

Advice of the Ombudsman for Children
on the
General Scheme of the Gender Recognition Bill 2013

October 2013

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1. Introduction

- 1.1. The Minister for Social Protection published the General Scheme of the Gender Recognition Bill on 17 July 2013. 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 dealings with the State, private and public bodies. Applications may be made by transgender persons or persons with intersex conditions.
- 1.2. Section 7 of the Ombudsman for Children Act 2002 provides that the Ombudsman for Children shall advise Ministers of the Government on any matter relating to the rights and welfare of children - including the probable effect of the implementation of proposals for legislation – when requested to do so by a Minister. The Minister for Social Protection has sought the Ombudsman for Children's views on the issue of making provision for young people under the age of 18 within the scope of the legislation. The following advice has been prepared in response to that request and in accordance with section 7 of the Ombudsman for Children Act 2002.
- 1.3. The General Scheme provides that the Minister shall only issue a gender recognition certificate to persons who are at least 18 years of age.¹This follows the recommendation made by the Gender Recognition Advisory Group (GRAG) established to advise the Minister on the legislation required to give effect to Ireland's obligations under the European Convention on Human Rights with respect to gender recognition.² The GRAG's report noted that differing views were expressed on the minimum age for applying for legal recognition of one's preferred gender during their consultation on the proposed legislation. With respect to the view that young people should not be included within the scope of the legislation, the GRAG's report outlined that:

“...mental health professionals advised the Group to exercise great caution if considering reducing the minimum qualification age. There is evidence from the literature that minors who desire a gender change frequently change their minds as they reach adulthood. [...]One option considered by the Group would be to allow applications from 16-year-olds who would, with parental consent, seek an exemption from the age 18 minimum from a District Court in much the same way as provided for in the Civil Registration Act for marriages of minors. However, the Group does not recommend this option given the reservations expressed by mental health professionals on the issue.”³
- 1.4. In light of continuing developments in relation to transgender and intersex young people, however, the Minister has indicated that this aspect of the legislation will be

¹ Head 5 of the General Scheme of the Gender Recognition Bill 2013,

² Gender Recognition Advisory Group, *Report to the Minister for Social Protection* (June 2011), section 5.4.1

³ Section 5.4

kept under review. It is in that context that the Minister has requested the views of the Ombudsman for Children on the age criterion contained in the proposed legislation.

- 1.5. The Ombudsman for Children's Office understands that the motivation for excluding those under the age of 18 from the legislation as currently drafted is, in essence, to safeguard them from the potentially negative consequences of having their preferred gender recognised when they have not formed a stable view in relation to their gender identity.
- 1.6. Seeking to safeguard children is a legitimate aim; it is the view of this Office that the current proposals are unlikely to achieve this aim. Transgender and intersex children can face extraordinary adversity and barriers to living with dignity. Indeed, this Office has highlighted difficulties brought to its attention by transgender young people in accessing education to the Oireachtas in the past.⁴ They remain invisible in many ways and the wider understanding and recognition of their identities is poor. If the proposed legislation can mitigate some of the challenges they face, it should do so. The legislation must be informed by a thorough assessment of what the impact of maintaining the status quo will be on transgender and intersex young people. This will hopefully form an integral component of the Oireachtas' consideration of the legislation.
- 1.7. The Bill must also align itself fully with Ireland's international human rights obligations relating to children. This includes the European Convention on Human Rights, which is relevant to young people's right to gender recognition and, of course, ultimately provided the impetus for the drafting of this legislation to begin with. Legal developments in other jurisdictions are also instructive in considering how Ireland might approach the issue of recognising the preferred gender of those under the age of 18.
- 1.8. The Ombudsman for Children's Office believes that the current proposals will not operate in children and young people's interest, nor vindicate their rights. This Office favours an alternative approach that would provide for a gender recognition mechanism for those under the age of 18 for the reasons set out in the advice that follows.

⁴ Ombudsman for Children's Office, *2007 Annual Report to the Houses of the Oireachtas* (Dublin: OCO, 2008), p.38

2. International human rights obligations and legal developments

- 2.1. There are a number of international instruments relevant to the question of young people's gender identity and obtaining legal recognition of their preferred gender.

