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**AN BILLE UM INSCNE A AITHINT, 2013**  
**GENDER RECOGNITION BILL 2013**

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**EXPLANATORY MEMORANDUM**

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The purpose of this Gender Recognition Bill is to provide a process enabling transgender people to achieve full legal recognition of their self-identified gender and allow for the acquisition of a new birth certificate and other documentation that reflects their gender identity. A transgender, or trans, person is a person whose self-identified gender does not reflect the gender assigned to him or her at birth.

Under Irish law, transgender people cannot legally change the gender on their birth certificate under any circumstance. Birth certificates are a foundational identity document and are often requested for official purposes (such as accessing social welfare, attaining a PPS number and getting married). While Ireland does, in certain cases, allow for changing gender on documents such as passports and driving licences, this results in trans people having inconsistent official identification documentation. That is, a person may be recognised as one gender on certain documents and another gender on their birth certificate. The result of this can be a 'forced outing', where a transgender person is outed as transgender against their will when they apply for a job, a new passport or entry to college. Forced outing can result in harassment, discrimination, persecution and even violence.

The lack of legal recognition for transgender people has also been deemed a clear human rights abuse. Presently, Ireland is one of only a few states in the European Union that do not allow for legal recognition of trans people's self-identified gender, despite the High Court ruling in *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470 that this is incompatible with Ireland's obligations under the European Convention on Human Rights.

In 2009, Council of Europe Commissioner for Human Rights Thomas Hammarberg stated:

*"There is no excuse for not immediately granting [the transgender] community their full and unconditional human rights".*

Section 2 defines "gender identity" as referring to "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.”*

This definition is taken from the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity which were agreed by a distinguished group of human rights experts following an experts’ meeting held at GadjahMada University in Yogyakarta, Indonesia from 6 to 9 November 2006.

The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity, including the principle that everyone has the right to recognition everywhere as a person before the law.

It is essential that the state recognises each person’s self-defined gender identity, as it is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. Further to this, it is also important that no person shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.

This Bill only allows for the legal recognition of either male or female genders and the changing of one to the other and thus fails to address the needs of those who may be intersexed, or identify with other genders or mixed gender roles, or those who do not fit into those gender binary categories. However, this Bill should be taken as the beginning of a broader conversation within Irish society about how gender is legally recognised in general.

While this Bill does not make this specific proposal, it is interesting to note that in Australia since 2011, a person may have their gender marked on their passport as male, female, or X — which represents indeterminate/unspecified/intersex genders.

The purpose of *Section 3* is to ensure that all persons have the right to legal recognition of their gender identity; the free development of their person according to their gender identity; and have their recorded sex be amended, along with changes in name(s) and image, in accordance with their own self-perceived gender identity.

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities should enjoy legal capacity in all aspects of life. No status, such as marriage or parenthood, should be invoked by the State in order to prevent the legal recognition of a person’s gender identity. No person should be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

As stated in the Yogyakarta Principles, states should ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property. States are also obliged to take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity and take all necessary measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s self-defined gender identity. They must ensure that such

procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned while ensuring that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy.

*Section 4* sets out the process that shall be followed by persons seeking to amend their recorded sex, name(s) and images under the new law. Changing a name might seem like a minor matter but many who have gone through a gender transition say a name change sends an important message to the world, a message solidified and made official with a court's approval.

For many transgender people, a legal name change is a first step towards conforming their legal identities to the way they identify and live their lives. But securing a legal name change can be an intimidating experience, involving interaction with the court system and judges that is foreign to many people. It can involve a significant expense as well as a serious commitment of time and effort. The purpose of this legislation is to amend and simplify that process.

While some people have questioned the constitutionality of changing a birth certificate, it is useful to look to the reasoning of Abbot J., in *MR v An t-Ard Chlaraitheoir* [2013] IEHC 91, who stated that because the Status of Children Act 1987 allows for blood testing to ascertain maternity there was a legal procedure whereby the birth certificate could be amended, though that procedure is very rarely used.

The purpose of *Section 5* is to ensure that a person will not be compelled to go through a surgical or other procedure or receive a diagnosis of any mental health condition in order to have their self-identified gender recognised.

The Government launched a report by the Gender Recognition Advisory Group (GRAG) in July 2011 and recommended a pathway to legal recognition for transgender people (Recognition). However, these recommendations were unduly restrictive.

The GRAG proposed that in order to apply for Recognition, a person must have:

- (a) a formal diagnosis of Gender Identity Disorder (GID) plus relevant supporting medical evidence, or
- (b) medical evidence that the applicant has undergone gender reassignment surgery, or
- (c) evidence of the recognition of changed gender in another jurisdiction.

A diagnosis of GID is a controversial issue in transgender communities as it positions transgender people as having an illness or disorder. In September 2011, the European Parliament called for GID to be removed from the list of mental disorders and reclassified. The Commissioner for Human Rights for The Council of Europe has also agreed stating; *“The fact that ‘transsexualism’ and ‘gender identity disorder’ are often found in medical classifications for mental illness can stigmatise trans persons [ . . . ]”*

Legislation should not have the effect of stigmatising people. Forcing a person to undergo medical treatment in order to obtain a

legal right would be a requirement that runs against the principles of human rights and human dignity.

