

Gender Identity Bill

Feedback and comments concerning the rights of children by the Office of the Commissioner for Children and the Maltese Paediatric Association

The Office of the Commissioner for Children recognises that the right to self determination includes the right of a person to determine his or her own gender identity; however this important life decision must be approached with caution.

The bill, in article 8 states that persons exercising parental authority, or the tutor of the minor, can file an application in court requesting the court to change the recorded gender and first name of the minor in order to reflect the minor's gender identity.

Certainly, as is stated in article 8 (2), the court must ensure that the best interests of the child as expressed in the Convention on the Rights of the Child are to be the paramount consideration, and in so far as is practicable, give due weight to the views of the minor having regard to the minor's age and maturity. We are concerned about the use of the phrase "in so far as is practicable", as this does not mean that the best interests of the child are to be necessarily guaranteed and his or her views taken into consideration. This phrase may cause a child not to be heard and allowed to express his or her own views. This is highly contradictory, particularly when we are trying to strengthen the voice of the child. Experience has taught us that the principle of the "best interests of the child" is too vague and subject to differing interpretations, thus giving rise to further inconsistencies.

Furthermore, the bill does not speak of any further safeguards or measures that are taken into consideration when the parent or tutor can exercise this right. The bill fails to mention the grounds that such parent or tutor can base such action, and life changing decision. The right of the child to have a gender change relies on the guardian, and this may potentially give rise to abuse. In accordance with the bill's objects and reasons, the sex characteristics of a person vary in nature and all persons must be empowered to make their decisions affecting their own bodily integrity and physical autonomy. In principle this is correct and ideal; however, it seems to contradict the very own articles of the said bill, entrusting the power to request the gender change to the persons exercising parental authority, rather than the person himself, or the child as long as he/she is able

and mature enough to understand the consequences of his/her actions and the weight of his/her decision, following the necessary medical assessments.

It has been noted that the bill in fact fails to distinguish between 2 categories of individuals:

- Those who feel trapped within a different gendered body (i.e. transgender people)
- Children who are born with a disorder of sex development (previously referred to as “intersex”)

It is important to distinguish between the 2 for various reasons, the primary and most important being that in the case of children born with a disorder of sex development, a decision to determine and register the child’s gender is justified, although medical research and opinion holds that there is no need to prolong until the child attains the age of 14 years of age as this may confuse and upset the child, causing psychological repercussions.

As it stands today the bill allows children to be left without an official gender on their birth certificate when born up until the age of 14 years, however does not specify the need for the child to have been identified as having a disorder of sex development by a medical specialist. We recognise that this may give rise to certain issues and complications for the child whose gender is not identified. It is not necessary and certainly not in the child’s best interest to leave him or her genderless until the age of 14 years.

Also such a choice should not be left solely in the hands of the parents/tutor to declare the child's gender by the age of 14 years. The duration of time until a child attains the age of 14 years is seen to be unnecessarily long. Even though such persons are meant to have their child’s best interest at heart, it is wrong to assume such, and moreover it should be based on professional medical advice which is given by a panel or board of listed medical professionals who are experts in that particular field. It is important that a panel of professionals is set up to advise on such delicate issues, and not leave the burden of such a decision in the hands of only one practitioner.

Another anomaly which could give rise to abuse is the fact that the Director of the Public Registry is not bound to ask for further documentation supporting the

change in gender. In Malta, should this Bill become law, a person would only be required to sign a notarial deed and sign a declaration to this effect after making a clear and unequivocal declaration that his/her gender identity does not correspond to the assigned sex in the act of birth, in accordance with article 5 of the bill. The Notary is also bound to explain to the applicant the legal implications of the change of the assigned gender and shall require the applicant to declare understanding of such implications. However, the person shall not be required to provide proof of a 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, as held in article 3 (4). While it is understandable that the procedure should not be overly bureaucratic, it is not recommended that it is left wide open.

In accordance with article 4 (3) the Director shall not require any other evidence other than such public deed. Also the person shall not be required to provide proof of a 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, as held in article 3 (4). While recognising and understanding the right to self determination, one also realises that this procedure without the need to provide supporting documentation and evidence gives rise to a number of concerns.

Another issue as proposed in the bill which must be examined is that found in article 17, concerning treatment protocol. The field of experience of the medical professionals sitting on such a working group must be clearly stipulated. For instance, in article 17 (3) it is too vague to state that the Chairperson of the working group shall be a medical doctor with at least 12 years experience. It is understandable that one must be a medical doctor with ample years of experience under his belt, however not every doctor is professionally equipped with the required expertise and competence to take such delicate and complex decisions. Again, in article 17 (4) the various experts' area of expertise must be qualified.

Above all, guidelines must be published for practitioners and professionals, and further examination of the bill is recommended.