

# **Recognising transgender persons in Ireland**

**A response to the Recommendations of the Gender Recognition Advisory Group for a Gender Recognition Act**

**FLAC**

**September 2011**

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## Introduction

Dr Lydia Foy, a transgender woman, began her long and difficult struggle to secure recognition of her female gender identity in 1993 when she applied to the General Register Office for a birth certificate showing her gender as female. After four years of fruitless correspondence she felt she had no option but to issue legal proceedings in the High Court in 1997.

Ten years later, in October 2007, the High Court finally held that the failure of Irish law to provide for the recognition of transgender persons in their acquired or perceived gender was a breach of the European Convention on Human Rights. It took another three and a half years before the State withdrew its appeal to the Supreme Court and accepted the High Court ruling that it was under a clear and binding obligation to bring in transgender legislation.

Ireland had become one of the last states in Europe to make provision for this small group of people who have suffered much humiliation, ostracism and misunderstanding over very many years.

It was as a direct result of Lydia Foy's courageous and lonely battle that the Government set up a Gender Recognition Advisory Group in 2010 to make recommendations for legislation to grant legal recognition to transgender persons.

FLAC (Free Legal Advice Centres) has represented Lydia Foy since 1996 in her struggle for recognition for herself and for all transgender people and in that capacity we make these comments on the Report and Recommendations of the Gender Recognition Advisory Group published in July 2011.

FLAC first of all welcomes the firm commitment by the Minister for Social Protection, Joan Burton TD, made at the launch of the Advisory Group Report, to bring in long overdue legislation to afford recognition, respect and inclusion to this very marginalised community.

We welcomed the establishment by the previous Government of the Gender Recognition Advisory Group to make recommendations for Transgender legislation and we made written and oral submissions to the Group. However, we regretted that it did not include representatives of the transgender community who could have brought to it the lived-in experience of those who would be most directly affected by the proposed legislation. Had it included transgender persons, it might have avoided some problems and its recommendations would have carried more authority.

Nevertheless, we welcome the Report of the Advisory Group, which clearly and unambiguously recommends full legal recognition of transgender persons in their acquired or perceived gender for all purposes and of their right to marry or enter into civil partnerships in that gender. However, we also have concerns about some of the report's recommendations, which we feel are discriminatory and tend to stigmatise transgender persons.

We make these comments on the Advisory Group's recommendations in a constructive spirit and in the hope that when the legislation is drafted, it will discard some unnecessarily restrictive

and possibly unworkable provisions in those recommendations and opt instead for a more liberal and inclusive scheme that benefits from the experience of other European countries and embodies current European best practice.

We would also suggest that when introducing the Gender Recognition Bill in the Oireachtas, the Minister would take the opportunity to express the Government's regret for the misunderstanding, exclusion and discrimination that transgender persons have suffered for so long.

## Recommended Provisions

### Preliminary:

#### **A. A Binding Obligation**

1. It is important to stress from the beginning that the introduction of a Gender Recognition Bill is not an optional extra. It is a legal obligation. After a series of cases in the 1980s and 1990s in the course of which it worked out its position, the European Court of Human Rights held in the case of **Goodwin v The UK** in 2002 that the UK was in breach of the European Convention on Human Rights because of its failure to introduce transgender legislation. The Court stated that:

In the 21<sup>st</sup> century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.<sup>1</sup>

2. The UK quickly brought in the **Gender Recognition Act, 2004** on which the Advisory Group's proposals are largely based.
3. Since 2002 the Court of Human Rights has reaffirmed this position in a series of transgender cases. And in **L v Lithuania** in 2008 it repeated that:  

States are required, by their positive obligation under Article 8 [of the Human Rights Convention], to implement the recognition of the gender change in post-operative transsexuals through, inter alia, amendments to their civil status data with its ensuing consequences.<sup>2</sup>
4. The Court of Justice of the European Union has also condemned unequal treatment of transgender persons in areas covered by EU law and has now incorporated much of the Human Rights Convention and the jurisprudence of the European Court of Human Rights directly into EU law through the EU Charter of Fundamental Rights, which is binding in all cases where EU law is involved.

