

*'GENDER IDENTITY, GENDER
EXPRESSION AND SEX
CHARACTERISTICS ACT'*

PUBLIC CONSULTATION INPUT



November 2014

T A B L E O F C O N T E N T S

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I N T R O D U C T I O N & B A C K G R O U N D

On 25th October 2014 the Minister for Social Dialogue, Consumer Affairs and Civil Liberties presented the ‘Gender Identity, Gender Expression and Sex Characteristics Bill’ (‘GI Bill’) in Parliament, described as *“as 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.”*¹

Presented a few months after the adoption of the ‘Civil Unions Act’, recognising the right of same-sex couples to enter into a legal relationship granting a level of rights and obligations equal to marriage, the GI Bill is a key component in Malta’s current process of reforming its legislative and policy approach to the LGBTI community. Another milestone in this regard are the 2014 amendments to the ‘Constitution of Malta’ inserting sexual orientation and gender identity as prohibited grounds of discrimination².

The GI Bill is largely based on a detailed proposal made by the Malta Gay Rights Movement (MGRM) in December 2010³. MGRM’s proposal was accompanied by a technical report assessing the compatibility of Malta’s gender identity legislation (contained in the ‘Civil Code’) with Malta’s human rights obligations as contained in key instruments⁴ and as enunciated in the jurisprudence of the Constitutional Court and of the European Court of Human Rights. The report proposed a ‘Gender Identity Bill’ as a trigger for national discussions on the way for the improvement in human rights by transgender persons, and also coincided with national developments in the Joanne Cassar case, regarding the right of transgender persons to marry⁵.

The GI Bill seeks to dramatically improve the enjoyment of human rights protection by transgender and intersex persons. For the former the Bill encompasses many of the MGRM report recommendations, including by simplifying the process of change of personal documentation, removing the requirement for persons to undergo sex-reassignment surgery prior to such a process, including the possibility of transgender children to rectify their documentation and fully entrenching the rights of gender identity and gender expression in Malta law. For the latter, the Bill seeks to prevent unnecessary intrusive surgical or other interventions on children and attempts to regulate, and therefore recognise, those complex situations where a person’s sexual characteristics may not be exclusively defined as either male or female.

This review is certainly welcome by **aditus foundation**, as it stresses the principle of the equal dignity of all persons, strives to eliminate discrimination based on sexual orientation and gender identity (or perceptions thereof) and consequently improves the quality of life of not only the persons directly involved but – generally – of the nation. The GI Bill adopts a strong rights-based approach to transgender and intersex realities, both often raising extremely complex legal, social and emotional concerns for the parties involved as also for those State authorities struggling to understand and handle with such challenges.

¹ The Bill can be accessed here: <http://www.parlament.mt/billdetails?bid=494&l=1&legcat=13>

² Articles 32 and 45.

³

See <http://www.maltgayrights.org/localcampaignsselected.php?title=Proposed%20Gender%20Identity%20Act%20For%20M%20alta>.

⁴ Largely focusing on the ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’.

⁵ See <http://transgriot.blogspot.com/2011/06/joanne-cassar-taking-trans-marriage.html>.

This input is being presented within the context of the public consultation launched as part of ongoing Parliamentary debate on the GI Bill. Prior to the publication of this Bill, **aditus foundation** has liaised closely with the Civil Liberties Ministry, providing regular technical input on various substantive aspects.

Such liaison and the present consultation are welcome initiatives insofar as they grant civil society organisations access to important policy- and law-making processes wherein we may share our experience and expertise.

Whilst much of our input has been endorsed and incorporated within the Bill, a number of elements require highlighting. This document presents these elements, together with an invitation to Members of Parliament to strive towards achieving the highest form of human rights protection for transgender and intersex persons.

A D I T U S F O U N D A T I O N P R O F I L E

aditus foundation is a young, independent, voluntary, non-profit and non-governmental organization established in 2011 by a group of young lawyers dedicated to ensuring human rights access in Malta. **aditus'** Director is Dr. Neil Falzon, and the current board is composed of Dr. Nicola Mallia (Chairperson), Dr. Michael Camilleri and Dr. Michael Ellul Sullivan.

Named for the Latin word meaning 'access', **aditus foundation's** mission is the attentive analysis of access in Malta to human rights recognition and enjoyment. In practical terms, **aditus** was established to *monitor, report* and *act* on issues of fundamental human rights access for individuals and groups.

aditus foundation was founded on the principles of the universality, interdependence and indivisibility of all fundamental human rights, and we strive to promote their understanding and application. Being a generic human rights NGO, we work to adopt a broad perspective for human rights in Malta, identifying themes such as discrimination and access to effective remedies. Furthermore, while focused on Malta, we work towards highlighting the regional and international implications of local obstacles to human rights access.

Our main activities include the identification of priority areas, formulating advocacy strategies and working towards improvement in legal and administrative standards. This includes offering pro bono legal information and advice. We focus primarily on the government of Malta (through participation, for example, in a series of meetings with the Office of the Prime Minister on the subject of refugees). We do also address the EU institutions, the UN, the Council of Europe and other relevant agencies. We remain in constant communication and cooperation with governmental, intergovernmental and non-governmental entities to maintain a comprehensive approach in our activities.

aditus is committed to engaging the general public in a human rights discourse that is well informed, unbiased and effective, through press statements and television and radio appearances. Further, **aditus** makes full use of the Internet to disseminate information, raise public awareness, gather advocacy support and establish contact with individuals and networks. We have a comprehensive website and a busy Facebook page and Twitter account. **aditus** also blogs about the European Asylum Support Office (EASO) to provide updated information and commentary on its activities.

