

# THE LEGAL STATUS OF INTERSEX PERSONS IN MALTA

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The Maltese Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (the 2015 Act) has been described as ‘the most expansive, ground-breaking and comprehensive bill of its kind’.<sup>1</sup> This chapter will analyse this Act to assess how it has impacted upon the status of intersex people in Malta.

Over the past few decades discourse about intersex has been divided into two types of discussions: deliberations aimed at achieving recognition of intersex identity which may differ from that recorded at birth, and debates about medical management. While these may seem to be two disparate aims at their core, they concern questions of dignity, respect and the realisation of human rights. It is by addressing simultaneously both sides of the discussions that the 2015 Act earns its praise.

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<sup>1</sup> A.J. NEUMAN WIPFLER, ‘Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents’ (2016) 39 *Harvard Journal of Law and Gender* 491, 511.

## 1. THE PROVISIONS IN THE LEGISLATION

The 2015 Act is ambitious in its aim. It unequivocally states that it will enable both the recognition of a person's gender identity and protect the bodily integrity of people.

### 1.1. THE RIGHT TO GENDER IDENTITY

The 2015 Act states unambiguously that all people have a right to gender identity. This is defined in Article 2 as

each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerism.

In Article 3 the legislation outlines the four component elements of this right:

- the recognition of people's gender identity;
- the free development of their person according to their gender identity;
- the right to be treated according to their gender identity, and in particular to be identified that way in identity documents; and
- the right to bodily integrity and physical autonomy.

Article 3 further notes that the right requires that the gender identity of the person be respected at all times. Finally, it clarifies that a person shall not be required to provide any independent evidence in order to establish a right to exercise the right to gender identity. Article 3(4) explicitly states that

[t]he person shall not be required to provide proof of surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.

### 1.2. THE GENDER RECOGNITION PROCESS

Having outlined the details of the right, the 2015 Act then notes in Article 4 that it is a right of citizens to request that their name and recorded gender be changed 'if the person so wishes' in order to reflect their 'self determined gender

identity'. This is a simple process. A person who wishes to change their legal gender completes a declaratory public deed, which must include:

- a copy of their birth certificate;
- a clear, unequivocal and informed declaration that their gender identity does not match that assigned at birth;
- a specification of the gender particulars; and
- the first name by which they wish to be registered.

These requirements do not necessitate any proof beyond the statement of identity of the applicant. The 2015 Act confirms that the applicant is the ultimate arbitrator of their gender identity and reiterates that there are no further gatekeepers which may prevent access to the exercise of the right. Indeed, the Act strengthens this commitment in Article 5(2) where it specifies that the notary shall not request 'any psychiatric, psychological or medical documents' in order to draw up the deed and further entrenches this policy in Article 4(3) where it states that neither shall the Director for Public Registry require any evidence beyond that contained in the declaratory public deed as published.

The 2015 Act also includes provision for minors. Under Article 7, parents or the tutor of a minor may make an application to the Civil Court (Voluntary Jurisdiction Section) requesting that the recorded gender and first name of a minor be changed. The article requires that in determining whether to order such a change the court must be guided by the best interests of the child and any views that the minor may express on the matter must be given due weight having regard to their age and maturity. Thus, the key principles underpinning the rights of the child as espoused in the UN Convention on the Rights of the Child are incorporated in the legislative scheme as foundational principles.

Article 18 of the 2015 Act amends Article 278 in the Acts of Birth section of the Civil Code, which lists the required particulars of the birth that must be declared to the state, to enable a delay in declaring the sex of a child 'until the gender identity of the minor is determined'. Where a declaration of gender has not been made at birth, Article 7(4) of the 2015 Act enables parents or tutors of the minor to file an application declaring the gender and first name of the minor can be made. Such an application must be made with the express consent of the minor in light of their maturity and best interests.

Once an amendment has been made under the 2015 Act within 15 days from the effective date of recognition of gender identity, the person must request an amended identity card and other identification documents reflecting the amended gender and first name by which they wish to be known. Article 6(3) enables a person to request that other official documentation and certificates be reissued in the preferred gender and with the preferred name from other

competent authorities such as government departments and employers as well as educational or other institutions.