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<sup>1</sup> *Christine Goodwin v. UK*, 35 EHRR 447; [2002] ECHR 588 (11 July 2002).

<sup>2</sup> *L v. Lithuania*, 27527/03, [2007] 725 (11 September 2007).

5. So it is now a question of the content of the Bill to be introduced, not of whether legislation should be introduced or not. But because we are introducing legislation well after many other European States, we have an opportunity to learn from what others have done and introduce legislation that follows the best practice that has developed.

#### **B. Terminology:**

6. The Advisory Group uses the term 'transsexual' throughout to refer to the community of persons who experience a dissonance between their perceived and felt gender identity on the one hand and their physical sexual characteristics and the gender on their birth certificates on the other hand.
7. Despite the fact that the European Court of Human Rights has used the term 'transsexual' in the judgment referred to and in its judgments generally, many in the transgender community are unhappy with the use of 'transsexual' as a general term and some use it to refer more specifically to persons who have had gender reassignment surgery to bring their physical characteristics more into line with their perceived gender identity.
8. We would suggest that the Gender Recognition Bill should use the term 'transgender' throughout to refer to the general transgender community.

#### **The Scheme for Gender Recognition:**

9. We are in broad agreement with the overall scheme for Gender Recognition, i.e. that there should be an independent, quasi-judicial, Gender Recognition Panel to receive and decide upon applications for recognition in the opposite gender to that in which the applicant has been registered. Recognition should be for all purposes, including marriage and civil partnership, and the applicant should be regarded as legally being of the acquired gender from the date of recognition. We also agree that there should be provision for an appeal by an unsuccessful applicant to the Circuit Family Court with the same rules about confidentiality that apply in family law cases.
10. Responsibilities incurred prior to recognition, especially family responsibilities, should be unaffected by recognition. Those recognised in their acquired gender should receive new birth certificates in the acquired gender and while the original record would not be erased, access to it should be strictly limited. And information about an individual's gender recognition status should be protected by the Data Protection Act.
11. We agree that the Minister should be empowered to make regulations and publish guidelines in relation to the administration of the scheme and we would suggest that this power should also include drawing up codes of conduct and best practice for those administering the scheme and also for those interacting with transgender persons either in

transition or subsequent to recognition, e.g. in schools, the health service, the Garda, employers and service providers.

12. We would suggest that the Gender Recognition Panel or a dedicated unit in the Department of Social Protection should have a role in drawing up guidelines and codes of conduct and also disseminating public information about the Scheme and recommended best practice.

### **Qualifications:**

13. It is in the area of the qualifications required for transgender recognition that we have the most concerns.

#### **A. Medical Criteria:**

14. We must first of all welcome, however, the fact that the Advisory Group has recommended that gender reassignment surgery should not be a precondition for recognition in the gender opposite to that allocated at birth. The countries in Europe which first legislated for transgender recognition, 20 to 30 years ago, made reassignment surgery a precondition and the cases which have come before the European Court of Human Rights so far have generally involved persons who have had reassignment surgery so that the court's decisions have been couched in terms of post-operative transgender applicants.
15. However as awareness and understanding of transgender issues has grown, it has become clear that a significant number of transgender persons are unable or unwilling to undergo the drastically invasive surgery required for full gender reassignment, or even the very intensive hormone treatment required by many of those who have not undergone surgery. In a number of cases, medical practitioners have advised against surgery where the persons concerned are frail or have other medical conditions which would make surgery dangerous or even life-threatening.
16. As a result, the question has increasingly arisen whether it is acceptable or proportional to impose, as a precondition for recognition, surgery or other treatment which is contra-indicated by the applicant's medical advisors, or which the applicant does not wish to undergo.
17. A number of countries which have introduced Gender Recognition legislation more recently, notably the UK, Hungary, Spain and Portugal, have not included a requirement for gender reassignment surgery. In Austria, which did require mandatory reassignment surgery until recently, the Constitutional Court held in December 2009 that such a requirement was contrary to the Constitution.<sup>3</sup> On 11 January 2011, the German Constitutional Court struck down a mandatory surgery requirement saying that "Gender reassignment surgery constitutes a massive impairment of physical integrity, which is protected by Article 2.2 [of

