

LICENSE TO BE YOURSELF:

TRANS CHILDREN AND YOUTH



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INTRODUCTION

In 2014, the Open Society Foundations produced *License to be Yourself*, a report on progressive gender recognition laws and policies for trans people, and the activist strategies behind them.¹

This brief is one of four complementary resources for activists. Each brief summarizes key arguments made by those opposing access to legal gender recognition. This resource focuses on minimum age restrictions that deny trans children and youth the right to legal gender recognition. It provides arguments that can be used by those advocating for rights-based gender recognition laws and policies.

This brief also introduces issues relevant to children and young people with intersex variations. It recognizes that children with intersex variations often face a complex series of interactions with the medical system in order to obtain an initial sex classification.

WHY LEGAL GENDER RECOGNITION IS IMPORTANT FOR CHILDREN AND YOUTH

There is evidence that social transition can greatly improve a trans child's emotional well-being.² It promotes better mental health, and improves self-esteem and confidence. Yet social transition can be very difficult if it is not formally recognized through some type of legal gender recognition process.

Social transition is not an option for many trans children and youth during the significant portion of the day when they are at school. School uniforms or dress codes, including regulated hair styles, typically enforce strict distinctions between male and female students, based solely on the student's sex assigned at birth.

Most trans children and young people around the world are excluded from legal gender recognition provisions. This means trans children and young people have to navigate sex-segregated situations with no formal documents that support their gender identity. The day-to-day impacts on their lives include being excluded from single-sex schools, from gender-segregated activities (such as sports teams or school camps), or facilities. Often trans children and youth are prohibited from using school bathrooms that are appropriate for their gender identity, placing them at high risk of violence and bullying.

Trans students are frequently discriminated against and bullied because of their gender identity or expression.³ Those students who cannot cope with the individual bullying or institutional discrimination may drop out of school. Some families may move in search of another school community with more flexible, inclusive policies or where their child's past is not common knowledge. However, this is not an option for most families. While home schooling may be a possibility for some trans students, others simply do not complete their education.

Legal gender recognition enables trans children and youth to focus on their education, and not on having to prove their gender identity or their right to express it. It can reduce the risk that a child's birth name or sex will be exposed by a birth certificate, school roll, or medical records. This is why it is imperative that legal gender recognition laws respect a child or young person's privacy. Typically, this means ensuring there is no public access to details showing that the gender marker has been amended, and that no previous name or sex/gender details are listed on new identity documents.

TERMINOLOGY AND SCOPE

This brief uses the umbrella term **trans** to describe children and young people whose gender identity and/or gender expression differs from their sex assigned at birth. This definition includes, for example, children and youth who identify as gender variant, gender non-conforming, transgender or transsexual, as well as trans boys who identify simply as male and trans girls who identify as female.

Trans is also used here to encompass terms which have developed and are best understood within their specific cultural context. These include, for example, *fa'afafine* / *fa'atama* (Samoa), *travesti* (Central and South America), *meme* (Namibia), *hijra* (India), *meti* (Nepal), *kathoey* (Thailand) and *transpinay* / *transpinoy* / (Philippines).

Gender Identity refers to the way an individual perceives their own gender. This is an individual's deeply felt identification as male, female, or some other gender. This may or may not correspond to the sex they were assigned at birth.

The term legal gender recognition describes how countries recognize a person's gender identity.

Gender expression refers to how a person manifests or displays their gender identity and/or how this is perceived by others. For example, this may be seen in choices that a person makes about their clothes, voice, hairstyle, facial hair, use of makeup or mannerisms.

Biological sex refers to a range of biological characteristics including chromosomes, hormones, reproductive capacity, and external genitalia. Not everyone is born with characteristics that fit neatly into just two binary categories, either totally 'male' or totally 'female.'

The terms **sex** and **gender** are used inconsistently both within and between countries. They are considered to be identical terms in some legal systems or languages. In this document the distinction being made is between someone's assigned or recorded sex at birth and their affirmed or preferred *gender*.⁴

The term **intersex** is used in this document to refer to people born with variations in physical sex characteristics (such as chromosomes, gonads, and genitals) that are considered to be either male or female at the same time, only partially male or partially female, or neither male nor female. While some people with intersex variations also describe their sex or gender identity as non-binary, most are either male or female.

Although this brief is written from a trans perspective, many of the issues it describes are also relevant to people with intersex variations. The initial sex assignment of some infants and children with intersex variations may be complicated. Many are subjected to surgeries and hormone treatment to deconstruct intersex differences and construct a body that conforms to stereotypical male and female categories.⁵ The long term implications of such interventions are known to include repeat surgeries, damage to sexual function, trauma and sterility.⁶ Some people with intersex variations may also later transition to change their gender assignment.

The term **legal gender recognition** describes how countries recognize a person's gender identity. The main focus of the Open Society briefs is how countries' laws and policies enable someone's sex details (or gender marker) to be amended to match their gender identity. The most obvious gender markers are binary categories such as male/female or Mr./Mrs./Ms./Miss. Less obvious binary gender markers include coded numbers which differentiate between males and females.

The term **social transition** can be used to describe when trans people take social, rather than legal or medical, steps to express their gender identity. This might include someone using a nickname or different pronoun or changing their style of clothes or haircut to more accurately reflect their gender identity.