United Nations Convention on the Rights of the Child

- 2.2. The UN Convention on the Rights of the Child (UNCRC) was ratified by Ireland in September 1992. It is the most significant international legal instrument relating to children and remains the most widely ratified human rights treaty in the world.
- 2.3. The UN Convention on the Rights of the Child does not address the situation of transgender or intersex young people explicitly. However, Article 2 of the Convention requires States to respect and ensure the rights set out in the Convention to each child within their jurisdiction without discrimination of any kind.⁵ The prohibited grounds of discrimination contained in the Convention include race, colour, sex, birth or other status. Although gender identity is not included in this list, the UN Committee on the Rights of the Child has clarified that transgender young people are protected by Article 2.⁶ Gender identity can therefore be taken to constitute a form of "other status" within the meaning of the non-discrimination provision of the Convention.
- 2.4. Article 3 of the UNCRC requires that in all actions concerning children, including those undertaken by legislative bodies, the best interests of the child shall be a primary consideration.⁷ The UN Committee on the Rights of the Child has elucidated its understanding of this obligation in the legislative context by indicating that States must be able to demonstrate how the best interests have been examined and assessed, and what weight has been ascribed to them in the relevant decision.⁸ In addition, the Convention imposes an obligation to undertake a continuous process of child rights impact assessment to predict the impact of any law on children and the enjoyment of their rights, as well as an obligation to evaluate the relevant law after it has entered into force.⁹ In the context of transgender and intersex young people, Article 3 of the UNCRC clearly requires that the legislative process incorporate fully a consideration of the impact of the Gender Recognition Bill on this group; this will require a description of how that impact was assessed, what weight was attached to this as distinct from other factors, and how the ultimate decision regarding the legislation respected the

⁵ Article 2.1 of the UNCRC provides that: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

⁶ UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/4 (20 October 2008), at para 24-25

⁷ Article 3.1 of the UNCRC provides that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

⁸ UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, at para 14 (b)

⁹ *Ibid.* at para 35

best interests principle in light of the totality of the State's obligations under the Convention.

- 2.5. Under Article 6 of the UNCRC, States are obliged to ensure to the maximum extent possible the survival and development of the child. The term "development" is to be interpreted in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development.¹⁰ The UN Committee has highlighted that implementation measures should be aimed at achieving the optimal development for all children.¹¹ In the context of deciding whether to provide legal recognition for the preferred gender of young people, Article 6 enjoins the State to consider whether providing such recognition would assist in creating conditions conducive to the optimal development of those young people. Of particular relevance in this regard is the interaction between legal recognition as envisaged in the General Scheme and matters such as reducing barriers to participation in education and supporting transgender and intersex young people to maintain their physical and mental health. Where a number of legislative options are under consideration, the option that favours young people's development across the domains outlined above most strongly is the most appropriate from the perspective of Article 6.
- 2.6. Article 8 of the UNCRC requires States to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law. The origins of this provision lie in concerns unrelated to gender identity;¹² however, its inclusion in the Convention underscores the fact that questions of identity go to the core of a person's dignity and that maintaining and respecting identity is a serious matter. The specific aspects of identity set out in Article 8 – nationality, name and family relations – are not exhaustive and it may well be that the UN Committee on the Rights of the Child will in future conclude that the obligations on States Parties under Article 8 encompass matters concerning gender identity.
- 2.7. Article 12 of the Convention obliges States to assure to children who are capable of forming their own views the right to express those views in all matters affecting them, with due weight given to those views in accordance with the age and maturity of the children. The UN Committee has noted that the voices of children have increasingly become a powerful force in the prevention of child rights violation and that they should be consulted in the formulation of legislation and policy related to them.¹³ Full compliance with Article 12 therefore requires the State to ensure that young people directly affected by the Gender Recognition Bill are afforded the opportunity to express their views on the legislation and for due consideration to be given to those views. In addition, were the State to provide in law for the guardians of a child to apply for a

¹⁰ UN Committee on the Rights of the Child, *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, p. 4

¹¹ *Ibid.*

¹² Hodgkin, R. and Newell, P., *Implementation Handbook for the Convention on the Rights of the Child*, (Geneva: UNICEF, 2007), p. 113

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

Gender Recognition Certificate on a child's behalf – for example, if the child had an intersex condition – Article 12 of the UNCRC would have to apply in relation to seeking the child's views and consent to such recognition, where appropriate.

