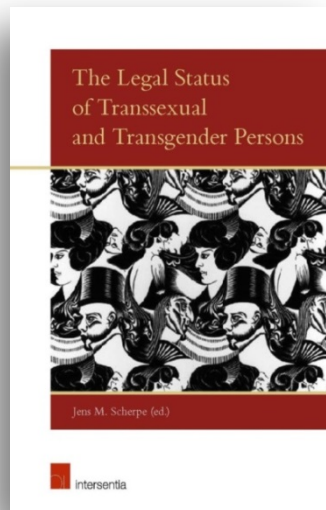


This contribution was originally published in:

The Legal Status of Transsexual and Transgender Persons

Jens M. Scherpe (ed.)

Published in December 2015 by
Intersentia www.intersentia.co.uk



For more information on the book or to purchase
<http://intersentia.com/en/the-legal-status-of-transsexual-and-transgender-persons.html>

This contribution is made available under the terms of the Creative Commons Attribution, NonCommercial, ShareAlike Creative Commons Licence (<https://creativecommons.org/licenses/by-nc-sa/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited and derived works are published under the same licence.

For any queries, or for commercial re-use, please contact Intersentia at mail@intersentia.co.uk or on +44 (0) 1223 370170.

Featured Recommendations

Legal Recognition of Same-Sex Relationships in Europe

Katharina Boele-Woelki and Angelika Fuchs (eds.)
European Family Law, vol. 32
June 2012
ISBN 978-1-78068-045-3
xvi + 312 pp.

Family Forms and Parenthood

Andrea Büchler and
Helen Keller (eds.)
European Family Law, vol. 40
March 2016
ISBN 978-1-78068-340-9
xxiv + 546 pp.

The Future of Family Property in Europe

Katharina Boele-Woelki, Jo Miles and
Jens M. Scherpe (eds.)
European Family Law, vol. 29
ISBN 978-94-000-0054-4
xxii + 434 pp.

THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS

Edited by
Jens M. SCHERPE



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7PP
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

The Legal Status of Transsexual and Transgender Persons
© The editor and contributors severally 2015

The editor and contributors have asserted their right under the Copyright, Designs and Patents Act 1988, to be identified as the authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Artwork on cover: M.C. Escher's 'Eight Heads' © 2015 The M.C. Escher Company B.V. – Baarn – Holland. All rights reserved. www.mcescher.com

ISBN: 978-1-78068-196-2
Depot no.: D/2015/7849/72
NUR code: 822

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

CONTENTS

<i>Preface</i>	vii
<i>List of Contributors</i>	xiii
Introduction	
Jens M. SCHERPE	1
PART I. MEDICAL/PSYCHOLOGICAL VIEWS	9
Transgenderism and Transsexuality: Medical and Psychological Viewpoints	
Friedemann PFÄFFLIN	11
PART II. CHRISTIAN VIEWS	25
Transgenderism and the Christian Church: An Overview	
Duncan DORMOR	27
Metamorphosis and (Trans) Migrations: Spiritual Dimensions of Gender Transition	
Christina BEARDSLEY	77
PART III. LEGAL VIEWS	101
Questionnaire	103
<i>Europe</i>	107
Belgium and the Netherlands	
Walter PINTENS	109
Czech Republic	
Barbara HAVELKOVÁ	125
Denmark	
Natalie VIDEBÆK MUNKHOLM	147

England and Wales	
Stephen GILMORE	183
Germany	
Anatol DUTTA	207
Ireland	
Brian SLOAN	223
Italy	
Maria Giovanna CUBEDDU WIEDEMANN	249
Spain	
Josep FERRER RIBA and Albert LAMARCA MARQUÈS	261
Sweden	
Jameson GARLAND	281
Turkey	
Yeşim M. ATAMER	313
<i>Asia</i>	333
Hong Kong Special Administrative Region	
Athena Nga-chee LIU	335
Japan	
Yuko NISHITANI	363
Singapore	
Terry Sheung-Hung KAN	391
Taiwan	
Chih-hsing Ho	425
<i>Australia and New Zealand</i>	441
Varieties of Decision-Making: Reflections on Deciding <i>Re Kevin</i>	
Richard CHISHOLM	443
Australia	
Rachael WALLBANK	457

New Zealand	
Elisabeth McDONALD and Jack BYRNE	527
<i>North and South America</i>	569
Argentina	
Laura María GIOSA, María Victoria SCHIRO and Peter DUNNE	571
USA	
Jameson GARLAND	585
PART IV. CONCLUSION.	613
Comparative Analysis and Recommendations	
Jens M. SCHERPE and Peter DUNNE	615

LIST OF CONTRIBUTORS

Yeşim M. Atamer

Istanbul Bilgi University, Turkey

Christina Beardsley

Chelsea & Westminster Hospital, London and St Mary's University, Twickenham, London, England

Jack Byrne

Consultant, TransAction, Auckland, New Zealand

Richard Chisholm

ANU College of Law, Australia; formerly a Judge of the Family Court of Australia

Maria Giovanna Cubeddu Wiedemann

University of Trieste, Italy

Duncan Dormor

University of Cambridge, England

Peter Dunne

Trinity College Dublin, Ireland

Anatol Dutta

University of Regensburg, Germany

Josep Ferrer Riba

Universitat Pompeu Fabra, Barcelona, Spain

Jameson Garland

Uppsala University, Sweden

Stephen Gilmore

King's College London, England

Laura María Giosa

Universidad Nacional de Centro de la Provincia de Buenos Aires, Argentina

Barbara Havelková

University of Oxford, England

Chih-hsing Ho

Academia Sinica, Taipei, Taiwan

Terry Sheung-Hung Kaan

University of Hong Kong, Hong Kong

Albert Lamarca Marquès

Universitat Pompeu Fabra, Barcelona, Spain

Athena Liu

University of Hong Kong, Hong Kong

Elisabeth McDonald

Victoria University of Wellington, New Zealand

Natalie Videbæk Munkholm

Aarhus University, Denmark

Yuko Nishitani

Kyoto University, Japan

Friedemann Pfäfflin

Ulm University, Germany

Walter Pintens

University of Louvain, Belgium, and Saarland University, Germany

Jens M. Scherpe

University of Cambridge, England, and University of Hong Kong, Hong Kong

María Victoria Schiro

Universidad Nacional de Centro de la Provincia de Buenos Aires, Argentina

Brian Sloan

University of Cambridge, England

Rachael Wallbank

Accredited Specialist Family Law Practitioner (LSNSW) and Principal of Wallbanks Legal, Australia

THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN IRELAND

Brian SLOAN*

Contents

I.	Legal Framework and Statistics.....	224
1.1.	Background and Overall Legal Framework.....	224
1.2.	Medical Treatment.....	225
1.3.	Statistics.....	227
II.	Recognising the Preferred Legal Sex and/or Gender of a Transgender/ Transsexual Person – Procedure and Requirements.....	228
2.1.	Legal Procedure.....	228
2.2.	Official Documents	230
2.2.1.	Current Position	230
2.2.2.	New Legislation.....	232
2.3.	Legal Requirements	235
2.3.1.	Birth/Adoption Registration and Ordinary Residence.....	235
2.3.2.	Age	236
2.3.3.	Declaration, ‘Life Test’ and Medical Requirements.....	238
2.3.4.	Marital/Civil Partnership Status	241
2.3.5.	Alternatives	243
III.	Consequences of Recognition of the Preferred Legal Sex and/or Gender of a Transgender/Transsexual Person.....	244
3.1.	Future Rights, Duties and Entitlements.....	244
3.2.	Existing Rights, Duties and Entitlements	247
IV.	Legal Challenges to the Existing Rules	248

* The author is extremely grateful to Peter Dunne and Alison Fynes for their helpful comments on an earlier draft.

I. LEGAL FRAMEWORK AND STATISTICS

1.1. BACKGROUND AND OVERALL LEGAL FRAMEWORK

At the time of writing, there is no mechanism by which a transgender person can have his or her preferred gender comprehensively recognised in Irish law.¹ The general legal position remains that biological indicators present at the time of birth ‘continue to act as the governance in the determination of sex’.² In his 2007 judgment in the High Court case of *Foy v An t-Árd Chláraitheoir*, McKechnie J declared that Ireland was in breach of Article 8 of the European Convention on Human Rights³ in the light of the European Court of Human Rights’ judgment in *Goodwin v United Kingdom*⁴ because of the ‘absence of any provision which would enable the acquired identity of [the applicant] to be legally recognised in this jurisdiction’.⁵

Nevertheless, the Government’s Gender Recognition Advisory Group (the ‘GRAG’ or the ‘Group’) did not report until 2011 (following the Government’s decision to abandon a surprising attempt to appeal the decision in the *Foy* case⁶),⁷ and the ‘General Scheme’ of a Gender Recognition Bill was finally published only in July 2013.⁸ A relevant report of the parliamentary Joint Committee on Education and Social Protection was then published in January 2014, recommending a number of changes to the anticipated Bill.⁹ Following discussion of the Committee’s recommendations by the Cabinet,¹⁰ a Revised General Scheme (containing few major changes) was published in June 2014,¹¹ and a Bill based on it was published only in December 2014.¹² Indeed, the Minister for Social

¹ See, generally, O. O’SULLIVAN (ed.), *Equality and Identity: Transgender and Intersex Experience in Ireland*, Transgender Equality Network Ireland, Dublin 2013, ch. 2. Cf. Gender Recognition Act 2015 (GRA), which became law in July 2015 but is not in force at the time of writing.

² *Foy v An t-Árd Chláraitheoir* [2002] IEHC 116, at [121] (McKechnie J).

³ See European Convention on Human Rights Act 2003, s. 5.

⁴ Appl. no. 28957/95 [2002] 35 EHRR 447 (ECtHR).

⁵ *Foy v An t-Árd Chláraitheoir* [2007] IEHC 470, at [102]. See T. Ní MHEIRTHILE, ‘Declaring Irish Law Incompatible with the Law of the ECHR – Where to Now?’ (2008) 4 *Independent Law Review* 2 for discussion.