ADVOCACY ON LEGAL GENDER RECOGNITION

This brief is primarily for those advocating for progressive gender recognition laws. It aims to bring the discussion back to objective facts and to untangle issues that are frequently conflated by those who oppose legal gender recognition. Local activists are best placed to know what arguments and language will carry most weight in their own community. For particularly charged issues, acknowledging the concerns and fears of those opposing gender recognition may be necessary before countering the misinformation or stereotypes behind those views.

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Harnessing the stories of trans children and youth, their parents, supportive schools, and health professionals can build effective support for change that is based on empathy instead of fear. Transgender Equality Network **Ireland's** gender recognition campaign is one example of this approach. Its anthologies, research reports, and video resources contain the voices, poetry, prose, art, and images of trans young people and their families.⁷ These powerfully convey the difference that legal gender recognition would make in these young people's lives.

In **Canada**, the website GenderCreativeKids provides resources for supporting and affirming gender creative kids within their families, schools, and communities.⁸ This includes material challenging many of the misconceptions underpinning resistance to gender recognition for children and youth.⁹ Around the world, many other youth initiatives that do not focus specifically on gender recognition help create a climate where gender diversity is acknowledged and celebrated. Two examples include the Gender is Not Uniform campaign in **Australia**, advocating for school uniform policies that are inclusive of gender diverse children,¹⁰ and research in **Thailand** on transphobic and homophobic bullying at school. The Thai report is being used for in-service training with secondary education teachers.¹¹ In the **United Kingdom**, the National Health Service has funded an e-learning resource on the care of gender non-conforming young people, developed in partnership with the Gender Identity Research and Education Society.¹²

GENDER RECOGNITION AND INTERSEX CHILDREN AND YOUTH

The *License to be Yourself* report did not analyze intersex-specific laws and policies. However it gave examples of activists' strategies that recognize the specific impacts of gender recognition laws and policies on intersex people. That approach is followed in this resource.

This section highlights the importance of considering the specific impacts that introducing non-binary sex or gender classifications have on intersex infants and children compared to those who are trans. Everyone should have the right to choose the classification that best matches their identity. This is denied whenever someone is forced into a classification.

Discussions about non-binary options sometimes lead to the false assumption that this should be the default option or even mandatory when an intersex infant is registered at birth. In some countries the non-binary category traditionally used for intersex infants has been "indeterminate" or "unspecified." A different approach was taken by **Germany** when it introduced a third 'blank' category on birth certificates in November 2013. Since then, if a child's gender classification cannot be medically assigned as male or female, it must be left blank.

This change has been criticized for exposing infants' intersex status, unnecessarily invading their privacy, and potentially making them the target of discrimination and stigma.¹³ National and international intersex organizations have criticized the lack of consultation and the potential flow-on effects of this amendment.¹⁴ These include concerns that citizenship rights, including the right to marry, may be denied to a person whose birth certificate has no sex recorded.¹⁵

Everyone should have the right to choose the classification the best matches their identity.

Automatically assigning children with intersex variations to a third classification reinforces flawed notions that a child's biology and identity must be aligned in order to be valid.¹⁶ That same argument has been used to justify genital surgeries on intersex infants. Parents already face considerable pressure to give consent to such surgeries being performed on their infant or young child. If obtaining a male or female birth record is also dependent on being medically assigned into one of those binary categories, the pressure to give consent increases.

Intersex organizations have advocated that intersex infants should be registered as either female or male with the awareness that, like all people, they may grow up to identify with a different sex or gender.¹⁷ At that future point they should be able to choose from the full range of sex and/or gender options on official documents.

In April of 2015, **Malta** passed the Gender Identity, Gender Expression and Sex Characteristics Act.¹⁸ It includes anti-discrimination and hate crime protections for intersex people, and introduces a universal right to bodily integrity and physical autonomy. The Act makes it unlawful to perform non-medically necessary treatment on the sex characteristics of a person without their informed consent. It also provides parents with the option of postponing the entry of sex details or a gender marker on their child's birth certificate until the age of 14. The vital distinction between this proposal and the German provisions is that it is entirely voluntary.

In summary, trans community efforts to improve gender recognition laws and policies often have a collateral impact on people with intersex variations. This risk is heightened in debates about non-binary gender categories. As Morgan Carpenter, President of OII Australia says:

"Trans community organizations and activists must not work in isolation from intersex community organizations and activists. Of course, intersex-led organizations need resources to support this—and to enable us to maintain a focus on priority areas like medical ethics."¹⁹

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CHILDREN AND YOUNG PEOPLE'S CURRENT ACCESS TO LEGAL GENDER RECOGNITION

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The United Nations Convention on the Rights of the Child (UNCRC) is the most universally ratified UN human rights treaty. For the purposes of the Convention, a child is anyone under the age of 18 unless the age of majority is reached earlier under a country's own domestic legislation.²⁰ The guiding principles of the UNCRC are:

- The best interests of the child are a primary consideration (Article 3)
- Non-discrimination (Article 2)
- The need to respect the growing capacity of a child to make decisions about their life (Article 5) and
- Children's views are to be listened to and given due weight, in accordance with the age and maturity of the child (Article 12).