- 2.8. Article 16 of the UNCRC provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, home or correspondence. This is virtually identical to Article 17 of the International Covenant on Civil and Political Rights (ICCPR);¹⁴ the relevance of this provision to the question of gender recognition arises from the fact that Ireland was criticised for failing to put a gender recognition mechanism in place in light of its obligations under Article 17 and other provisions of the ICCPR.¹⁵ If the right to gender recognition is acknowledged to exist for adults under the ICCPR, there is no reason to assume that an analogous provision of the UNCRC would not afford a similar protection to children (in addition to the fact that the ICCPR applies to adults and children alike). The manner in which a State chooses to vindicate such a right can legitimately have regard to the differences between adults and children; however, it cannot deny that the right exists for children.
- 2.9. It is worth noting the similarity between Article 16 of the UNCRC, Article 17 of the ICCPR and Article 8 of the European Convention on Human Rights (ECHR).¹⁶ The congruence is unsurprising given their common origin in the Universal Declaration of Human Rights.¹⁷ The central role played by Article 8 of the ECHR in establishing gender recognition rights across Europe supports the contention that Article 16 of the UNCRC could be similarly invoked to advance the protection of the rights of transgender and intersex young people.
- 2.10. Clearly, there are many other provisions of the UN Convention on the Rights of the Child that are directly relevant to transgender and intersex young people, especially those relating to education and health.¹⁸ However, given the focus of the Minister for Social Protection's request to this Office for views on the issue of legal recognition, a full examination of those provisions is beyond the scope of this advice.

European Convention on Human Rights

- 2.11. The principal motivation for the establishment of the Gender Recognition Advisory Group by the Minister for Social Protection in 2010 was the need to align Ireland's

¹⁴ Article 17 of the ICCPR provides that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

¹⁵ UN Human Rights Committee, *Concluding Observations: Ireland*, CCPR/C/IRL/CO/3 (30 July 2008), at para 8

¹⁶ Article 8.1. states that: "Everyone has the right to respect for his private and family life, his home and his correspondence".

¹⁷ Article 12 of the Universal Declaration of Human Rights states that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

¹⁸ Articles 28 and 24 of the UNCRC respectively

legislation in this area with the European Convention on Human Rights (ECHR).¹⁹ It is therefore appropriate to consider the relevance of this instrument to the situation of those under the age of 18 who may wish to seek a Gender Recognition Certificate.

2.12. In the case of *Foy v. An tArd-Chláraitheoir and Others*, the High Court held that certain provisions of the Civil Registration Act 2004 were incompatible with the plaintiff's rights to gender recognition flowing from Article 8 of the ECHR.²⁰ From the point of view of young people, the question this raises is whether the proposal to provide for a minimum age of 18 for applications for a Gender Recognition Certificate is also incompatible with the Convention.

2.13. Article 8.1 of the European Convention on Human Rights provides that everyone has the right to respect for his private and family life. There is no qualification as to the age of those whose private and family life is protected; children and young people are clearly included within the scope of Article 8's protection. Consequently, it seems clear that if an adult has a right to gender recognition under Article 8 of the Convention, a child is equally entitled to respect for his or her right to gender recognition.

2.14. As noted above in relation to instruments developed under the auspices of the United Nations, the fact that Article 8 of the ECHR encompasses both children and adults does not require that they be treated alike with respect to the vindication of their Article 8 rights. However, the protection of those rights and limitations to them must be viewed in the context of the provisions of Article 8.2 which sets out the circumstances in which the public authorities of a State may legitimately interfere with the exercise of the right, as well as the margin of appreciation enjoyed by a State with regard to the protection of rights under the Convention.