⁶ Transgender Equality Network Ireland, ‘Dr Lydia Foy’s Case’ <www.teni.ie/page.aspx?contentid=588> accessed 25.03.2015. In 2014, Dr Foy reached a settlement with the state as regards its failure to recognise her female gender: Transgender Equality Network Ireland, ‘Press Release: TENI Welcomes News of Settlement in Lydia Foy Case’, 28.10.2014 <www.teni.ie/news-post.aspx?contentid=1160> accessed 18.08.2015.

⁷ Gender Recognition Advisory Group, *Report to Joan Burton, TD, Minister for Social Protection*, 2011.

⁸ Department of Social Protection, *General Scheme of Gender Recognition Bill 2013*, 2013 (the ‘original General Scheme’).

⁹ Joint Committee on Education and Social Protection, *Report on the General Scheme of a Gender Recognition Bill 2013*, ESP31011, 2014.

¹⁰ Dáil Deb 9 May 2014, vol. 840, no. 4, p. 629.

¹¹ Department of Social Protection, (*Revised*) *General Scheme of Gender Recognition Bill 2014*, 2014 (the ‘Revised General Scheme’).

¹² Gender Recognition Bill (No. 116 of 2014) <www.oireachtas.ie/viewdoc.asp?DocID=27835&&CatID=59&StartDate=01%20January%202014&OrderAscending=0> accessed 18.08.2015.

Protection has admitted that gender recognition was an issue that has been ‘left unaddressed for far too long’.¹³ By the time the General Scheme was published, two Private Members’ Bills had been propagated, by Aengus Ó Snodaigh TD¹⁴ and Senator Katherine Zappone¹⁵ respectively. This chapter will focus on the Government Bill (GRB)¹⁶ that became the Gender Recognition Act (GRA) in July 2015 after considerable amendment and debate. It is apparently expected to be commenced by the end of August 2015.¹⁷

Ireland has a written constitution. However, in a 2002 judgment relating to earlier proceedings in *Foy, McKechnie J* rejected the submission that the applicant’s inability to have the register of births amended to reflect her preferred female identity violated her constitutional ‘rights of privacy, of dignity, [or] of equality’,¹⁸ or her right to marry, in spite of his recognition that those constitutional rights did exist. Indeed, it will become clear that Ireland’s (pre-amendment) constitutional protection of heterosexual marriage and the marital family had the potential to limit the effectiveness of any scheme of gender recognition.¹⁹

It should be noted, however, that Ireland’s Equality Tribunal has recognised that the existing gender ground in Ireland’s anti-discrimination employment legislation²⁰ applies to a transgender individual.²¹ This has been used as a justification not to include a ground relating to transgender or intersex status,²² but the Joint Committee recommended that ‘[c]onsideration should be given to amending Equality legislation to add “gender identity” to the existing nine grounds under which discrimination is illegal’.²³

1.2. MEDICAL TREATMENT

The Gender Recognition Advisory Group, perhaps oddly composed entirely of representatives from government departments and without any trans members, engaged in some discussion of medical provision for those with gender identity

¹³ Department of Social Protection, ‘Minister for Social Protection Publishes Revised General Scheme of the Gender Recognition Bill 2014’ (17.06.2014) <www.welfare.ie/en/pressoffice/Pages/pr180614.aspx> accessed 18.08.2015.

¹⁴ Gender Recognition Bill (No. 56 of 2013) <www.oireachtas.ie/viewdoc.asp?DocID=23558&&CatID=59> accessed 18.08.2015 (the ‘Ó Snodaigh Bill’).

¹⁵ Legal Recognition of Gender Bill (No. 75 of 2013) <www.oireachtas.ie/viewdoc.asp?DocID=23950&&CatID=59> accessed 18.08.2015 (the ‘Zappone Bill’).

¹⁶ Gender Recognition Bill (No. 116b of 2014) <www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2014/11614/b116b14s.pdf> accessed 18.08.2015 (the ‘GRB’).

¹⁷ Transgender Equality Network Ireland, ‘Legal Gender Recognition in Ireland’ <<http://www.teni.ie/page.aspx?contentid=586>> accessed 18.08.2015.

¹⁸ *Foy v An t-Árd Chláraitheoir* [2002] IEHC 116, at [132] (McKechnie J).

¹⁹ See e.g. Gender Recognition Advisory Group, above n. 7, at [5.5.1]. Cf. Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015.

²⁰ Employment Equality Act 1998 as amended, s. 6(2)(a).

²¹ DEC-E2011-066 (Equality Tribunal).

²² Joint Committee on Education and Social Protection, above n. 9, at [5.7].

²³ Joint Committee on Education and Social Protection, above n. 9, p. 38.

disorder in Ireland. It generally did so, however, without referring specifically to its sources of information. In its 2011 report, it asserted that there were ‘two principal clinics operated by mental health professionals for GID patients in Ireland’, but that no specific psychiatric or psychological clinics were publicly funded via the Health Service Executive (HSE).²⁴ It did report that ‘[a] HSE consultant endocrinologist operates a hormone treatment clinic’.²⁵ However, it was clear that ‘[g]ender re-assignment surgery is not available in Ireland’, albeit that a small number of Irish patients ‘are known to have had surgery in the United Kingdom and in other countries such as Thailand’²⁶ and this has on occasion been funded by the HSE.²⁷ The Ó Snodaigh Bill would impose a specific but light obligation on the state to ‘facilitate re-entry visas for non-EU nationals who travel abroad’ for such treatment, where it is ‘necessary and practicable’ to do so.²⁸

A 2009 report of a HSE mapping exercise asserted that ‘there are significantly limited tailored healthcare services to meet the needs of Transsexual people in Ireland’.²⁹ In spite of the setting up of a transgender health working group in 2011, it has been said that ‘[a]ccess to healthcare is one of the most urgent issues facing the trans community’.³⁰ In a document published in March 2013 (but seemingly written in 2012), the Government asserted that ‘a National HSE Strategy and Action Plan for LGBT people’ was ‘in preparation and expected to be published shortly’.³¹ That said, the GRAG felt unable to make any recommendations on ‘access to health and support services for transsexuals’,³² and no such specific provision appears to have been made in the GRA.

As regards private health insurance, coverage depends on the particular insurance contract, although the Health Insurance Act 1994 (Minimum Benefit) Regulations 1996 mandate a minimum level of provision. The Government has pointed out that those regulations exclude ‘cosmetic services or treatment

²⁴ Gender Recognition Advisory Group, above n. 7, at [2.5.1].

²⁵ Gender Recognition Advisory Group, above n. 7, at [2.5.1]. See also C. DE GASCUN, J. LUCEY, J. KELLY, N. SALTER and D. O’SHEA, ‘Gender Identity Disorder’ (2006) 99(5) *Irish Medical Journal* 146.

²⁶ Gender Recognition Advisory Group, above n. 7, at [2.5.1]. See also Health Service Executive, *LGBT Health: Towards Meeting the Health Care Needs of Lesbian, Gay, Bisexual and Transgender People*, 2009, p. 33.

²⁷ See e.g. Equality Authority, *Equality Authority Submission to the Gender Recognition Advisory Group*, 2010, p. 11; Joint Committee on Education and Social Protection, *General Scheme of Gender Recognition Bill 2013: Discussion (Resumed)*, 24.10.2013, p. 14.

²⁸ Ó Snodaigh Bill, cl. 15(2).

²⁹ Health Service Executive, above n. 26, p. 283.

³⁰ Transgender Equality Network Ireland, *Presentation: Oireachtas Committee on Health and Children*, 2013, p. 2. See, generally, O. O’SULLIVAN, above n. 1, ch. 5, and Transgender Equality Network Ireland, ‘Press Release: New Survey Reveals nearly 80% of Trans People have Considered Suicide’ (02.12.2013) <www.teni.ie/news-post.aspx?contentid=970> accessed 18.08.2015.

³¹ Steering Committee For Human Rights, *Follow-up to Committee of Ministers’ Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity: Member States['] replies*, CDDH(2013)004FIN, 2013, p. 283.

³² Gender Recognition Advisory Group, above n. 7, at [5.18].

except the correction of accidental disfigurement or significant congenital disfigurement',³³ and asserted that insurance cover would be provided for procedures such as hysterectomy and breast reduction only if 'deemed medically necessary'.³⁴ It also claimed, however, that measures such as hormone treatment 'can be conducted on an outpatient basis and may be covered depending on the health insurance policy held'.³⁵

The Ó Snodaigh Bill provides specifically that '[w]here a person under 18 is seeking access to total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, the normal age of medical consent of 16 shall apply having regard to the rights of children'.³⁶ Where such a person is refused the relevant treatment, the Bill would allow him or her to apply to the District Court for consent to the treatment,³⁷ and the Court would be required to 'take into account the evolving capacities, best interests and welfare of the person as outlined in the UN Convention on the Rights of the Child'³⁸ (as it would be on an application by a non-adult for legal recognition of gender identity) and deliver a decision within 60 days of the application.³⁹

1.3. STATISTICS

The Gender Recognition Advisory Group estimated that there were around 300 adults with gender identity disorder in Ireland.⁴⁰ That said, it also recorded that this was the approximate number of patients registered with the principal clinics for those with GID, suggesting that the actual number is likely to be higher. The campaigning organisation Transgender Equality Network Ireland goes as far as to say that there are 'tens of thousands' of 'trans or intersex people ... living their lives in Ireland today'.⁴¹ The 2011 Census suggested that the total Irish population is approximately 4.6 million people.⁴² The GRAG claimed that 90% of people with GID wished to transition from male to female.⁴³

As stated above, it is not currently possible for a transgender individual to have his or her gender identity comprehensively recognised in Irish law.

³³ Steering Committee for Human Rights, above n. 31, p. 283. See Health Insurance Act 1994 (Minimum Benefit) Regulations 1996, SI No. 83/1996, r. 3.

³⁴ Steering Committee for Human Rights, above n. 31, p. 283.

³⁵ Steering Committee for Human Rights, above n. 31, p. 283.

³⁶ Ó Snodaigh Bill, cl. 13(1).

³⁷ Ó Snodaigh Bill, cl. 13(2).

³⁸ Ó Snodaigh Bill, cl. 14(a).

³⁹ Ó Snodaigh Bill, cl. 14(b).

⁴⁰ Gender Recognition Advisory Group, above n. 7, at [2.5.1].

⁴¹ Transgender Equality Network Ireland, *TENI Presentation to Fine Gael Committee on Justice, Equality and Defence*, 2013, p. 1.