### 1.3. ENHANCED PROTECTION FOR RELATED RIGHTS

The legislation also includes measure to protect and respect the privacy of people who make amendments to their birth records under this Act. Article 11 introduces an offence of knowing exposure of a person who has availed of the provisions of the Act. Anyone convicted of this offence shall be liable to a fine of between €1,000 and €5,000. Subsection 2 of that article enhances the protections available under the hate crime law through the specific inclusion of gender expression and sex characteristics as motivations which attract the increased penalties under Article 83B of the Criminal Code for offences which are racially aggravated or motivated by xenophobia or homophobia. Article 12 ensures that officials who acquire information in the course of carrying out their duties under the Act are restrained from disclosing that information in accordance with both the Professional Secrecy and Data Protections Acts.

The 2015 Act explicitly extends the protection for anti-discrimination and promotion of equality to the right to gender identity in Article 13. Thus, it requires that norms, regulations and procedures are interpreted and enforced in a manner that favours access to and exercise of the right to gender identity. Subsection 2 of this article imposes an obligation on the public service to eliminate unlawful discrimination and harassment on the basis of gender identity, gender expression and sex characteristics. Simultaneously it mandates that equality of opportunity must be promoted by the public service regardless of sexual orientation, gender identity, gender expression and sex characteristics. Finally, Article 13(3) extends these obligations beyond the public service to include private sector departments, agencies and all competent authorities that maintain personal records and/ or collect gender information. The article gives to all relevant agencies three years from the date of entry into force of the Act to modify their forms, records and information to reflect these new standards.

### 1.4. EXPLICIT GUARANTEE OF RIGHT TO BODILY INTEGRITY AND PHYSICAL AUTONOMY

Perhaps the most innovative aspect of the 2015 Act is the right to bodily integrity and physical autonomy guaranteed under Article 14. This deals very specifically with the question of medical and/or surgical treatment of intersex minors. It starts from the position that any sex assignment treatment or surgical intervention on the sex characteristics of a minor will be unlawful if those treatments or interventions could be postponed until the person treated can

provide informed consent. However, the 2015 Act does enable such treatment and interventions to be carried out on a minor who gives informed consent through their parent or tutor.<sup>2</sup> In administering such treatment the medical professionals are charged with ensuring that the best interests of the child are the paramount consideration and that weight is given to the views of the minor in accordance with their age and maturity.<sup>3</sup> Under Article 14(2) treatment is permissible in ‘exceptional circumstances’ when agreement is reached by the interdisciplinary treatment team and the parents or tutor where the minor is unable to provide consent and such treatment would ordinarily contravene the provisions of the legislation.

An interesting question arises when this newly recognised right to bodily integrity and physical autonomy meets other more traditional rights such as the right to religious freedom, in particular, the issue of male circumcision for members of the Jewish faith. For many within the Jewish community circumcision shortly after birth is a central prerequisite to membership of the religious community.<sup>4</sup> The wording of Article 14(1) of the legislation is such that it might be read such as to prohibit circumcision of neo-natal males. As of yet this is not an issue that has drawn official attention within Malta. A case which did consider the question of circumcision and the right to bodily integrity, but in England, was *Re J (Child’s Religious Upbringing and Circumcision)* (2000).<sup>5</sup> The case came to judicial attention as there was a disagreement between the parents as to whether their son should be circumcised. J’s parents, his English non-practising Christian mother and his Turkish non-practising Muslim father, had raised him in a secular environment. Having relocated back to his native Turkey, J’s father wished to ensure that his now five-year-old son would be brought up according to some Muslim traditions: to be circumcised and not to eat pork. In support of his position he advanced an argument under Article 9 of the European Convention on Human Rights that circumcision would help his son identify with the father and establish himself within the Muslim community. The mother did not want her son circumcised. There was no medical reason compelling the circumcision. The Court found that undergoing the procedure

<sup>2</sup> Art. 14(1) of the Gender Identity, Gender Expression and Sex Characteristics Act 2015.

<sup>3</sup> Art. 14(5) of the Gender Identity, Gender Expression and Sex Characteristics Act 2015.

<sup>4</sup> The circumcision of young boys is not practised by all Jews and has been the subject of debate within the community. See L. HOFFMAN, *Covenant of Blood: Circumcision and Gender in Rabbinic Judaism*, University of Chicago Press, Chicago 1996. This reflects a growth in the ‘intactness’ movement of those who argue that the circumcision of neo-natal males is a gender-specific offence similar to female gender mutilation and ought to be expressly outlawed. See further L.M. SARDI, ‘The Male Neonatal Circumcision Debate: Social Movements, Sexual Citizenship, and Human Rights’ (2011) 6(3) *Societies Without Borders* 304; R. DARDY and S. SAVBODA, ‘A Rose by Any Other Name: Rethinking the Similarities and Differences Between Male and Female Genital Cutting’ (2007) 21(3) *Medical Anthropology Quarterly* 301.

