

**Mandates of the Working Group on the issue of discrimination against women in law and in practice
and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health**

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Excellency,

We have the honour to address you in our capacities as Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health pursuant to Human Rights Council resolutions 23/7 and 24/6.

In this connection, we would like to bring to the attention of your Excellency's Government concerns related to the **Gender Recognition Bill (Number 116 of 2014)**, including provisions about mandatory medical certification and marital status, as well as disproportionate safeguards applied to children under the scope of the bill, which discriminate against transgender people and restrict their right to the enjoyment of the highest attainable standards of physical and mental health, as well as their rights to privacy, equality before the law, education, physical and psychological integrity, the rights of transgender children to have their best interests be the primary consideration in the determination of all actions or decisions that concern them, and their right to be heard.

According to the information received:

The drafting of the Gender Recognition Bill was initiated following the judgment of Lydia Foy's case (Foy-v-An t-Ard Chláraitheoir & Ors) in October 2007, a transgender woman seeking a new birth certificate in her female gender.

After being announced by the Government in September 2014, the Gender Recognition Bill was presented to the upper house of the Oireachtas – the Irish legislature - on 17 December 2014 and on 21 January 2015, and then examined on 5 March 2015 by the lower house. Under the proposed legislation, once a gender recognition certificate is issued to a person, the person's gender will be recognised for all purposes, including when interacting with the State, private and public institutions.

While acknowledging that this is a positive attempt to provide access to legal recognition of gender identity for transgender people, the Gender Recognition Bill retains a number of provisions which could amount to violations of the right to the enjoyment of the highest attainable standard of physical and mental health and the rights to privacy, equality before the law, and education.

Firstly, section 10 of this bill establishes the process for acquiring a gender recognition certificate which requires that an endocrinologist or psychiatrist provide a supporting statement that the applicant is transitioning or has transitioned to the applicant's preferred gender. It is also stipulated that the process be undertaken by the transgender person's "primary treating medical practitioner" defining that person as "the primary treating endocrinologist or psychiatrist". While this provision does not require any medical diagnosis or treatment, it is considered stigmatising and humiliating for the applicant since it bases the adjudication of gender identity on medical certification and not on self-declaration and the rights to autonomy and physical and psychological integrity of the person concerned. The human-rights based approach to legal gender recognition should be based on self-identification and self-declaration free of any unnecessary, disproportionate and abusive barriers based on the medical model, including medical certification.

The bill also stipulates at Article 9 (2) (b) that all transgender people who wish to apply for a Gender Recognition Certificate to change their legal gender must be single. Therefore, if they are married, it is alleged that they will have to divorce their spouses. On 10 March 2015, the government published a draft legislation which will be enacted following the successful passage of the marriage equality referendum on 22 May 2015. It includes a section explaining how the Gender Recognition Bill will be amended to ensure that marital status will allegedly no longer be an obstacle to recognition. Nevertheless, the restriction to single persons in article 9 (2) (b) should be removed and should not be conditional on the passage of the referendum.

In addition, while Section 12 of the bill allows access to gender recognition for children between 16 and 18 years old, it requires the submission of additional documentary evidence for legal gender recognition from the child's parents, primary treating physician and a second physician, as well as a legal process through a Circuit Family Court.

According to reports, during the consultations on the mentioned legislation, different views were expressed on the minimum age for applying for legal gender recognition of one's preferred gender. It is reported that safeguards established are based on the reservations expressed by mental health professionals and intended to protect children ages 16 to 18 from the negative effects of having their preferred gender recognised when they have not yet formed a stable view

regarding their gender identity. In this process, the Minister of Social Protection sought the advice of the Ombudsman for Children.¹

While safeguarding children is a legitimate aim, we concur with the advice provided by the Ombudsman for Children that the current provisions, which impose a blanket exclusion of young people below the age of sixteen from the scope of the legislation, may not achieve this aim and may impact negatively on the rights of transgender children. We are concerned that this exclusion could be a disproportionate interference with their right to freedom from discrimination, recognition of their gender identity, their right to be heard, and their right to their best interests being the primary consideration in the determination of all actions or decisions that concern them, which could have serious effects on their right to health, privacy, recognition before the law, and education. It may also expose the child to intolerable pressure and family conflict.

