

Malta: Enforced Sterilization and Virginity Testing

Dr Daniel Bianchi,

Lecturer in Health Care Law, University of Malta

NCP for Malta

A. Enforced Sterilization

There have been two recent changes to Title VIII of Malta's Criminal Code on crimes against the person under its sub-title IX concerning threats, private violence and harassment. The first change occurred by way of Act X of 2024.¹⁹ Article 2 of the latter Act introduces a new version of Article 251F of the Criminal Code thereby substituting the preceding version of that same provision addressing the criminal offence of enforced sterilization. The preceding version of Article 251F of the Criminal Code, which has now been substituted, read as follows: "Any person who for non-medical reasons, by force, deceit, bribery or threats surgically removes or disables a person's reproductive organs without that person's full and informed consent, leading to sterilization, shall be guilty of enforced sterilization ...".²⁰ The new version of Article 251F (1) of the Criminal Code now reads as follows: "Whosoever surgically removes or disables a minor person's reproductive organs, or an adult person's reproductive organs without that adult person's free and informed consent, leading to sterilization, shall be guilty of enforced sterilization ...". Furthermore, Article 251F (3) now provides that whosoever is an accomplice to the latter offence "by aiding, abetting or procuring the enforced sterilization of any minor person or adult person shall, unless the act constitutes a more serious offence under any other law or any other provision of this Code, be liable, on conviction, to the punishments laid down in sub-articles (1) and (4) of" Article 251F. The new version of the offence of enforced sterilization in the Maltese Criminal Code arguably then has five characteristics that distinguish it from the preceding version of Article 251F.

First, whereas the preceding version of Article 251F of the Criminal Code meant that sterilization for medical reasons fell beyond the scope of the criminal offence of enforced sterilization, the new version of Article 251F instead engages with a medical intervention as a possible, but not evident, exception to the general rule that enforced sterilization is a criminal offence. Thus, it is not the case that any sterilization for medical reasons is exempt from criminal liability. It is instead now provided in Article 251F (2) that "no offence under this article shall be committed when sterilization shall result as a consequence of a medical intervention" but only if that intervention satisfies, as a minimum, all three conditions listed in the proviso of that sub-article. Any medical intervention that does not satisfy all three conditions listed in Article 251F (2) is not otherwise, all else being equal, exempted from the purview of the offence of enforced sterilization under Article 251F. The first condition arising from the proviso to Article 251F (2) then is that the medical

¹⁹ Act X of 2024 – Criminal Code (Amendment No. 4) Act, 2024 [Government Gazette of Malta No 21,197 – 23/02/2024].

²⁰ Act I of 2014 – Criminal Code (Amendment) Act, 2014 [Government Gazette of Malta No 19,204 – 31/01/2014], Art 2.

intervention “is not performed with the purpose of achieving enforced sterilization” in terms of Article 251F. The second condition for the exception to apply as it was originally indicated in the Bill preceding Act X of 2024 simply provided that the medical intervention “would have been otherwise deemed medically necessary by a medical professional”.²¹ Following comments made in the House of Representatives over the course of the Bill’s second reading,²² that second mandatory condition for the exception in relation to medical interventions to apply was amended within the Adjunct Committee for Consideration of Bills,²³ before the third reading, so that Article 251F (2) now provides that the medical intervention:

would have been otherwise deemed medically necessary by one (1) or more medical professionals, in accordance with the applicable standard of care, with such standard following established medical practice, and with such medical intervention consisting of one (1) or more procedures, and which has the aim of saving or preserving the life of an adult person or of a minor person, in the immediate or longer term.

As such, for instance, absent the latter aim of saving or preserving life, it will be an offence to perform enforced sterilization even for medical reasons. Furthermore, the third condition so that, when accompanied by the other two conditions, the exception to the general rule that enforced sterilization is a criminal offence may apply is that the medical intervention “follows established medical practice with regard to the granting of informed consent by the patient in terms of other legislation”.²⁴ The latter condition then furnishes reason to consider other legislation. By way of example, the Health Act outlines if, when and how a person who has attained the age of sixteen years, but not eighteen years,²⁵ would have the right to consent to or refuse, medical attention, care or treatment.²⁶

The second distinctive characteristic of the new version of Article 251F of the Criminal Code when compared to its preceding version is that, other than the exception that I outlined in the previous paragraph, it will be a criminal offence to remove or disable “a minor person’s reproductive organs”²⁷ and it will also be a criminal offence to remove or disable the reproductive organs of an adult person who “is unable to give free and informed consent in accordance with this article, whether due to a cause that is either temporary or long-term”.²⁸ It is thus clarified in the new version of Article 251F (2) that “no other person shall be able to substitute said adult person’s free and informed consent for the purposes of this article”. It is furthermore provided that, other than in the circumstances outlined in the preceding paragraph of this report, “any surgical

²¹ Bill No 86, Criminal Code (Amendment No. 4) Bill [Government Gazette of Malta No 21,167 – 19/12/2023] clause 2.

²² House of Representatives Malta, Plenary Session, 14th Legislature: Sitting No. 193 (10th January 2024). See, for instance: Hon Graziella Galea and Hon Rebecca Buttigieg.

²³ House of Representatives Malta, *Kumitat Permanenti għall-Konsiderazzjoni ta' Abbozzi ta' Ligi Aggunt (Rapport Ufficjali u Rivedut)*, 14th Legislature: Sitting No. 22 (7th February 2024).

²⁴ Criminal Code, Chapter 9 of the Laws of Malta, Art 251F (2).

²⁵ Daniel Bianchi, *Medical Law in Malta* (Alphen aan den Rijn: Kluwer Law International – 2023) 162 – 163.