<sup>5</sup> *Re J (Child’s Religious Upbringing and Circumcision)* [2000] 1 FCR 307.

was not in J's best interests as he was essentially experiencing a secular upbringing in England, the procedure was not medically indicated, it would cause pain and distress and was irreversible. As Dame Butler-Sloss stated:

There is, in my view, a small group of important decisions made on behalf of a child which, in the absence of agreement of those with parental responsibility, ought not to be carried out or arranged by a one-parent carer although she has parental responsibility under section 2(7) of the Children Act 1989. Such a decision ought not to be made without the specific approval of the court. Sterilisation is one example. The change of a child's surname is another.<sup>6</sup>

Thus, the Court was willing to limit the autonomy of a parent to consent to the circumcision of his child on the basis that the immediate harm to the child outweighed the speculative future benefits should he identify as Muslim in later life.

This would seem to support a reading that in balancing the right to religious freedom on one hand and the right to bodily integrity and physical autonomy on the other, the latter would win out. However, it is important to remember that *Re J* concerned a disagreement between parents as to what was in the child's best interests in a context where the child had thus far been raised, and would primarily continue to be raised, in a secular fashion. Where parents are in agreement and fully intend to raise their son in a religious community that requires circumcision as a prerequisite to membership the balancing may weigh differently. It remains to be seen how this balancing will be achieved in Malta should such a case come to official attention.

The 2015 Act provides in Article 15 that all people who may seek psycho-social counselling, support or medical intervention relating to sex or gender should be given expert sensitive and individually tailored support by psychologists and medical practitioners or peer counselling. There are no limits on the access to this support and it is available from the moment of diagnosis or self-referral for 'as long as necessary'.

In a related vein, Article 16 requires the establishment of a working group to review the current medical treatment protocols in line with current best medical practices and human rights standards and to issue a report with recommendations for revision of the current medical treatment protocols. This working group would be appointed by the minister with responsibility for equality following consultation with the minister for health. It shall consist of a chairperson, who shall be a medical doctor with at least 12 years' experience and nine other members. These nine members shall include three experts in human rights issues, three psychosocial professionals and three medical experts. As of the date of publication, this working group has not yet been established.

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<sup>6</sup> Above n. 5, at para. 31.

## 2. ANALYSIS OF THE 2015 ACT AS IT RELATES TO INTERSEX PEOPLE

As stated in the introduction, the strength of the 2015 Act lies in how it responds to both the potential need to amend the gender of legal recognition and to protect people with intersex variations from unwanted interventions on their bodies.

### 2.1. GENDER RECOGNITION

In order to come *sui juris* and to avail of the protection and rights contained in law one must be able to be recognisable by the law. Records are available for births in Malta since 1863, the year that the Registration of Births, Deaths and Marriages Act introduced the first system of civil registration in England and Wales. The Public Registry, the office responsible for maintaining such records, was established on 3 August 1889.<sup>7</sup> The information required for a record of birth has since then included a requirement that the sex of the child be declared. Malta has a binary understanding of gender; thus, one must be declared as either male or female in order to be legally recognisable.

Until the introduction of the 2015 Act there was no mechanism by which to dispute the gender assigned at birth. A particular difficulty arises for intersex people in this context. When access to registration is predicated on a binary understanding of sex as either male or female, this can have the effect of excluding intersex people whose bodies may be configured such that they fall outside these classifications. The mid/late twentieth century saw a growth in the prevalence for ‘corrective’ or ‘normalisation’ procedures on the genitalia of children with intersex variations to reconstruct them along more apparently male or female lines.<sup>8</sup> As has been well documented, the majority of such re/assignments were to the female sex.<sup>9</sup> Tellingly, former US Surgeon General Joycelyn Elders was quoted in the *New Yorker* magazine ‘I always teach my students you can’t make a good male but you can make a pretty good female. Just take everything out and make a pouch.’<sup>10</sup> Thus if the gender as which an intersex person identified did not correspond with the sex noted in the birth record it was impossible for that person to be legally recognised in their identified gender.