⁴² Central Statistics Office, *Census of Population 2011 Preliminary Results*, 2011.

⁴³ Gender Recognition Advisory Group, above n. 7, at [2.5.1].

Nevertheless, and again without citing independent research or indeed specific evidence of any kind, the Group confidently asserted that '[f]or the majority of transgender persons who were married in their former gender but have since transitioned to the opposite gender, the marriage will have broken down by the time the transgender spouse wishes to apply for gender recognition'.⁴⁴ It will be seen that this assertion was frequently used to justify a restriction on the legal recognition of gender identity to those who are neither married nor in a civil partnership before it became relatively clear that same-sex marriage would be introduced in Ireland.

II. RECOGNISING THE PREFERRED LEGAL SEX AND/OR GENDER OF A TRANSGENDER/ TRANSSEXUAL PERSON – PROCEDURE AND REQUIREMENTS

2.1. LEGAL PROCEDURE

The GRAG proposed a '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 register entry of the person'.⁴⁵ It should be noted that the Group's scheme was not designed to include intersex persons,⁴⁶ though the Government hoped that it had made adjustments sufficient to facilitate applications by such individuals when it published even the original General Scheme.⁴⁷

The Group's scheme would have worked via an application for a gender recognition certificate made to a statutory (administrative) independent three-person Gender Recognition Panel including a medical expert and a legal expert, chaired by 'a lay person representing wider civil society'.⁴⁸ The Group recommended that '[u]nsuccessful applicants should be allowed to appeal to the Circuit Court sitting as the Family Court',⁴⁹ and also that there should be 'a revocation and correction process'.⁵⁰

⁴⁴ Gender Recognition Advisory Group, above n. 7, at [5.5].

⁴⁵ Gender Recognition Advisory Group, above n. 7, at [6.1.1].

⁴⁶ Gender Recognition Advisory Group, above n. 7, at [5.8.3].

⁴⁷ Department of Social Protection, 'Minister for Social Protection Publishes General Scheme of the Gender Recognition Bill 2013' (17.07.2013) <www.welfare.ie/en/pressoffice/Pages/pr170713.aspx> accessed 18.08.2015.

⁴⁸ Gender Recognition Advisory Group, above n. 7, at [5.11.1]. See A. FYNES, *A Comparison of the UK and Irish Approaches to Transgender Legislation*, unpublished LLM thesis, Cambridge, 2013, pp. 37–39 for discussion.

⁴⁹ Gender Recognition Advisory Group, above n. 7, at [6.4].

⁵⁰ Gender Recognition Advisory Group, above n. 7, at [6.1.2].

The Ó Snodaigh Bill would simply require a (proven) adult to submit a ‘request to amend the sex recorded on their birth certificate in the records’,⁵¹ along with any new name under which the applicant wishes to be registered.⁵² Only those under 18 would be required to apply ‘through their legal representatives or Guardian ad Litem to the District Court’ for a new birth certificate.⁵³ The Zappone Bill would also involve a direct application to the Registrar General to ‘record and recognise the person’s gender identity’.⁵⁴ Its requirements are slightly more onerous than the Ó Snodaigh Bill, since it requires a statutory declaration *inter alia* that it is the relevant person’s ‘intention to live permanently as a person of [the relevant] gender identity’,⁵⁵ with ‘permanently’ meaning ‘for the remainder of the life of the person’.⁵⁶ But it is also less onerous in another respect, since even those under 18 but who are at least 16 could make a direct application with the consent of at least one guardian,⁵⁷ and the guardian or guardians themselves could make an application for a younger child.⁵⁸

In formulating its Bill, the Government chose a method closer to that in the Ó Snodaigh and Zappone Bills, which the Minister hoped would be a ‘more progressive and less cumbersome approach’ than that proposed by the Group.⁵⁹ The GRA provides that the Minister for Social Protection herself will receive and adjudicate upon applications.⁶⁰ There will therefore be no need for a Gender Recognition Panel, though the Minister would be able to ‘request further information from the applicant regarding any information furnished by the applicant on his or her behalf’.⁶¹ The GRA is less clear than the General Scheme on the Minister’s obligation to issue the certificate if ‘the application meets all the qualification requirements’,⁶² but the Explanatory and Financial Memorandum to the Bill makes clear that such an obligation is intended.⁶³ As we will see, those requirements are more onerous than those imposed by the two Private Members’ Bills. No application fee would be payable, although it is implied that the applicant would be responsible for the costs of obtaining and submitting the required evidence.⁶⁴

⁵¹ Ó Snodaigh Bill, cl. 4(b).

⁵² Ó Snodaigh Bill, cl. 4(c).

⁵³ Ó Snodaigh Bill, cl. 6(1).

⁵⁴ Zappone Bill, cl. 2(2).

⁵⁵ Zappone Bill, cl. 2(3)(b).

⁵⁶ Zappone Bill, cl. 1.

⁵⁷ Zappone Bill, cl. 2(5).

⁵⁸ Zappone Bill, cl. 2(4).

⁵⁹ Department of Social Protection, above n. 47.

⁶⁰ GRA, ss. 8(1), 2; see also Revised General Scheme, Head 4(1).

⁶¹ GRA, s. 8(4). Cf. GRB, cl. 8(4)(b); see also Revised General Scheme, Head 4(4).

⁶² Revised General Scheme, Head 4(2).

⁶³ Department of Social Protection, ‘Gender Recognition Bill 2014: Explanatory and Financial Memorandum’ <www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2014/11614/b11614d-memo.pdf> (12.2014) accessed 18.08.2015, p. 2.

⁶⁴ GRA, s. 8(2); cf. Revised General Scheme, Head 4(5).

If an application does not meet the requirements, the Minister would be required to issue the person concerned with a written notice setting out the reason(s) why the application is not being approved and advising that person of his or her right to appeal the decision and the fact that the decision will be suspended until the deadline for appeals has passed or an appeal has been disposed of.⁶⁵ The appeal⁶⁶ would lie to the Circuit Family Court,⁶⁷ and would have to be made within 90 days of the refusal to issue the certificate, although the court could apparently grant an extension.⁶⁸ Provision would also be made for the correction of certificates.⁶⁹ Revocation of a certificate would be possible if it is subsequently established that the applicant concerned did not meet the requirements⁷⁰ or if the person to whom it was issued wishes to revert to their original legal gender.⁷¹ The level of evidence would effectively equal that needed for the original application, and the Revised General Scheme's Explanatory Notes asserted that the intention behind the gender recognition scheme is that 'revocations due to "a change of mind" would be extremely rare'.⁷²

The Zappone Bill provides for an appeal to the High Court against the refusal to record an applicant's true gender identity within three months of the refusal.⁷³ An appellant may seek an order 'directing An tArd-Chláraitheoir [the Registrar General] to record and recognise the person's gender identity in the Gender Recognition Register'.⁷⁴ No specific right of appeal appears to be included in the Ó Snodaigh Bill, perhaps because there are so few bases upon which an application could possibly be refused in the first place in light of its requirements.

2.2. OFFICIAL DOCUMENTS

2.2.1. *Current Position*

Even under the pre-GRA law in Ireland, a person's preferred gender can be recognised for the purposes of passports. The Passports Act 2008 allows a person who 'has undergone, or is undergoing, treatment or procedures or both to alter [that person's] sexual characteristics and physical appearance to those

⁶⁵ GRA, s. 8(5); see also Revised General Scheme, Head 4(3).

⁶⁶ GRA, s. 17, which also covers appeals regarding correction and revocation; see also Revised General Scheme, Head 18.

⁶⁷ GRA, s. 17(1); *cf.* Revised General Scheme, Head 18(1). See Irish Human Rights Commission, *Observations on the General Scheme of Gender Recognition Bill 2013*, 2013, at [37]–[38] on the importance of the ready availability of legal representation in such proceedings.

⁶⁸ GRA, s. 17(1); see also Revised General Scheme, Head 18(3).

⁶⁹ GRA, s. 16; see also Revised General Scheme, Head 19.

⁷⁰ GRA, s. 14; see also Revised General Scheme, Head 20(1)(i).

⁷¹ GRA, s. 15; see also Revised General Scheme, Head 20(1)(ii). *Cf.* original General Scheme, Head 19.

⁷² Revised General Scheme, Head 20 Explanatory Notes.

⁷³ Zappone Bill, cl. 2(12).

⁷⁴ Zappone Bill, cl. 2(12).

of the opposite sex⁷⁵ to apply for a passport to be issued in the ‘new sex’⁷⁶ and in a name that is different from the one shown on the applicant’s birth certificate, from one on another document used to prove evidence of Irish citizenship or previous passport, or from the applicant’s married name.⁷⁷ If the applicant produces ‘evidence (including medical evidence from a registered medical practitioner) to the satisfaction of the Minister [of Foreign Affairs]⁷⁸ to confirm that the applicant has undergone, or is undergoing’ the relevant treatment,⁷⁹ together with, ‘if appropriate, evidence to the satisfaction of the Minister of the use by the applicant of the new name’,⁸⁰ the Minister ‘may ... issue a passport to the applicant in the new name, if appropriate, and in which the new sex of the applicant is entered’.⁸¹ Significantly, the procedure under the Passports Act 2008, while onerous and difficult to use in itself,⁸² is expressed not to ‘confer any right or entitlement’ on the successful applicant that is ‘not connected with the purposes’ of the Act,⁸³ or to ‘affect any right, entitlement, duty or obligation arising under statute or otherwise’.⁸⁴ The 2008 provisions will be softened by the GRA and may nevertheless be of some use to transgender people in a marriage or civil partnership, or some 16- and 17-year-olds, even once the GRA as currently drafted is commenced.⁸⁵

A transgender individual could also change his or her name by enrolment of a deed poll, which contains an affidavit to the effect that the applicant is ‘abandoning the use’ of the former name, will use the new name at all times and requires others to do the same.⁸⁶ The use of a deed poll means that ‘a record of the change is kept for future identification’.⁸⁷ The record can be attached to an individual’s birth certificate and ‘is acceptable for most administrative procedures’.⁸⁸ The applicant in *Foy v An t-Árd Chláraitheoir* changed her name via this method, with the result that she was ‘described as “female” bearing her chosen name of Lydia Annice in

⁷⁵ Passports Act 2008, s. 11(1)(a).

