

LICENSE TO BE YOURSELF:

MARRIAGE AND FORCED DIVORCE

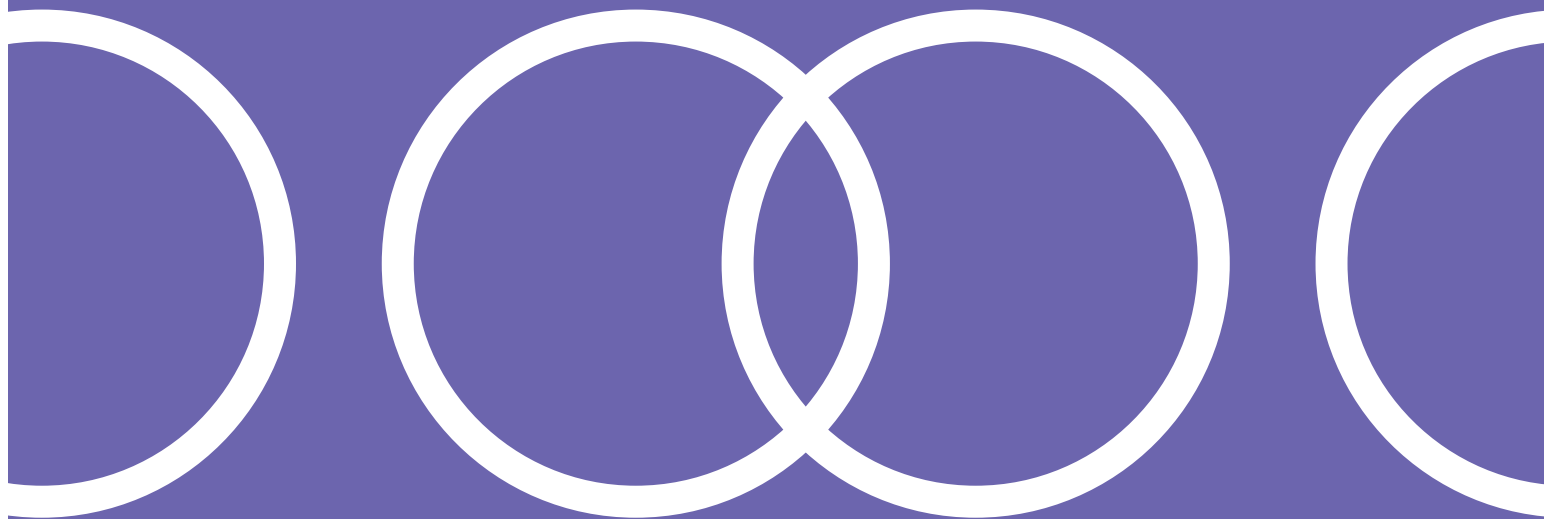


TABLE OF CONTENTS

INTRODUCTION	2
Overview	3
Terminology and scope	3
Using this resource	4
Marriage and forced divorce for intersex people.....	4
Marriage for people with non-binary identification documents.....	5
THE CURRENT SITUATION.....	6
Human rights obligations	7
Current progressive laws	7
Case law	8
SOME COMMON ARGUMENTS AND POSSIBLE RESPONSES	10
Opposing same-sex marriages.....	11
Impacts on children and spouses	12
This is a small and insignificant issue.....	13
CONCLUSION	16

Acknowledgements

This policy brief was authored by Jack Byrne with extensive input from the following peer reviewers: Morgan Carpenter, Wiktor Dynarski, Sally Goldner, Kseniya Kirichenko, Richard Köhler, Sam Winter and Joe Wong.

INTRODUCTION

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

This brief is one of four complementary resources for activists that summarize and address some of the key arguments made by those who oppose access to legal gender recognition. This brief focuses on legal gender recognition restrictions that affect married people. It provides counter-arguments that can be used by those advocating for rights-based gender recognition laws and policies.

Although this brief is written from a trans perspective, many of the issues it describes are relevant to people with intersex variations. In addition, it includes some specific information about how people with intersex variations are affected by gender recognition laws that exclude people who are married.

OVERVIEW

The vast majority of trans people around the world cannot obtain official documents under their appropriate name and sex matching their gender identity. Trans people risk discrimination when they are required to verify their identity using documents that do not match. As identification is required for most activities in daily life, inappropriate documents can result in trans people being denied vital housing, health services, or a job.

Where gender recognition laws and policies exist, they often exclude people who are married. This forces trans people to choose between legal recognition of their gender identity or their marriage. Such requirements amount to forced divorce. They violate trans people's rights to privacy, to marriage, and to recognition before the law.

