection for transgendered persons from discrimination,

⁵ GRAG Report at p. 45.

Law Society of Ireland: Human Rights Committee Submission on the Proposed Gender Recognition Bill

despite the fact that this protection is now increasingly recognised at a regional level⁶ and at an international level.⁷ The UN Committee on Economic, Social and Cultural Rights has confirmed that “gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place”.⁸ In order to achieve this, the Society would recommend an amendment to the Equality legislation in a manner similar to the amendments made in the UK by the Gender Recognition Act 2004 (UK).⁹

Secondly, the Society would also call for any legislation drafted in this area to include a provision that allows for equality proofing all “practices and policies with a view to ensuring that they do not disadvantage, prejudice or exclude people who are transsexual or transgendered”¹⁰.

1.3. Parenthood

Recommendation 3: The Society recommends the inclusion of a provision which would protect the parental status of an applicant for gender recognition.

The Society recommends that a provision similar to that under the Gender Recognition Act 2004 (UK) be included in any primary legislation on this matter. A provision to the following effect might be considered: “*The fact that a person’s*

⁶ For example, 13 EU Member States have introduced legislation treating discrimination on the grounds of gender identity as a form of sex discrimination and another 2 EU Member States consider it (inaccurately) as a form of sexual orientation discrimination. See EU Fundamental Rights Agency, *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: A Comparative Legal Analysis* (Vienna: European Union Publications, 2010). See also the decisions of the Court of Justice of the European Union and the European Court of Human Rights which have recognised the right to equality of transgendered persons (See Court of Justice of the European Union decisions Case C-13/94, *P. v. S. and Cornwall County Council* [1996] ECR I-2143, Case C-117/01 *K.B v. National Health Service Pension Agency and Secretary of State for Health* [2004] ECR I-00541; Case C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions* [2006] ECR I-03585 and the *European Court of Human Rights in Grant v. United Kingdom* [2006] EHRR 584).

⁷ See for example, Article 2, Universal Declaration on Human Rights and Article 2 and 26, International Covenant on Civil and Political Rights.

⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No. 20 on Non-Discrimination.

⁹ Schedule 6, Gender Recognition Act 2004 (UK).

¹⁰ Equality Authority, *Submission to the Gender Recognition Advisory Group*, (Dublin: Equality Authority, 2010) at p. 38.

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**

gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.”¹¹

2. Outline of Process

2.1. Transparency, Fairness and Reasonableness

Recommendation 4: The Society recommends that the operation and organisation of the process would be governed by the overarching principles of transparency, fairness and reasonableness.

To ensure compliance with international obligations while establishing fair, fast and firm decision-making processes that are transparent and easy to use, it is important to incorporate general principles that will determine the manner in which the process will operate. Transparency, fairness and reasonableness will ensure consistency in decision-making and public confidence in the system.

3. Decision-Making Body and Decision-Making Process

3.1. Gender Recognition Panel

Recommendation 5: The decision-making body, The Gender Recognition Panel, should take the form of an independent quasi-judicial tribunal which can receive and process written applications and oral applications, where requested to do so by an applicant.

The Society commends the work of the GRAG in relation to the proposal to establish a Gender Recognition Panel. However, the Society does have some proposals in relation to the operation and organisation of that Panel.

¹¹ Section 12, Gender Recognition Act 2004 (UK).

Law Society of Ireland: Human Rights Committee Submission on the Proposed Gender Recognition Bill

Firstly, the Society would recommend that the Panel should be independent in nature and that it should operate in the same manner as other quasi-judicial tribunals, such as the Equality Tribunal.¹² This would ensure the development of fair and transparent rules and processes, easy access for applicants and adequate resources for the effective operation of the Panel.

Secondly, the Society would recommend that the Panel would hear representations from applicants in both written form and in oral form (where this is requested by the applicant or where otherwise deemed necessary). This will ensure that applicants, who may not be in a position to make written applications, would still have appropriate access to the Panel.¹³

In this regard, the Society proposes that any Gender Recognition Panel established in Ireland operates and is organised in a manner similar to the UK Gender Recognition Panel¹⁴ which is administered and operated by the HM Courts and Tribunal Service in the UK.¹⁵

3.2. Rules and Procedure of the Panel

Recommendation 6: The Society recommends that the rules, guidelines, procedures and relevant decisions of the Gender Recognition Panel, including the rules, guidelines, procedures and decisions of the appellate process, should be readily accessible to the public.