²⁶ Health Act, Chapter 528 of the Laws of Malta, Art 27 (2).

²⁷ Criminal Code, Chapter 9 of the Laws of Malta, Art 251F (1).

²⁸ *Ibid.*, Art 251F (2).

procedure performed on a minor person, and that leads to sterilization, shall be deemed to be enforced sterilization for the purposes of this article ... and no other person, including a parent or legal guardian, shall be able to provide consent for such a procedure in the name of the minor person, other than when the exception mentioned would be applicable”.²⁹ With the exception of medical interventions as indicated in the preceding paragraph of this report, the new version of Article 251F does not therefore furnish an exception to the offence of enforced sterilization were a substitute decision-maker to furnish consent on behalf of another person to undergo a procedure that surgically removes or disables reproductive organs.

The third distinctive characteristic of the new version of Article 251F of the Criminal Code is that, while all else being equal an adult person may elect to undergo surgery to remove or disable one’s own reproductive organs, that surgery must be done in accordance with the adult person’s free and informed consent as defined in that provision so as not to incur criminal sanction. Article 251F (2) thus now clarifies that, for the purpose that article, free and informed consent shall:

- (i) mean consent reflecting the will and preferences of an adult person, freely given directly by said adult person, in respect of a surgical procedure the adult person might undergo which may lead to sterilization; and (ii) be given after said adult person would have been provided with prior information, in respect of the purpose and nature of the procedure, as well as of its consequences, risks and alternative options thereto, in a manner that is appropriate, accessible and easy to understand for that adult person, including, as necessary, through non-conventional methods of communication and access to independent support from third parties; and (iii) be able to be withdrawn at any moment prior to the procedure following its initially having been given, with said possibility having been likewise communicated to the adult person alongside the information indicated above.

Whosoever surgically removes or disables an adult person’s reproductive organs without the subject’s free and informed consent in accordance with all three of the above characteristics listed in Article 251F (2) of the Criminal Code may be open to being found guilty of enforced sterilization in terms of Article 251F (1) even if the adult person ostensibly consented to the procedure but not in line with the requirements of “free and informed consent” as defined Article 251F (2).

The fourth distinctive characteristic of the new version of Article 251F of the Criminal Code is that, while in the preceding version of Article 251F at least one between “force, deceit, bribery or threats”³⁰ had to be present in order for enforced sterilization to qualify as a criminal offence, those criteria of force, deceit, bribery or threats are now no longer required under the new version of Article 251F for enforced sterilization to qualify as a criminal offence in terms of that provision. Instead, the punishment prescribed for any of the

²⁹ *Ibid.*

³⁰ Act I of 2014 – Criminal Code (Amendment) Act, 2014 [Government Gazette of Malta No 19,204 – 31/01/2014], Art 2.

offences in Article 251F (1) to (3) shall now “be increased by one (1) degree, when the commission of such crimes involves also the use of force, deceit, fraud, bribery, false pretences, coercion or threats”.³¹

The fifth distinctive characteristic of the new version of Article 251F of the Criminal Code when compared to its predecessor is that the victim of the offence is now taken into account as an injured party. As such, that injured party may benefit from compensation from the person convicted of the offence of enforced sterilization under Article 251F for the harm that was occasioned in its performance. It is thus now provided in Article 251F (5) that, in addition to any other punishment “to which the person convicted of such an offence may be sentenced, the Court may also order such person to pay the injured party such sum of money as may be determined by the said Court ... as compensation for the harm, including moral and, or psychological harm caused to such party by, or by means of the offence”. That order by the court would then constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta.

B. Virginity Testing

A second recent change to Malta’s Criminal Code occurred as a consequence of Act XI of 2024.³² This Act added Article 251EA to the Criminal Code, which provides for the offence of virginity testing. It was clarified over the course of the pertinent Bill’s second reading within the House of Representatives that it was being introduced as a precautionary measure,³³ meaning that there was no evidence per se of virginity testing being regularly practiced in Malta. Article 251EA (1) of the Criminal Code thus now provides that whosoever “carries out virginity testing upon another person by examining the female genitalia of that person shall be guilty of an offence...”. It is furthermore provided in Article 251EA (2) that whosoever “aids, abets, counsels, incites, procures, coerces or advertises virginity testing” shall also be guilty of an offence and liable to the same offence as the person who may be found guilty of carrying out virginity testing.

To be clear, for the purposes of Article 251EA, virginity testing is defined in Article 251EA (3) as the examination of female genitalia, meaning “vagina or vulva”, for the purpose or purported purpose of determining virginity. The offence will subsist “with or without consent”³⁴ of the person being examined. As such, the subject’s consent will not exonerate a person from criminal liability for virginity testing in terms of Article 251EA.

There is however a proviso in respect of medical examinations carried out by a medical professional. Thus, a proviso to Article 251EA (3) of the Criminal Code excludes from the ambit of virginity testing for the purpose of Article 251EA “any medical examination of the female genitalia which may be carried out by a medical professional during a medical intervention, in accordance with established medical practices”. In this

³¹ Criminal Code, Chapter 9 of the Laws of Malta, Art 251F (4).

³² Act XI of 2024 – Criminal Code (Amendment No. 5) Act, 2024 [Government Gazette of Malta No 21,208 – 15/03/2024].

³³ House of Representatives Malta, Plenary Session, 14th Legislature: Sitting No. 192 (9th January 2024), Hon Rebecca Buttigieg.

³⁴ Criminal Code, Chapter 9 of the Laws of Malta, Art 251EA (3).

respect, it is the latter “established medical practices”, rather than defined parameters at law, that are the basis upon which to establish whether the actions of a “medical professional” fall within the scope of the offence in Article 251EA of the Criminal Code.

Date of submission: 31st May 2024