Forced divorce requirements also impact on trans people's partners and children. A marriage that has stayed strong through one partner's transition should be celebrated, not dissolved. The emotional costs, on all family members, of a forced divorce should not be under-estimated. In addition, there are frequently financial implications when spousal benefits come to an end, on top of the actual costs of a divorce. Spousal benefits may be not available to de facto couples or only on less favourable terms. Beyond the financial loss, the impact of divorce can be destabilizing, particularly when a spouse's immigration visa is based on marital status.

Even when trans people are able to change their name and gender marker on official documents, this does not automatically mean they will be allowed to marry as that sex. In places where marriage is defined as being solely between one woman and one man, laws and policies frequently place higher thresholds before a trans person is legally recognized as male or female for this purpose. These often require evidence of permanent sterilization and gender affirming surgeries.

Trans people should never have to choose between the dignity, equality, and safety that come with legal gender recognition, or the ability to marry or stay married to their partner.

TERMINOLOGY AND SCOPE

This document uses the umbrella term **trans** to describe people whose gender identity differs from their sex assigned at birth. It includes, for example, gender variant and gender nonconforming people, those who identify as transgender or transsexual, and trans women who simply identify as female and trans men who identify as male. Trans is also used here to encompass terms that have developed and are best understood within their specific cultural context. These include, *fa'afafine* / *fa'atama* (Samoa), *travesti* (Central and South America), *meme* (Namibia), *hijra* (India), *meti* (Nepal), *kathoey* (Thailand) and *transpinay* / *transpinoy* / in the Philippines.

Gender Identity refers to the way an individual perceives their own gender.

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

Even when trans people are able to change their name and gender marker on official documents, this does not automatically mean they will be allowed to marry as that sex.

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.²

The term **intersex** refers to people born with variations in physical sex characteristics (such as chromosomes, gonads or genitals). Intersex bodies do not fit typical definitions of male or female. There is a diversity of intersex bodies, identities and experiences. Some people with intersex variations may describe their sex or gender identity in non-binary terms, but most are male or female.

The term **legal gender recognition** describes how countries recognize a person's gender identity. The main focus of these four 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.

USING THIS RESOURCE

This brief primarily supports people advocating for progressive gender recognition laws and policies. It untangles the stereotypes and misinformation behind many of the challenges to such proposals. Where valid concerns are raised, it suggests ways to balance different perspectives and rights in a way that upholds each person's dignity. This requires understanding the real impact current laws and policies have on people's lives.

Some arguments will carry more weight than others within specific communities. Hopefully, spelling them out will enable people to make strategic decisions about how best to advocate for change.

MARRIAGE AND FORCED DIVORCE FOR INTERSEX PEOPLE

This section identifies the specific legal gender recognition issues intersex people face that affect their right to marry. It is deliberately placed near the front of this resource to encourage discussion about how progressive gender recognition laws can meet the needs of both trans and intersex people. Being intersex is a different experience from being trans. Therefore it is important that intersex-led organisations are involved in developing gender recognition reforms.

One of the demands of the Third International Intersex Forum, held in Malta in 2013, was "to ensure the provision of all human rights and citizenship rights to intersex people, including the right to marry and form a family."³ Forced sterilization of intersex people obviously affects their right to form a family. It is discussed in the separate resource in this series about reproductive autonomy.

In some countries such as **Thailand**, where trans people cannot amend sex details on birth registration records, the option to do so is available for intersex people who have undergone genital surgery.⁴ Typically these surgeries will have been performed on intersex infants and children without their consent. Such amendments to birth records invariably obscure a child's history, particularly if no records are kept of medical and surgical interventions. Therefore it is appropriate to acknowledge the importance

This brief primarily supports people advocating for progressive gender recognition laws and policies.

of broader human rights violations against people with intersex variations, rather than focusing narrowly on legal gender recognition alone. For example, people with intersex variations should have access to this historical information about their own body, and the choice to decide who else is able to access such personal details.

The sex details listed on an intersex person's birth certificate and other official documents also impact on their right to marry. 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.⁵ At that future point they should be able to choose from the full range of sex and or gender options on official documents, including those outside binary male and female classifications. Sometimes it is incorrectly assumed that people with intersex variations should automatically be assigned a non-binary sex or gender. However, as the Open Society report *License to be Yourself* emphasizes, the decision to have one's sex listed as a non-binary or third sex must be entirely voluntary for the individual concerned.

If intersex people subsequently amend the sex they were assigned at birth, they typically face a range of barriers that impact on their right to marry. Like trans people, an intersex person may be denied the right to change these details unless they are single, and be forced to divorce if they are already married. In addition, intersex people may be excluded because laws are framed around the experiences of trans people, for example by requiring evidence of clinical treatment for gender transition.⁶ More progressive gender recognition laws enable those intersex people who wish to change their gender marker to do so, either based on their intersex status or as a universal right to self-determination.

