

# Gender Identity, Gender Expression and Sex Characteristics Act Consultation

**UNHCR's comments on the Gender Identity, Gender Expression and Sex Characteristics Bill submitted to the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties**

**November 2014**

## I. Background

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide its comments to Malta's *Gender Identity, Gender Expression and Sex Characteristics Bill* ("Draft Bill"), proposing 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.
2. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.<sup>1</sup> As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."<sup>2</sup> UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 *Convention relating to the Status of Refugees* ("the 1951 Convention")<sup>3</sup> according to which State parties undertake to "*co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.*" The same commitment is included in Article II of the 1967 *Protocol relating to the Status of Refugees* ("the 1967 Protocol").<sup>4</sup>
3. UNHCR's supervisory responsibility is also reflected in European Union (EU) law, including by way of a general reference to the 1951 Convention in Article 78(1) of the *Treaty on the Functioning of the European Union*, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that "*consultations shall be established with the United Nations High*

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<sup>1</sup> See UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>

<sup>2</sup> *Ibid.*, para. 8(a).

<sup>3</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>. See also Article 3 of the *Refugees Act* (Chapter 420) of the Laws of Malta, stating that "[t]his Act incorporates the obligations assumed by Malta under the [1951] Convention and its obligations under the [EU] Directives." Malta acceded to the 1951 Convention on 17 June 1971, and the 1967 *Protocol Relating to the Status of Refugees* on 15 September 1971, subject to declarations and reservations.

<sup>4</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

*Commissioner for Refugees [...] on matters relating to asylum policy*".<sup>5</sup> Secondary EU legislation also emphasizes the role of UNHCR. UNHCR's supervisory responsibility is specifically articulated in Article 29 of the EU Asylum Procedures Directive<sup>6</sup>, Recital 22 of the EU Qualification Directive<sup>7</sup> as well as Article 10(3) and 18(2)(b) and (c) of the Reception Conditions Directive.<sup>8</sup>

4. UNHCR welcomes and supports the efforts made by the Government of Malta to improve the protection environment for persons who have diverse sexual orientations and/or gender identities, including refugees and beneficiaries of international protection.

5. In particular, UNHCR welcomes:

- The introduction of the ground of "gender identity" in the list of grounds of non-discrimination found in the *Constitution of Malta (Amendment) Act, 2014*;
- The inclusion of "gender identity" within the definition of a particular social group in the *Procedural Standards in Examining Application for Refugee Status (Amendment) Regulations, 2014* (L.N. 161 of 2014);
- The inclusion of the ground of "gender reassignment" for purposes of sick leave and other rights and protections afforded under the *Employment and Industrial Relations Act*;
- The amendment to the *Civil Code* allowing transgender persons to be fully recognised in the acquired gender and the right to marry their opposite sex partner through the *Civil Code (Amendment) Act, 2013* (Act No. VII of 2013);

<sup>5</sup> European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: <http://www.refworld.org/docid/51c009ec4.html>

<sup>6</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L180/60, available at: <http://www.refworld.org/docid/51d29b224.html>. Article 29(1)(c) in particular obliges Member States to allow UNHCR "to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.

<sup>7</sup> European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337; December 2011, pp 9-26, available at: <http://www.refworld.org/docid/4f197df02.html>

<sup>8</sup> European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96, available at: <http://www.refworld.org/docid/51d29db54.html>

- The introduction of the *Civil Unions Act* (Act IX of 2014) providing for the registration of partnerships as a civil union between two persons of the same or of different sex.

UNHCR considers that all the above-mentioned legislation contributes to an improved protection environment for lesbian, gay, bisexual, transgender and intersex (LGBTI) refugees and beneficiaries of international protection.

