

Trans Rights

A detailed analysis of access to gender affirming treatments by minors and the differing approaches taken by Member States in the European Union



Definitions

Transgender

Designating a person whose sense of personal identity and gender does not correspond to that person's sex at birth, or which does not otherwise conform to conventional notions of sex and gender.

Cisgender

Designating a person whose sense of personal identity and gender corresponds to his or her sex at birth; of or relating to such persons.

Pronouns

A word that is used instead of a noun or noun phrase.

Examples: He, She, They

Transition

Where an individual makes changes to identify to the gender to which they relate to.



Irish Legal Environment

Irish Constitution:

The rights of children are provided for under Article 42A of the Constitution which was added to the Constitution following the referendum of children's rights in 2012.

Article 42A.1

The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.



Irish Legal Environment

Irish Constitution:

- Permits the Court to recognise the rights of minors on an individual basis
- Provides clarity to the circumstances in which the State may intervene to safeguard a minor
- It transfers the mechanism of intervention from centering exclusively on a parent's failure to the effect of such failure on a minor



Irish Legal Environment

Children and Family Relationships Act 2015:

- Section 63 of the Children and Family Law Relationships Act 2015 inserted a new section 31 into the Guardianship of Infants Act 1964.
- Section 31 provides for a considerable list of factors to be taken into consideration by a Court in ascertaining what is best for a child in proceedings relating to custody, guardianship, access, or rearing of a child



Gender Recognition Act 2015

- Creation of a system whereby applicants aged 18 years and above may apply to the Minister for Social Protection for their favoured gender to be acknowledged for the entirety of legal motivations



Gender Recognition Act 2015

Gender Change: 16 & 17 years of age

- Application is brought by the minors 'next friend'
- Application to the Circuit Court for an exemption from the 18 years of age restriction
- The Circuit Court must be satisfied that a child's parent consents to such an application
- Certification from a child's primary medical practitioner (The Act considers this to be a child's endocrinologist or psychiatrist)



Gender Recognition Act 2015

Gender Change: 16 & 17 years of age

- Certification of an endocrinologist or psychiatrist, with no connected to the child certifying the same opinion which coincides with opinion of a child's primary medical practitioner
- Gender Recognition Certification



Applications and outcomes for Gender Recognition Certificates (16&17 years of age)

YEAR	APPLICATIONS RECEIVED IN THE YEAR	APPLICATIONS GRANTED IN THE YEAR	APPLICATIONS REFUSED	MALE TO FEMALE	FEMALE TO MALE
2022	3	3	0	0	3
2021	1	1	0	0	1
2020	1	1	0	0	1
2019	2	1	0	1	0
2017	2	2	0	0	2

Source: Department of Social Protection: Gender Recognition Act 2015 Annual Report 2022



Gender Recognition Act 2015

Criticisms:

- Breach of a child's rights under Article 42A of the Constitution
- Breach of rights contained within Article 5 of the UN Convention on the Rights of the Child to utilise their rights under the guidance of their parents in a manner which is consistent with a child's capacity that is consistently developing



United Kingdom

Gender Recognition Act 2004

Trans individuals may change their legal gender by virtue of the Gender Recognition Act 2004

The requirements which must be met are provided for by Section 2 of the Gender Recognition Act 2004 include:

- A medical diagnosis of gender dysphoria
- Proof of having lived for a minimum of two years in their acquired gender e.g. passport, bank statements
- Statutory declaration that they intend to live in their acquired gender until death



United Kingdom

Gender Recognition Act 2004:

Section 1(a) Gender Recognition Act 2004:
Minimum age for legal gender recognition is 18 years

Mental Capacity Act 2005:

A child who is aged 16 or 17 are presumed to possess capacity unless there is evidence which proves otherwise.



Gillick Competence

A child under 16 years of age is only permitted to consent to treatment if they are deemed to be competent under the Gillick test. ***Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112, [1985] 2 All ER 402, [1985] 3 WLR 830 (HL)***

A child **must**:

1. Possess sufficient understanding of the nature of their medical condition and the proposed treatment
2. Possess sufficient understanding of the family and moral issues concerned
3. Possess certain life experience
4. Not waiver between a state of incompetence and competence
5. Can suitably consider the information to make such a decision



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Gillick Competence

- If a child does not possess the competency as required by *Gillick*, the consent of an individual who possesses parental responsibility is required
- If a parent does not consent to such treatment the Court possesses the authority to grant the necessary consent for treatment in circumstances whereby a child's mental health is at paramount risk if the child does not undertake the treatment



Gillick Competence & Confidentiality

- A child who is considered to be Gillick competent possesses an entitlement to confidentiality. It is not permitted for medical practitioners to breach such a right by informing the parents of a child of the proposed treatment or medical issues.
- A child should be encouraged by a medical professional to talk to their parents about the treatment
- If a child opposes to such or does not permit the medical professional to talk to their parents and the situation places the child's physical and mental health at risk, in the best interests of the child a practitioner is entitled to administer treatment in the absence of parental consent if a child is Gillick competent under the Lord Fraser Guidelines



Netherlands

Transgender Law, Article 1:28 of Civil Code (Transgenderwet)

Article 1:28 of the Civil Code was adjusted in 2014.

Amendment reinforces the right to physical integrity and self determination.

The amendment abolished the requirements for trans individuals to:

- Undergo gender reassignment surgery to alter their physical appearance to have their gender legally recognised.
- ‘Sterilisation Requirement’ - A transgender individual was required to be infertile to modify their preferred gender to their birth certificate.



Netherlands

The former Minister for Legal Protection, Sander Dekker stated that:

'Transgender people were faced with a difficult, almost impossible choice under the old law. It was only possible to change the gender designation after a physical transition and completely abandoning the wish to have children. Such a violation of physical integrity is no longer conceivable in this day and age.'



Netherlands

Transgender Law, Article 1:28 of Civil Code (Transgenderwet)

Requirements:

- An individual must be 16 years of age. Children below the age of 16 may not have their gender changed
- Statement from an expert (may include a doctor, psychologist or psychotherapist) which certifies an individual's decision to change gender. The statement must provide that an individual understands the consequences of such a decision.





Questions?



Thank you

