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BILL ON GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS COMMENTS AND CONCERNS

1. Any legislation which intends to implement the values enshrined in the *European Convention on Human Rights*, the *European Charter of Fundamental Rights* and the *Constitution of Malta* is to be welcomed. The values which inspire and shape Europe, such as respect for human dignity, freedom, tolerance and equality, proportionality, human rights and democracy, justice and solidarity, and the rule of law, are to be interpreted not as a catalogue of entitlements but as a necessary precondition of a 'culture of dignity' in which every citizen, irrespective of nationality, status, sexual orientation, gender, age or achievement, lives in an inclusive culture of recognition between human beings. All persons and minority groups are to be recognized as belonging to the same moral and civic community as the majority.
2. The legislation, which is being proposed on gender identity, gender expression and sex characteristics, is seeking to address the needs of a category of people who very often find it socially hard and painful in trying to deal with a fundamental dimension of their own self-identity. It is certainly a step in the right direction for society to take the necessary measures, including appropriate legislation, to create those conditions that enable everyone, above all those whose vulnerability exposes them to multiple disadvantages, to live with dignity and to exercise their lawful rights.

While there is no clear-cut answer as to the required kind of legislation on the matter, it is important to recognize the complexity of the problem and be guided by a set of ethical principles which can help one to find the right kind of balance between the rights of the individual and the legitimate interests of others and the community as a whole.

3. A basic principle is that the provisions of the proposed legislation should be proportionate to the objective desired. The main objective is to create a social environment that is supportive of the dignity of those experiencing issues related to their gender identity. These have certainly a right to equality and should not suffer any form of discrimination, stigmatization and marginalization. In trying to protect its members from unnecessary hardship and pain, a society is truly expressing a human face. But one is justifiably concerned about legislation that would be making a change in one's gender practically as simple as a change in one's identity card. The matter involves clearly a fundamental aspect of individual and social life. An over-simplified



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solution to a complex problem would trivialize the issues clustered around it. While granting individual rights, a proper balance must be struck between the rights of such individuals, the interests of others and those of the community at large. In other words, the promotion and safeguarding of the dignity and rights of the individual should be pursued in a way that no adverse consequences are exerted on society in general and on the family in particular.

4. The precautionary principle is particularly relevant to this case. This principle was originally applied as a guide in those cases in which one could not foresee with certainty, on the basis of current scientific evidence, the long-term consequences of certain interventions on the physical environment. In such circumstances, the principle called for caution and the exploration of a wide range of initiatives from which one could choose possibly with no or, at least, with a minimum harm to the environment. This kind of reasoning, based fundamentally on prudence and foresight, applies equally and, even more, to legislative measures that would be having drastic consequences on the life of individuals and society in general. Some of the Bill's propositions seem to be complex and far-reaching since they may imply serious anthropological repercussions. It is much wiser to learn from the acquired experience of other established legal systems, if any, rather than to engage in an in-house experimentation with a leap into the unknown.
5. Given its socially broad relevance, the matter surely calls for a decision-making procedure that is transparent and open to the widest possible public participation. The public would have been better served, if it had been given the opportunity to participate from the initial stages. Other possible pathways could have been explored and other options could have been considered. The parameters seem now to have been fixed and the period for consultation has been limited to a relatively short time. A properly structured consultation process in which civil society is given the opportunity to engage in a fruitful discussion on what is at stake would still be a wise way forward.
6. The Bill touches on quite a number of areas of concern. The most crucial one is the definition which it gives of gender identity. It defines it 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 mannerisms". This definition, besides taking a diametrically opposite position from the traditionally held one based on biology, is very vague and leaves its interpretation wide-open. This invariably results in a wide arbitrariness in the application of the law and to conflicting interpretations.



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Since the Bill requires no external physical or even psychological signifier, the determination of “gender” is entirely subjective and psychologically dependent on the personal preference of the individual. It says that 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.” Moreover, it states that “it shall be the right of every person who is a Maltese citizen to request the Director to change the recorded gender and, or first name in order to reflect that person’s self-determined gender identity.” Once one substitutes a purely subjective for an objective criterion in determining the way a person will be known as male or female the way is wide open to abuse of the power that one can actually exercise when switching from one gender to another.

7. A necessary distinction ought to be made between the real and concrete situation of persons who experience an interior conflict between their physical sex and their gender identity, and the gender ideology according to which people can freely determine whether they want to be male or female and freely choose their sexual orientation arbitrarily.

If the Bill intends to serve both compassion and justice, it should set unequivocal parameters that distinguish clearly between genuine requests for gender identity change from requests of a more ambivalent nature. Moreover, the Bill not only allows change of one’s gender by a mere declaration to a public notary but does not exclude the possibility of an eventual reversal of this decision.

8. It is laudable to note that changes in the recorded gender of minors will be subject to judicial review, which will be tasked to ensure that the best interests of the child will be of paramount consideration. Bearing in mind the *Convention on the Rights of the Child* (CRC), it is similarly commendable to note that in determining these best interests, the Court will give due weight to the views of the minor, having regard to the minor’s age and maturity (CRC, Article 12).

For this to be meaningful, however, the child’s right to seek and receive information, regardless of frontiers, needs to be respected (CRC, Article 13). This should include mandatory counselling to provide the opportunity to better understand one’s sexual orientation and identity, which will promote the child’s social, spiritual and moral well-being and physical and mental health (CRC, Article 17). This information needs to respect “the right of the child to freedom of thought, conscience and religion”, together with “the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of [this right] in a manner consistent with the evolving capacities of the child” (CRC, Article 14).



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Indeed, any counseling received should also take into consideration the provisions of Article 40 of the Constitution of Malta which protects the minor's right for religious instruction as determined and consented to by the parents. This would be in adherence to the basic principles of fundamental human rights which are universal, inalienable and consequently indivisible.

9. The Bill states that "a person's rights, relationship and obligations arising out of parenthood or marriage shall in no way be affected". This provision is unclear since it basically raises a myriad of legal and social questions. Complications may arise when it comes to distinguish between civil unions and other forms of marriage, including same-sex marriage.
10. The situation of transgendered persons is complex and delicate, and cannot be reduced to an ideological stance that considers sex merely as a socially construed attribute rather than as a given element of nature to be accepted and cherished as a gift. Such a complex issue cannot be addressed adequately if it is considered to be simply a question of recognition of a civil right, presuming this will suffice to service the best interest of transgendered persons. The Bill seems to dilute the latter's condition as a mere matter of self-determination, thus failing to reply to the real needs of transgendered people and society's duty to offer those means that truly help them address their situation. Instead of loosening some legal restraints to make life easier for these individuals, the Bill seems to impose a new philosophy, a new culture, and a new definition of sexuality and gender. This Bill, instead of being an act to confer dignity and equality, may risk being an act of injustice.

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