⁷⁶ Passports Act 2008, s. 11(1).

⁷⁷ Passports Act 2008, s. 11(1)(b). See s. 10 for details of how the applicant’s name is otherwise determined for these purposes.

⁷⁸ Passports Act 2008, s. 2.

⁷⁹ Passports Act 2008, s. 11(2)(a).

⁸⁰ Passports Act 2008, s. 11(2)(b).

⁸¹ Passports Act 2008, s. 11(2).

⁸² See e.g. Transgender Equality Network Ireland, *Human Rights Violations in Ireland on the Basis of Gender Identity and Intersex Identity: Submission to the Country Report Task Forces, 109th Session of the Human Rights Committee*, 2013, p. 4.

⁸³ Passports Act 2008, s. 11(3)(a).

⁸⁴ Passports Act 2008, s. 11(3)(b).

⁸⁵ GRA, s. 38; Department of Social Protection, above n. 63, p. 9.

⁸⁶ <www.citizensinformation.ie/en/birth_family_relationships/problems_in_marriages_and_other_relationships/changing_your_name_by_deed_poll.html>; see also Civil Registration Act 2004, s. 25 on changes to the forename of a child.

⁸⁷ Citizens Information Board, ‘Changing your Name by Deed Poll’ <www.citizensinformation.ie/en/birth_family_relationships/problems_in_marriages_and_other_relationships/changing_your_name_by_deed_poll.html> accessed 18.08.2015.

⁸⁸ Citizens Information Board, above n. 87.

documents such as her passport, driving licence, car registration records, medical card, medical card records and tax and social security documents'.⁸⁹ A passport can be issued in a new name (without the legal recognition of gender identity) if the applicant simply 'produces evidence to the satisfaction of the Minister of the use by him or her of the new name for a period of not less than 2 years prior to the date of the application'.⁹⁰

The fundamentally significant document for the purposes of legal gender, however, is the birth certificate, and in the 2002 judgment in *Foy* (reaffirmed in 2007 but with a declaration of incompatibility with the ECHR) it was held that the Registrar had made no relevant error by registering the transgender applicant as a male with the male name supplied by her parents shortly after birth and therefore had no power to 'correct' the entry notwithstanding the applicant's subsequent gender reassignment surgery and adoption of a feminine name. As McKechnie J acknowledged, there were a 'limited number of occasions' on which the applicant had to produce that birth certificate containing her originally recorded gender, causing 'distress and embarrassment' as well as 'a loss of dignity and privacy'.⁹¹

2.2.2. *New Legislation*

Under the GRA, a successful applicant to the Minister would be entitled to a new birth certificate or entry in the foreign birth register recognising their preferred gender,⁹² which on the GRAG's view would be 'indistinguishable in content, style and design from the original that would have been issued to the same person'.⁹³ The GRA provides that 'any requirement of law for the production of a certificate of birth shall be satisfied by the production of the certified copy' of an entry in the register of gender recognition.⁹⁴

The GRA specifically states that '[t]he person to whom the gender recognition certificate is issued shall not be required to produce it as proof of gender or identity for any purpose save as required by law',⁹⁵ albeit that he or she 'may produce it to provide proof of gender or identity, if he or she so chooses'.⁹⁶ The person to whom a gender recognition certificate is issued 'may contact [the Registrar General] and request that the required particulars relating to the recognition of the gender of the person are entered in the register' of gender recognition, though

⁸⁹ [2007] IEHC 470, at [64(2)].

⁹⁰ Passports Act 2008, s. 10(4).

⁹¹ [2007] IEHC 470, at [64(2)].

⁹² Department for Social Protection, above n. 63, p. 5; cf. Revised General Scheme, Head 10(3). See also Gender Recognition Advisory Group, above n. 7, at [5.12.1], and Ó Snodaigh Bill, cl. 7.

⁹³ Gender Recognition Advisory Group, above n. 7, at [5.14.1].

⁹⁴ GRA, s. 27, inserting Civil Registration Act 2004, s. 30D(3); see also Revised General Scheme, Head 10(2).

⁹⁵ GRA, s. 18(4); cf. Revised General Scheme, Head 9(6)–(7). See also Gender Recognition Advisory Group, above n. 7, at [6.2].

⁹⁶ GRA, s. 18(5); see also Revised General Scheme, Head 9(5).

this is perhaps odd since the Minister must inform the Registrar of the decision.⁹⁷ When informed and sufficiently 'satisfied', the Registrar would record details of the gender recognition certificate in a new register of gender recognition,⁹⁸ whose index would not be open to public inspection or search and would be searchable only by the subject of the entry or by various surviving relatives in the event of the death of that person.⁹⁹

The Registrar would be obliged to 'maintain an index to make traceable the connection between each entry in the register [of gender recognition] and the corresponding entry in the register of births or the Adopted Children Register'.¹⁰⁰ That index would 'not be open to public inspection',¹⁰¹ and 'no information from that index [would] be given to any person except by order of a court'.¹⁰² Necessity for the purposes of a criminal investigation had previously been given as one example of a circumstance in which such disclosure would be appropriate,¹⁰³ although this is not apparently mentioned in the GRA and it specifically provides that a '[a] court shall not make [a relevant] order where the person to whom the information relates is a child of less than 18 years of age, unless satisfied that it is in the best interest of the child'.¹⁰⁴

In rather less depth than the GRA, the Ó Snodaigh Bill states that it will be 'prohibited to refer to the current law', by which it apparently means the Bill itself, 'in the amended birth certificate or any new identity documents issued on foot thereof'.¹⁰⁵ It provides that '[o]nly those persons authorised by the document holder, or provided with written consent, or consent of the District Court, may access an original birth certificate once it has been amended',¹⁰⁶ which implies that the original birth record would still exist. It also contains a general prohibition on 'publishing details of an amendment of recorded sex and name or names save where the explicit consent of the document holder has been given'.¹⁰⁷ It would be a specific offence for a person who 'acquired protected information in an

⁹⁷ GRA, s. 27, inserting Civil Registration Act 2004, s. 30B(1); GRA, s. 13; *cf.* Revised General Scheme, Head 9(4).

⁹⁸ GRA, s. 27, inserting Civil Registration Act 2004, s. 30B(2); see also s. 33 for equivalent provisions relating to those who have been the subject of intercountry adoption; Revised General Scheme, Head 11(1), Gender Recognition Advisory Group, above n. 7, at [5.14.1].

⁹⁹ GRA, s. 27, inserting Civil Registration Act 2004, s. 30B(2); see also s. 28; *cf.* Revised General Scheme, Head 11(5).

¹⁰⁰ GRA, s. 27, inserting Civil Registration Act 2004, s. 30D(1); see also Revised General Scheme, Head 13(1)(c); Gender Recognition Advisory Group, above n. 7, at [5.14.1]; Steering Committee For Human Rights, above n. 31, p. 279.

¹⁰¹ GRA, s. 27, inserting Civil Registration Act 2004, s. 30D(2); Revised General Scheme, Head 13(2).

¹⁰² GRA, s. 27, inserting Civil Registration Act 2004, s. 30D(2); *cf.* original General Scheme, Heads 11(3), 12(3); Revised General Scheme, Heads 13–14.

¹⁰³ Gender Recognition Advisory Group, above n. 7, at [5.14.1].

¹⁰⁴ GRA, s. 27, inserting Civil Registration Act 2004, s. 30D(4).

¹⁰⁵ Ó Snodaigh Bill, cl. 8.

¹⁰⁶ Ó Snodaigh Bill, cl. 11(1).

¹⁰⁷ Ó Snodaigh Bill, cl. 11(2).

official capacity' to 'disclose the information to any other person'.¹⁰⁸ 'Protected information' is defined to mean 'information which relates to a person who has had their recorded sex changed, or made an application to have it changed', and concerns the application, the 'information changed' or 'the person's previous recorded sex'.¹⁰⁹ A wide definition of 'official capacity' is employed, which includes the acquisition of information in the course of 'the conduct of business or the supply of professional services',¹¹⁰ but the Bill also specifies a number of circumstances in which the offence would not in fact be committed.¹¹¹

A linking method is also employed in the Zappone Bill. The Registrar General would 'record and recognise the [applicant's] gender identity in the Gender Recognition Register and ... attach a note to the entry concerning that person in the registry of births indicating that there is now an entry concerning the person in the Gender Recognition Register'.¹¹² There is then a rather general provision to the effect that 'access to the entry in the register of births shall be restricted to a person authorised under the [Civil Registration Act] 2004'.¹¹³ The Bill also provides that any legal requirement for the production of a birth certificate 'shall be satisfied by the production of a copy of a certificate of birth containing the particulars entered in the gender recognition register'.¹¹⁴ Similarly, any application for a certification of birth concerning someone with an entry in the Gender Recognition Register would, 'unless otherwise specified and duly authorised, be deemed' to be a request 'for a copy containing the particulars from that Register'.¹¹⁵ The Registrar General would be placed under a specific obligation to 'ensure that it is not evident, from examination of any certificate of birth containing the particulars entered in the Gender Recognition Register, that such certificate is in any way distinguishable from a certificate containing particulars entered in the register of births',¹¹⁶ and the Registrar, the Minister for Social Protection and 'their respective officers' would be required to ensure, '[s]ave where the law requires otherwise', that 'the identity of an applicant [for gender recognition] and all other particulars relating to the application are kept confidential'.¹¹⁷

As well as mandating the transfer of information to the Registrar General, the Revised General Scheme provided that the information 'may' be transmitted to 'facilitate changes to the Public Service Identity (PSI) dataset' held by the Department of Social Protection 'and promulgation to the wider group of public

¹⁰⁸ Ó Snodaigh Bill, cl. 16(1).

¹⁰⁹ Ó Snodaigh Bill, cl. 16(2).

¹¹⁰ Ó Snodaigh Bill, cl. 16(3).

¹¹¹ Ó Snodaigh Bill, cl. 16(4)–(6).

¹¹² Zappone Bill, cl. 2(2).

¹¹³ Zappone Bill, cl. 2(2).

¹¹⁴ Zappone Bill, cl. 2(8).

¹¹⁵ Zappone Bill, cl. 2(9).