2.15. In the *Foy* case, the High Court made clear that the State "still retains a margin of appreciation as to the most appropriate method by which the applicant's rights can be vindicated"²¹ and acknowledged that "the precise model which might be used is still very much a matter for the Oireachtas and not this Court."²² The Court specifically accepted that there must be many possible responses by which the right to gender recognition could be protected and that the choice of which was appropriate in this jurisdiction was reserved for the Oireachtas.²³

2.16. The approach of Mr Justice McKechnie in *Foy* mirrors that of the European Court of Human Rights in *Goodwin v. The United Kingdom*²⁴ where the Court found that:

¹⁹ *Report to the Minister for Social Protection*, p. 6

²⁰ [2012] 2 IR 1

²¹ At para 147, p63

²² At para 147, p63

²³ At para 146, p63

²⁴ [2002] 35 EHRR 18

“Having regard to the above considerations, the Court finds that the Respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.”²⁵

- 2.17. In essence, the approach of the Court in *Goodwin* was that a respondent State did not enjoy any margin of appreciation as to whether the right to gender recognition would be vindicated, but did enjoy a margin of appreciation as to how that end would be achieved. The real issue, therefore, is whether a State can legitimately within its margin of appreciation exclude a particular category of persons - in this case those under 18 years of age - from achieving the right to gender recognition in any circumstances.
- 2.18. There is in a general sense a clear difference of capacity between children and adults. The law in this State recognises that difference by restricting the ability of children to carry out certain acts, such as entering into contracts or marrying.²⁶ Having regard to these differences, a failure to make any arrangements in law for the gender recognition of a child would be permissible pursuant to Article 8 of the Convention if such failure could be justified in accordance with the provisions of paragraph 2 of that Article.
- 2.19. The aim of prohibiting young people from obtaining legal recognition for their preferred gender as articulated by the Gender Recognition Advisory Group was to protect the interests of children who may not have formed a stable view regarding their gender identity. This would most probably be regarded as a legitimate aim, were it to come before the Courts.
- 2.20. However, to satisfy the requirements of Article 8.2, the prohibition must also be “necessary in a democratic society”. The case-law of the European Court of Human Rights shows that this expression incorporates the concepts of necessity and proportionality. That case-law requires that the impugned statutory provision is necessary to achieve the legitimate aim in question and is proportionate in the sense that it goes no further than is necessary to protect the aim.²⁷ Put in another way, the

²⁵ At para 93

²⁶ S.31 of the Family Law Act 1995 provides that a marriage between persons, either of whom is under the age eighteen years, shall not be valid in law unless an exemption has been obtained pursuant to s.33 of the said Act.

²⁷ See for example the judgments of the European Courts of Human Rights in *Y.C. v. The United Kingdom*, (Application No 4547/10) [2012] 2 FLR 332 and *R & H v. The United Kingdom*, (Application No 35348/06 [2011] 2 FLR 1236); the judgments of the Courts of the United Kingdom in *In re P (Children) (Adoption: Parental Consent)* [2008] 2 FLR 625 and *A and S v. M.L.*, United Kingdom Supreme Court [2012] UKSC 30, 11th July 2012 and the Irish Courts the judgment of Fennelly J. in *Mahon and Others v. Post Publications*

test as to whether a particular interference with a right protected under Article 8 can be said to be “necessary in a democratic society” requires examination as to whether the reasons adduced to justify the interference are “relevant and sufficient”.²⁸

- 2.21. This Office’s principal concern with the exclusion of young people from the scope of the proposed Gender Recognition Bill is the absolute nature of that exclusion. No children will be able to seek gender recognition under the legislation, no matter how compelling their circumstances and even if it can be shown that recognition of their gender would be unequivocally in their best interests. In adopting this approach, the proposed legislation ignores the many different situations in which such recognition would in reality be sought; these would include, for example, applications in relation to children with intersex conditions, younger trans children whose parents support their transition fully, and older teenagers in a position to consent to medical treatment themselves and who may be going through or have gone through transition already. The lack of any opportunity for young people in these situations to avail of a statutory gender recognition mechanism will leave many of them in a manifestly unsatisfactory situation, as outlined further below.²⁹ It is doubtful whether a blanket prohibition on obtaining gender recognition in all of these situations could be regarded as a necessary and proportionate interference with the young people’s rights under Article 8.
- 2.22. It is inherent in the concept of proportionality that the greater the level of interference with a right, the stronger must be the reasons which are put forward as being sufficient to justify the interference with that right. The total prohibition on applications for gender recognition by persons under the age of 18 has the effect of negating, or at least postponing, the vindication of that right. This could have a significantly negative effect on children and young people.
- 2.23. In the course of the Oireachtas’ consideration of the General Scheme, the Minister may be able to expound more fully the concerns that led the Gender Recognition Advisory Group to recommend excluding young people from the ambit of the legislation. However, even if there were reasonable grounds for believing that some young people would seek recognition of their gender inappropriately (i.e. in circumstances where they had not formed a stable view regarding their gender identity), it is unclear why denying such an opportunity to all young people would be the proportionate response to that concern.
- 2.24. In light of the serious restriction on children and young people’s right to gender recognition proposed in the General Scheme, the Ombudsman for Children’s Office believes that the Minister for Social Protection should consider an alternative legislative approach that eschews an absolute prohibition on the granting of Gender