Intersex people have difficulties marrying or staying married even when they have not amended their sex assigned at birth. In some cases an intersex person's marriage has been annulled because their body has been deemed not wholly one sex or another, or as unsatisfactory for heterosexual intercourse.⁷

MARRIAGE FOR PEOPLE WITH NON-BINARY IDENTIFICATION DOCUMENTS

Marriage equality laws that are framed around same-sex and opposite-sex couples, often do not apply to people who have documentation describing their sex as other than simply male or female. Some trans people and some people with intersex variations will be in this situation. Ideally marriage equality laws should recognize marriages of any two eligible people, irrespective of their sex.⁸ For example, amendments in 2013 to **New Zealand's** Marriage Act clarified that a marriage is between two people regardless of their sex, sexual orientation, or gender identity.⁹

Intersex people may face barriers that impact on their right to marry, even without amending their sex assigned at birth.

THE CURRENT SITUATION

In countries that have recently introduced or updated gender recognition or marriage equality laws, there has been a significant shift towards respecting trans people's right to marry and to stay married.

HUMAN RIGHTS OBLIGATIONS

The Yogyakarta Principles collate obligations under existing international human rights law, clarifying how these apply to human rights violations based on a person's gender identity or sexual orientation. Principle 3 focuses on the right to recognition before the law:

"Everyone has the right to recognition everywhere as a person before the law... No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."¹⁰

In Europe, both the current and former Council of Europe Commissioner for Human Rights have spoken out against gender recognition provisions that force trans people to divorce their spouses. In 2009, Thomas Hammarberg specifically recommended that member states "remove any restrictions on the right of trans persons to remain in an existing marriage following a recognised change of gender."¹¹ This was reiterated in November 2012 by Commissioner Nils Muižnieks who wrote to the Irish minister of social protection urging that "divorce should not be a necessary condition for gender recognition as it can have a disproportionate effect on the right to family life."¹² In addition, Commissioner Hammarberg's 2011 report recommended that member states "respect the right of transgender persons to effectively exercise their right to marry in accordance with their legally recognised gender."¹³

CURRENT PROGRESSIVE LAWS

In Latin America, married people have been able to access gender recognition in **Uruguay** since 2009, and in **Argentina** since 2012.¹⁴ In 2014, **Mexico City** followed Argentina's world-leading approach. It introduced a simple administrative process that provides universal access to gender recognition, including for those who are married.¹⁵ In North America, no state in the **United States** has a law requiring a trans person to be single or to divorce in order to obtain legal gender recognition. If someone in a legal marriage transitions and changes their gender marker, the marriage remains valid. This is true, even in states that do not recognize same-sex marriage.¹⁶

In Europe a growing number of countries no longer require trans people to end a valid marriage prior to changing their gender marker. These include, for example, **Austria, Denmark, England, Germany, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Switzerland** and **Wales**.¹⁷

In countries that have recently introduced or updated gender recognition or marriage equality laws, there has been a significant shift towards respecting trans people's right to marry and to stay married. In **New Zealand** the Marriage (Definition of Marriage) Amendment Act 2013 repealed previous provisions prohibiting married people from changing sex details on a birth certificate. In **Australia**, married people can access the March 2014 changes to gender recognition laws in the Australia Capital Territory.¹⁸

In **England** and **Wales**, the removal of forced divorce requirements, with the passage of the Marriage (Same Sex Couples) Act 2013, was welcomed. However the new law was criticized for requiring trans people to obtain their spouse's consent in order for the marriage to continue once a gender recognition certificate had been issued. Significantly the Scottish Parliament's Equal Opportunities Committee unanimously

"Everyone has the right to recognition everywhere as a person before the law."

removed this spousal veto from its equivalent Marriage and Civil Partnership (Scotland) Act 2014. Scotland's national LGBTI organization, the Equality Network, consulted spouses of trans people on this issue. All supported removing a spousal veto and greatly objected to the notion that they should have control over such a fundamental aspect of their partner's identity.¹⁹

In **Malta**, the ground-breaking Gender Identity, Gender Expression and Sex Characteristics Act was passed on April 1, 2015.²⁰ Its provisions remove any requirement for a person to be single or to divorce in order to gain legal gender recognition. Instead it creates a quick, transparent gender recognition process based on self-determination.²¹

The momentum continues to build. In October 2014, bills were introduced in three Australian states (New South Wales, South Australia and Tasmania) to repeal current provisions that force married trans people to divorce in order to be eligible for legal gender recognition.²²