The Society would call upon the Oireachtas to make any rules, guidelines, procedures and relevant decisions relating to the operation of the Panel readily accessible and available in writing to the public. In this regard, the Society refers to the website of

¹²Farrell, Senior Solicitor, FLAC, *Submission to Gender Recognition Advisory Group: Public Consultation on Gender Recognition Legislation* (Dublin: FLAC, 2010) at p. 13.

¹³ See also Irish Human Rights Commission, *Submission to Gender Recognition Advisory Group* (Dublin: Irish Human Rights Commission, 2010) at p. 17.

¹⁴ The UK Gender Recognition Panel was established under the Gender Recognition Act 2004 (UK).

¹⁵ See TENI, *Submission to Gender Recognition Advisory Group* (Dublin: TENI, 2010) at p. 10.

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**

the UK Gender Recognition Panel which provides guidelines on all aspects of the decision-making process.¹⁶

Secondly, the Society recommends that the annual reports of the Panel should also be published. This procedure is common in other jurisdictions, such as the UK.

3.3. Appointment of Panel Members

Recommendation 7: All members of the Panel should be appointed by the Commission for Public Service Appointments.

To ensure transparency, fairness and fitness for the Panel, the Society recommends that all full time and part time members of the Panel, including the Chairperson, be chosen by a public competition organised, managed and completed by the Commission for Public Service Appointments.

3.4. Qualifications of Panel Members

Recommendation 8: Members of the Panel should have a broad range of expertise in the area of Gender Recognition, should have recognised expertise in the area of gender recognition at the time of their appointment and should continue to build their expertise in this area through ongoing study with appropriate experts. A complaints procedure against members of the Panel should also be included in the Bill.

The Society commends the GRAG on the proposal that the members of the Panel should come from a broad spectrum of professions, including the medical profession, the legal profession and wider civil society and that such members will be independent in the performance of their functions. However, there are some

¹⁶ See <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/gender-recognition-panel/index.htm>.

Law Society of Ireland: Human Rights Committee Submission on the Proposed Gender Recognition Bill

significant omissions from the proposal that the Society would like to see included in the proposed legislation.

Firstly, the minimum levels of experience required by Members of the Panel should be set out clearly in the legislation. This is clearly provided for in Schedule 1 of the Gender Recognition Act 2004 in the UK. For example, the UK legislation provides that legal panel members should be of, at least, 7 years standing¹⁷ and that medical experts should be either registered medical practitioners or registered psychologists¹⁸. Where possible, it should be required that the experts would have some experience or expertise in the area of gender recognition or the legal issues involved in the particular area.

Secondly, the Society would recommend that Panel members should be required to maintain their knowledge and expertise through on-going study after appointment.

Finally, the Society recommends that a complaints, and disqualification, procedure, be established whereby the Chairperson may request the Minister to decide whether any member should be subject to a disciplinary procedure because of his/her incapacity, misconduct, failure to properly execute the office or has been placed, by conduct or otherwise, in a position that is incompatible with due execution of that office.

3.5. Fee Charging

Recommendation 9: The Society recommends that no fee or, where necessary, only a nominal fee, should be charged for the application process. Assistance should be made available to persons on low incomes to adequately make an application and obtain the evidence required.

The Society would recommend that the Panel should either not charge any fee; or, where necessary, that only a nominal fee would be charged. The Society has two grounds for this reasoning. Firstly, the Society is concerned that excessive fees will

¹⁷ Schedule 1, section 1, Gender Recognition Act 2004 (UK).

¹⁸ See section 1(2), Schedule 1, Gender Recognition Act 2004 (UK).

Law Society of Ireland: Human Rights Committee Submission on the Proposed Gender Recognition Bill

prevent deserving applicants from making an application to the Panel. Secondly, even if the fee is not prohibitive, the cost of obtaining the required evidence may, in addition to the fee, become burdensome for the applicant and may either prevent the applicant from pursuing their application or cause the applicant to make an incomplete application leading to an unsuccessful outcome for the applicant. In the UK, the Gender Recognition Panel may accept applications without a fee in certain cases, for example, in situations where the applicant is receiving certain benefits or where the applicant's income is below a minimum threshold.¹⁹

The Society also recommends that financial; or other appropriate; assistance should be made available to deserving applicants to assist them in gathering the evidence needed to make their application.

3.6. Timeframe

Recommendation 10: The Society recommends that the average timeframe for dealing with an application be included in any legislation on this matter.

In light of the delays in other quasi-judicial tribunals in Ireland, the Society recommends that a provision setting out the average timeframe for a decision in relation to an application for gender recognition be included in any legislation on this matter.²⁰

3.7. Appeals Process

Recommendation 11: The Society recommends that there should be an appeal to the Circuit Court on matters of law and fact.

