



**KUNSILL NUTARILI
TA' MALTA**

Bill 70 of 2014

Gender Identity, Gender Expression and Sex Characteristics Act

An Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.

Official Position Paper

Kunsill Nutarili ta' Malta

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Premise

This paper provides a detailed analysis prepared by the Notarial Council of Malta of Bill 70 of 2014. Whilst not purporting to comment on any policy decision, this document analyses the Bill in the light of the legal certainty required by the Notarial Profession and also within the wider ambit of civil status (including civil partnerships, same sex marriages, etc.) and general civil effects. It also brings to the fore some practical aspects which the Notarial Council feels have been overlooked so far.

The nature of the Public Deed and the Notarial functions

One of the main aims of the Bill is to allow persons to request a change on official identification documents to reflect one's gender through a 'simplified procedure which respects the privacy of the person'. The 'simplified procedure' chosen by the legislator is a declaratory act drawn up by public deed in front of a Notary Public, thus granting it the highest form of probatory value at law. Whilst this is welcomed by the Notarial Profession, the Bill contains a number of instances which go counter to the very basic nature of the public deed. If the whole process is to be made by public deed (in order to favour expediency and cost efficiency over the Courts' time consuming bureaucracy) then the information is intrinsicly public. A public deed, by its very nature, is available to all and sundry to peruse and the Notary, or the Government Archives, are under a legal obligation to furnish a copy of the deed to anyone who requests it. In this light, *Article 13* of the Bill goes directly counter to the legal definition of Public Deed and the obligations of a Notary Public as prescribed by Law. It is suggested therefore, that *Article 13* is amended as follows:

(1) A person who in the course of the discharge of official duties was involved with a matter relating to this Act may not unlawfully disclose such matter in accordance the Professional Secrecy Act and the Data Protection Act. Any copy of the public deed referred to in Article 5 of this Act issued in terms of The Notarial Profession and Notarial Archives Act shall not be deemed to have been issued in contravention of this article.

The Notary is a legal professional who is also an independent and impartial public officer. The Bill over-complicates matters, trying to redefine terms which are already well established in Chapter 55 of the Laws of Malta, and which do not require any further elaboration. The definition of a Notary afforded by the Bill, *'a Notary Public of one's choice holding a warrant issued in accordance with the Notarial Profession and Notarial Archives Act'* is seen unnecessarily long-winded and such definition, if deemed at all necessary, should simply read:

"Notary" means a person holding a warrant to practice as a Notary Public in Malta in accordance with the Notarial Profession and Notarial Archives Act.

Furthermore, a Notary is already under an obligation at Law to explain to the parties and the appearers the contents, import and consequences of the public deed being published. Therefore, it is totally superfluous for the scope of the Act to include such requirements and obligations which emanate strictly from Chapter 55 of the Laws of Malta. It is submitted that *Article 5(2)* of the Bill is redundant and should be deleted in its entirety. This is a declaratory act by the individual with no specific civil effects. The social effects are another matter altogether, but these are outside the scope of the Bill and the explanation required from the Notary. The Notary should not be made to shoulder a responsibility which not even the legislator seems to know the extent thereof.

The Bill also tries to regulate the Notarial fees for publication of the deed, which once again, are regulated under Chapter 55. The deed referred to in Article 5 is a declaratory deed where no consideration or value is determined or determinable, for which Chapter 55 already stipulates a fee. It is submitted,

therefore, that *Article 5(3)* is removed totally. In the same spirit, tariffs and fees for enrollment and registration of a deed is regulated under The Public Registry Act, Chapter 56 of the Laws of Malta, and the time limit within which such registration is to take place is already regulated under Chapter 55. *Article 5(4)* should be amended as follows:

(4) Every notary receiving such an act must deliver to the Director of the Public Registry a note in accordance with Article 50 of The Notarial Profession and Notarial Archives Act.

It is also submitted that given the delicate nature of these declaratory deeds, Article 11 of Chapter 55 of the Laws of Malta is not to remain mandatorily applicable. It is being suggested that a new sub-article is added to *Article 5* as follows:

(5) Article 11(1) of the Notarial Profession and Notarial Archives Act shall not apply to the declaratory public deed mentioned in this article.