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<sup>3</sup> Austria, Constitutional Court: *Verfassungsgerichtshof/* B 1973/08 (03.12.2009).

the Basic Law, i.e. the German *Grundgesetz* or Constitution] and it involves considerable health risks and side effects for the person involved".<sup>4</sup>

18. The Constitutional Court held that it was not permissible to impose such a risk as a condition of securing the transgender person's right to sexual self-determination, which was protected by the Basic Law.
19. And on 11 March 2011, the Rome Civil Tribunal held that gender reassignment surgery should not be a pre-condition of granting gender recognition despite a previous perception that this was mandatory under Italian law.<sup>5</sup>
20. It seems clear that there is an emerging view that to require gender reassignment surgery as a precondition is disproportionate and unfair or "clearly run[s] against the principles of human rights and human dignity" as the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, put it in his weekly *Human Rights Comment* on 31 August 2010.<sup>6</sup>

#### **B. Other Medical Evidence:**

21. The Advisory Group recommends that an applicant who has not had gender reassignment surgery or been granted recognition in another country, should be required to submit:
  - a formal diagnosis of GID [Gender Identity Disorder] by one or more qualified mental health professionals, plus confirmation that the applicant is not suffering from any debarring mental health condition, plus supporting relevant medical evidence such as details of treatments undergone or in progress (hormone therapy, minor surgery or treatments to change facial appearance, gender reassignment surgery etc.) if available.
22. The term Gender Identity Disorder or Dysphoria, is disliked by many transgender persons as, combined with the fact that the diagnosis is sought from mental health professionals, they feel it suggests that they are suffering from a mental disorder, which is not the case. Unfortunately, this term is used in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, which is widely used internationally, but the Advisory Group's Report notes that there is a proposal within the psychiatric profession to replace it with the more neutral term 'Gender Incongruence'.
23. We suggest that the wording in the Gender Recognition Bill should be amended to read something like this:
  - a formal statement by one or more qualified medical professionals that the applicant's perceived gender identity is not congruent/consistent with her/his currently assigned gender...

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<sup>4</sup> German Federal Constitutional Court: 1 BvR 3295/07 (11 January 2011).

<sup>5</sup> Italy: *Tribunale di Roma, Sentenza, N. 5896* (11-3-2011).

<sup>6</sup> "Forced Divorce and Sterilisation – a reality for many transgender persons", Council of Europe Commissioner for Human Rights: "Human Rights Comment", 31 August 2010; [http://commissioner.cws.coe.int/tiki-view\\_blog.php?blogId=18bl-y](http://commissioner.cws.coe.int/tiki-view_blog.php?blogId=18bl-y)

24. We also suggest that the reference to confirmation that the applicant is not suffering from any debarring mental health condition should be deleted. It might be seen as offensive and we suggest that it should be possible to rely on the integrity of reputable medical practitioners to ensure that they would not supply statements of the kind referred to above if they thought the applicant was suffering from some condition that impaired her/his ability to make a rational and considered decision.
25. It should also be made clearer that the supporting medical evidence referred to is intended to be supportive and confirmatory of the statement by the medical professional but is not essential to an application.