¹⁹ See Gender Recognition Panel, *Fees for Applying to the Gender Recognition Panel*, (London: HM Court and Tribunal Service, 2010) available at:

http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/gender-recognition-panel/other-guidance-and-information/fees_applyingtoGRP10052011.pdf.

²⁰ See Irish Human Rights Commission, *Submission to Gender Recognition Advisory Group* (Dublin: Irish Human Rights Commission, 2010) at p. 20.

Law Society of Ireland: Human Rights Committee Submission on the Proposed Gender Recognition Bill

The Society commends the GRAG recommendation that an appeal should be available from the decisions of the Panel. The Society would recommend, in line with submissions from other organisations,²¹ that this appeal should be made to the Circuit Court and that an appeal should be available on both law and fact. The Society would not recommend the current law in the UK, which only allows an appeal to the High Court on a point of law, as the Society would consider this too restrictive.

4. Qualification Requirements

4.1. Residence

Recommendation 12: The Society recommends that the Bill clearly define the concept of “ordinarily resident” to include persons who have lived in the State for a period of 12 months or more. The Bill should also make provision for persons whose gender identity has been recognised in another jurisdiction.

The Society recommends, in the first instance, that the concept of “ordinary residence” should be clearly defined in any legislation proposed. It is also recommended that a time limit might be placed on the concept of “ordinary residence” in order that certain persons, e.g. asylum seekers, would not be excluded from the scope of the legislation.²²

Secondly, the Society recommends that persons who have had their acquired gender recognized in another country should be entitled to apply (in a simplified and speedy manner) for gender recognition in Ireland. The UK legislation provides for a two-tier system of recognition. The first tier provides that persons who have received gender recognition in an approved list of jurisdictions are automatically entitled to gender recognition in the UK. The second tier; requires persons who have received gender recognition in an unapproved jurisdiction; to undertake an “overseas track”

²¹ Farrell, Senior Solicitor, FLAC, *Submission to Gender Recognition Advisory Group: Public Consultation on Gender Recognition Legislation* (Dublin: FLAC, 2010) at p. 13.

²² See also Irish Human Rights Commission, *Submission to Gender Recognition Advisory Group* (Dublin: Irish Human Rights Commission, 2010) at p. 21.

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**

application.²³ This system, while somewhat complicated, does provide a very speedy resolution for all applicants and the Society would recommend a similar system be introduced in Ireland.

4.2. Age

Recommendation 13: The Society recommends that 16 is a more appropriate age for access to the application process.

The Society recommends that, while 18 is the age of majority in Ireland, a person aged 16 or over is competent to make medical and surgical decisions on their own behalf, without requiring parental consent.²⁴ Therefore, the Society would recommend that this is a more appropriate age for the application process.²⁵ Requiring a transgendered person to wait until the age of 18 to make an application may otherwise lead to severe emotional, physical and psychological distress for the applicant.

4.3. Marriage or Civil Partnership

Recommendation 14: The Society recommends that applicants should not automatically be excluded from the process merely because they are married or in a civil partnership.

The Society recommends that this potentially discriminatory requirement be omitted from the legislation. The Society recognises the very distinct difficulties in this area surrounding the current reading of Article 41.3 of the Irish Constitution in relation to the definition of marriage. Short of recommending a constitutional amendment, the Society would endorse the recommendations of the submission of the Equality Authority to GRAG in which this issue was carefully and thoroughly examined.²⁶ In endorsing this view, the Society is critical of the current legal situation which causes

²³ Section 1, Gender Recognition Act 2004 (UK).

²⁴ Section 23, Non-Fatal Offences Against the Person Act 1997.

²⁵ See Equality Authority, *Submission to the Gender Recognition Advisory Group*, (Dublin: Equality Authority, 2010) at p. 23.

²⁶ See Equality Authority, *Submission to the Gender Recognition Advisory Group*, (Dublin: Equality Authority, 2010) at p. 17.

Law Society of Ireland: Human Rights Committee Submission on the Proposed Gender Recognition Bill

significant ethical, moral and emotional difficulties for persons who are faced with the dilemma of choosing between their marriage or civil partnership and seeking recognition of their acquired gender.”²⁷

Therefore, the Society recommends that “where a married couple or civil partners do not wish to dissolve or annul their legal union, they should not be forced to do as a precondition to legal recognition of a party’s acquired gender. While this may result in a situation where, despite restrictions on grounds of sex, some same-sex marriages and some opposite-sex civil partnerships would be recognised, the numbers involved are likely to be very small. Any perceived discrepancy in the law would be outweighed by the imperative to avoid the greater distress involved in forcing happily married couples to dissolve or annul their marriages or civil partnerships.”²⁸

This view has also been endorsed by recognised academics in this field who note the impact that such provisions have on children of the marriage²⁹ and by constitutional courts in other European countries. In Germany and Austria³⁰, for example, the courts have held that “protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages”³¹.