Alternatively, a *new Article 23* is introduced in the Bill after Article 22 as follows:

23. The Notarial Profession and Notarial Archives Act (Cap 55) shall be amended as follows:

Immediately after paragraph (b) of subarticle (2) of article 11 thereof, there shall be added the following new provision:

“(c) where his services consist in the publication of the declaratory public deed referred to in article 5 of the Gender Identity, Gender Expression and Sex Characteristics Act.”

The notion of the Public Registry

According to *Article 5* of the Bill, the declaratory public deed is to be enrolled in the Public Registry. At the same time, the Bill is stipulating that the information, even though enrolled in the public registry, should not be searchable and should not even be indicated in the extract of a person's birth certificate. There seems to be total confusion between enrollment of public deeds and the civil status registration in Public Registry.

Article 6 refers to the notary having the obligation to make an application (*rikors*) against the Director of Public Registry whereas *Article 4* makes this the right of every person to request the Director to make the change after the declaratory deed is published. At the same time, *Article 5* is dictating that the deed is to be enrolled (*insinwat*) in the Public Registry. The Bill does not afford a clear procedure that needs to be followed after publication of the declaratory deed and this confusion stems directly from the failure to differentiate between the concepts of enrollment and civil status registrations.

Creating a gender Registry in the Public Registry which shall not be accessible to anyone defies the whole purpose of having such a register in the first place, since its purpose is solely to give public information and certainty. The legislator needs to ensure that individuals who will undergo the procedure to have their gender identity changed, will have all their civil rights and corresponding civil obligations carried forward with their new identity and

that a direct and certain link is always established in the best interest of society's juridical order.

Article 6(1) should therefore establish a procedure akin to that presently used in cases where a married woman reverts to her maiden surname consequent to a deed of personal separation, and be amended as follows:

(1) There shall be maintained at the Public Registry Office in Malta and in Gozo a register, to be called the Gender Register, in which shall be made such entries as may be directed to be made therein by the Director following the note of enrollment presented by the Notary according to Article 5(4).

Consequently, the indexes of the entries in this Gender Register should result from an official search, if specified, and should be searchable in the same manner as all other volumes in the Public Registry. *Article 6 (3)* should be amended to read as follows:

(3) The Director shall cause an index of the Gender Register to be made and kept in the Public Registry Office in Malta and in Gozo which indexes shall be searchable in the same manner as all other volumes in the Public Registry, if specified in an official search.

The Bill puts into question established practices of the Public Registry which should be totally transparent and provide complete factual information. Presently, all certificates and extracts issued by the Public Registry are issued with any relevant annotation following any entry which changed any particulars of that certificate. The Bill is suggesting that annotations are not

published on birth certificate extracts issued by the Public Registry in cases of gender change. Furthermore, it is being suggested that the full birth certificate is not made available to anyone except the particular individual and that an extract will not contain any annotation denoting the 'rectified gender'. This further undermines the certainty required by Notaries and other legal professionals. It is submitted that *Article 6(4)* should reflect all the passages of the individual in civil status matter and therefore, any relevant annotation should remain noted on any certificate or extract issued by the Public Registry. *Article 9* should also be revised in the same manner to reflect these fundamental requirements.

It is of vital importance that a clear and uninterrupted link is maintained between the previous gender and name of an individual and the new ones taken up by means of this procedure. This is needed in order to safeguard legal certainty and any rights and obligations acquired and entered into by individuals, amongst which, certainty of title to property or a person's liabilities existing at any point in time.