**C. Marital and Civil Partnership Status:**

26. The Advisory Group recommends that an applicant for gender recognition “cannot be in an existing valid marriage or civil partnership”.
27. The Advisory Group Report acknowledges that this was the most contentious issue they had dealt with and that in the consultation they had carried out, “those submissions that expressed a view were unanimous that married persons should not be excluded”. The reason given by the Advisory Group for excluding married persons or insisting on ‘compulsory divorce’ where an applicant was already married, was that otherwise the granting of gender recognition certificates would turn a very small number of heterosexual marriages, where one spouse had changed gender, into same-sex marriages.
28. The Group took the view that this would contravene the protection of marriage in the Constitution given that the Irish courts had held that marriage could only be between a male and a female and that following recognition of one spouse’s acquired gender, both spouses would then be of the same gender.
29. It may seem surprising to some that a married couple would want to stay together if one spouse has transitioned from one gender to the other. However, evidence from the UK and other European countries indicates that in a small number of marriages, especially of older persons, the non-transgender partner has assisted and supported the transgender partner through the transition process and they have continued and want to continue in a loving relationship.
30. This issue has been raised in the UK where the Gender Recognition Act, 2004 contains a ‘compulsory divorce’ provision and at least two couples who did not wish to divorce challenged the ‘compulsory divorce’ provision before the European Court of Human Rights. The European Court noted in its decision in November 2006 that the UK law “clearly puts the applicants in a quandary – the first applicant must, invidiously, sacrifice her gender or their



marriage". The court added that this amounted to "a direct and invasive effect upon the applicants' enjoyment of their right to respect for their private and family life".<sup>7</sup>

31. However, the UK Act provides for the granting of an interim Gender Recognition Certificate which enables the couple in question to obtain a fast track divorce. In theory they can then enter into a Civil Partnership within days, thus continuing their relationship with the minimum of interruption. The Court of Human Rights felt that in those circumstances, the requirement was not disproportionate as the inconvenience to the couples was not very great. As a result, the court held that the complaints were inadmissible.
32. In Ireland, however, the Constitution requires that spouses seeking a divorce must have lived apart from one another for four years and the court to which the application is made must be satisfied that "there is no reasonable prospect of a reconciliation between the spouses". This is clearly very different from the situation considered by the Court of Human Rights as no relationship would be likely to survive the compulsory separation for four years, never mind the provision that the relationship should have irretrievably broken down, which would require that spouses who did not wish to separate would have to perjure themselves or have a miraculous reconciliation almost immediately after the divorce.
33. It is unlikely that the Court of Human Rights would so readily dismiss a complaint about this issue from an Irish couple as it could not be said in the Irish context that requiring the spouses concerned to divorce would cause only minimal inconvenience.
34. This issue has largely been resolved in the seven Council of Europe states that allow same-sex marriage (Belgium, Iceland, Netherlands, Norway, Portugal, Spain and Sweden) but it has been argued out in the courts of Austria and Germany, neither of which allow same sex marriage and both of which required married transgender persons to divorce as a condition of securing legal recognition in their acquired gender. The Austrian Constitutional Court held in June 2006 that an existing marriage should not stand in the way of one of the spouses obtaining recognition of her/his acquired gender.<sup>8</sup>
35. The German decision was particularly relevant to the Irish situation as the legal provisions in question were very similar to those in Ireland. The German Basic Law (Constitution) contains a strong protection of marriage and the German courts have held that marriage must be between a male and a female. The divorce law also requires that the couple must have lived apart for three years before applying for a divorce and that the marriage itself must be "damaged" before a divorce can be granted.
36. The German Constitutional Court on 27 May 2008 held that to force or pressure spouses to divorce against their wishes undermined the protection of their marriage provided by the Constitution.

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<sup>7</sup> *Parry v. UK*, Application No. 42971/05, Admissibility Decision, 28 November 2006 and *R. and F. v UK*, Application No. 35748/05, Admissibility Decision, 28 November 2006.

<sup>8</sup> Austria, Constitutional Court; *Verfassungsgerichtshof* B947/05 (21.06.2006).