¹¹⁶ Zappone Bill, cl. 2(10).

¹¹⁷ Zappone Bill, cl. 2(11).

agencies that are legally authorised to use the PSI data’,¹¹⁸ and to ‘the Passport Office of the Department of Foreign Affairs and Trade for use in approving and issuing passports’.¹¹⁹ This specific provision appears to have been omitted from the GRA. Under the Ó Snodaigh Bill, such details would be passed to ‘the National Vetting Bureau and other bodies as determined by the Minister for Social Protection’.¹²⁰

2.3. LEGAL REQUIREMENTS

The GRAG’s recommendations, to a significant extent reflected even in the Revised General Scheme and the GRB, before it was amended to some extent, would have imposed a number of stringent conditions before the legal recognition of a transgender person’s gender identity would be allowed, and indeed the Explanatory Memorandum to the Ó Snodaigh Bill describes the Group’s requirements as ‘unduly restrictive’.¹²¹

2.3.1. *Birth/Adoption Registration and Ordinary Residence*

Under the Revised General Scheme, the application for a gender recognition certificate would have been open only to a person whose birth was registered in Ireland (whether because he or she was born there or appears on the foreign births entry book or register) or who has been ordinarily resident there for at least a year.¹²² The GRB expands eligibility to include those whose adoption (including intercountry adoption) is registered in Ireland,¹²³ but all of these criteria, *inter alia*, apply equally to applicants whose preferred gender was recognised abroad.¹²⁴ Applications from such people would succeed only if the foreign requirements can be shown to the satisfaction of the Minister to be ‘at least equivalent’ to the remaining Irish requirements, which sets a relatively high threshold.¹²⁵ As the Group recognised, however, many people who had their preferred gender recognised abroad ‘would have no need to seek a gender recognition decision in Ireland as they would have entered Ireland in their new gender with all the relevant supporting personal documentation’.¹²⁶ Indeed, ironically the Government has

¹¹⁸ Revised General Scheme, Head 9(5)(a).

¹¹⁹ Revised General Scheme, Head 9(5)(b). *Cf.* Gender Recognition Advisory Group, above n. 7, at [5.15.1].

¹²⁰ Ó Snodaigh Bill, cl. 12.

¹²¹ Ó Snodaigh Bill Explanatory Memorandum <www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/5613/b5613dmemo.pdf> accessed 18.08.2015, p. 3.

¹²² Revised General Scheme, Head 5(a)–(c). See also Gender Recognition Advisory Group, above n. 7, at [5.3.1].

¹²³ GRA, ss. 2, 9.

¹²⁴ GRA, s. 11(2); *cf.* Revised General Scheme, Head 6(a)(vii).

¹²⁵ GRA, s. 11(2)(b)(i); *cf.* Revised General Scheme, Head 6 Explanatory Notes, Gender Recognition Advisory Group, above n. 7, at [5.9.1].

¹²⁶ Gender Recognition Advisory Group, above n. 7, at [5.9].

announced in response to a questionnaire on the implementation of a Council of Europe recommendation¹²⁷ that ‘the General Registrar Office ... will accept a birth certificate amended by another State where gender reassignment is recognised ... from a person born outside of Ireland’ even under the current law for the purposes of notification of intention to marry or enter a civil partnership.¹²⁸

2.3.2. Age

Under the original General Scheme, extremely cautiously, a gender recognition certificate could have been issued by the Minister only if the applicant were aged 18 or over.¹²⁹ The Group had decided not to recommend that gender identity could be recognised before the applicant reached the age of 18, on the basis of supposed and disputed ‘evidence from the literature that minors who desire a gender change frequently change their minds as they reach adulthood’.¹³⁰ The Irish Human Rights Commission has doubted whether this requirement was human rights compliant and pointed out its inconsistency with the general age of consent for medical treatment.¹³¹ It clearly contrasts with the Ó Snodaigh Bill, which provides that a court can consider an application for gender identity recognition by someone under 18, even in the absence of the consent of relevant adults,¹³² taking into account the minor’s ‘evolving capacities, best interests and welfare’ as well as his or her constitutional rights.¹³³ Under the Zappone Bill, moreover, court involvement is not a requirement of an application by or on behalf of a minor. Those between 16 and 18 could apply with the consent of at least one guardian,¹³⁴ while for those under 16 it is the guardian making the application on behalf of the relevant person (and not a court) who must ‘in so far as is practicable, give due weight to the views of the child, having regard to the child’s age and maturity’,¹³⁵ and ‘ensure the best interests of the child [are] the paramount consideration’.¹³⁶

¹²⁷ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

¹²⁸ Steering Committee For Human Rights, above n. 31, p. 279.

¹²⁹ General Scheme, Head 5(d). See also Gender Recognition Advisory Group, above n. 7, at [5.4.1].

¹³⁰ Gender Recognition Advisory Group, above n. 7, at [5.4]; cf. Transgender Equality Network Ireland, *Legislation Based on Human and Civil Rights is Key to Equality for All*, 2014, pp. 5–6. Time spent living in the preferred gender between the ages of 16 and 18 would have been taken into account under the GRAG proposal, provided it was supported by medical evidence as to the applicant’s capacity during that period (at [5.4.1]), but the minimum period was not in any case included in the General Scheme.

¹³¹ Irish Human Rights Commission, above n. 67, at [16]–[21]. See also Transgender Equality Network Ireland, above n. 130, pp. 4–6 for criticism.

¹³² Ó Snodaigh Bill, cl. 6(3), oddly describing such adults as ‘legal representatives’.

¹³³ Ó Snodaigh Bill, cl. 6(2).

¹³⁴ Zappone Bill, cl. 2(5).

¹³⁵ Zappone Bill, cl. 2(6)(a).

¹³⁶ Zappone Bill, cl. 2(6)(b).

This would be an interesting application of the ‘paramountcy’ principle in the context of decision-making by private individuals rather than by a court.¹³⁷

To some extent reflecting the concerns of its consultees concerning the rights of minor transgender persons, the parliamentary Joint Committee on Education and Social Protection recommended that the minimum age reflected in the General Scheme be lowered to 16.¹³⁸ The Government partially accepted this recommendation, since while the default minimum age remains 18 in the revised scheme and the GRA,¹³⁹ an exemption could be granted by court order for those who are 16 or 17.¹⁴⁰ This was by far the most significant change made in the Revised General Scheme. The court would be able to grant the order only if apparently each of a number of evidential criteria is met.¹⁴¹

The first evidential requirement is that ‘the court is satisfied, that, as appropriate, the child’s parents, surviving parent or guardian consent or consents’.¹⁴² That said, the GRA would add a power of the court to ‘make an order dispensing with the requirement of ... consent’ where it is ‘satisfied that the consent cannot be obtained because the person [whose consent would otherwise be required] cannot be identified or found or is failing or neglecting to respond to a request for consent’, or that it ‘should not be obtained because the nature of the relationship between the child ... and the person shows that it would not be in the interest of the safety or welfare of the child to contact the person’.¹⁴³ While this is a positive addition, it is a long way from a true application of a welfare principle¹⁴⁴ or self-determination for competent adolescents where consent is not given.

The second requirement is that in the opinion of the child’s ‘primary treating medical practitioner’ the child ‘has attained a sufficient degree of maturity to make the decision to apply for gender recognition’ and ‘is aware of, has considered and fully understands all the consequences’, and that the applicant’s decision was ‘freely and independently made’ without duress or undue influence.¹⁴⁵ The third requirement is that ‘an endocrinologist or psychiatrist, who has no connection to the child’, certifies that his or her opinion ‘concurs’ with that of the primary treating practitioner.¹⁴⁶ Finally, the GRA (unlike the Revised General Scheme) specifically provides that ‘court shall not make an order under this section unless satisfied that it is in the best interest of the child’.¹⁴⁷ Once the exemption is granted

¹³⁷ Cf. e.g. R. HODGKIN and P. NEWELL, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed., Unicef, Geneva 2007, p. 39.

¹³⁸ Joint Committee on Education and Social Protection, above n. 9, p. 37.

¹³⁹ Revised General Scheme, Head 5(d); GRA, s. 8(2)(a).

¹⁴⁰ GRA, s. 12; see also Revised General Scheme, Head 7.

¹⁴¹ GRA, s. 12(4)–(6); cf. Revised General Scheme, Head 7(2)(d).

¹⁴² GRA, s. 12(4)(a); cf. Revised General Scheme, Head 7(2)(d)(i).

¹⁴³ GRA, s. 12(5).

¹⁴⁴ Cf. Department of Social Protection, above n. 63, p. 3.

¹⁴⁵ GRA, s. 12(4)(b)(i); cf. Revised General Scheme, Head 7(2)(d)(ii); see also GRA, s. 12(4)(c) for equivalent provisions for applications to revoke a gender recognition certificate.

¹⁴⁶ GRA, s. 12(4)(b)(ii); cf. Revised General Scheme, Head 7(2)(d)(iii).

¹⁴⁷ GRA, s. 12(6).

by the court, the application could proceed in the same manner as for those over 18, provided that the evidence of the court order is supplied to the Minister.¹⁴⁸

The removal of the absolute bar on applications by those under 18 by the revised scheme and the GRA is welcome. That said, the apparent imposition of cumulative demanding criteria, in addition to the overall requirement of a court order (the criteria seemingly being necessary but not sufficient for such an order) is onerous by comparison with the Ó Snodaigh and Zappone Bills. The same could be said for the continuing bar on applications by those under 16. Moreover, the persisting need to secure a second medical opinion seems particularly harsh given the removal of the medical requirement for adults (considered below),¹⁴⁹ and might make the shortage of appropriate medical expertise in Ireland particularly problematic for 16- and 17-year-olds.

2.3.3. *Declaration, 'Life Test' and Medical Requirements*

Under the GRA, the applicant must make a statutory declaration that he or she has 'a settled and solemn intention of living in the preferred gender for the rest of his or her life'¹⁵⁰ (adjusting the terminology from that of the 'acquired' gender used in the General Scheme),¹⁵¹ that he or she 'understands the consequences of the application',¹⁵² and that he or she 'makes the application of his or her free will'.¹⁵³ The Group described a declaration of this sort as 'the foundation step for any person wishing to make the transition from one gender to the other'.¹⁵⁴ It has been seen that a similar declaration is required by the Zappone Bill,¹⁵⁵ but not the Ó Snodaigh Bill.