Limited [2007] 3 IR 338 at para 107, pp 380-381 and the judgment of O’Neill J. (High Court) in *W.S. v. An Bord Uchtála* [2010] 2 IR 530, para 71, pp 557-558.

²⁸ Para 133 of the Judgment of the European Court of Human Rights in *Y.C. v. The United Kingdom*

²⁹ See Section 4 below.

Recognition Certificates to those under the age of 18. A failure to do so may well render the legislation vulnerable to challenge under Article 8 of the ECHR for the reasons outlined above.

International legal developments on gender recognition for young people

- 2.25. To the best of this Office's knowledge, it is common for other jurisdictions not to include those under the age of 18 within the scope of gender recognition legislation. A notable exception is Argentina. Provision was made there in legislation passed last year for gender recognition applications to be made in respect of young people under the age of 18.³⁰ Specifically, an application may be made for a young person under the age of 18 through his or her legal representative, with the express consent of the young person in question.³¹ The legislation further stipulates that the decision to accept or reject the application must take into account the best interests and evolving capacity of the child, in accordance with the UN Convention on the Rights of the Child.³²
- 2.26. If the Oireachtas determines that young people should be included in within the scope of the Gender Recognition Bill, the Argentine legislation would provide a useful reference point.
- 2.27. Some jurisdictions have introduced legislation and other measures to respect the gender identity of young people specifically in educational settings. An example of this is the School Success and Opportunity Act recently enacted in California. The Act introduced an amendment to the education code to permit young people to participate in sex-segregated programmes and activities, and to use facilities, in a manner consistent with their gender identity, irrespective of the gender indicated in their school records.³³
- 2.28. Although not equivalent to the gender recognition mechanism contemplated in the General Scheme of the Gender Recognition Bill 2013, it is also instructive to consider how legislatures in other jurisdictions have tackled issues concerning gender identity in the interest of the young people affected by that legislation.

³⁰ Ley 26.743 (23 May 2012), *Establécese el derecho a la identidad de género de las personas*

³¹ See Article 5

³² Ibid.

³³ School Success and Opportunity Act (AB 1266). The measure was signed into law on the 12th of August 2013 and will take effect from the 1st of January 2014.

3. Domestic law

- 3.1. In *Foy v. an tArd Chláraitheoir and Others*³⁴ Mr Justice McKechnie in the High Court rejected the Applicant's claims that the failure to provide a right to gender recognition was unconstitutional. This approach has been neither approved or disapproved by the Supreme Court given that the appeal from his July 2002 Judgment was referred back to the High Court for further consideration. If there is no constitutional right for an adult to obtain gender recognition, there is no reason why a child would enjoy such a right. Therefore, the principal question which must be addressed in regard to this matter is whether the State is entitled to restrict the statutory right to obtain gender recognition to persons who are over 18 years of age.
- 3.2. The decision to exclude young people under the age of 18 from the ambit of the Gender Recognition Bill constitutes a legislative classification by reference to age. In considering the legal situation relating to such a classification, the most relevant case is *J.D. v. the Residential Institutions Redress Review Committee, Ireland and the Attorney General*.³⁵ This case concerned a challenge by the Applicant to the constitutionality of legislation which restricted the right to compensation for abuse in residential institutions to children who were under the age of 18 years at the time of such abuse.
- 3.3. Giving the judgment of the Supreme Court in regard to the constitutionality of the impugned provision, the definition of "child" contained in s.1 of the Residential Institutions Redress Act 2002, Murray C.J. made the following observations in regard to classification by age in legislation:³⁶