CASE LAW

Strategic litigation has played a key part in bringing about many of these changes, including in the **United Kingdom, Switzerland, and Sweden** and through Constitutional Court decisions in both **Austria** and **Germany**. In a landmark 2002 decision, the European Court of Human Rights (ECtHR) recognized that trans people who had undergone gender affirming surgeries had the right to marry as that sex (*Goodwin and I v. United Kingdom*). The 2006 Austrian decision acknowledged that Austria's Civil Code reserves the right to marry to opposite sex couples but considered it was "inexplicable" that only an unmarried person could correct their entry in the register of births, deaths and marriages.²³ In 2008, the German Constitutional Court emphasized the unfairness of requiring individuals to choose between two fundamental rights—personal self-determination and marriage.²⁴

It was only in 2012 that the ECtHR heard a case about a trans person's right to stay married. The Court dismissed a complaint by a trans woman that the compulsory divorce requirement in Finnish law breached her rights under the Convention. The case was referred to the Grand Chamber, which came to the same decision in July 2014 (*Hämäläinen v. Finland*).²⁵ To a significant extent this was because **Finland** enables a trans person's marriage to be converted to "an almost identical" civil partnership. This still leaves the door open for applications to the ECtHR about forced divorce from trans people in countries where there is no civil partnership law or other alternative way for their relationships to be recognized.

The freedom that the ECtHR affords individual countries to interpret their human rights obligations—known as the margin of appreciation—limits the extent to which it critically scrutinizes forced divorce requirements.²⁶ However in *Hämäläinen v. Finland*, three dissenting judges critiqued the emphasis that decision put on the absence of consensus among Council of Europe Member States. These judges reiterated past criticism that such an approach allowed the "lowest common denominator" among member States to prevail. Instead they argued that the Court should have asked whether there was "clear and uncontested evidence of a continuing international trend," as it had done in *Goodwin and I v. United Kingdom*. This would have given greater weight to case law overturning forced divorce requirements, such as the German Constitutional Court judgment.

Strategic litigation has played a key part in bringing about many of these changes.

The dissenting judges considered that the majority judgment had not given due weight to the emotional hardship that the dissolution of this marriage would cause the couple. Their religious beliefs meant they placed high value on being married, rather than in a registered partnership. Furthermore, the dissenting judges found that others' rights and freedoms would in no way be affected if the trans applicant and her wife remained married, and nor would the institution of marriage be jeopardized. Similarly, five years earlier Commissioner Thomas Hammarberg had stated that "protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages."²⁷

In Asia, the **Hong Kong** Court of Final Appeal's May 2013 decision in *W v The Registrar of Marriages* allowed a trans woman, who had undergone gender affirming surgery, to marry her boyfriend.²⁸ This decision reversed earlier rulings over the preceding five years. Subsequently the Hong Kong government introduced the Marriage Amendment Bill (MAB) 2014 to explicitly limit legal gender recognition, for the purpose of marriage, to trans people who had undergone sterilization and genital reconstruction. In October 2014, the Legislative Council of Hong Kong rejected this proposal.²⁹

In **Taiwan**, a marriage is only legally binding if one partner is a man and the other is a woman. In August 2013, the Taiwan Ministry of Interior overturned an earlier decision to annul the marriage of two trans women. The women married in 2012 when only one of them had amended her gender marker to female on her national identity card. The marriage was registered but then invalidated after officials discovered the second trans woman had subsequently changed her gender marker to female. After a lengthy public hearing and a closed-door meeting, the Ministry of Interior agreed to reinstate the couple's marital status. This decision was based on a 1994 ruling in which the Ministry of Justice said a change of gender during a legally recognized marriage does not affect that person's marital standing or relationship with their children. The marriage was valid because the two women were legally recognized as belonging to opposite genders at the time their marriage was registered.³⁰

"Protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages."

SOME COMMON ARGUMENTS AND POSSIBLE RESPONSES

Argument:

The number of trans people this affects is very small.

Response:

The number is not insignificant and their rights are no less valid.

ARGUMENTS OPPOSING SAME-SEX MARRIAGES

ARGUMENT:

LEGAL GENDER RECOGNITION FOR MARRIED PEOPLE CREATES A SAME-SEX MARRIAGE

Allowing someone to stay married after changing their gender marker creates a same-sex marriage. In places where same-sex marriage is not available, trans and intersex people are asking for special privileges. There is no reason why they should have their relationship recognized when other people do not have that option.

RESPONSE:

ENDING FORCED DIVORCE PROTECTS EXISTING MARRIAGES AND FAMILIES

- A trans person's marriage should have the same legal protection as any other marriage.
- It is inappropriate and highly insensitive for the law to dissolve a marriage that has remained strong after one partner transitions.
- Decisions about whether or not to end a marriage should be based solely on the wishes of the two people who are married.
- Allowing the state to force such couples to divorce undermines their right to family life.
- The importance of protecting existing marriages, without exception, outweighs concerns that a small proportion of marriages might now be considered same-sex marriages.