Each of these points is reiterated in the Yogyakarta Principles which apply international human rights standards to gender identity and sexual orientation issues.²¹ Legal gender recognition is set out in Yogyakarta Principle 3: the right to recognition before the law. It acknowledges that every person's self-defined gender identity is one of the most basic aspects of their self-determination, dignity, and freedom.

Children's right to identity is contained in Article 8 of the UNCRC. Ireland's Ombudsman for Children argued that it may be interpreted as including a child's right to their gender identity.²² Article 8.2 requires that whenever a child is illegally deprived of elements of their identity, a country must provide appropriate assistance and protection to speedily reestablish that child's identity. Legal gender recognition can also play a pivotal role in protecting and fulfilling other rights in the Convention, including a child's right to development (Article 6), to privacy (Article 16), to education (Article 28), and to the highest attainable standard of health (Article 24).

Other regional human rights obligations are important tools for activists pushing for legal gender recognition. In Europe, this includes case law of the European Court on Human Rights. The Council of Europe specifically asks member states to facilitate, "the changing of the entry as to first name or gender in school documents."²³

Article 8.1 of the European Convention on Human Rights provides that everyone, including children and young people, has the right to respect for their private and family life. The Irish Ombudsman for Children stated that, "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."²⁴ At the same time, while Article 8 encompasses both children and adults, it does not require that they be treated alike. As of January 2015, there were no court decisions clarifying what restrictions on the right to legal gender recognition could be justified, as a necessary and proportionate interference with young people's rights. The Irish Ombudsman for Children has argued that, "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" and could be vulnerable to a legal challenge.²⁵

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CURRENT LAWS

In some countries trans children and youth may be socially recognized in their appropriate gender identity without having to change formal legal documents. In parts of **the Pacific**, specifically **Polynesia**, gender diversity is commonly accepted amongst children assigned a male sex at birth, even though there are no gender recognition laws or policies. However, in most countries social recognition alone for trans children and youth falls short of providing dignity, equality, and safety. It is typically dependent on the discretion of individuals in positions of authority, including teachers or government officials. Legal gender recognition laws and policies provide greater consistency, transparency and enforceable rights for children and young people.

The *License to be Yourself* report describes some of the very few examples of progressive gender recognition laws that are available to trans children and youth. Notably **Argentina's** 2012 gender recognition law enables those younger than 18 to change their recorded sex to match their gender identity.²⁶ Typically the application is made by the child's legal guardian, and the child must give their explicit agreement. The law cites the UNCRC, including that the child's best interests and evolving capacities must be taken into account. In late September 2013, the administration of the Province of Buenos Aires officially recognized a six-year-old trans girl, who was supported by her family.²⁷ The second successful application was by a 10-year-old trans boy in October 2014.

The Gender Identity, Gender Expression and Sex Characteristics Act in **Malta** contains a universal right to gender identity, with no age restrictions.²⁸ For those under the age of 18, applications are made by a legal guardian. These must give paramount consideration to the best interests of the child and due weight to the child's views, recognizing their age and maturity. While subsequent changes to an adult's gender marker would require a court order, there is no such requirement proposed for children and young people. This recognizes the protection that legal gender recognition can provide when a child is exploring their gender identity. Malta also became the first country in Europe to publish a comprehensive education policy focusing specifically on trans, gender variant, and intersex children.²⁹

In Europe, **Germany** removed the minimum age from its *Transsexual Law* as a result of a 1982 Federal Constitutional Court decision.³⁰ Trans children under the age of 18 can apply to the court for legal gender recognition. Like other applications from children, a trans person aged 12 or over has the right to be heard in such a case. **The Netherlands'** gender recognition law that came into force in July 2014 lowers the age threshold slightly by extending eligibility to 16 and 17 year olds.³¹ The *Gender Recognition Act* in **Ireland** that was passed in July 2015 allows parents or guardians to apply for a court exemption to the minimum age requirement for a child aged 16 or 17. Two certificates from medical practitioners must be furnished to the court before a young person can be legally recognized.³² This process was widely criticized by Transgender Equality Network Ireland as well as the Irish Human Rights and Equality Commission for being onerous and restrictive. This provision will be formally reviewed by the Irish Government in 2017.

In **New Zealand** and in states and territories in **Australia** there is no minimum age for applying to change sex details on a birth certificate. However the medical steps usually required to amend a birth certificate typically exclude children and young people in Australia and limit the accessibility of the provisions in New Zealand.³³ This is also the case in many European countries.

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The exception in Australia is the **Australian Capital Territory**. In April 2014, it moved to simply require a statutory declaration from a doctor or a psychologist that someone has had or is receiving appropriate clinical treatment to change their sex, or is intersex. An application for a child must also include a statement signed by the parents (or a person with parental responsibility) that the reclassification is in the best interests of the child.³⁴ The law also enables a birth certificate to be issued listing a sex other than male or female. The additional option is either one or all components of the classification 'unspecified/indeterminate/intersex.' Intersex activists have opposed a third classification for intersex infants and children.³⁵

One component of progressive gender recognition laws is the requirement that other records will be amended too. Placing responsibility on schools to recognize a child's chosen name and gender identity makes a huge difference in trans students' lives. A regional law introduced in **Andalusia, Spain** in July 2014 includes trans children and youth for the first time. Inspired by the Argentinean law, it is based on the principles of de-pathologization and self-defined gender identity. Article 15 requires education records to recognize a trans child's self-defined name and sex. In addition, the autonomous government is planning to implement tools that promote the diversity of trans youth (Article 20).³⁶

In the **United States**, the *School Success and Opportunity Act* (AB 1266) in **California** amended the education code to permit young people to participate in sex-segregated activities, and to use facilities based on their gender identity. These changes came into effect in January 2014, irrespective of the gender indicated on a child's school records.