"[24] However, almost all legislation addressed to the regulation of society resorts to some form of classification. Age is frequently used as a classification of inclusion or exclusion for multitudes of legislative purposes. There is nothing in such classification, taken on its own, to suggest that it is invidious, unfair or, in the legal sense, discriminatory. Hamilton C.J., in giving the judgment of this court in *The Employment Equality Bill, 1996* [1997] 2 I.R. 321 at p. 346 considered age classification as follows:-

"Article 40, s. 1 as has been frequently pointed out, does not require the State to treat all citizens equally in all circumstances. Even in the absence of the qualification contained in the second sentence, to interpret the Article in that manner would defeat its objectives. In the present context, it would mean that the State could not legislate so as to prevent the exploitation of young people in the work place or, at the other end of the spectrum, to make special provision in the social welfare code for the elderly. The wide ranging nature of the qualification which follows the general guarantee of equality before the law puts beyond doubt the legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation. In particular, classifications based on age cannot be regarded as, of themselves,

³⁴ Unreported 9th July 2002 McKechnie J. [2002] IEHC 116 5

³⁵ [2010] 1 IR 262

³⁶ At paras 24 and 25, pp 271-272

constitutionally invalid. They must, however, be capable of justification on the grounds set out by Barrington J. in *Brennan v. Attorney General* [1983] I.L.R.M. 449 at p. 480 as follows:-

'the classification must be for a legitimate legislative purpose ... it must be relevant to that purpose, and that each class must be treated fairly.'

Keane C.J., in his judgment in *The Planning and Development Bill 1999* [2000] 2 I.R. 321 referred with approval to this passage and added, at p. 357:-

"However, Article 40 does not preclude the Oireachtas from enacting legislation based on any form of discrimination: as has often been pointed out, far from promoting equality, such an approach would simply result in greater inequality in our society."

The decision of the Court in regard to the constitutionality of the impugned provision is set out in the following paragraphs:³⁷

"[30] In deciding as a matter of policy to establish a special scheme of redress for abused children, the Oireachtas necessarily had to define the scope and limits of its application. The court is satisfied that the choice of an age limit of eighteen constituted a legitimate legislative designation of the persons who naturally and normally have been described as children. The definition of "child" as a person under the age of eighteen years represents an objective classification containing no element of discrimination. It is neither arbitrary nor irrational.

[31] The court is satisfied that the Act of 2002, in designating persons under the age of eighteen at the relevant time as the beneficiaries of the redress, represented a legitimate exercise of legislative power and that it is not incompatible with the Constitution."

3.4. It is clear from these passages that the Courts will not strike down as unconstitutional a provision in legislation which restricts the ability to claim a legislative right by reference to age, unless such restriction is arbitrary or irrational. In this regard it must be borne in mind that legislation passed following the enactment of the Constitution enjoys a presumption of constitutionality and Keane C.J. emphasised in giving the judgment of the Supreme Court in the *Planning and Development Bill 1999*³⁸ that the presumption applied with particular force "to legislation dealing with controversial social and economic matters".³⁹

3.5. The question of the appropriate legislative arrangements in regard to gender recognition is a sensitive and controversial social matter. It follows that the presumption of constitutionality will apply with particular force to legislation dealing with this issue and the Courts are likely to be slow to strike down such legislation on

³⁷ At paras 30 and 31, p 273

³⁸ 8 [2000] 2 IR 321

³⁹ At p 357

constitutional grounds. Given the stated purpose of excluding young people from the ambit of the proposed Gender Recognition Bill, it is likely that the Courts would be satisfied that aim being pursued was legitimate. Furthermore, a Court would in all likelihood be satisfied that a legislative prohibition on applications for gender recognition by persons under eighteen years is neither arbitrary nor irrational.

3.6. However, if the Courts - in particular the Supreme Court – come to the conclusion that the right to gender recognition is in fact protected by the Constitution, then a more onerous test based on the doctrine of proportionality would be applied in relation to the prohibition on applications by persons under eighteen years.⁴⁰

3.7. In summary, there is no obligation under Irish law to provide for the possibility of young people under the age of 18 obtaining Gender Recognition Certificates. It is also unlikely that the Courts would find the classification on the basis of age to be unconstitutional. However, it should be borne in mind that there is equally no impediment to the Oireachtas deciding to include young people within the ambit of gender recognition legislation.