<sup>7</sup> See further <[www.identitymalta.com/public-registry](http://www.identitymalta.com/public-registry)> (last accessed 8 January 2018).

<sup>8</sup> See further G. DAVIS, *Contesting Intersex: The Dubious Diagnosis*, New York University Press, London 2015; S.E. PREVES, *Intersex and Identity: The Contested Self*, Rutgers University Press, London 2005; A. FAUSTO-STERLING, *Sexing the Body: Gender Politics and the Construction of Sexuality* Basic Books, New York 2000 and S.J. KESSLER, *Lessons from the Intersexed*, Rutgers University Press, New Brunswick 1998.

<sup>9</sup> FAUSTO-STERLING, above n. 8.

<sup>10</sup> N. ATKINS, ‘DR ELDERS’ MEDICAL HISTORY’ (1994) 26 September *New Yorker* 45–46.

As Neuman Wipfler noted, there is an emerging crisis about the role of gender in establishing legal identity. The presumption that a sex designation is necessary on identity documents has harmed those who do not conform to normative binary understandings of sex/gender.<sup>11</sup> As an appreciation of the fluidity of gender, gender identity and gender expression increases and governments become more aware, there has been a growth in legislation and other measures that relax and expand the ways in which gender is classified. Attempts to account for greater gender variation has caused tensions to emerge both in terms of how best to acknowledge variance within gender markers to enable access to gender identity rights and how best to challenge the presumptive need for such markers in the first place as a significant aspect of the self that underpin legal identification documents.

In response to these challenges, the 2015 Act has opted to create a scheme for legal recognition that enables movement between the genders. While not entirely abandoning the need of gender markers, the Maltese legislation, in permitting delayed declaration of gender for minors under Article 18, does acknowledge that such markers are not absolutely essential in navigating legal existence. This openness towards thinking beyond the binary gender paradigm is reflected in the Maltese approach to consideration of foreign gender recognition determinations. Article 9(2) states that a gender marker other than male or female, or the absence of a marker, that is recognised by the relevant competent foreign authority will be recognised by Malta. Notwithstanding this acceptance of non-binary or absence of markers in these limited circumstances, in general the Maltese approach requires that all adults over the age of 18 years declare a gender of legal recognition and that must be male or female.

The exercise of the recognition rights in 2015 Act is not dependent on any preliminary diagnosis or determination by anyone other than the person making the declaration and amendment to their birth record. This is a welcome feature of the 2015 Act. Thus the rights in the Act are available to all. Other recognition systems, such as that under the Gender Recognition Act 2004 in the United Kingdom require certification by multiple medical professionals and subsequent determination on the authenticity of the application by a panel, thus introducing many gatekeepers which can prevent access to the rights.<sup>12</sup> Where recognition is dependent on a particular diagnostic label, such as 'gender dysphoria' under

<sup>11</sup> NEUMAN WIPFLER, above n. 1.

<sup>12</sup> Gender Recognition Act 2004 (England and Wales), ss. 2 and 3. For critiques of the gatekeeping functions of medical professionals, see L. FISHBAYN, 'Not Quite One Gender or the Other: Marriage Law and the Containment of Gender Trouble in the United Kingdom' (2006) 15 *American University Journal of Gender, Social Policy and the Law* 413; A.N. SHARPE, 'A Critique of the Gender Recognition Act 2004' (2007) 4 *Bioethical Inquiry* 33; S. COWAN, "'Gender is No Substitute for Sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 *Feminist Legal Studies* 67.

the scheme in the UK, it inherently excludes those, like people with intersex variations, who might otherwise wish to avail of the scheme. By adopting a de-pathologised approach to recognition, the Maltese 2015 Act ensures that all people, including intersex people, can exercise the rights contained therein.

A further important aspect of the de-pathologised approach contained in the 2015 Act is the implication that it may reduce the social pressure on parents to consent to irreversible interventions on their intersex children that may not be mandated by urgent medical concerns. This is particularly so when the declaration of sex can be delayed until the gender identity of the minor emerges as the child grows. Indeed, aside from questions of gender recognition, the primary strength of the 2015 Act, from the perspective of those concerned with realising rights for intersex people, are those aspects of the Act that address the question of the medical management of intersex.