In its General Scheme (as revised and reflected in the GRA), the Government rejected the Group's recommendation of a 'life test' being imposed for a fixed period.¹⁵⁶ This would have required the applicant to prove that he or she has 'been living full-time in the new gender during the two years immediately preceding the application',¹⁵⁷ via 'independent evidence' such as a 'change of gender and name in official and other documentation' and 'statements of witnesses familiar with the applicant'.¹⁵⁸ This 'life test' with a fixed qualifying time period could legitimately

¹⁴⁸ GRA, s. 12(1); cf. Revised General Scheme, Head 6(a)(vii).

¹⁴⁹ Department of Social Protection, 'Government agrees self-declaration approach for Gender Recognition Bill', 03.06.2015 <<http://www.welfare.ie/en/pressoffice/pdf/pr030615.pdf>> accessed 18.08.2015.

¹⁵⁰ GRA, s. 10(1)(f)(ii).

¹⁵¹ Revised General Scheme, Head 6(a)(v).

¹⁵² GRA, s. 10(1)(f)(iii); cf. Revised General Scheme, Head 6(a)(v).

¹⁵³ GRA, s. 10(1)(f)(iv); cf. Revised General Scheme, Head 6(a)(v), Gender Recognition Advisory Group, above n. 7, at [5.6.1].

¹⁵⁴ Gender Recognition Advisory Group, above n. 7, at [5.6].

¹⁵⁵ Zappone Bill, cl. 2(3)(b).

¹⁵⁶ Gender Recognition Advisory Group, above n. 7, at [5.7].

¹⁵⁷ Gender Recognition Advisory Group, above n. 7, at [5.7.1].

¹⁵⁸ Gender Recognition Advisory Group, above n. 7, at [5.7.1].

be regarded as excessive given the other requirements, and the rejection of it in principle by the Government is welcome even if it lives on in substance.

However, the Government did originally decide to carry forward the Group's recommendation that medical evidence be required, albeit in attenuated form. Under the Group's original proposal, the applicant would in addition have had to provide medical evidence taking one of two forms. The evidence could have consisted of 'a formal diagnosis' of gender identity disorder 'by one or more qualified mental health professionals'¹⁵⁹ 'together with confirmation that the person is not suffering from any other debarring mental disorder'.¹⁶⁰ This would also have been accompanied, if possible, by 'supporting relevant medical evidence such as details of treatments undergone or in progress'.¹⁶¹ Alternatively, the applicant could provide 'proof that [he or she] has undergone gender reassignment surgery',¹⁶² comprising 'a formal statement by a qualified medical practitioner' to that effect, 'based on a physical examination'.¹⁶³ In formulating its onerous requirements,¹⁶⁴ the Group aimed to ensure consistency with the evidence currently required under the Passports Act 2008, discussed above.

Under the GRB pre-amendment, rather more flexibly, a qualifying application would have required a certificate by the applicant's 'primary treating medical practitioner'¹⁶⁵ confirming that the applicant 'has transitioned' or 'is transitioning' to his or her 'preferred' gender¹⁶⁶ (*i.e.* the gender a person applies to have specified in a gender recognition certificate),¹⁶⁷ and that the practitioner is 'satisfied' that the applicant 'fully understands the consequences of his or her decision to live permanently in the preferred gender'.¹⁶⁸ The Minister regarded these diluted conditions, as well as the absence of a fixed life test, to be a 'more compassionate and understanding approach' that was 'central to the spirit of the Bill'.¹⁶⁹ The Bill as introduced required the certificate to be 'based on a medical evaluation of the applicant',¹⁷⁰ but this requirement was removed by the Seanad.¹⁷¹ While the GRA defines a 'primary treating medical practitioner' as a 'primary treating endocrinologist or psychiatrist' at the time of writing, the Government announced its intention to delay the Dáil committee stage in order to consult with general practitioners on whether they should be included in the so-called

¹⁵⁹ Gender Recognition Advisory Group, above n. 7, at [5.10].

¹⁶⁰ Gender Recognition Advisory Group, above n. 7, at [5.8.4].

¹⁶¹ Gender Recognition Advisory Group, above n. 7, at [5.10].

¹⁶² Gender Recognition Advisory Group, above n. 7, at [5.8.4]. See Transgender Equality Network Ireland, above n. 41, p. 8 for criticism of any medical diagnosis requirement.

¹⁶³ Gender Recognition Advisory Group, above n. 7, at [5.10].

¹⁶⁴ See FYNES, above n. 48, p. 34 for criticism of the invasiveness of the examination-based criterion.

¹⁶⁵ GRB, cl. 10(1)(g)(i); *cf.* Revised General Scheme, Head 6(a)(vi).

¹⁶⁶ GRB, cl. 10(1)(g)(ii)(I); *cf.* Revised General Scheme, Head 6(a)(vi).

¹⁶⁷ GRB, cl. 2; *cf.* Revised General Scheme, Head 2.

¹⁶⁸ GRB, cl. 10(1)(g)(ii)(II); see also Revised General Scheme, Head 6(a)(vi).

¹⁶⁹ Department of Social Protection, above n. 13.

¹⁷⁰ Gender Recognition Bill as introduced, above n. 12, cl. 9(1)(g)(ii).

¹⁷¹ GRB, cl. 10(1)(g)(ii).

‘validation’ process.¹⁷² The Cabinet came to the rather more dramatic conclusion that no medical statement should be required at all for adults, and the Government announced in June 2015 that the requirement would be removed from the Bill during the committee stage, and this is reflected in the GRA.¹⁷³

The Minister expressed the hope that the approach even in the pre-amendment GRB would ‘facilitate applications from people with intersex conditions should they wish to apply’.¹⁷⁴ The Joint Committee on Education and Social Protection (rather opaquely) recommended that the General Scheme’s language be ‘reconsidered to address the concerns ... that people not be stigmatised’ by its evidential requirements.¹⁷⁵ The Minister, however, emphasised that intersex people would be within the scope of the legislation¹⁷⁶ and that the original General Scheme (substantially reflected in the revised version and the GRB) did ‘not in any way stigmatise persons who wish to apply for a gender recognition certificate’.¹⁷⁷ Problems could nevertheless still have occurred given that the GRB appeared to remain premised on a ‘transition’ from one gender to another and the amendments in the GRA may have solved the difficulty.

The Irish Human Rights Commission said that the use of the word ‘acquired’ (used in both versions of the General Scheme) ‘may not be appropriately sensitive to the reality of the experience of transgender persons or persons who are intersex’ because it ‘suggests that gender is a matter extraneous to the person, rather than an intrinsic part of a person’s identity’.¹⁷⁸ The Joint Committee recommended that the word ‘preferred’ be considered as a replacement for ‘acquired’,¹⁷⁹ and it is a positive development that this suggestion was taken up in the GRB.¹⁸⁰

Any medical requirement was burdensome and a significant fetter on self-identification,¹⁸¹ particularly given the potential difficulties faced by some transgender individuals in accessing appropriate treatment discussed above.¹⁸² Indeed, the Group conceded that ‘[t]he relatively small number of mental health and medical professionals who are active in treating GID patients in Ireland ... would seem to rule out the establishment of lists or panels of approved expert witnesses’.¹⁸³ The medical evidence requirement may in substance have introduced a version of the ‘life test’ that the Government expressly purported to reject, and

¹⁷² Department of Social Protection, ‘Government to Engage with GPs on Gender Recognition Bill’ (10.03.2015) <www.welfare.ie/en/pressoffice/Pages/pr100315.aspx#> accessed 25.03.2015.

¹⁷³ Department of Social Protection, above n. 149; GRA, s. 10.

¹⁷⁴ Department of Social Protection, above n. 13.

¹⁷⁵ Joint Committee on Education and Social Protection, above n. 9, p. 37.

¹⁷⁶ Dáil Deb 9 May 2014, vol. 840, no. 4, p. 629.

¹⁷⁷ Dáil Deb 9 May 2014, vol. 840, no. 4, p. 630.

¹⁷⁸ Irish Human Rights Commission, above n. 67, at [11]–[12].

¹⁷⁹ Joint Committee on Education and Social Protection, above n. 9, p. 37.

¹⁸⁰ Revised General Scheme, Head 2.

¹⁸¹ Irish Human Rights Commission, above n. 67, at [35]–[36].

¹⁸² Transgender Equality Network Ireland, above n. 130, pp. 4–6.

¹⁸³ Gender Recognition Advisory Group, above n. 7, at [2.5.1].

the Government's eventual embracing of a self-determination principle for adults is enormously progressive.

The Ó Snodaigh Bill went even further than the GRB by specifically providing that an applicant to the Registrar General 'shall not be required to provide evidence that any surgical procedure for total or partial genital reassignment, hormonal therapies, or any other psychological or medical treatment has taken place in order to have their recorded sex amended'.¹⁸⁴ No similar statement is made in the Zappone Bill, though it is clear that the same effect is intended,¹⁸⁵ and the Bill set out to avoid the need for gender recognition to depend on assessments by professionals.¹⁸⁶ This, like the eventual GRA, would create the possibility that a person could successfully change his or her legal gender even if he or she has not experienced gender identity disorder or any related medical condition at all. While the GRA contains an offence of 'knowingly or recklessly', in respect of an application for a gender recognition certificate, providing 'information to the Minister that is false or misleading in a material respect', the absence of a medical evidence requirement significantly reduces the scope for such an offence to be committed.¹⁸⁷

That said, even the GRAG admitted that there would be no financial risks to the state if people not suffering from gender identity disorder made applications, and that, 'given the nature of the condition and the difficulties and distress experienced by individuals in making the transition from one gender to the opposite one, the probability of frivolous applications was extremely low'.¹⁸⁸ This itself casts doubt on the appropriateness of requiring an applicant to be assessed and adds weight to the Government's decision to abandon such a requirement.

2.3.4. *Marital/Civil Partnership Status*

The Group recommended that 'the criteria for legal recognition of an acquired gender should include a provision whereby the applicant cannot be married or in a civil partnership',¹⁸⁹ in spite of the fact that all individual respondents to its consultation exercise and 'almost all' organisational respondents had been opposed to such a requirement.¹⁹⁰ We have seen that the Group claimed that '[f]or the majority of transgender persons who were married in their former gender but have since transitioned to the opposite gender, the marriage will have broken down by the time the transgender spouse wishes to apply for gender

¹⁸⁴ Ó Snodaigh Bill, cl. 5.