PROPOSED LAWS

In June 2015, **Norway's** Health Minister announced proposed changes to the legal recognition law which would allow the parents of children aged seven to fifteen to apply for a change in legal gender. This process would dispense of psychiatric or medical evaluations. Children over sixteen will be allowed to change their legal gender without parental consent.³⁷ **Sweden** and **Belgium** have also committed to changing their laws to allow minors to apply.

Placing responsibility on schools to recognize a child's chosen name and gender identity makes a huge difference in trans students' lives.

SOME COMMON ARGUMENTS AND POSSIBLE RESPONSES

ARGUMENTS ABOUT WHETHER CHILDREN HAVE THE RIGHT TO LEGAL RECOGNITION

ARGUMENT:

CHILDREN ARE TOO YOUNG TO UNDERSTAND THEIR GENDER IDENTITY

Children are too influenced by their peers and are likely to be confused about their gender identity. They should wait until they are adults to make such an important decision.

RESPONSE:

MANY CHILDREN ARE AWARE OF THEIR GENDER IDENTITY FROM A YOUNG AGE

- Recent research has found that trans children, from age five to twelve years old, have a clear, deeply-rooted understanding of what gender identity means. This runs counter to common assumptions that trans children are pretending or confused about their gender. Lead researcher, Dr. Nicholas Eaton stated, “as schools and organizations struggle with how best to accommodate and include transgender children...our results inform the debate and support honoring the needs and identities of the transgender children.”³⁸
- In some instances social transition alone, without changes to formal documents, may be sufficient. However in many countries changing one’s name or gender marker is necessary for many practical aspects of a young person’s life. These include access to education, particularly where schools and/or school uniforms, facilities or activities are sex-segregated.
- Legal gender recognition provides legal protection and assurances to trans students.
- Having a minimum age for legal gender recognition would be arbitrary and could exclude those most vulnerable.
- A process that enables the best interests of the child to be assessed should be the primary consideration.³⁹ It would be very difficult to justify that a blanket exclusion of children from legal gender recognition is in the best interests of every child.
- Many gender-variant children become aware of their gender identity by the age of three to five years.⁴⁰ Some express a sense of discomfort with the discrepancy between their assigned sex and gender identity from as young as 2 years of age.⁴¹ Increasingly, youth have begun living their affirmed gender by high school.⁴²
- Many children with intersex variations are aware of their gender identity from a young age, or have undergone medical treatment to meet others’ expectations about their anatomy and gender identity.
- Children with intersex variations need the freedom to explore their gender identities and, as they mature, their sexuality (particularly given the impact of early genital surgeries on sexual function and sensation).
- Legal gender recognition can enable intersex children and youth to be involved in decisions about their own gender identity.
- Talking about bodily diversity, gender identity and sexuality can help reduce secrecy and shame for children and youth with intersex variations and their families. This openness may prevent or expose human rights violations.

ARGUMENT:
CHILDREN CHANGE
THEIR MINDS

Children continually change their minds, so it would be irresponsible to allow them to change such an important document.

RESPONSE:
LEGAL GENDER RECOGNITION PROTECTS CHILDREN
AND DOES NO HARM

- Progressive legal gender provisions enable formal documents to be updated if the person's circumstances change.
- If a child adopts a different gender identity in the future, no harm is done. That child has simply received support and affirmation in exploring their identity, no matter what direction it has taken them.⁴³
- Children and young people articulate their identity at increasingly younger ages. They need legal protection at a time when they are very vulnerable to exclusion, harassment and discrimination by others.
- This may be particularly important for children with intersex variations whose initial sex assignment may not match their evolving identity.

ARGUMENT:
CHILDREN ARE TOO YOUNG TO
MAKE LEGAL DECISIONS

Children and youth do not have legal capacity to make decisions about their name or legal sex/gender.

RESPONSE:
CHILDREN HAVE THE RIGHT TO EXPRESS THEIR WISHES
AND HAVE THOSE CONSIDERED

- According to international human rights obligations, children and youth who are capable of forming their own personal views should be able to express those views freely. These should be given due weight, in accordance with the age and maturity of the child.⁴⁴
- The concept of evolving capacity is found in other laws that, for example, enable young people under the age of 18 to marry and to stand trial.
- Court decisions have recognized trans youth who are 'Gillick competent' and able to give informed consent to medical treatment that affirms their gender identity.⁴⁵ It would be inconsistent to deny young people the ability to have that gender identity legally recognized too.
- As previously noted, a number of countries have no minimum age for gender recognition, while others have lowered the minimum age to 16 or are considering such an option. This is an emerging issue in many regions as countries update older laws in the context of growing and visible trans youth populations.