Parental Consent

3.8. If the Oireachtas proceeds to legislate for children and young people obtaining Gender Recognition Certificates, it is important to consider the legal parameters that would necessarily frame such a provision, especially from the perspective of parental consent.

3.9. The constitutional role of parents and the scope of their decision-making powers are clearly enunciated in the case of *North Western Health Board v. H.W and C.W.*⁴¹ These principles were restated by the Supreme Court in *N v. the Health Service Executive and Others.*⁴² There can be no doubt that the Constitution clearly recognises and endorses the right of parents to make decisions in respect of matters which will, or may, affect the health and welfare of their children. Any legislative scheme providing for the recognition of children and young people's preferred gender would have to observe this principle.

3.10. A question that arises is whether it would be sufficient to have the consent of one rather than both of a child's guardians (if there are two) in order for a guardian to make an application for a Gender Recognition Certificate. Clearly, this particular situation has never been tested before the Courts. However, there have been a number of cases where the Courts have considered the question of whether one guardian could validly apply for and obtain a passport for a child without the consent of the other guardian of the child, in particular *Cosgrove v. Ireland*⁴³ and *Igoe v. Ireland.*⁴⁴ The *Cosgrove* case

⁴⁰ See in particular *Heaney v. Ireland*, [1994] 3 IR 593, at p. 607

⁴¹ [2001] 3 IR 622

⁴² [2006] 4 IR 374

⁴³ [1982] ILRM48

would appear to be authority for the proposition that it is not open to the State to issue a passport to one guardian of a child where the other guardian objects, unless a Court Order has authorised such a course of action. Procedures in regard to the issue of passports for children have now been included in the Passport Act 2008. Section 14 of the 2008 Act provides a model of how protections can be provided in a statutory provision in relation to the interests of one guardian where an application is made by the other guardian to seek a particular statutory right or benefit in respect of a child.

16 and 17 year olds

- 3.11. If provision is made for children and young people in the Gender Recognition Bill, the particular situation of 16 and 17 year olds will have to be addressed. Section 23 of the Non-Fatal Offences against the Person Act 1997 provides that the consent of a minor who has obtained the age of 16 years shall be as effective as it would be if he or she were of full age in relation to surgical, medical or dental treatment which would otherwise amount to a trespass in the absence of consent. There are young people over the age of 16 who can and do seek medical services as part of the transition process; under Irish law, they can consent to any such treatment as effectively as a person over the age of 18.
- 3.12. In the interests of consistency, a mechanism for obtaining legal recognition of one's preferred gender would need to stipulate that the consent of young people aged 16 and 17 would of itself be sufficient to go through that process. Otherwise, an illogical situation would arise in which the State would countenance a young person receiving the relevant medical treatment on the strength of his or her own consent, yet that consent would be insufficient to obtain legal recognition of the young person's preferred gender and the outcome of that treatment.
- 3.13. In relation to children under the age of 16, there has been no clear legal authority in this jurisdiction as to whether children at some point prior to adulthood become competent and entitled to decide themselves in relation to medical treatment. The concept of "Gillick competence" has been explored⁴⁵ but there is no settled case-law in Ireland analogous to the judgment of the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority*.⁴⁶ Thus, the possibility of young people applying on their own initiative for legal recognition of their preferred gender would logically be confined to those who could consent in law to medical treatment, i.e. those over the age of 16.

⁴⁴ [1989] IR 386

⁴⁵ See, for example, the recent case of *Health Service Executive v. J.M. and R.P.*, [2013] 1 ILRM 305, Birmingham J. High Court

