An in-depth look: Spain becomes fifth EU country to ban IGM

In February 2023, Spain became the 5th EU country to adopt a ban on intersex genital mutilation within the law "for the real and effective equality of trans people and for the guarantee of the rights of LGBTI people" (BOE-A-2023-5366). Article 19 of the law **prohibits non-consensual genital modification practices performed on intersex minors** under the age of 12, with the exception of cases where the intervention is required in order to protect the person's health.

For intersex minors between the ages of 12 and 16, such practices are allowed at the request and upon the provision of informed consent of the minor according to their age and maturity.

Article 74 outlines explicit rights afforded to intersex people regarding comprehensive and adequate attention to their health, employment and educational needs, the respect of their right to privacy, as well as specific provisions in relation to the registration of the sex marker of intersex persons at birth (see more below).

The law is comprehensive and the ground of sex characteristics is explicitly included in provisions related to education, sport, culture, cyberbullying, victim support and international protection.

Strengths of the law

- Article 19 of the law introduces a **ban on all genital modification practices** in people under twelve years of age, except in cases where medical indications require otherwise in order to protect the person's health (art 19§2).
    - The broad phrasing of this prohibition, which covers "all genital modification practices", leaves room to include all variations of sex characteristics, without leaving certain practices outside the scope of the law, such as prenatal treatments attempting to "fix" or "prevent" the variations in sex characteristics of the unborn child.
    - This is the first time that the wording "all genital modification practices" is used in the context of a law protecting intersex children from non-vital, non-emergency medical interventions.

- Title IV of the law sets out **offences and penalties** for cases in breach of equal treatment and discrimination occurring from not applying the provisions of the law.
    - Article 79 classifies administrative offences in three categories: minor, serious, and very serious offences.
    - Article 79 (h) states that very serious administrative offences include among others the "violation of the prohibition of genital modification practices on persons under twelve years of age established in article 19.2 of this Act, when it does not constitute a criminal offence". While violation of the prohibition of genital modification practices from article 19§2 is classified as a very serious offence, these interventions may also constitute a criminal offence. Legislators

therefore left room for victims to obtain remedies in both criminal or administrative proceedings.

- Strong sanctions are planned for very serious offences, including the loss of licence to practise and closure of the medical establishment for a maximum period of 3 years.

- Article 19§1 puts forward a **set of overarching principles guiding the provision of healthcare for intersex people.**
  - These principles include "non-pathologization, autonomy, informed decision and consent, non-discrimination, comprehensive assistance, quality, specialisation, proximity and non-segregation".
  - For the first time in a European law, it is stated that "in any case, the respect of [one's] privacy and confidentiality about [one's] physical characteristics, avoiding unnecessary explorations or their exposure without a directly related diagnostic or therapeutic objective" needs to be guaranteed. This law goes beyond prohibiting non-vital and non-emergency medical interventions, as it also aims to ensure that the harmful practice of bodily examination and exposure without therapeutic scope does not occur in practice.

- The law emphasises the importance of **training healthcare professionals** to properly care for LGBTI patients. Article 19§4 instructs public administrations to "guarantee sufficient, continuous and up-to-date training of health personnel, which takes into account the specific needs of intersex people". The comprehensiveness of the nature of the training mandated by the law is a great example of the importance of language in legislation, and its comprehensiveness should ensure appropriate implementation by relevant authorities of this article.

Missing points

The intersex-specific article (Article 19) lacks full comprehensiveness, for example no explicit mention of the following is made:

- an indication of **how the minor's informed consent is assessed** for those between the ages of 12 and 16, who can request to undergo such a procedure;
- clarity about how those procedures which are permitted due to "***protecting the person's health***" are defined. We know from experience that the arguments in favour of performing IGM in order to "protect the intersex person's health", have been used by medical professionals, where the concept of "health" was not clearly defined. According to human rights principles, "protection of the person's health" as justification for the performance of medical interventions should only refer to cases where there is an immediate danger to the person's life or health.

- Claims for damages related to "very serious offences", as outlined in Article 81§1, are subject to a three-year **limitation period**. This limitation poses a significant challenge in guaranteeing the right to accessing truth, justice and reparations, especially when

surgeries are most often performed when children are very young and unable to pursue a case, and will be unable to do so for a number of years.

- In Article 80§4b, the language around **penalties**, which are dependent on assessing the "***intent of the offender***", can be used to legally justify IGM and can allow offenders to effectively not be held accountable for their actions if they claim that their intent had not been to cause harm.
- Article 74§2 sets out the procedure for the registration at birth of intersex persons, which while it allows parents, initially, to leave the gender marker blank, contains an **obligation for parents of an intersex child to register the sex of the child after 1 year following their birth**. This obligation still results in adding pressure on parents to make a decision about the child's gender as either being male or female, and may result in parents feeling more pressure to provide authorisation for treatments/interventions which "align" the child's sex to either male or female. Doctors and the medical establishment may also use this legal requirement to push for interventions or treatments to be performed. It is also to be noted that Spanish intersex activists raised these concerns with the Spanish government during the stakeholder consultations held ahead of drafting the law, however these concerns were not taken into consideration.
- There are no provisions in the law on guaranteeing **access to all relevant medical information and the person's medical records**, including information about the diagnoses related to the person's variation of sex characteristics, the decision-making process in relation to treatments/interventions and the patient file.
- There are no provisions made in the law to ensure that **comprehensive, up-to-date, accurate and objective information** is provided to parents and intersex persons themselves, including about the possible impact and likely risks of treatments and/or interventions, as well as the existence of alternatives and/or the possibility to postpone interventions/treatments. While we recognise that Article 19§1 underlines that "the health care of intersex people will be carried out in accordance with the principles of [...] informed decision and consent," this provision does not make the provision of comprehensive information a prerequisite.
- There are no provisions mandating the creation of a specific **mechanism to review medical guidelines and protocols,** for example through the creation of an independent working group to revise relevant national medical protocols and guidelines from a depathologizing, patient-centred perspective (including the creation of a working group overseeing the revision process, which comprises intersex-led civil society).
- **No monitoring mechanism is foreseen** to ensure that the implementation of the prohibition can be assessed by means of an evaluation report submitted by an independent monitoring body. Monitoring mechanisms are essential to ensure that proposals for closing any legal gaps can be made, that the number and nature of interventions performed in the country can be monitored, that consent procedures can be assessed, and that national intersex organisations are involved in the assessment process.
- There is a **lack of regulation of foreign evasion:** prohibited interventions on intersex children who live in Spain may still be performed in another country without any repercussions. There is no guarantee that legal sanctions will also apply for the conduct of healthcare professionals who refer parents or legal guardians of an intersex minor to healthcare professionals abroad for the purpose of having the latter perform prohibited treatments and interventions.