ARGUMENT:**GIVING CHILDREN A CHOICE
OVERRIDES PARENTS' RIGHTS**

It is parents' role to make important decisions for their children. Listening to the views of children undermines parents' authority and rights.

RESPONSE:**GENDER RECOGNITION LAWS RECOGNIZE BOTH PARENTS'
AND CHILDREN'S RIGHTS**

- Parents or legal guardians have responsibilities and rights to provide appropriate direction and guidance to their child. This needs to be done in a manner consistent with that child's evolving capacities and rights.⁴⁶
- Legal gender recognition gives parents and their children more choices by removing many barriers trans children face. When gender recognition is not an option, parents may not be allowed to make the best decision for their child. For example, they may not have the option of enrolling their trans daughter in a girls' school.
- The World Professional Association for Transgender Health (WPATH) recognizes that while parental support is ideal, 16-year-olds are legal adults for medical decision-making purposes in many countries and do not require parental consent.⁴⁷
- There may be situations where parents or legal guardians cannot agree on the steps that should be taken. Some progressive gender recognition laws set out a process for making decisions where the legal guardian's consent cannot be obtained or is disputed.⁴⁸ This is consistent with good practice in situations when other legal guardians are unable to make joint decisions about important aspects of their child's life.
- Progressive gender recognition laws explicitly reinforce related human rights issues for trans and intersex children. For example, the 2015 law in **Malta** prohibits the modification of a person's sex characteristics without their informed consent.

In **Argentina**, the gender recognition law requires a lawyer to be appointed specifically to assist the child. It also includes a process for situations where a legal guardian's consent is denied or impossible to obtain. Summary proceedings can be taken before a judge, whose decision will also be guided by the child's evolving capacities and best interests. Where parents fully support an application, a judicial process is not required. This was the case in a successful October 2014 application for a trans boy.

ARGUMENTS ABOUT PROTECTING CHILDREN WHO WANT LEGAL GENDER RECOGNITION

ARGUMENT:

EXTRA CHECKS AND BALANCES ARE NEEDED FOR CHILDREN

There should be further administrative or legal requirements for children and young people to ensure they are making the right decision.

RESPONSE:

THE PRIMARY CONSIDERATION IS THE BEST INTERESTS OF THE CHILD

- Children's rights, particularly the best interests of the child, are paramount in progressive gender recognition laws.
- It is also important to ensure the child's views are heard, taking into account their evolving capacities. For younger children, the consent of a parent or legal guardian is an additional safeguard.
- If it is in a child's best interest to have their gender identity legally recognized, requiring further administrative or legal hurdles could amount to unlawful discrimination on the basis of age.
- Legal gender recognition is often very time-sensitive for trans children. Extra hurdles and delays can prevent a trans child being able to start high school or take exams with the right name and sex or gender marker.⁴⁹

ARGUMENT:

CHANGING NAME OR SEX DETAILS WILL STIGMATIZE CHILDREN

Changing a child's name or sex gender marker will mark them as different, making them vulnerable to bullying and discrimination. Exposing children to discrimination by allowing them to question or experiment with their gender identity potentially amounts to child abuse.

RESPONSE:

LEGAL GENDER RECOGNITION PROVIDES GREATER PROTECTION FROM DISCRIMINATION

- Like all children, a transitioning child or youth has the right to their identity and to freedom of expression. Legal gender recognition does not change someone's gender identity or make them trans. It simply recognizes that identity, making it safer for a child or young person to be who they are.
- Trans and gender variant children and youth are already vulnerable to greater levels of discrimination. That vulnerability increases when their identity is disclosed as a result of presenting their birth certificate or other identification with a photo, name, or gender marker that does not match their gender identity.
- Legal recognition means a child or youth can participate in school events, gain school qualifications, and belong within their school and wider community under their appropriate name and gender marker.
- It is important for health professionals, teachers, and others to know a child or youth's correct name, gender marker, and pronoun.
- Progressive gender recognition includes laws that prohibit discrimination based on one's gender identity, sex, or intersex status.⁵⁰
- Courts have upheld a legal guardian's decision to allow a child to live as their preferred gender, and to access age-appropriate gender affirming health treatment.⁵¹

ARGUMENT:**CHILDREN WILL BE FORCED TO MAKE IRREVERSIBLE CHANGES TO THEIR BODIES**

Where legal gender recognition laws require evidence of medical treatment, they will be pressured into premature medical procedures that can not be easily reversed.