## 2.2. MEDICAL MANAGEMENT OF INTERSEX

For the majority of the twentieth century the discussion around intersex concerned the medical management of intersex conditions. Discourse centred on the technicalities of intervention rather than whether intervention should take place.<sup>13</sup> While the medical profession has ceased to officially classify intersex as a ‘social emergency’<sup>14</sup> nonetheless these interventions continue. The 2015 Act is innovative in its efforts to protect against irreversible interventions that have not been consented to by the person upon whom they have been carried out.

This is achieved in a number of ways. First, the act eschews a definition of intersex. In a context where language surrounding intersex is contested avoiding a definition removes any latent sense of stigmatising or pejorative language.<sup>15</sup> Rather the 2015 Act focuses on the substance of the protection it enshrines. Article 2 defines ‘sex characteristics’ as referring

to the chromosomal, gonadal and anatomical features of a person which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.

This is a broad definition that cover all bodies without distinction and thus it encompasses intersex variations without isolating them.

<sup>13</sup> See references in n. 8 above and A.D. DREGER, *Hermaphrodites and the Medical Invention of Sex*, Harvard University Press, Cambridge (Massachusetts) 1998.

<sup>14</sup> AMERICAN ACADEMY OF PEDIATRICS, ‘Evaluation of the Newborn With Developmental Anomalies of the External Genitalia’ (2000) 106 *Pediatrics* 138.

<sup>15</sup> See DAVIS, above n. 8.

The past few years have seen an increase in statements from human rights organisations identifying the need to protect intersex bodies from interventions to which they have not expressly consented. The first explicit such statement was contained in Article 18 of the Yogyakarta Principles which exhorted states to

ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration.<sup>16</sup>

This was supported by the report from the UN High Commissioner for Human Rights in 2011.<sup>17</sup> The following year the Special Rapporteur on Torture published a report on violence in medical settings which included specific mention of intersex issues.<sup>18</sup> This trend continues to be evident in the recent resolution of the Parliamentary Assembly of the Council of Europe on Promoting the human rights of and eliminating discrimination against intersex people adopted in October 2017 which called on states to prohibit medically unnecessary sex-normalising surgery, sterilisation and other treatments practised on intersex children without their informed consent.<sup>19</sup>

The 2015 Act explicitly vindicates the rights of people with intersex variations through the inclusion of Article 14. In doing this it aims to strike a balance between various actors while keeping the child at the centre of the focus. As stated above, the default position adopted by the Act is that any intervention on the sex characteristics of a minor that has not been consented to by the minor is unlawful. Yet the prohibition is not complete.<sup>20</sup> The article allows for minors with the capacity to do so to consent to interventions through their parents or guardians. In placing both the best interests of the child and respect for the evolving maturity at the centre of this exception, the 2015 Act succeeds in

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<sup>16</sup> The Yogyakarta Principles <<http://yogyakartaprinciples.org>> (last accessed 08.02.2018).

<sup>17</sup> UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* UN Doc A/HRC/19/41 available at <[http://www.ohchr.org/\\_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Discrimination/A.HRC.19.41\\_English.pdf&action=default&DefaultItemOpen=1](http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf&action=default&DefaultItemOpen=1)> (last accessed 08.02.2018).

<sup>18</sup> J.E. MENDEZ, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53 available at <[http://www.ohchr.org/Documents/HRBodies/HRCouncil/Regularsession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/Regularsession/Session22/A.HRC.22.53_English.pdf)> (last accessed 08.02.2018).

<sup>19</sup> PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Resolution on promoting the human rights of and eliminating discrimination against intersex people, Resolution 2191 (2017) available at <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>> (last accessed 08.02.2018).

<sup>20</sup> See the discussion above regarding neo-natal male circumcision as part of the Jewish faith.

vindicating the rights of children in a meaningful way. The second exception to the prohibition contained is in Article 14(2) and permits intervention in ‘exceptional circumstances’ where the interdisciplinary team and parents are in agreement. Thus, urgent medical need can be attended to without risk of violating the protections offered by the Act.

In a similar vein the provisions in Article 15 guaranteeing access to healthcare for so long as it is required are important in the context of addressing the health needs of those who may have been subjected to interventions prior to the introduction of the Act.

### 3. CONCLUSION

The scheme introduced in the 2015 Act is comprehensive. It facilitates intersex people to change the gender by which they are legally recognised while simultaneously offering comprehensive protection from unwanted medical interventions. Thus, the Act successfully meets the challenge of responding to both aspects of the discourse centred on intersex rights. In achieving this, it manages to respect the dignity and human rights of intersex people in Malta.