ARGUMENT:

MARRIAGE SHOULD BE LIMITED TO COUPLES WHO ARE ABLE TO HAVE CHILDREN

One of the fundamental purposes of a marriage is to create a stable foundation for having and bringing up children. Trans or intersex people who are unable to have children naturally should not be eligible to marry.

RESPONSE:

MARRIAGE RECOGNIZES COUPLES WHETHER OR NOT THEY ARE TRANS OR INTERSEX OR HAVE CHILDREN

- The legal institution of marriage is not tied to a couple's ability to have children. If it were, many women and men would be excluded because of fertility issues—particularly older couples.
- Many trans people become parents prior to, or after, their transition. Only some require assisted reproductive technologies in order to have their own children, and they should have the same access to these treatments as other couples with fertility challenges.

ARGUMENT:**LEGAL GENDER RECOGNITION INVALIDATES A MARRIAGE**

In places where marriage is defined as being between a man and a woman, if someone changes their legal sex, the marriage can never be valid.

RESPONSE:**A MARRIAGE IS VALID AT THE POINT WHEN TWO PEOPLE ARE LEGALLY WED**

- There are countries and states where marriage is defined as being between a man and a woman yet they do not require forced divorce when one partner changes their legal gender marker.³¹
- A person is required to meet the marriage eligibility criteria at the point at which they marry.³² If a couple met the eligibility criteria at that point, any subsequent changes to the person's circumstances (including their legal sex or gender) should not affect the legal status of the marriage.
- Typically, legal gender recognition does not invalidate other existing legal arrangements. Therefore in countries where marriage is limited to opposite-sex couples, arguably "the couple remain in what is legally a heterosexual marriage as they were respectively male and female on the date of their marriage."³³ This point has been recognized in some countries including recently in Taiwan.
- Marriage carries specific legal rights and responsibilities that do not change simply because one spouse applies to change their gender marker on official documents.

ARGUMENTS ABOUT THE IMPACTS ON CHILDREN OR A SPOUSE

ARGUMENT:**ALLOWING A TRANS PARENT TO STAY MARRIED IS BAD FOR CHILDREN**

It would be too hard for children if a parent transitions, changes their gender marker, and therefore becomes officially recognized as being part of a same-sex couple.

RESPONSE:**FORCING PARENTS TO DIVORCE NEGATIVELY IMPACTS THEIR CHILDREN**

- There is no evidence that having trans parents negatively impacts children.³⁴
- A recent court decision from **Ukraine**, for example, declared it was illegal to exclude parents from access to legal gender recognition. In doing so, the court stated that a child is not damaged because of a parent's gender identity. Conversely, the court noted that a child's development is supported in an environment that respects human rights and freedoms, including equality for all members of society.³⁵
- Forced divorce has financial and emotional impact on children as well as parents. The Select Committee considering New Zealand's proposed marriage equality legislation noted "we are aware of how distressing this can be for transgender people in this position, and how disruptive it can be for their families."³⁶ Its recommendation to repeal forced divorce requirements came into effect in August 2013.

ARGUMENT:**TRANS OR INTERSEX PEOPLE SHOULD NOT FORCE THEIR PARTNERS INTO A SAME-SEX MARRIAGE**

A married person should only be able to change their sex or gender marker if they have the permission of their spouse. Otherwise, it is forcing the spouse into a same-sex marriage.

RESPONSE:**A PARTNER RETAINS THE RIGHT TO END A MARRIAGE**

- Allowing a trans or intersex person to stay married merely maintains the status quo.
- A spousal veto on legal recognition of their partner's sex or gender identity could have significant impacts on almost all areas of their partner's life.
- Laws that give a spouse the power to veto their partner's rights are extremely rare, particularly with regard to rights questions as fundamental as these.
- If either of the partners considers they no longer wish to stay married, they retain their right to end the marriage.
- In some places, evidence of irreconcilable differences is required before spouses can divorce. For some people, a partner's transition would amount to an irreconcilable difference, and would therefore be grounds for ending the marriage.
- For partners who have stayed together through a transition, it would be incorrect to describe their relationship as irreconcilable. Forcing partners to divorce in those circumstances makes a mockery of the legal protection given to a marriage.

ARGUMENTS THAT THIS IS A SMALL, INSIGNIFICANT ISSUE

ARGUMENT:**THE NUMBER OF TRANS PEOPLE THIS AFFECTS IS VERY SMALL**

When a married person transitions, it is very unlikely that their spouse will want the marriage to continue. Trans people in this situation are likely to become divorced anyway and therefore eligible for legal gender recognition. So there is no need for legal gender recognition to be extended to people who are married.