RESPONSE:**LEGAL GENDER RECOGNITION IS SEPARATE FROM MEDICAL DECISIONS**

- Legal gender recognition laws and policies should not require evidence of a medical diagnosis or medical interventions for anyone, particularly children and youth.
- Medical treatment or transition must be optional and separate from legal recognition.
- Separating legal gender recognition from medical decisions gives children and young people the opportunity to explore their gender identity without having to undergo invasive medical procedures.
- The 2015 update to WPATH's legal gender recognition statement affirms that "appropriate legal gender recognition should be available to transgender youth."⁵²
- Decisions about medical procedures that are irreversible or only partially reversible are best informed by health care standards, not legal gender recognition laws. The WPATH Standards of Care clarify that children below the age of puberty should not have irreversible gender affirming medical treatment. Prior to that age any medical support they receive is likely to be counselling or other forms of mental health care.⁵³
- Conversely, infants and children with intersex variations are often subjected to irreversible changes to their bodies without legal protection. Recognizing it can be cruel, inhuman, and degrading treatment and a violation of the rights to privacy, self-determination and to bodily or physical integrity, the UN Special Rapporteur on Torture has recommended that States repeal any law allowing such intrusive and irreversible treatments, including forced genital-normalizing surgery.⁵⁴

ARGUMENT:**CHILDREN'S DELUSIONS ABOUT THEIR IDENTITY AND BODY SHOULD NOT BE ENCOURAGED**

Changing a child or youth's birth certificate does not change the reality of their body or their sex. Legal gender recognition is pandering to children's delusions and fantasies about their bodies. Children should be taught to accept their bodies and biological sex, not to change their gender identity.

RESPONSE:**LEGAL GENDER RECOGNITION SUPPORTS A CHILD'S HEALTH AND WELL-BEING**

- Gender diversity is common and should not be judged as negative, pathological, or delusional.⁵⁵
- It is important to let a child thrive in their preferred gender. Recent research shows that gender variant children who are pressured to conform have higher rates of behavioral and emotional health problems than those who are supported and affirmed.⁵⁶
- Every child, youth, and adult has a gender identity. Legal gender recognition does not change a person's gender identity or body. It simply enables everyone to be legally recognized.
- Treatment aimed at trying to change a young person's gender identity and expression to better match their sex assigned at birth is no longer considered ethical.⁵⁷

ARGUMENTS ABOUT PROTECTING OTHER CHILDREN AND FAMILIES

ARGUMENT:

GENDER RECOGNITION CREATES GENDER CONFUSION

Allowing children to change their gender marker creates confusion and concern, both for them and for other children.

RESPONSE:

OPENNESS ABOUT GENDER IDENTITY AND DIVERSITY REDUCES CONFUSION

- Appropriately recognizing a person's gender is not as complicated as many people assume. While some adults struggle with the concept, children typically find it very easy to understand and accept.
- Trans and gender diverse children exist, whether or not they are legally recognized. Having words to describe who they are, and ways to have that identity recognized, reduces their confusion, isolation, and risk of discrimination.⁵⁸
- Children should not be blamed, and their needs should not be ignored, just because there is insufficient language or knowledge to describe their identities. Families, communities, and schools require information to see past stereotypes and to know how to support trans children and young people.
- Encouraging age-appropriate discussion of gendered assumptions and stereotypes can be very helpful. This can facilitate the understanding of trans and intersex young people and how gendered stereotypes can limit options for other children too.

ARGUMENT:

TRANS CHILDREN'S RIGHTS ARE OVERRIDING THE RIGHTS OF OTHERS

Legal recognition means trans children and youth have access to sex-segregated activities or facilities. This prioritizes their rights over the majority of children. Parents will have no right to object to their child being on a sports team or in a changing room with a trans child.

RESPONSE:

ALL CHILDREN HAVE THE RIGHT TO PRIVACY AND SAFETY

- The rights and safety of all children are important.
- Legal gender recognition is necessary to protect the safety and privacy of transitioning children.
- It is important that sports teams and schools have clear policies for including children with all kinds of different bodies, including trans and intersex children.
- It is helpful to provide opportunities for other parents to ask questions and raise any concerns. This support could include providing parents with resources to help them answer questions from their child in an age-appropriate way.

ARGUMENT:**THE PRIVACY AND SAFETY OF OTHER CHILDREN IS THREATENED**

Boys will say they are trans so they can go into the female-only bathrooms and changing rooms to harass girls. The privacy and safety of young girls is threatened when trans girls are allowed in a female changing room. Other boys will feel uncomfortable using the urinals if there are trans boys in the bathroom.

RESPONSE:**ALL CHILDREN HAVE THE RIGHT TO PRIVACY AND SAFETY**

- There is no evidence that children and youth pretend to be trans so they can enter sex-segregated school toilets or changing rooms to harass other students. There is evidence that trans and gender non-conforming students are vulnerable to bullying and violence from other students when they use school toilets.⁵⁹
- This argument inappropriately sexualizes trans children and youth, stereotyping them as predators.
- Everyone deserves safety and privacy when they need to use a public toilet or changing room. This requires respecting the privacy and safety of others too. All students should be taught that bullying and harassment is wrong, and the difference they can make as bystanders standing up for other students' rights.
- It is illegal to harass another person in a public facility. Schools have powers to discipline anyone breaking school rules about privacy and safety, whether they are trans or not.
- Like many other students, including those with disabilities and those with intersex variations, trans children and youth are likely to be very aware of having a body that is different from other children using the same facilities. Having single-stall facilities, cubicle doors, or curtains that allow some degree of privacy are a good option for all students, including those who are conscious of their bodies. Such facilities may also be more appropriate for some students due to religious or cultural reasons.
- Many children may not realize one of their schoolmates is trans or has an intersex variation. Forcing children to use a public toilet that does not match their outward gender appearance, discloses very personal information. It breaches that child's privacy and may jeopardize their safety.
- Using unisex facilities can be appropriate and more comfortable for some students, especially those who are gender non-conforming or early in their transition. It would be helpful if unisex toilets were more commonly available so this is an option for more students. However forcing any child to use a different toilet or changing room from all other students singles them out. This can make them an increased target for bullying.