The difficulties experienced by young transgender and intersex people in educational settings have been underlined during the consultation process, including discrimination, stigmatisation and social exclusion. These children face extraordinary challenges in schools and other settings which could be unnecessarily prolonged and exacerbated by the fact that under the new legislation that they will have to wait until they are sixteen to access legal gender recognition of their preferred gender. Moreover, the significant additional requirements for recognition of the gender identity of children between sixteen and eighteen years are more restrictive and burdensome than other legal provisions in Ireland on consent of children to surgery and treatment between the ages of 16 and 18.

In assessing the impact of the proposed legislation, a mechanism should be in place to ensure that the best interest of the child and the evolving capacity of the child will be a primary consideration. The best interests of the child must be guaranteed by the State in a non-discriminatory manner, including on the basis of gender identity. States have the obligation to create an environment that respects the human dignity of children, including transgender children, and that guarantees the right of transgender children to be heard. The best interest of the child must be adjusted and defined on an individual basis, according to the specific situation of the child concerned. In this regard, it is essential to take into account the views of young people affected under the scope of this legislation through a meaningful consultation process, as well as to ensure that the rights of individual children, including transgender children, are fully protected and respected.

It is alleged that transgender children below the age of 18 were not allowed to be present during debates on the mentioned legislation in Parliament, and that their right to be heard was not guaranteed by the legislative process, despite the fact that the legislation will impact significantly on their rights.

¹ Advice from the Ombudsman Office for Children on the General Scheme of the Gender Recognition Bill (2013), Ombudsman for Children's Office

Furthermore, it is alleged that while Government officials have indicated that the Bill would address the situation of intersex persons, the actual Bill makes no specific provisions relating to intersex people, and uses terms such as "transitioning to his or her preferred gender", which will not apply to intersex persons who do not identify as transgender, but who may nevertheless have sex markers on their birth certificates that were incorrectly assigned at birth, or that may not correspond to their physical appearance as a result of physical changes in their bodies following puberty.

While acknowledging once again that the Gender Recognition Bill (Number 116 of 2014) is a positive attempt to provide access to legal gender recognition for transgender people, concern is expressed about provisions requesting mandatory medical certification and a single marital status, as well as the disproportionate safeguards applied to children under the scope of the bill. It is deemed that such provisions may perpetuate stigma and discrimination towards transgender people, and that such requirements could be disproportionate and unnecessarily restrict the right of transgender and intersex adults and children to the enjoyment of the highest attainable standards of physical and mental health, as well as their rights to privacy, equality before the law, and education. It is of further concern that while the Government has stated that it would address the situation of intersex persons through the Bill, the Bill has no specific provisions that address their specific situation.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

Since it is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on measures taken by the Government of the Republic of Ireland to ensure that the proposed legislation will provide equal and non-discriminatory access to legal gender recognition to transgender people without disproportionate or abusive requirements, and in full respect of their human rights.
3. Please provide information on the analysis carried out by the Government with regards to the compatibility of the requirement of certification by medical practitioners with international human rights standards.
4. Please provide information about the assessment of the impact of the proposed legislation on the human rights of young transgender people, including transgender people below the age of 16, and between the ages of 16 and 18,

and the measures taken by the Government to protect their rights, inter alia to freedom from discrimination, health, education, physical and psychological integrity and to be heard, in this legislative process.

5. Please provide information on mechanisms and processes in place to ensure that transgender people would not be required to divorce in order to obtain legal gender recognition, should the marriage equality referendum fail to pass.
6. Please provide information on how the rights of intersex people will be protected through this proposed legislation.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any persons responsible for the alleged violations.