RESPONSE:**THE NUMBER IS NOT INSIGNIFICANT AND THEIR RIGHTS ARE NO LESS VALID**

- It is hard to know the number of married people in this situation. This is partly because current policies tend to make married trans people invisible by requiring a trans person to choose between their gender identity and their marital status.
- Even if the current number of married trans people were small, the right to legal gender recognition should not be dependent on forfeiting other rights.
- This issue has emerged in many different countries and cultural contexts, suggesting the number of trans people who are married is not insignificant and that this a priority for them and their partners. This is reinforced by statements made by couples in individual court cases or when lobbying for legal or policy change.
- As trans issues gain visibility and greater understanding, the number of married trans people who seek legal gender recognition is likely to increase. Current or proposed laws should be future-proofed to meet this potential growth in demand.

ARGUMENT:**A MARRIAGE SHOULD BE MORE IMPORTANT THAN A PIECE OF PAPER**

Married people sometimes have to put their relationship ahead of their individual wishes. It is selfish for a married trans person to give more value to their personal legal status than to their marriage.

RESPONSE:**LEGAL GENDER RECOGNITION IS AN IMPORTANT FUNDAMENTAL RIGHT**

- Legal gender recognition is more than a piece of paper. It is about someone being recognized for who they truly are, in every aspect of daily life. Without appropriate identity documents, trans people are at greater risk of stigma, violence, and discrimination. Gender recognition is often essential in order to be able to access many other rights.
- When forced divorce requirements are removed, gender recognition strengthens rather than weakens a relationship. It enables a trans person to be themselves within that relationship and for the couple to continue to have the legal protections linked to being married.
- Someone should not be denied gender recognition merely because they have maintained their relationship.
- Courts have upheld that recognition of a person's self-defined gender identity "follows from respect for human dignity and from the fundamental right to personal self-determination."³⁷

ARGUMENT:**A CIVIL OR REGISTERED PARTNERSHIP IS JUST AS GOOD AS A MARRIAGE**

Where same-sex couples are able to enter into a civil or registered partnership, forced divorce is not a hardship. This is recognized by the European Court of Human Rights.

RESPONSE:**TRANS PEOPLE WANT THE CHOICE TO STAY MARRIED, JUST LIKE OTHER MARRIED COUPLES**

- Divorce, or dissolving or converting a marriage into a registered partnership, often means a loss in rights for a trans person, their partner, or their children.
- Typically only trans people are forced to change an existing marriage into a civil partnership.
- A civil partnership may not be legally recognized in another country.
- Even where a civil partnership conveys identical legal rights, the institution of marriage carries significant religious or emotional meaning for many people. Someone who has made a considered decision to marry should not be forced to end that marriage.
- In the 2014 *Hämäläinen v. Finland* case, the couple's religious beliefs meant they wished to remain married, and did not place the same value on a registered partnership. Other judges hearing this case did not consider sufficient weight was given to the emotional hardship dissolving their marriage would have on this couple.

ARGUMENT:**TRANS PEOPLE SHOULD WAIT FOR SAME-SEX MARRIAGE LIKE EVERYONE ELSE**

There is no need to change gender recognition or birth registration laws. If and when same-sex marriage is introduced, trans and intersex people will have the same legal rights as everyone else.

RESPONSE:**SAME-SEX MARRIAGE DOES NOT ALWAYS RECOGNIZE EVERYONE'S RIGHT TO MARRY**

- Trans people's fundamental right to recognition before the law impacts on all aspects of their lives. Recognizing this right should not rely on hope that marriage laws will be reformed.
- Marriage equality is typically understood to be about same-sex marriage for lesbian and gay couples. Same-sex laws are not always inclusive of people who have documentation stating their sex or gender is other than male or female. Marriage equality may also require repealing laws that specifically exclude those with a non-binary birth certificate from access to marriage. It may also require repealing laws that annul a marriage because one spouse has an intersex variation.
- Enabling same-sex couples to marry does not automatically give a married person the right to gender recognition. Sweden introduced marriage equality in 2009, but the forced divorce obligation on trans people was removed only in June 2012 after a 2010 court decision.³⁸
- Some marriage equality laws place additional restrictions on trans people, such as requiring a spouse's consent before an existing heterosexual marriage is converted into a same-sex / same-gender marriage.³⁹

CONCLUSION

Gender recognition laws that exclude people who are married, and amount to forced divorce for those who are already married, violate fundamental human rights.

Gender recognition laws that exclude people who are married, and amount to forced divorce for those who are already married, violate fundamental human rights. These rights include the right to privacy, to marriage, and to recognition before the law (including the dignity, equality, and security such recognition provides). In addition, forced divorce has significant financial and emotional implications for a person's partner and children.