CONCLUSION

Gender recognition laws must address the human rights needs of an increasingly and visibly diverse population. International human rights standards provide a principled approach to such changes, recognizing the best interests and evolving capacities of an individual child and the full range of human rights involved. It is vital that the voices of children and their parents are heard not only in individual applications for gender recognition but also in the campaigns and public debates needed to build support for more progressive laws. Gender recognition laws must recognize intersex children and young people's right to define both their sex and their gender identity.

Progressive gender recognition laws have the potential to do much more than change details on official paperwork. They enable trans people to claim and assert their gender identity, and they are slowly recognizing the distinct rights of people with intersex variations. The world's leading laws clearly demonstrate the links between gender recognition and the rights to health and education. Legal gender recognition laws pave the way to inclusion and promote a positive environment by underscoring trans and intersex people's rights to self-determination, dignity, bodily integrity and physical autonomy. For trans children and youth, this requires recognizing their evolving capacity to make fundamental decisions about their gender identity. For intersex infants and children it also requires banning genital surgeries and other medical practices intended to 'normalize' intersex bodies, and performed without free and informed consent.

ENDNOTES

- 1 The *License to Be Yourself* report can be found online at: <http://www.opensocietyfoundations.org/reports/license-be-yourself> and the animated video at: www.osf.to/TransRights
- 2 Brill, S. and Pepper, R. (2008) *The Transgender Child: A Handbook for Families and Professionals*. San Francisco, CA: Cleis Press Inc.; Ehrensaft, D. (2011) *Gender Born, Gender Made: Raising Healthy Gender Non-Conforming Children*. New York: The Experiment.
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- 4 Gender affirmation refers to ways a person receives social recognition and support for their gender identity and expression. The phrases “gender affirmation” and “gender affirming” are preferred by some trans activists because they reflect a positive support for self-defined gender identity and expression. Other words such as reassignment, confirmation or validation could imply external assessment of a trans person's gender identity.
- 5 Australian Senate Standing Committee on Community Affairs (2013) *Involuntary and coerced sterilisation of intersex people in Australia: Second report*, paragraph 3.109. Accessed 29 January 2015 at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index
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- 7 TENI's January 2015 legal gender recognition video can be downloaded at: <http://www.teni.ie/news-post.aspx?contentid=1301>, policy briefs at: <http://www.teni.ie/page.aspx?contentid=1207> and other reports and anthologies can be found here: <http://www.teni.ie/page.aspx?contentid=650>
- 8 <http://gendercreativekids.ca/>
- 9 Temple, J. (2014) *'Transgender Children: Beyond the Myths'*, a learning opportunity for professionals who work with young children.
- 10 <http://safeschoolscoalitionvictoria.org.au/ginu/>
- 11 Mahidol University, Plan International Thailand and UNESCO Bangkok Office (2014) *Bullying targeting secondary school students who are or are perceived to be transgender or same-sex attracted: Types, prevalence, impact, motivation and preventative mechanisms in 5 provinces of Thailand*. Accessed 12 February 2015 at: <http://unesdoc.unesco.org/images/0022/002275/227518e.pdf>
- 12 Surrey and Borders Partnership NHS Foundation Trust and the Gender Identity Research and Education Society (2014) *E-learning resource on the care of gender nonconforming young people*. Accessed 12 February 2015 at: <http://www.nlmcontent.nesc.nhs.uk/sabp/gv/>
- 13 Vilorio, H. (6 November 2013) 'Op-Ed: Germany's Third-Gender Law Fails on Equality' in *The Advocate*. Accessed 14 September 2014 at: <http://www.advocate.com/commentary/2013/11/06/op-ed-germany-s-third-gender-law-fails-equality>
- 14 Agius, S., Carpenter, M. and Ghattas, D. (23 August 2013) 'Third Gender: A Step Towards Ending Intersex Discrimination' in *Spiegel International Online*. Accessed 14 September 2014 at: <http://oii.org.au/14732/spiegel-third-gender-germany/>
- 15 Ghattas, D. G. (2013) 'Human Rights between the Sexes: A preliminary study on the life situations of inter* individuals', *Heinrich Böll Stiftung Publication Series on Democracy*, Volume 34. Accessed 21 February 2015 at: <http://www.boell.de/en/2013/10/21/human-rights-between-sexes>; OII Australia (29 January 2014) 'Intersex people and identification documents'. Accessed 29 January 2015 at: <https://oii.org.au/24378/intersex-people-and-identification-documents/>; A December 2014 Kenyan High Court case (*Baby 'A' (Suing through her Mother E.A) & another v Attorney General & 6 others* [2014] eKLR) addressed the related issue of ongoing barriers when a child born in 2009 was never issued a birth certificate because other forms completed at birth recorded the baby's sex with a question mark, rather than as male or female.
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- 17 Public statement by the Third International Intersex forum, Malta, 1 December 2013. Accessed 14 September 2014 at: <http://www.intersexualite.de/index.php/public-statement-third-international-intersex-forum/>
- 18 Transgender Europe's press release and Malta's Gender Identity, Gender Expression and Sex Characteristics Act, accessed 3 April 2015 at: <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>
- 19 Personal communication with Morgan Carpenter, President of OII Australia, October 2014.
- 20 Child under the age of majority are referred to legally as minors. This resource follows the example of children's rights activists who avoid that term because it implies children, and their rights, have less value than those of adults.
- 21 International Commission of Jurists (March 2007) *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*. Accessed 14 September 2014 at: <http://www.yogyakartaprinciples.org/>
- 22 Ombudsman for Children (October 2013), *Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013*. Accessed 14 September 2014 at: <http://www.oco.ie/wp-content/uploads/2014/03/OCOAdviceonGenderRecognitionBill2013.pdf>
- 23 Committee of Ministers (31 March 2010) *Explanatory Memorandum CM(2010)4 add3 to Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, para 32. Accessed 31 January 2015 at: <https://wcd.coe.int/ViewDoc.jsp?id=1570957>
- 24 Ombudsman for Children (October 2013), para. 2.13
- 25 Ombudsman for Children (October 2013), para 5.1 and para 2.24
- 26 Article 5 of the Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act (Decree No. 773/12, of Gender Identity Act No. 26.743). A full English translation of the Argentinean law is attached as an appendix to *License to be Yourself*.
- 27 Brydum, S. (2013) 'Trans Six-Year-Old is Argentina's Youngest to Amend Gender on Birth Certificate' in *The Advocate*, 28 September 2013, accessed 14 October 2013 at: www.advocate.com/politics/transgender/2013/09/28/trans-six-year-old-argentinians-youngest-amend-gender-birth or the original article is available in Spanish at: www.lanacion.com.ar/1623497-luana-la-primera-vena-trans-que-logro-la-rectificacion-del-nombre-en-su-dni
- 28 Transgender Europe's press release and Malta's Gender Identity, Gender Expression and Sex Characteristics Act, accessed 3 April 2015 at: <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>
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- 32 Article 12. Gender Recognition Act: <http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf>
- 33 Australian Human Rights Commission (2009) *Sex Files: Legal Recognition of Sex in Documents and Government Records*, Concluding Paper of the sex and gender diversity project, p. 26. Accessed 5 November 2014 at: <https://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009#Heading597>. Section 29(3)(c) of the New Zealand's Births, Deaths, Marriages and Relationships Registration Act 1995 requires expert medical evidence of the medical treatment a child has taken or will undergo