Your Excellency's Government's response will be made available in a report to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Emna Aouij

Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice

Dainius Pūras

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Annex

Reference to international human rights law

In connection with the above concerns, we would like to refer your Excellency's Government to the International Covenant on Civil and Political Rights (ICCPR), which Ireland ratified on 8 December 1989. The ICCPR underlines that the State shall respect and ensure the rights of all individuals, without any distinction of any kind, including of sex (art.2), provides equal civil and political rights for all men and women (art.3), the right to recognition for everyone before the law (art.16), the right to one's privacy and family (art.17) as well as equality before the law, without any discrimination to the equal protection of the law and that, in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, including sex (art.16).

Furthermore, we would like to recall the recommendations (CCPR/C/IRL/CO/4) made by the UN Human Rights Committee in July 2014 following the submission of Ireland's fourth periodic report, stating that the State should "ensure that transgender persons and representatives of transgender organizations are effectively consulted in the finalization of the Gender Recognition Bill so as to ensure that their rights are fully guaranteed, including the right to legal recognition of gender without the requirement of dissolution of marriage or civil partnership" and its recommendation (CCPR/C/UKR/CO/7) that States repeal "abusive and disproportionate requirements for legal recognition of a gender reassignment".

In this connection, we would like to also mention the General Recommendation n°28 from the CEDAW Committee (CEDAW/C/GC/28) which in its paragraph 18 underlines the question of intersectionality of different forms of discrimination against women including when it is based on gender identity. The Committee emphasizes the need for State parties to legally recognise and adopt policies to eliminate occurrences of intersectionality in discrimination.

We deem it pertinent to refer your Excellency's Government to the UN Convention on the Rights of the Child (CRC), which Ireland ratified in September 1992. The CRC underlines, inter alia, that in all actions concerning children, including legislative measures, the best interest of the child should be a primary consideration (Art. 3.1 and General Comment No. 14), and its content must be determined on a case-by-case basis, taking into account the child's personal context, situation and needs, the child's right to be heard. It also establishes the obligation of States to ensure to the maximum extent possible the survival and development of the child (art. 6 and General Comment No. 5), the creation of an environment that respects human dignity, and that the child's development is interpreted as a holistic concept including physical, mental, spiritual, moral, psychological, and social development. The Convention also enshrines the obligation of States to ensure the right of children to express their views in all matters affecting them, with due consideration to those views in accordance with age and maturity of the children (art. 12 and General Comment No. 12).

In this connection, we wish to recall that CRC reiterates that children, including girls, and like adults, have a right to privacy (art. 16) and it also address aspects of the right of the child to be recognized as a person (art. 7 and 8). The CRC also recognizes that children and adolescents have the right to the enjoyment of the highest standard of health (art. 24.1).

We would like to refer your Excellency's Government to General Comment 15 of the Committee on the Rights of the Child, where it is underlined that, in order to fully realize the right to health for all children, States have an obligation to ensure that children's health is not undermined as a result of discrimination which is a significant factor contributing to vulnerability. The grounds on which discrimination is proscribed, according to article 2 of the Convention, include gender identity and health status. The Committee draws attention to any other forms of discrimination that might undermine children's health, and the implications of multiple forms of discrimination. (CRC, GC 15, para 8)

We would like also to refer to the European Convention on Human Rights, which under Article 8 provides that “[e]veryone has the right to respect for his private and family life [...]”, and thus without age specifications, except for entering a marriage (fixed from 18 years old by international human rights law). Article 12 further stipulates that “[m]en and women of marriageable age have the right to marry and to found a family”. Furthermore, I would like to draw attention to the European Court for Human Rights’ decision that uphold the rights of transgender people to have their gender legally recognised, in the landmark case *Goodwin v. the United Kingdom* (ECtHR application no. 28957/95).

In this connection, the Yogyakarta Principles, in principle 3 reaffirm the right to recognition before the law, specifying that “[e]ach person’s self-defined [...] gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom”. It also stipulates in principle 6 that “[e]veryone, regardless of [...] gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family [...]”, and in principle 24 that “[e]veryone has the right to found a family, regardless of [...] gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the [...] gender identity of any of its members”.