In January 2015, the World Professional Association for Transgender Health updated its statement in support of legal gender recognition. It explicitly states that "marital status and parental status should not affect legal recognition of gender change." The statement concludes by urging governments "to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity."⁴⁰

Intersex people wishing to amend sex details on official documents often face the additional barrier of navigating laws and policies that are designed around the experiences of trans people. For example, these may require evidence of clinical treatment for gender transition and reinforce the role of medical experts in pathologizing not only gender diversity but also intersex variations. These requirements are also obstacles for many trans people, particularly those who do not wish to medically transition.

Internationally, strategic litigation has resulted in court decisions emphasizing that trans people should not be required to choose between their personal self-determination and their right to marriage. Progressive laws and policies respect such rights by removing any requirement to be single, or for married people to divorce, in order to obtain recognition before the law. They also resist any form of spousal veto that undermines people's right to make decisions about their own gender identity, and to take responsibility for negotiating the impacts on those decisions with their partner.

Marriage equality can be an important step towards achieving more progressive gender recognition laws. However it has not always been sufficient, particularly when framed narrowly as same-sex marriage. Nor can legal gender recognition wait for decisions about marriage equality. Recognition before the law is a fundamental right—necessary to enable dignity, equality, and security in virtually all aspects of people's daily lives.

ENDNOTES

- 1 The *License to Be Yourself* report can be found online at: <http://www.opensocietyfoundations.org/reports/license-be-yourself> with an accompanying animated video at: www.osf.to/TransRights
- 2 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.
- 3 Public statement by the Third International Intersex forum, Malta, 1 December 2013. Accessed 2 January 2015 at: <http://oieurope.org/public-statement-by-the-third-international-intersex-forum/>
- 4 UNDP, USAID (2014) *Being LGBT in Asia: The Thailand Country Report*. Similarly, in **the Philippines**, a 2007 Supreme Court decision ruled that there is no legal ability for trans people to amend their first name or sex on a birth certificate on the ground of sex reassignment (*Rommel Jacinto Dantes Silverio vs. Republic of the Philippines*, Supreme Court of the Philippines, First Division, G.R. No. 174689, 22 October 2007). The impact of allowing such an amendment, including that it would enable a trans woman to marry her male partner, was emphasised in the judgement. In contrast, a 2008 Supreme Court decision found that where the individual was biologically or naturally intersex, it was reasonable to allow the person to determine his or her own gender (*Republic of the Philippines vs. Jennifer Cagandahan*, Supreme Court of the Philippines, Second Division, 12 September 2008). This man was able to amend his name and sex details on his birth certificate and subsequently married his female partner.
- 5 Public statement by the Third International Intersex forum.
- 6 For example, section 2(1)(a) of the Gender Recognition Act 2004 in the **United Kingdom** requires that an applicant "has or has had gender dysphoria".
- 7 For example, Family Court of Australia case of C and D (falsely known as C) cited in Wilson, G. (2012) *Intersex people and marriage - an analysis*. Accessed 15 April 2015 at: <https://oii.org.au/21183/intersex-people-and-marriage-analysis/>
- 8 Submission by Tony Briffa JP to the Australian Senate Committee on the Recognition of Foreign Marriages Bill 2014. Accessed 24 November 2014 at: <http://www.aph.gov.au/DocumentStore.ashx?id=855476ce-6c00-4906-aa9c-fd1691ba6308&subId=253639>
- 9 Marriage (Definition of Marriage) Amendment Act 2013. These provisions also repealed section 30(2) of the Births, Deaths, Marriages and Relationships Registration Act 1995 which explicitly excluded someone who was married from amending the sex details on their birth certificate. Accessed 24 November 2014 at: <http://www.legislation.govt.nz/act/public/2013/0020/latest/whole.html#DLM5045103>
- 10 International Commission of Jurists (2007) *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity*, pp.11-12.
- 11 Hammarberg, T. (2009) *Gender Identity and Human Rights: Issue paper*. Accessed 25 November 2014 at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2009\)2&Language=all](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2009)2&Language=all)
- 12 Accessed 15 April 2015 at: <http://tgeu.org/human-rights-commissioner-mui%c5%benieks-urges-ireland-to-adopt-legal-gender-recognition/>
- 13 Hammarberg, T. (2011) *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd edition, p. 13. Accessed 19 February 2015 at: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf
- 14 National Center for Transgender Equality's blog about the Uruguay law, accessed 15 April 2015 at: <https://transgenderequality.wordpress.com/2009/10/15/uruguay-passes-landmark-gender-identity-law/>; 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*
- 15 Lavers, M.K. (2014) 'Mexico City lawmakers approve trans rights bill', *Washington Blade*, 14 November 2014. Accessed 15 April 2015 at: <http://www.washingtonblade.com/2014/11/14/mexico-city-lawmakers-approve-trans-rights-bill/>
- 16 The Transgender Law Center's September 2013 briefing to the European Court of Human Rights in *Hämäläinen v. Finland*
- 17 Transgender Europe (2014) *Legal and Social Mapping*, October 2014 update from the TransRespect versus Transphobia (TvT) worldwide project. Accessed 19 February 2015 at: <http://tgeu.org/tvt-mapping-2014/>
- 18 These amendments to the Births, Deaths and Marriage Act 1997 (ACT) were passed on 20 March 2014.
- 19 French, T. (2014) 'Comment: Spousal veto amendment is a victory for trans equality in Scotland' in *Pink News*, 16 January 2014. Accessed 19 February 2015 at: <http://www.pinknews.co.uk/2014/01/16/comment-spousal-veto-amendment-is-a-victory-for-trans-equality-in-scotland/>
- 20 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/>
- 21 The Act also recognises every person's right to bodily integrity and physical autonomy, and prohibits so-called genital normalizing surgeries on infants and children where these can be deferred until the person can provide informed consent. In addition it introduces a process for regulating medical treatment protocols for trans and intersex people, in line with current medical best practices and human rights standards.
- 22 These are opposition proposals introduced by the Green Party in each state. Green Party Australia media release 16 October 2014, accessed 19 February 2015 at: <http://greens.org.au/node/6253>
- 23 Austrian Constitutional Court Case V 4/06-7 (decided on 8 June 2006)
- 24 German Constitutional Court Case 1BvL 10/05 (decided on 27 May 2008)
- 25 *Hämäläinen v. Finland* (Application no. 37359/09) Accessed 25 November 2014 at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145768>
- 26 Cojocariu, C. (2013) "Moving beyond Goodwin: A Fresh assessment of the European Court of Human Rights' Transgender Rights Jurisprudence." in *INTERRIGHTS Bulletin*, Vol. 17, No. 3, Autumn 2013, pp. 118-122 and 135-137
- 27 Hammarberg, T. (2009), section 3.2.2
- 28 *W v The Registrar of Marriages* [2013] HK Ct of Final Appeal (13/05/2013, FACV4/2012)
- 29 Cheung, T. and Siu, P. (2014) 'Transgender marriage law vetoed by Legco' in *South China Morning Post*, 23 October 2014. Accessed 15 April 2015 at: <http://www.scmp.com/news/hong-kong/article/1622339/legco-vetoes-transgender-marriage-law-minister-accused-not-lobbying>
- 30 Hsu, J. T. (2013) 'Taiwan reinstates transgender couple's marriage' in *The Wall Street Journal: China*, 9 August 2013. Accessed 20 February 2015 at: <http://blogs.wsj.com/chinarealtime/2013/08/09/taiwan-reinstates-transgender-couples-marriage/>
- 31 As already noted, examples include Taiwan and states in the United States where there has not been access to same-sex marriage.
- 32 If the couple do not meet these criteria at that point, the marriage does not become legal if they subsequently fulfil those requirements. For example, if partners are under-age when they marry, the marriage does not become legal once they are old enough to marry. Similarly if one of the partners was already married and marries a second time, that second marriage is void even if the first marriage is later annulled.
- 33 Dr Fergus Ryan, Blog entry to *Human Rights in Ireland* <http://humanrights.ie/children-and-the-law/ryan-on-gender-recognition-and-marriage/>, 19 October 2012, accessed on 2 January 2015. The counter-arguments listed in the preceding footnote are also drawn from this source.
- 34 Stotzer R.L., Herman J.L. and Hasenbush, A. (2014) *Transgender Parenting: A review of existing research*. Accessed 2 January 2015 at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/transgender-parenting-oct-2014.pdf>

ENDNOTES

- 35** This decision was made on 19 January 2015 by the county administrative court in Kyiv. It was responding to an Order issued by the Ukrainian Ministry of Health that trans people whose children were under the age of eighteen were not able to obtain permission for 'gender reassignment' and legal gender recognition. Source: Personal communication with Russian lawyer Kseniya Kirichenko, 31 January 2015.
- 36** Report of the Government Administration Committee on the Marriage (Definition of Marriage) Amendment Bill, 27 February 2013. Accessed 20 February 2015 at: http://www.parliament.nz/resource/en-NZ/50DBSCH_SCR5764_1/a2eb2bf39827f8f70203f4679349247d3044def2
- 37** German Constitutional Court Case 1BvL 10/05 (decided on 27 May 2008)
- 38** ILGA-Europe (2013) *Annual Review 2013*, p. 212
- 39** This is the case under Schedule 5 of the United Kingdom's Marriage (Same-Sex Couples) Act 2013 which came into effect in December 2014.
- 40** WPATH (2015) *WPATH Statement on Identity Recognition*, 19 January 2015. Accessed 20 February 2015 at: http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf



**OPEN SOCIETY
FOUNDATIONS**