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 - 35 Carpenter, M. (March 2014) 'Birth registrations in ACT'. Accessed 29 January 2015 at: <https://oii.org.au/24868/birth-registrations-in-act/> Laws enabling intersex people to make subsequent administrative corrections to sex details on Australian birth certificates vary between states: <https://oii.org.au/4856/on-birth-registrations/>
 - 36 The Integral Law for the Protection and Non-discrimination of Transsexual People. Accessed 14 September 2014 at: <http://www.parlamentodeandalucia.es/webdinamica/porta-web-parlamento/pdf.do?tiPodoc=coleccion&id=94693&cley=2>
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 - 39 UN Convention on the Rights of the Child (Article 3); Yogyakarta Principles (Principle 24c).
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 - 44 UN Convention on the Rights of the Child (Article 12); Yogyakarta Principles (Principle 24d).
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 - 46 UN Convention on the Rights of the Child (Article 5).
 - 47 WPATH (2012), *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, Version 7, pp. 18-21. Accessed 12 February 2015 at: http://admin.associationonline.com/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf Version seven was first published in the *International Journal of Transgenderism*, 13(4), 165-232. doi:10.1080/15532739.2011.700873
 - 48 This is the case in Argentina. In the Australian Capital Territory, this possibility was raised in a February 2014 report by the Standing Committee on Justice and Community Safety in its legislative scrutiny of the Births, Deaths and Marriages Registration Amendment Bill 2013 (see p. 3 of: http://www.parliament.act.gov.au/__data/assets/pdf_file/0011/551396/8scrutiny14.pdf). Malta's 2015 gender recognition law states that the right to gender identity is a universal, individual right. Arguably this means it is held by children, irrespective of their parents' support.
 - 49 A criticism of the Irish Gender Recognition Act is that 16 and 17 year olds require parental/guardian consent, supporting documentation from two medical practitioners and a Court order to be legally recognized. This will result in significant delays and these additional barriers may significantly reduce the opportunities for trans youth to have their gender identity recognized before turning 18.
 - 50 Australia's federal Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 has been welcomed by intersex organization OII Australia for recognizing intersex status separate from sex or gender identity.
 - 51 Family Court of Australia: *Re Jamie* FAM CA 248 (6 April 2011), *Re Alex* FAM CA 1292 (6 May 2009) and FAM CA 297 (13 April 2004); *Re Brodie* FAM CA 334 (15 May 2008); personal communication with the Chief Executive of Transgender Equality Network Ireland, 21 August 2014, about a recent unpublished United Kingdom case.
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 - 53 WPATH (2012) Section VI.
 - 54 Méndez, J.E. (2013) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/22/53*, paras 38, 78 and 88.
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