Other provisions in the law that are relevant for intersex people:

1. Legal gender recognition

- **Legal gender recognition based on self-determination** for persons 14 and older is a key measure of the law, to which a whole chapter is dedicated. This procedure can be used by intersex persons wanting to change their gender marker.

    - Article 43 outlines the different legal gender recognition regimes based on the person's age:
        - From 16 on, one can legally change their gender marker following a simple administrative procedure.
        - Persons between the ages of 14 and 16 can change their gender marker following a simple administrative procedure. They can submit the application themselves, assisted in the procedure by their legal representatives.
        - Persons between the ages of 12 and 14 can change their gender marker following a court procedure.
        - The law does not envision a possibility for persons under the age of 12 to change their gender marker.
    - Article 44 outlines the administrative procedure to be followed for persons from 14 on:
        - The application is to be filed with the person in charge of any Civil Registry Office.
        - No medical or psychological opinion related to gender identity, nor any prior medical procedure to modify the appearance or function of the body shall be required to file an application.
        - Following the reception of the application by the Civil Registry Office, the person will be summoned to state their wish to change their legal gender, and their legal name if this wish is also expressed. The applicant is then informed of the legal consequences of the intended rectification.
        - In the three months following the interview with the Civil Registry Office, the person will be called again to ratify their request, asserting the persistence of their decision.
        - Once the request has been reiterated and ratified again, the person in charge of the Civil Registry, after checking the documentation in the file, will issue a decision concerning the requested rectification of the registry within a maximum period of one month from the date of the second appearance.
        - The decision may be appealed by the applicant.

    - Chapter I bis of Title II of Law 15/2015 describes the court procedure for legal gender recognition for minors between 12 and 14:

- The application is to be filed by the minor, assisted by their legal representatives, or a legal defender in the event of disagreement between the legal representatives.
- No medical or psychological opinion related to gender identity, nor prior medical procedure to modify the appearance or function of the body shall be required to file an application, and it shall not be used in the judge's assessment.
- The intervention of a lawyer or solicitor is not mandatory.
- The application must include evidence that the person has maintained the disagreement with their legal gender in a stable manner.
- Once the application has been admitted, a court hearing is to take place, during which the judge will assess the maturity of the minor, as well as the stability of their intention to rectify their legal gender, taking into account the best interests of the minor at all times.
- Based on this assessment, the judge will decide whether or not to grant the request.

- **Gaps**:
  - The law does not envision a possibility for persons under 12 to change their gender marker
  - Furthermore, the law leaves a **gap for intersex children that wish to change their legal gender marker between the ages of 1 and 12,** as the current provisions only account for the situation between the ages of 12 and 14 via court-procedure and from the age of 14 onwards, based on self-determination (see points above).
  - It is also regrettable that the law does not allow for the registration of a third, neutral, diverse or blank gender marker, but only allows persons to choose between male and female.
  - The court proceedings for children between the ages of 12 and 14 leave a considerable margin of appreciation to the judge who is free to decide to interpret the notion of 'maintaining the disagreement with one's legal gender in a stable manner' very restrictively.

2. Sport

In Article 26(§3), related to *sport, physical activity and sports education* and the need to ensure the promotion in sports of the full respect of the **principle of equal treatment and non-discrimination on grounds of SOGIESC**, an **exception** is made when it comes to international regulations and anti-doping rules. OII Europe expresses concern that this exception, which proposes to "avoid competitive advantages that may be contrary to the principle of equality" may be misused and misread as allowing sports bodies to enforce discriminatory and exclusionary rules and regulations on intersex athletes upon the basis of

their variation of sex characteristics. OII Europe is aware of, and has repeatedly warned of[1], the **harm caused by international and national sports bodies and sports committees' regulations,** which are not human rights compliant and which are enforced upon intersex athletes at all sporting levels. OII Europe regrets the inclusion of this exception in the law which aims to combat discrimination, but which in reality, may exacerbate and create a legal loophole for discrimination against intersex athletes to continue.

3. Preserving Capacity to Reproduce

For the **first time** in an IGM law (see Article 19 §3), the need to **guarantee intersex people's ability to access freezing techniques for preserving gonadal tissue and reproductive cells** for future recovery and use before the start of any treatment that could compromise their reproductive capacity, is mentioned.

The law includes some key elements that will contribute to the better protection of the rights of intersex people in Spain. However, we encourage the Spanish government to address the missing points through implementation guidelines developed in collaboration with intersex-led civil society and/or through a future revision of the law.

[1] See OII Europe Legal Toolkit, p.18 *"ensure that regulations and practices in public and private sectors, e.g. in international competitive sport, do not bypass national protection and anti-discrimination legislation and provisions."*