¹⁸⁵ See e.g. Zappone Bill, cl. 2(7).

¹⁸⁶ Zappone Bill Explanatory Memorandum <www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/7513/b7513s-memo.pdf> accessed 18.08.2015, p. 3.

¹⁸⁷ GRA, s. 35(1)(a); cf. Revised General Scheme, Head 20.

¹⁸⁸ Gender Recognition Advisory Group, above n. 7, at [2.3].

¹⁸⁹ Gender Recognition Advisory Group, above n. 7, at [5.5.1].

¹⁹⁰ Gender Recognition Advisory Group, above n. 7, at [3.4].

recognition'.¹⁹¹ When announcing that the Group's recommendation would be carried forward into the General Scheme, the Minister similarly asserted that she wanted to 'legislate now for the majority of the people affected, who are single' even if that would be 'disappointing for the small number of transgender persons concerned who are already married and wish to remain married while having their changed gender recognised'.¹⁹²

Both the Group and the Government were particularly wary of in substance allowing same-sex marriage or opposite-sex civil partnership via gender recognition in Ireland's current constitutional context, which was widely (but not universally) believed to require privilege for heterosexual marriage.¹⁹³ The outcome of the constitutional referendum on same-sex marriage that took place in May 2015 removed this difficulty,¹⁹⁴ and the Government announced that the marriage and civil partnership bars will be removed from the GRB during the committee stage.¹⁹⁵ Unfortunately, however, a court challenge to the referendum result caused the single status requirement to be retained in the GRA as enacted in July 2015.¹⁹⁶

It was rather a pity that both the Group and (originally) the Government felt it necessary to impose an absolute bar on applications by people in subsisting formalised relationships,¹⁹⁷ rather than at least allowing the new gender to be recognised on an interim basis until the relevant relationship could be dissolved. That state of affairs would have been particularly unfortunate in situations where an applicant had been forced to dissolve a marriage or civil partnership in order to make an application for a gender recognition certificate that was ultimately unsuccessful. It also meant that a desire for gender identity recognition would not have been a ground for nullity or divorce in itself,¹⁹⁸ and that an applicant would have had to make use of Ireland's restrictive law on divorce/dissolution or nullity before having his or her preferred gender recognised. In order to obtain a divorce, a married couple must have lived apart for periods totalling at least four years in the previous five years.¹⁹⁹ The court must also be satisfied that there is no reasonable prospect of reconciliation between the spouses before the divorce

¹⁹¹ Gender Recognition Advisory Group, above n. 7, at [5.5].

¹⁹² Department of Social Protection, above n. 13.

¹⁹³ See e.g. *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404; and B. SLOAN, 'The Changing Concept of "Family" and Challenges for Family Law in Ireland' in J.M. SCHERPE (ed.), *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Laws*, Edward Elgar, Cheltenham 2016 (forthcoming), and Joint Committee on Education and Social Protection, above n. 9, at [5.3], for discussion.

¹⁹⁴ Referendum Ireland <<http://www.referendum.ie>> accessed 08.08.2015. Cf. Transgender Equality Network Ireland, above n. 130, p. 9.

¹⁹⁵ Department of Social Protection, above n. 13.

¹⁹⁶ Department for Social Protection, 'Legal Recognition for Transgender People' (15.07.2015) <<http://www.welfare.ie/en/pressoffice/pdf/pa150715.pdf>> accessed 18.08.2015; GRA, s. 9(2)(b).

¹⁹⁷ See e.g. Irish Human Rights Commission, above n. 67, at [22]–[34].

¹⁹⁸ Cf. Zappone Bill Explanatory Memorandum, above n. 186, p. 4 for a discussion of the possible relevance of transgender status to the current law of nullity.

¹⁹⁹ Irish Constitution, Article 41.3.2(i)°.

can be granted,²⁰⁰ by virtue of what has been described as ‘the most restrictive’ divorce law in Europe,²⁰¹ and of course that may not be an accurate representation of the parties’ relationship. It had also been suggested that encouraging couples to divorce may itself be contrary to the Constitution.²⁰² Same-sex civil partners may obtain a dissolution more easily, since they have to show have lived apart for periods totalling two years in the previous three years²⁰³ and the court is not required to inquire into any reasonable prospect of reconciliation. But the GRAG admitted that married couples who wished for their relationship to continue but also for one or more of the parties to be able to change legal gender would be placed in a ‘very difficult position’, and that its requirement would be ‘very distressing’ for them.²⁰⁴ It is therefore heartening that the requirement will apparently be removed if the challenge to the referendum result is dismissed.

Neither of the Private Members’ Bills were intended to allow a gender recognition decision to affect, or be affected by, a subsisting marriage or civil partnership of the applicant.²⁰⁵ The Explanatory Memorandum to the Zappone Bill argues that marriages between an opposite-sex couple, one of whom later acquires a different legal gender, ‘were contracted as valid opposite-sex marriages and thus are not legally same-sex marriages’.²⁰⁶ There is a certain irony in the fact that gender recognition advocates found themselves arguing that marriages or civil partnerships founded on incorrect genders should nevertheless remain valid once gender recognition occurs.

2.3.5. *Alternatives*

In contrast to the relatively stringent overall requirements recommended by the Advisory Group, many of which were translated into the Government’s General Scheme (even as revised) and the GRA at the time of writing, the Ó Snodaigh Bill requires that ‘[o]nce a request has been made’²⁰⁷ by a proven adult,²⁰⁸ ‘the Office of the Registrar General shall, without any additional legal or administrative procedure, issue a new birth certificate incorporating the requested change reflecting the amended sex and the new name or names as recorded, if

²⁰⁰ Irish Constitution, Article 41.3.2(ii)°.

²⁰¹ M. ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia*, Intersentia, Antwerp 2006, p. 351.

²⁰² Ó Snodaigh Bill Explanatory Memorandum, above n. 121, p. 5; Joint Committee on Education and Social Protection, above n. 9, at [5.3].

²⁰³ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s. 110(a). See generally M. WALLS, ‘Dissolution and Provision for Qualified Cohabitants’ in *The General Scheme of the Civil Partnership Bill: Legal Consequences and Human Rights Implications*, Irish Council for Civil Liberties, Dublin 2009.

²⁰⁴ Gender Recognition Advisory Group, above n. 7, at [5.5].

²⁰⁵ Ó Snodaigh Bill Explanatory Memorandum, above n. 121, pp. 4–5; Zappone Bill Explanatory Memorandum, above n. 186, pp. 4–6.

²⁰⁶ Zappone Bill Explanatory Memorandum, above n. 186, p. 5.

²⁰⁷ Ó Snodaigh Bill, cl. 7.

²⁰⁸ Ó Snodaigh Bill, cl. 4.

applicable’.²⁰⁹ Similarly, the Zappone Bill provides that the Registrar General ‘shall as soon as practicable upon receipt of [the required] statutory declaration ... record and recognise the applicant’s preferred gender and as appropriate the preferred forename or forenames in the Gender Recognition Register and shall attach the appropriate note to the entry concerning the applicant in the register of births’.²¹⁰ Only an application by a minor seemingly involves any substantive evaluation (by the court in that instance) under the Ó Snodaigh Bill, and indeed it is the applicant on behalf of the child who conducts the relevant evaluation under the Zappone Bill.²¹¹ Views will differ as to whether this extremely liberal approach is appropriate, but any substantive qualifying criteria risk excluding some deserving individuals and it is widely accepted that the risk of abuse of a gender recognition scheme is extremely low. It is therefore a largely positive prospect that the GRA will eventually be similarly liberal.

Other procedural details were considered above.

III. CONSEQUENCES OF RECOGNITION OF THE PREFERRED LEGAL SEX AND/OR GENDER OF A TRANSGENDER/TRANSSEXUAL PERSON

3.1. FUTURE RIGHTS, DUTIES AND ENTITLEMENTS

The Government has claimed that ‘[t]he acquired gender of transgender persons is currently recognised in many official dealings with the State ... in social welfare, healthcare and revenue matters’.²¹² Anecdotal evidence nevertheless suggests that individual experiences can be anything but straightforward,²¹³ and the Joint Committee highlighted that ‘[i]ssues faced by transgender youth within the school system were raised by some stakeholders’ during its evidential hearings.²¹⁴ In *Foy* it was said that there was ‘some uncertainty as to how [the applicant] would be treated if she had to endure a prison sentence’,²¹⁵ and Transgender Equality Network Ireland has ‘been contacted by a number of individuals who have been incorrectly assigned to detention centres which do not respect their gender identities’.²¹⁶ In her book *Sport and the Law* Donnellan does not appear to mention any jurisdiction-specific provision for athletes in the section on transgender rights in Ireland.²¹⁷

²⁰⁹ Ó Snodaigh Bill, cl. 7.

²¹⁰ Zappone Bill, cl. 2(7).

²¹¹ Zappone Bill, cl. 2(6).

²¹² Steering Committee For Human Rights, above n. 31, p. 279.

²¹³ Transgender Equality Network Ireland, above n. 40, pp. 3–4; O. O’SULLIVAN (ed.), above n. 1.

²¹⁴ Joint Committee on Education and Social Protection, above n. 9, at [5.5].

²¹⁵ [2007] IEHC 470, at [64(2)] (McKechnie J). Cf. Steering Committee For Human Rights, above n. 31, p. 274.

²¹⁶ Transgender Equality Network Ireland, above n. 81, p. 11.

²¹⁷ L. DONNELLAN, *Sport and the Law*, Blackhall, Blackrock 2010, p. 136.