⁴⁶ [1986] AC 112

4. Probable effect of legislation

- 4.1. If the provisions of the General Scheme are replicated in the legislation that it is ultimately enacted, the status quo will remain for transgender and intersex young people.
- 4.2. In considering the probable effect of this course of action, the importance of hearing the views of the young people directly affected by the legislation must be emphasised. Article 12 of the UN Convention on the Rights of the Child requires that children and young people directly affected by legislation be consulted in relation to such legislative proposals. This is especially important when the decision to include or, as in this case, exclude children from the scope of the legislation is motivated by a desire to safeguard their interests.
- 4.3. BeLong To, a national organisation that provides direct youth work services to LGBT young people, has consulted with transgender youth members of their service in relation to the General Scheme of the Gender Recognition Bill.⁴⁷ Those consultations indicated that “it is painful for them to have to wait until they are eighteen to have their preferred gender recognised”.⁴⁸ This anxiety was linked to the difficulties experienced by transgender young people in educational settings, which are set out in detail in the submission made by BeLong To to the Oireachtas Committee on Education and Social Protection.
- 4.4. A failure to provide in law for transgender young people to have preferred gender recognised renders it more difficult to advance awareness of the serious challenges facing them in schools and in other settings.⁴⁹ More fundamentally, it compounds the invisibility of this group of young people. Indeed, if the State is unwilling under any circumstances to recognise the gender of transgender young people, efforts to encourage public bodies, employers and schools to do so will surely be undermined.
- 4.5. The proposed Gender Recognition Bill is aimed at remedying an injustice; its purpose is to ameliorate the legal situation of a minority in our society that faces extreme exclusion, isolation and hardship. Although these difficulties are faced by both adults and children, the legislation addresses itself only to adults. The challenges already faced by transgender young people will endure, perhaps sharpened by the fact that adults wishing to obtain recognition of their preferred gender will be able to do so.
- 4.6. The caution that led to the Gender Recognition Advisory Group’s recommendation with respect to those under the age of 18 relates to a concern that young people may

⁴⁷ BeLong To Youth Services, *Submission to the Joint Oireachtas Committee on Education and Social Protection on the Gender Recognition Bill 2013* (Dublin: BeLong To Youth Services, 2013)

⁴⁸ P. 3

⁴⁹ Ibid.

not have formed a stable view regarding their gender identity and that providing for legal recognition of a gender other than that assigned at birth is therefore not advisable. This must be weighed against the difficulties actually faced by young people who have gone or are going through transition. These concerns are not hypothetical; they are real and substantial. It seems untenable to argue that in order to close off the possibility of granting legal recognition to young people who have not formed a stable view regarding their gender identity, all young people should be denied the opportunity of legal recognition, irrespective of their individual circumstances. Moreover, proceeding on this premise may well render the legislation vulnerable to challenge in light of Article 8 of the European Convention on Human Rights, as outlined above.

- 4.7. The probable effect of the legislation as currently proposed will therefore be to allow the manifestly unsatisfactory situation of transgender and intersex young people to persist when a legal avenue to improve their situation and advance their rights exists. Providing for legal recognition of their preferred gender will certainly not alleviate all the difficulties faced by this group of young people. It would, however, represent a significant step forward with practical benefits. In many senses, the benefits that would accrue to young people are the same as those that will accrue to adults wishing to avail of the mechanism created by the legislation. The very existence of the proposed legislation acknowledges, after all, that the failure to provide in law for legal recognition is unambiguously injurious to the interests and rights of transgender and intersex people.
- 4.8. Perhaps most importantly, including children and young people within the scope of the legislation would represent an affirmation from the State that is overdue. The importance of this dimension should not be underestimated.

5. Recommendations

5.1. In light of the considerations outlined above, the Ombudsman for Children's Office believes that the approach taken to young people under the age of 18 in the forthcoming gender recognition legislation should be altered. In the view of this Office, maintaining an absolute exclusion on young people or their parents seeking a Gender Recognition Certificate is a disproportionate interference with young people's right to gender recognition. This reality is placed in stark relief by the variety of situations in which young people or their parents might in fact seek a Gender Recognition Certificate.

5.2. As a result, the recommendations of the Ombudsman for Children's Office are that:

- **The Gender Recognition Bill should make provision for children and young people by removing the criterion relating to minimum age in Head 5 of the General Scheme that prevents them being able to obtain legal recognition of their preferred gender.**
- **Parents or guardians should be enabled to make an application for a Gender Recognition Certificate on behalf of their children.**
- **In the interests of consistency between the Gender Recognition Bill and the Non-Fatal Offences Against the Person Act, young people who have reached the age of 16 should be enabled to apply for legal recognition of their preferred gender on their own initiative.**