6. UNHCR notes that Malta has indeed granted international protection to asylum-seekers on the basis of their sexual orientation and/or gender identity, in line with international and domestic refugee law standards. UNHCR further notes that refugees and beneficiaries of international protection may not necessarily have been granted protection on sexual orientation and/or gender identity grounds, but could nevertheless identify as LGBTI at a later stage, after they have obtained protection in Malta.
7. The human rights guarantees contained in international legal instruments are part of the protection framework for LGBTI asylum-seekers and refugees and are complementary to those contained in the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol*.<sup>9</sup> According to the Yogyakarta Principles, “international human rights law affirms that all persons, regardless of their sexual orientation or gender identity, are entitled to full enjoyment of all human rights, and the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities.”<sup>10</sup> The right to non-discrimination is essential for the international protection of LGBTI asylum-seekers and refugees.<sup>11</sup>

<sup>9</sup> See further UNHCR Guidance Note, above footnote 1, generally and para. 9 and footnotes thereto, and International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and Human Rights Law Practitioners Guide No 4*, 2009, at 25, available at [http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=22929](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22929).

<sup>10</sup> Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, March 2007, (hereafter “Yogyakarta Principles”), available at: [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm), Preamble.

<sup>11</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008 (hereafter “UNHCR Guidance Note”), available at <http://www.unhcr.org/refworld/docid/48abd5660.html>, para. 9; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>. The non-discrimination provisions on account of “sex” or “other status” in the ICCPR and ICESCR, as well as in Article 2 of the Convention on the Rights of the Child (available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>), are to be taken as including sexual orientation, as affirmed by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. The same interpretation has been adopted by the European Court of Human Rights (ECtHR) in relation to Article 14 (Prohibition of discrimination) of the European Convention for the Protection of Human Rights and Fundamental. See also Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles” (2008), *Human Rights Law Review*, Vol. 8, No. 2, 207–48, at 232,

8. It is UNHCR’s understanding that the Draft Bill is intended to provide 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. UNHCR considers that the Draft Bill is directly relevant to the gender identity, gender expression and sex characteristics of refugees and beneficiaries of international protection.

## II. Specific comments on the Draft Bill

9. UNHCR welcomes the introduction of the right to gender identity in Article 3, in particular the extension of such rights to persons habitually resident in Malta. UNHCR considers this to extend to refugees and other beneficiaries of international protection in Malta who enjoy residence rights in terms of the *Refugees Act*, Chapter 420 of the Laws of Malta, and relevant subsidiary legislation.

10. UNHCR welcomes the introduction of the provision on anti-discrimination and promotion of equality in Article 14, in particular:

*“(1) Every norm, regulation or procedure shall respect the right to gender identity. No norm or regulation or procedure may limit, restrict, or annul the exercise of the right to gender identity, and all norms must always be interpreted and enforced in a manner that favours access to this right.”*

UNHCR further welcomes the duty of the public service to ensure that unlawful sexual orientation, gender identity, gender expression and sex characteristics’ discrimination and harassment are eliminated in subarticle (2).

11. UNHCR notes that the procedure laid down by the Act (in Articles 4 and 5) to change one’s gender identity is limited to persons who are Maltese citizens, and does not seem to extend to those persons who are habitually resident in Malta, such as refugees and beneficiaries of international protection. UNHCR considers that the established procedure does not reflect the principles outlined in Article 3 and 14 of the same Act as well as international human rights standards on non-discrimination.

12. UNHCR notes that refugees and beneficiaries of international protection may find difficulties in obtaining their birth certificate and other identification documents due to their personal and contextual circumstances of flight from their country of origin. Moreover, LGBTI refugees and beneficiaries of international protection would not normally be in a position to request a competent court or responsible authority in their country of origin to change their gender identity (in terms of Article 10 of the Act). Indeed, it may be the case that they would have had to flee their country of origin due to their fear of being persecuted by the authorities and/or other non-state actors for reasons related to their gender identity and/or sexual orientation. In this sense, refugees and other beneficiaries of international protection cannot reasonably be expected to have the same level of accessibility to personal documents as persons who are Maltese citizens.
13. UNHCR recommends that a more inclusive or an alternative procedure be established so as to enable refugees and beneficiaries of international protection to fully enjoy their right to their gender identity. This procedure could include the following element:
- The declaratory public deed (in Article 5) could include a copy of the application for international protection signed by the Office of the Refugee Commissioner instead of a copy of the act of birth of the applicant [as per Article 5(1)(a)].
14. UNHCR stands ready to contribute to the further development of the protection environment for LGBTI refugees and beneficiaries of international protection and to further assist and provide guidance to the Government of Malta on relevant matters.

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