The granting of a gender recognition certificate under the GRA would in general mean that ‘the person’s gender shall from the date of that issue become for all purposes the preferred gender’.²¹⁸ That recognition, according to both the Group and the Explanatory and Financial Memorandum of the GRB, would take effect ‘for all purposes, including dealings with the State, public bodies, and civil and commercial society’,²¹⁹ though no further specific guidance on what this means for the purposes of peerages and other matters was provided by the Group. It expressly declined to make recommendations on ‘supports for young people in schools and in sporting and other organisations’ and ‘the issuing of educational certificates by official bodies’ in the light of its ‘specific remit’.²²⁰ For its part, the GRA currently provides expressly that ‘[a] person issued with a gender recognition certificate may only’²²¹ ‘marry a person of the opposite gender to the preferred gender’²²² or ‘be a party to a civil partnership registration with a person of the same gender as the preferred gender’,²²³ but it has been seen that this provision is expected to be removed. Rather more helpfully than the Group’s proposal, the GRA contains a number of other provisions dealing with particular circumstances. For example, where ‘the disposition or devolution of any property under a will or other instrument’ made *after* the day the eventual Act comes into effect ‘is different ... from what it would be but for the fact that a gender recognition certificate is issued to a person’,²²⁴ a person ‘adversely affected’ by the difference would be able to apply for a High Court order.²²⁵ The Court would have the power to make ‘such order as it considers appropriate’ in relation to ‘any person benefiting’ from the difference, ‘if it is satisfied that it is just to do so’.²²⁶ This is a pragmatic provision, though it is odd that the order it facilitates is focused on the *person* benefitting from the difference in disposition rather than the property itself.

The GRA would make an exception to the recognition of a preferred gender for gender-specific crimes committed both before and after the gender recognition decision. It provides that ‘where ... a relevant gender-specific sexual offence could be committed or attempted only if the gender of the person to whom a gender recognition certificate has been issued were not the preferred gender, the fact that the person’s gender has become the preferred gender does not prevent the offence

²¹⁸ GRA, s. 18(1); see also Revised General Scheme, Head 10(1), Gender Recognition Advisory Group, above n. 7, at [5.12.1].

²¹⁹ Gender Recognition Advisory Group, above n. 7, at [5.12.1]; Department of Social Protection, above n. 63, p. 5.

²²⁰ Gender Recognition Advisory Group, above n. 7, at [5.18]. Cf. F. BLACK, ‘Transsexual wins Plea to alter Gender on Exam Certs’, Independent.ie, 01.06.2007 <www.independent.ie/irish-news/transsexual-wins-plea-to-alter-gender-on-exam-certs-26294405.html> accessed 18.08.2015.

²²¹ GRA, s. 18(3).

²²² GRA, s. 18(3)(a).

²²³ GRA, s. 18(3)(b); cf. Revised General Scheme, Head 9(2).

²²⁴ GRA, s. 22(1).

²²⁵ GRA, s. 22(2); see also Revised General Scheme, Head 24(2).

²²⁶ GRA, s. 22(3); see also Revised General Scheme, Head 24(3).

being committed or attempted'.²²⁷ A 'relevant gender-specific sexual offence' is then defined²²⁸ to mean a sexual offence that can be committed either only by someone of a particular gender, or only against or in relation to someone of a particular gender, or both.²²⁹

Finally, the original General Scheme would have allowed a 'body responsible for regulating the participation of persons' in events involving 'a gender-affected sport' to 'prohibit or restrict the participation as competitors' of people who have obtained legal recognition of their gender identity, if this is necessary to secure 'fair competition' or 'the safety of competitors'.²³⁰ No distinction was apparently made between professional and amateur sport. The Irish Human Rights Commission expressed grave concern that the provision governing sport could 'allow for a most serious invasion of the individual's privacy, cause undue embarrassment regarding an intimate detail of a person's private life' and 'defeat the very recognition already granted to them by the State'.²³¹ The Joint Committee recommended that this aspect of the General Scheme 'should be reconsidered in consultation with stakeholders', and that 'Irish sporting regulatory bodies receiving public funding should develop comprehensive policies in relation to the participation of transgender people'.²³² The relevant head in fact appeared to have been omitted from the Revised General Scheme.²³³ and indeed no equivalent clause appears in the GRA.

In the absence of specific provision governing other matters, one must presumably fall back upon the proposed Bill's general principle that a person's legal gender becomes his or her preferred gender on the date of the decision to issue a gender recognition certificate. On a practical level, the Joint Committee has at least recommended that '[g]uidelines on supporting the inclusion of transgender young people in schools should be developed in consultation with relevant stakeholders'.²³⁴

The Ó Snodaigh Bill explicitly confers the 'right' on 'each person' to 'the recognition of their gender identity', to 'the free development of their person according to their gender identity', and to 'have their recorded sex amended, along with changes in name or names and image, in accordance with their own self-perceived gender identity'.²³⁵ 'Gender identity' is specifically defined in both the Ó Snodaigh and Zappone Bills using the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation

²²⁷ GRA, s. 23(1); see also Revised General Scheme, Head 26(1).

²²⁸ GRA, s. 23(2)–(5); see also Revised General Scheme, Head 26(2)–(4).

²²⁹ GRA, s. 23(2)–(4); see also Revised General Scheme, Head 26(2)–(3).

²³⁰ Original General Scheme, Head 26(b).

²³¹ Irish Human Rights Commission, above n. 67, at [39]–[41].

²³² Joint Committee on Education and Social Protection, above n. 9, p. 38.

²³³ The table of contents of the Revised General Scheme nevertheless refers to a 'Head 27' with the title 'Sport'.

²³⁴ Joint Committee on Education and Social Protection, above n. 9, p. 37.

²³⁵ Ó Snodaigh Bill, cl. 3.

and Gender Identity²³⁶ to mean ‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms’.²³⁷ The Ó Snodaigh Bill also provides that, subject to its own provisions, ‘all laws and regulations adopted shall respect the person’s right to their gender identity as well as ensuring that there is no limitation, restriction, exclusion or annulment of the exercise of the right to gender identity’.²³⁸

The Zappone Bill simply provides that ‘[s]ave where the context or law otherwise requires it, the gender entered and recorded in the Gender Recognition Register on foot of an application under [the Bill] be for all purposes the recognised gender of that person from the date of entry’.²³⁹ No further detail is provided, and while the simplicity of its statement is admirable, the general exception for where the context or law requires that the person not be recognised in his or her preferred gender could cause significant difficulties.

3.2. EXISTING RIGHTS, DUTIES AND ENTITLEMENTS

Under the GRA, ‘[t]he issue of a gender recognition certificate’ is expressed not to ‘affect the rights or liabilities of a person or consequences of an action by the person in their original gender prior to the date of issue of the certificate’.²⁴⁰ The Group explicitly stated that the fact that a person’s changed gender has been recognised would ‘not affect the status of the person as the father or mother of a child’.²⁴¹ It was unclear whether this merely confirmed the prospective nature of the gender recognition decision in respect of *existing* children, or whether it was intended to introduce a special rule so that, for example, a person who gives birth to a child is always the child’s mother even if that person has obtained a gender recognition certificate and is a man for all other purposes at the time of birth. The Revised General Scheme used the same ambiguous wording.²⁴² Thankfully, the GRA makes clear that a gender recognition certificate ‘shall not affect the status of the person as the father or mother’ only ‘of a child born prior to the date of the issue of the certificate’.²⁴³

²³⁶ Ó Snodaigh Bill Explanatory Memorandum, above n. 121, p. 2.

²³⁷ Ó Snodaigh Bill, cl. 2; Zappone Bill, cl. 1.

²³⁸ Ó Snodaigh Bill, cl. 15(1).

²³⁹ Zappone Bill, cl. 3(2).

²⁴⁰ GRA, s. 18(6); cf. Revised General Scheme, Head 10(4), Gender Recognition Advisory Group, above n. 7, at [5.12.1].

²⁴¹ Gender Recognition Advisory Group, above n. 7, at [5.12.1].

²⁴² Revised General Scheme, Head 22.

²⁴³ GRA, s. 19.

The GRA also provides that the issuing of a gender recognition certificate will ‘not affect the disposal or devolution of property under a will (including a codicil) or other instrument executed before the date this Act comes into operation’,²⁴⁴ and the relevant provisions of the Bill are not intended to ‘affect the right of a person to make a claim in respect of any property, other than where the property is sold to a purchaser for value in good faith and without notice.’²⁴⁵ That said, the Act would also relieve a trustee or personal representative of any duty to enquire ‘whether a gender recognition certificate has been issued to any person or revoked’ in carrying out their duties,²⁴⁶ and from liability arising out of a failure to make such enquiries.²⁴⁷

The Ó Snodaigh Bill similarly, but perhaps less clearly, provides that ‘[a] change in the recorded sex of a person shall not change the legal entitlements, rights, and legal obligations that were afforded to persons before the recording of the amendments, nor those derived from relationships established under family law, including adoption and marital rights.’²⁴⁸ The Zappone Bill’s equivalent clause provides that ‘[s]ave where the context otherwise requires it, the making of an entry in the Gender Recognition Register does not affect the previous operation of anything duly done under law or affect any right, privilege, obligation or liability acquired, accrued or incurred, or affect any penalty incurred, or prejudice or affect any legal proceedings (civil or criminal) pending at the time of the making of the entry in the Gender Recognition Register concerning the person in question’.²⁴⁹ This spells out matters rather more than the same Bill’s complementary sub-clause on prospective matters, but leaves the parentage question open to doubt.

IV. LEGAL CHALLENGES TO THE EXISTING RULES

Imperfect as it currently is, it is to be hoped that the Gender Recognition Act 2015 will soon be brought into force. In spite of considerable pressure exerted on the Government by Transgender Equality Network Ireland *inter alia*, transgender individuals in Ireland have already waited far too long for comprehensive recognition of their preferred genders. There is some consolation in the fact that the Irish legislation appears likely to be among the more internationally progressive gender recognition statutes when it is eventually commenced. Legal position may not remain static for long after the GRA comes into force, however, since it obliges the Minister to ‘commence a review’ of its operation not more than two years after it comes into effect.²⁵⁰

²⁴⁴ GRA, s. 20(1); *cf.* Revised General Scheme, Head 23.

²⁴⁵ GRA, s. 21(3); see also Revised General Scheme, Head 24(3).

²⁴⁶ GRA, s. 21(1); see also Revised General Scheme, Head 24(1).

²⁴⁷ GRA, s. 21(2); see also Revised General Scheme, Head 24(2).

²⁴⁸ Ó Snodaigh Bill, cl. 9.

²⁴⁹ Zappone Bill, cl. 3(1).

²⁵⁰ GRA, s. 7.