Under the GRAG, a recommendation of a diagnosis of GID will only allow people who are transsexual to apply for Recognition. This would exclude many transgender people and intersex people. People with intersex conditions cannot be diagnosed with GID because it is one of the exclusion criteria. A major barrier to gender recognition using this procedure is that there are very few mental health professionals in Ireland who have the experience or willingness to diagnose GID.

Most importantly, individuals should not have to be diagnosed with a mental illness in order to access a basic human right.

The purpose of *Section 6* is to ensure that transgender people who are younger than eighteen years old and wish to have their gender amended can make requests under Section 4 through their legal representatives to the District Court, with explicit agreement by the minor. It is important to recognise that there may be occasions where an application may be made by a person under 18 but the Court must take into account the capacity of the child to make decisions as per the terms of the UN Convention on the Rights of the Child.

*Section 7* sets out the responsibility of the Office of the Registrar General to issue new birth certificates for an applicant.

*Section 8* prohibits any reference to the current law in the amended birth certificate or any new identity documents issued on foot thereof. This is an absolutely essential requirement for any person who has their gender changed under the law in order to ensure that their rights to dignity and privacy are upheld.

*Section 9* ensures that any 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.

The GRAG proposes that people in an existing valid marriage or civil partnership should be excluded from applying for Recognition. It is important to note the following:

- (a) As Commissioner for Human Rights for The Council of Europe, Thomas Hammarberg urged countries to remove all restrictions for married applicants in gaining Recognition,
- (b) The GRAG based their recommendations on the UK system, which provides an “informal fast track process”: married couples can divorce and get a civil partnership in 48 hours. No-one has to move out of the family home, and the children do not need to know that their family was legally broken apart, however temporarily. Divorce in Ireland is subject to more restrictive and demanding conditions than in the UK, and this can only be altered by an amendment to the Constitution,
- (c) In order to get a divorce, spouses in Ireland must have been living apart for 4 out of the previous 5 years. It may not be possible for happily married applicants to satisfy this requirement, as the phrase “living apart” refers to the mental and physical state in which both people are living genuinely separate lives,

- (d) Spouses must also show that there is no reasonable prospect of reconciliation. This means the only way for happily married applicants to get a divorce would be to commit perjury before a court,
- (e) Austria and Germany are similar to Ireland in that they do not permit same-sex marriage. However, in 2006 the Austrian Constitutional Court held that being married should not prevent Recognition. In 2008, the German Constitutional Court decided that requiring people to be unmarried in order to gain Recognition violated the Basic Law (German Constitution),
- (f) Forcing people to divorce would be likely unconstitutional under Article 41.1, which states: “The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”

The purpose of *Section 10* is to ensure that a change made under *Section 4* can be amended with the consent of the District Court. This is especially important for those who may have been born Intersex.

Intersex is an umbrella term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't fit the typical definitions of female or male. A person with an intersex condition may have elements of both male and female anatomy, have different internal organs than external organs, or have anatomy that is inconsistent with chromosomal sex. These conditions can be identified at birth (where there is obviously ambiguous genitalia), at puberty (when the person either fails to develop certain expected secondary sex characteristics, or develops characteristics that were not expected), later in adulthood (when fertility difficulties present) or on autopsy.

Many individuals who are intersex do not identify as transgender or do not consider themselves covered by the transgender umbrella. However some intersex children may have their gender decided by their parents at birth, and then grow up to identify with a different gender, so it is important that the Court has the capacity to make changes as appropriate.

*Section 11* ensures that only persons authorised by a document holder may access an original birth certificate once it has been amended, and further makes it illegal to make this information public or “out” a person's transgender status.

*Section 12* ensures that the Office of the Registrar General shall provide information about the change of the birth certificate to the National Vetting Bureau and other bodies as determined by the Minister through the publication of regulations in accordance with the provisions of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

The purpose of *Section 13* is to ensure that where a person under 18 is seeking access to total or 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 and that no extra hurdle is placed in front of a transgender person seeking to access treatments.

*Section 14* is designed to ensure that where a person under 16 makes an application to the District Court for treatments, the Court is compelled to make a decision taking into account the evolving

capacity and best interest of the person as outlined in the UN Convention on the Rights of the Child, and furthermore to ensure a decision is made in a timely manner.

The purpose of *Section 15* is to provide a non-discrimination clause.

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity and it is essential that this is recognised in law. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

It is essential that the state embodies the principles of equality and non-discrimination on the basis of sexual orientation and gender identity within its legal framework. Under the Yogyakarta Principles the State has an obligation to adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity, and to take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups' or individuals' equal enjoyment or exercise of human rights. In all its responses to discrimination on the basis of sexual orientation or gender identity, the State must take account of the manner in which such discrimination may intersect with other forms of discrimination. It is essential that the State takes all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours related to an idea of inferiority or superiority of any sexual orientation, gender identity or gender expression.

The purpose of Section 16 is to make it an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person. There may be certain categories of person who, due to their profession or position (such as government employees and members of An Garda Síochána), have access to protected information regarding a person who has had their recorded gender changed. This sections sets out the parameters of the offences, as well as a range of defences to any charge.

*Deputy Aengus Ó Snodaigh,*  
*22 Bealtaine, 2013.*