37. The Court said that the 'compulsory divorce' provision in Germany's 'Transsexual Law' makes the realisation of one fundamental right [recognition of one spouse's gender identity] contingent on renouncing the other [the right to marriage]. This leads the persons concerned not only to a virtually unsolvable internal conflict, but also to an unacceptable impairment of fundamental rights. S. 8.1 no. 2 TSG [the Transsexual Law] is hence unconstitutional because it does not afford to a married transsexual the possibility to obtain legal recognition of his or her new gender affiliation without having to terminate his or her marriage.<sup>9</sup>

The German parliament repealed the relevant section of the Transsexual Law in July 2009.

38. In Sweden in 2010, despite the legalisation of same-sex marriage, the National Board of Health and Welfare had refused to accept an application for legal recognition by a transgender spouse because the applicant's marriage had not been dissolved. The Stockholm Administrative Court in September 2010 overturned the decision holding that such a requirement was in breach of Article 8 of the European Convention on Human Rights.<sup>10</sup>

39. The German and Swedish decisions were made subsequent to the decisions of the Court of Human Rights in the UK 'compulsory divorce' cases referred to above, and the Swedish decision in particular was based specifically on the applicant's rights under the European Convention on Human Rights. These decisions suggest a changing consensus in Europe on the issue of 'compulsory divorce' as a precondition for recognising transgender persons. In an Issue Paper on "Human Rights and Gender Identity" published in July 2009, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, called on all Council of Europe member States to "remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender".<sup>11</sup>

40. We would also suggest that to compel a transgender spouse to apply for a divorce against her/his wishes, and where the marriage has not broken down, as a condition of recognising her/his acquired gender would be a clear violation of the protection of marriage in Article 41.3.1 of the Irish Constitution<sup>12</sup> as the couple would presumably be in a validly contracted and subsisting marriage. It would also, of course, constitute an interference with the rights of the non-transgender spouse who wants to continue in the marriage.

41. The question of whether a person is married or not, has also, of course, got nothing to do with the determination of whether s/he is a transgender person whose perceived gender identity does not accord with the gender assigned at birth.

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<sup>9</sup> German Federal Constitutional Court, 1 BvL 10/05 (27 May 2008). Press release No. 77/208 by the Court, 23 July 2008, "S. 8.1 no. 2 of the Transsexuals Act unconstitutional".

<sup>10</sup> Sweden, *Förvaltningsrätt i Stockholms dom*, Case No. 21170-10 (14 September 2010).

<sup>11</sup> Commissioner for Human Rights: *Issue Paper "Human Rights and Gender Identity"*, Council of Europe, Strasbourg, July 2009.

<sup>12</sup> "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".

42. We suggest that the requirement that an applicant should not be married or in a Civil Partnership should not be included in the Gender Recognition Bill. The result might be a legal anomaly but if so, it would affect only a tiny handful of people with no wider consequences. It would not create a backdoor route to same sex marriage as such a situation could only arise where two persons had contracted a valid heterosexual marriage and one of them had subsequently transitioned to the opposite gender with the agreement of the non-transgender spouse. No-one is likely to do all that just to contract a same sex marriage.
43. We suggest that to include the suggested 'compulsory divorce' clause would inevitably result in early litigation which would be very likely to lead to the striking down of the provision in any event.

**D. Minimum Age Requirement:**

44. We welcome the fact that while recommending a minimum age of 18 for formal transgender recognition, the Advisory Group also recommended that time spent living in the role of the applicant's perceived gender before the age of 18 can be taken into account to satisfy the proposed two-year 'living in role' requirement. Not to do so would effectively mean setting a minimum age of 20.
45. In today's more open climate of discussion and with increasing understanding of gender diversity and the right to personal self-determination, some transgender persons are beginning to question their allocated gender identity at a much younger age and seek assistance. Such approaches, especially from teenagers at a very vulnerable stage of their lives, should be treated with sympathy and understanding and it should be made possible for them to take such steps as are recommended towards conforming to their perceived gender identity, such as living in that role and taking hormone treatment under medical supervision.
46. Transgender young people engaging in treatment and endeavouring to live in the gender opposite to that allocated at birth can be very vulnerable to bullying, harassment and even physical attack, especially while still at school. Such a situation can also be difficult for school managers and other official agencies unless they have clear guidelines on how to deal with it.
47. An example of sensitive and supportive treatment in such a situation was given in the Australian case of 'Re: Alex'<sup>13</sup> in 2004 where the Chief Justice of the Family Court of Australia, on medical advice, authorised hormonal treatment for a transgender female to male 13 year old and ordered that he should be enrolled in school under a male name.
48. The court made further orders in 2009 when 'Alex' was 17, allowing him to have a double mastectomy to bring his body more in line with his perceived male gender.<sup>14</sup> The detailed