Third parties and society in general have a right to know all the legal facts that have a bearing on a particular civil transaction, in as much the same way that one has a right to know whether one is dealing with a married person and if such person requires the signature of the other spouse to enter into any agreement or if there is separation of estates between the spouses. It is also submitted that in order to safeguard third party and creditor rights, *Article 3(2)* must also contain a reference that such rights will remain unimpaired and unaffected following this change, and should add:

(2) Without prejudice to any provision of this Act -

(a) a person's rights, relationship and obligations arising out of parenthood or marriage shall in no way be affected;

(b) the person's rights arising out of succession, including but not limited to any testamentary dispositions made in one's favour, and any obligations and, or rights subjected to or acquired prior to the date of change of gender identity shall in no way be affected; and

(c) any real or personal rights already acquired by third parties or any privileged or hypothecary standing or ranking of any creditor acquired prior to the date of change of gender identity shall in no way be affected.

The Notarial profession is a guarantor for legal certainty and the present Bill could undermine this basic concept. If the indexes at the public registry where the gender-specifying deeds are to be enrolled are not searchable, then a Notary has no means of ascertaining a direct connection between a particular person pre and post gender change. This could easily lead to abuse and give rise to the possibility of fraud.

To date, searches in the Public Registry are conducted purely on a name basis and not on ID card number basis. The lack of a searchable index will also have a practical impact on Notaries who will be faced with a potentially embarrassing scenario of having to ask particularly sensitive questions (possibly in the presence of third parties) in person, in order to determine certain facts which would otherwise be perused by the Notary from an official search, with all due discretion as part of the public registry searches carried out routinely in the background.

Furthermore, this lack of transparency will mean that the Notary will not have any official document to prove the fact but will have to rely on the person's declaration. This will also impact negatively the Customer Due Diligence protocols Notaries are legally obliged to have in place and observe.

Other effects and lacunae

Existing marriage

The effects of a person changing gender during marriage must be clearly addressed. The Bill is without prejudice to any issue involving parenthood or marriage. This blanket provision under Article 3(2) gives rise to a number of moot questions in case of married persons. Will the law now recognise marriages between persons of the same gender? Will the prior marriage now be regarded as a civil union? If so, is the legislator allowing one party to a marriage to unilaterally change the terms of the marriage 'contract'?

Minors

Under *Article 8(4)* the Bill allows for parents to defer the determination of the gender of their offspring until the age of 14. There is a lacuna in the Bill as to what happens in cases of persons aged between 14 and 18 where this determination has not yet been made and what are the consequences of such an omission.

Furthermore, it is submitted that the procedure created under the said sub-article may be creating an unnecessary complication, where the Bill itself already provides a solution in cases where parents feel that their minor children

require rectification of their gender. Gender markers (*'identifikatur tal-generu'* would be a more appropriate translation than *'ghodda tal-generu'*) should be clear and unequivocal and made mandatory in every official document offering certainty and unequivocality. The Bill is already providing a 'simplified procedure for persons wishing to subsequently request a change on official identification documents to reflect one's gender identity'.

The proviso to be added after paragraph (c) of Article 238 of the Civil Code, according to *Article 21(b)* of the Bill, namely:

(b) immediately after the words "the sex of the child:", there shall be added the following new proviso:

"Provided that the identification of the sex of the minor may not be included until the gender identity of the minor is determined."

creates further confusion, as it seems to imply that in order to establish the sex of a newborn child one has to determine its gender identity at birth, which is an impossible task if one adheres to the definition of 'gender identity' afforded by the Bill itself, namely *'the 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'*. Does this mean, therefore, that all parents will be required to declare the sex of their offspring by means of a public deed once the gender identity can be safely determined in accordance with the definition given in the Bill?

Establishment of a Name and Gender Register

The simplified procedure envisaged in the Bill allowing persons to change their name and their gender by means of a public deed, could be viewed as creating a discriminating 'fast track' process for a particular minority, whilst leaving other individuals who might merely want a change in name, still having to resort to the present cumbersome and expensive procedure via the Civil Courts.

It is being submitted for discussion whether a 'Name and Gender Register' could be created in the Public Registry thus making this new simplified and cost effective procedure available to all and sundry. The scope of this new register could be further widened in time by including registration of declaratory public deeds pertaining to cancellation of powers of attorney, renunciation to inheritance, interdictions and incapacitations and any other declaratory act that may be prescribed by the Minister from time to time.