4.4. “Real Life Test”

Recommendation 15: The Society recommends that the “real life” test be maintained subject to certain provisions being implemented to ensure that transgender persons can live “full-time in the preferred gender”.

While the Society is satisfied with the recommendation that the applicant should have lived in their acquired gender for a period of 2 years prior to their application, any

²⁷ See Mitchell and Howarth, *Trans Research Review* (London: Equality and Human Rights Commission, 2009) at p. 5.

²⁸ See Equality Authority, *Submission to the Gender Recognition Advisory Group*, (Dublin: Equality Authority, 2010) at p. 21.

²⁹ Whittle, Turner, Combs and Rhodes, *Transgender EuroStudy: Legal Survey and Focus on The Transgender Experience of Health Care* (Transgender Europe and ILGA-Europe, 2008) at pp. 22-23.

³⁰ Austrian Constitutional Court, BVerfG, 1 BvL 1/04 (18 July 2006); German Constitutional Court, BVerfG, 1BvL 10/05 (27 May 2008).

³¹ Hammarberg, (Council of Europe Commissioner for Human Rights), *Human Rights and Gender Identity* (Strasbourg, Council of Europe Publications, 2009).

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**

legislation should ensure that applicants are in a position to do this without discrimination. This would require the amendment of the Equality Acts and the Equal Status Acts (as discussed previously) to specifically address transgender persons and the development of policies and procedures for education and awareness-raising in relation to transgender issues, particularly in areas of education, healthcare and employment.

5. Evidence to be Submitted

5.1. Evidential Requirements

Recommendation 16: The Society recommends that the precise evidential requirements necessary for making an application to the Panel should be laid out in primary legislation.

The Society recommends that any necessary evidence required to make an application should be clearly set out in any primary legislation so as to make the application process as simple as possible. The Society would recommend the evidential requirements set out in the submission to GRAG of the Irish Human Rights Commission to the effect that the evidential requirements should normally include the following:

- “Evidence of a desire/intention to irreversibly make a genuine transition for life;
- Supportive medical evidence of a recognised psychological need to make this transition - either through past acts (e.g. having lived in the new gender identity for some time) or diagnosis (e.g. diagnosis as having gender dysphoria);
- Evidence of having undergone an adequate level of counselling prior to making the application.”³²

³² See Irish Human Rights Commission, *Submission to Gender Recognition Advisory Group*, (Dublin: Irish Human Rights Commission, 2010) at p. 23.

6. Gender Recognition Certificate and Management of Data

6.1. Duty of Confidentiality

Recommendation 17: The Society would recommend the insertion of a duty of confidentiality and an offence of unauthorised disclosure into the Bill.

There are currently no provisions in the GRAG Report relating to the importance of a statutory duty of confidentiality and non-disclosure and a corresponding offence of unauthorised disclosure. The Society recommends that these provisions constitute part of any legislation in this area. A duty of confidentiality and an offence of unauthorised disclosure currently form part of the legislation in the UK.³³ The UK provisions provide that it is an offence for a person “who has acquired protected information in an official capacity to disclose the information to any other person”³⁴. However, certain exceptions are allowed, for example, in situations where the information does not enable that person to be identified etc. Once again, the provisions of the Gender Recognition Act 2004 (UK) are instructive in this regard.

Conclusion

The GRAG Report was published on July 15th of this year and the Society welcomes this unique opportunity to consolidate and clarify the law in relation to gender recognition and to ensure compliance with international and regional standards. However, the Society has a number of concerns, which it has outlined above, in relation to the manner in which the GRAG report proposes to implement this new legislation. The Society is hopeful that any new legislation in this area will consider these recommendations positively.

³³ Section 22, Gender Recognition Act 2004 (UK).

³⁴ Section 22, Gender Recognition Act 2004 (UK).

**Law Society of Ireland: Human Rights Committee
Submission on the Proposed Gender Recognition Bill**

In particular, the Society views this unique occasion as an opportunity to ensure that all persons who seek recognition of their acquired gender in Ireland can do so in a manner which is respectful and mindful of the dignity and human rights of all applicants and which will ensure the least interference with their lives. This requires legislation not only in the manner in which this recognition can occur but also in other areas of life, most particularly, education, healthcare and employment.

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