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<sup>13</sup> "Re Alex" [2004] FamCA; 180 FLR 89; [2004] FLC 93-175; 31 Fam LR 503, Family Court of Australia, 13 April 2004.

<sup>14</sup> "Re Alex" [2009] Fam CA 1292.

judgments in this case demonstrate the sympathetic way in which the courts, the education authorities and the social services dealt with a young person at a very difficult stage in his life.

49. We suggest that protocols and guidelines should be developed to provide for methods of recognition and support for transgender young persons which would enable them to live in the role of their perceived gender and obtain appropriate treatment, support and assistance. A commitment to develop such protocols and guidelines could be given during the introduction of the Bill.

#### **E. Prohibition of Discrimination and Incitement to Hatred on Grounds of Gender Identity:**

50. In our Submissions to the Advisory Group, FLAC suggested that the Employment Equality Acts, 1998 to 2008 and the Equal Status Acts 2000 to 2008 should be amended to include 'transgender status' as well as 'gender' among the grounds on which discrimination is prohibited. However, the Advisory Group stated that the existing legislation is sufficient to deal with discrimination against transgender persons. The Advisory Group Report relied upon the case of **Hannon v First Direct Logistics Ltd.** decided in March 2011, in which the Equality Officer stated that

It is well established that the gender ground protects transgender persons from sex discrimination, that is discrimination arising essentially if not exclusively on the sex of the person concerned. Such an approach was approved by the European Court of Justice in *P v S and Cornwall County Council* (Case C-13/9)...<sup>15</sup>

51. While the decision in the case of Ms Hannon was very welcome and dealt with someone in the course of transition from her originally allocated gender rather than someone who had undergone gender reassignment surgery, we would still suggest amending the Equality Acts to include transgender status for two reasons.
52. One reason is that specifically naming transgender status would increase awareness among employers, service providers and the general public, as well as members of the transgender community themselves, that discriminatory treatment, whether direct or indirect, against transgender persons is clearly prohibited.
53. The second reason is to remove any possible ambiguity or doubt that the prohibition of discrimination covers all transgender persons, including those in the course of transition to their perceived gender and those who have opted not to undergo surgery, as well as those who have had gender reassignment surgery.
54. The UK **Equality Act 2010** has included 'gender reassignment' among the 'Protected Characteristics' in relation to which discrimination is prohibited and has then defined 'gender reassignment' inclusively, saying that

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<sup>15</sup> *Hannon v. First Direct Logistics Limited*, Equality Tribunal, Dec –E2011-066 (29 March 2011).

A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.<sup>16</sup>

55. We suggest that a similar amendment to the Equality Acts here would amount to best practice and remove any doubts as to the scope and requirements of the legislation in relation to transgender persons. We note that the **Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010** amended the Equality Acts to remove any doubts about the extent to which discrimination against persons in civil partnerships was prohibited as well as discrimination against married persons.
56. We also suggest that the Prohibition of Incitement to Hatred Act, 1989, which currently prohibits incitement to hatred on the basis of 'sexual orientation', should be amended to include incitement to hatred on the basis of 'transgender status' as well, as 'sexual orientation' could not be taken to include transgender status.

#### **F. Guidelines and Protocols:**

57. While the obligations of employers, public authorities and service providers may be clear in relation to transgender persons who have had their perceived gender recognised under the Gender Recognition Bill, and who are legally of that gender for all purposes, more confusion may arise in relation to persons in the process of transition or who are living in their perceived gender without formal recognition.
58. In particular, persons who are living in the role of their perceived gender as part of the requirements for gender recognition could encounter embarrassment and humiliation when asked to produce documentation which does not correspond to the gender in which they present themselves. There is a need for agreement on some procedure and form of interim documentation to avoid misunderstanding and ensure sensitivity and respect in the treatment of persons in this position by public authorities, service providers etc.
59. We suggest that protocols and guidelines outlining the obligations and responsibilities of employers, public authorities and service providers and explaining the rights and entitlements of transgender persons would be of considerable assistance and note that the Gender Recognition Panel and Government Equalities Office have published such guidelines in the UK.

#### **G. Residency Requirement:**

60. We welcome the proposal that transgender recognition should be open to persons whose birth is registered in Ireland and persons who are 'ordinarily resident' in Ireland. It would be invidious and unfair if persons who had been living in Ireland for a significant period and who otherwise qualified for recognition in their perceived gender, were excluded from qualification simply because their births were not registered here.

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<sup>16</sup> Equality Act, 2010, Sections 4, 7, 14, 16, 19 and 25.

61. The Advisory Group uses the term 'ordinarily resident' in the sense that is "widely used in Irish legislation and administrative practice".<sup>17</sup> This is somewhat vague, however, and we suggest it should be clarified to make clear that it includes persons living here pursuant to work permits and their dependants, and persons living here by permission of the Minister for Justice and Defence while awaiting decisions on asylum applications or following the granting of subsidiary protection or leave to remain in the State, and who have been here for a significant period of time such as 12 months.
62. It is well-known that people can spend a number of years in the asylum process and that among those whose asylum or subsidiary protection applications are unsuccessful, a number are subsequently given what is popularly known as 'humanitarian leave to remain', renewed at periodic intervals. We suggest it would be unreasonable and disproportionate to refuse transgender recognition to people in this position who would otherwise qualify for such recognition. We would suggest that the only additional criteria for persons whose birth is not registered here should be residence for 12 months by right (e.g. UK citizens and EEA workers), on foot of a work permit, or pursuant to permission granted by the Minister.

#### **H. Intersex Cases:**

63. Another issue raised with the Advisory Group in the course of their consultations was that of persons with intersex conditions, that is persons born, as the Advisory Group put it, "with a reproductive or sexual anatomy that does not fit the typical definitions of female or male".<sup>18</sup> The Advisory Group felt unable to include intersex persons in the Gender Recognition Scheme.
64. FLAC does not have sufficient knowledge or experience in relation to this condition to make specific recommendations as to how it should be dealt with in this Bill. We have no doubt, however, that life for persons with this condition must be just as difficult and painful as it is for members of the transgender community and that they are equally entitled to have measures taken to enable them to have their perceived gender identity recognised.
65. We suggest that in introducing this Bill, the Minister might undertake to establish a working group to consider the issue of persons with an intersex condition with a view to introducing amending legislation to provide recognition and support for this group in due course.

## **Conclusion**

In conclusion, we reiterate our welcome for the Government's commitment and that of the Minister for Social Protection in particular to the early introduction of legislation to protect and respect the rights and dignity of transgender persons in Ireland. We welcome as well the broad outline of the scheme for a Gender Recognition Bill recommended by the Gender Recognition Advisory Group.

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<sup>17</sup> Gender Recognition Advisory Group: *Report*, paragraph 5.3, page 28.

<sup>18</sup> *Ibid*, paragraph 5.8.3, page 34.

We are concerned about some of the recommendations of the Advisory Group as indicated in this submission and we would urge the Minister and the Government to adopt a broad and inclusive approach following the example of those states which have in recent years relaxed the preconditions required for transgender recognition. Let us put the emphasis on helping and facilitating a group of people who have suffered much in the past rather than put any further obstacles in their way.