We firmly believe that professional research is a necessary advocacy tool and encourage its use by policy-makers in formulating national strategies and action plans. Accordingly, we prepare reports for various national, regional and international entities on the local human rights scenario, violations, law and administrative policy and practice. One example is *Fleeing Homophobia: Seeking Safety*, an EU-wide research project identifying best practices for LGBTI asylum cases and making EU-policy recommendations. Another important example is our collaboration with other Maltese NGOs to draft a report on LGBTI children, children with disabilities and migrant children in Malta, for submission to the United Nations Committee on the Rights of the Child.

We organise training projects regularly, targeting a variety of actors. One such project is *Our Voice*, aimed at enhancing the integration of Malta's refugee and migrant communities, to foster a sense of active social participation, support the creation of refugee and migrant networks and organizations and to develop strategies for funding future programmes.

A second training project is our *Stakeholder Training Sessions*, designed to give core information to those public and private service-providers that have direct and frequent contact with refugees. The project works to help identify the specific challenges, opportunities and best practices associated with their work. Lastly, we insist on striving to improve our own capacity to address lapses in human rights access: as part of that effort, we participate in training, workshops and conferences with local and international colleagues.

aditus is the Secretariat for the Platform of Human Rights Organisations in Malta (PHROM)⁶, Malta's first and only national coalition of human rights NGOs.

Apart from being registered with the Malta Commissioner for Voluntary Organisations, aditus has affiliations and memberships with the International Detention Coalition (IDC), the Platform for International Cooperation on Undocumented Migrants (PICUM), the European Council on Refugees and Exiles (ECRE) and the Anna Lindh Foundation.

We are also members of the Consultative Forum of the European Asylum Support Office, and of the Fundamental Rights Platform of the European Union Agency for Fundamental Rights.

For more information on how you can follow and/or support our advocacy activities:

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⁶ www.humanrightsplatform.org.mt

S U M M A R Y O F R E C O M M E N D A T I O N S

This is a summary of the recommendations made through this document. Each recommendation is preceded by argumentation and analysis relating to specific articles in the Bill.

- i. *For the purposes of creating clear lines of authority and accountability, and ensuring good administrative practices that would facilitate individual access to the procedures and – where necessary – access to redress mechanisms – the Ministers responsible for these public authorities should be responsible for their appropriate implementation of the Bill’s provisions.*
- ii. *Remove Article 3 from the Bill and position within the **Constitution**, to truly elevate the right to gender identity to the status of a fundamental human right in principle and in legal description. This would also render applicable to the right the necessary protection, redress mechanisms, related jurisprudence and interpretation enjoyed by the fundamental human rights enshrined in the Constitution.*
- iii. *Reword the right to gender identity as being a right for **all persons**, and attach the Article’s current wording to the Bill’s eligibility criteria for the procedure to amend documentation.*
- iv. *Clarify the notion of ‘**habitual residence**’ for this Bill’s purposes.*
- v. *Revise the procedure to ensure cognisance of the interests, rights and obligations of the applicant’s spouse. The Court of Voluntary Jurisdiction could be explored, in an attempt to prioritise the amicable settlement of possible disputes or disagreements.*
- vi. *Clarify the discrepancy between Articles 3 and 4.*
- vii. *Either alter the procedure for it not to be based on a public deed, or accept in principle and in law (especially with regard to Article 13) that public deeds registered in terms of the Bill will be publicly available.*
- viii. *Delete Article 5(2), with the understanding that the Bill will presume an informed decision being taken by an applicant.*
- ix. *Ensure harmony between the Bill and Chapter 55 of the Laws of Malta.*
- x. *Clarify the procedural requirement contained in Article 6 in terms of the relationship between the notary and the Director.*
- xi. *Revise the procedure for establishing a child’s gender for the first time, in those situations where this is not declared at birth. We recommend streamlining procedural steps in order to guarantee higher levels of protection for all children.*
- xii. *Consider removing the reference to the UN Convention on the Rights of the Child.*
- xiii. *Insert the notion of self-determination.*

- xiv. *Provide increased guarantees as to the confidentiality of procedures before the Court of Voluntary Jurisdiction.*
- xv. *Provide clarity on the queries relating to 'subsequent changes', the court order procedure, negative foreign decisions.*
- xvi. *Consider establishing automatic cancellation/amendment of personal details within all State databases following a stipulated timeframe, and therefore irrespectively of actions of the applicant.*
- xvii. *Delete Article 14.*

OUR INPUT ON THE BILL

This document does not comment on the parts of the Bill relating exclusively to intersex persons (Articles 15, 17, and 18).

Article 2 - Interpretation

The Bill identifies the **Minister** responsible for equality as its key Minister. Whilst we appreciate the nature of this Bill as being one related to equality issues, we feel that the Bill ought to identify the Ministers for Justice and for Health as responsible Ministers, respectively according to the Bill's various transgender/intersex components. Our approach is based on an understanding of the Bill's practical implications as requiring the fulfilment of specific procedures and obligations by public authorities falling under the responsibility of these two Ministries.

For the purposes of creating clear lines of authority and accountability, and ensuring good administrative practices that would facilitate individual access to the procedures and – where necessary – access to redress mechanisms – the Ministers responsible for these public authorities should be responsible for their appropriate implementation of the Bill's provisions.

Article 3 – Right to gender identity

We support the Bill's **rights-based approach** and applaud the codification of the right to gender identity, and consequential rights. We also welcome **Article 3(4)** removing the requirement of sex-reassignment surgery or other forms of medical and non-medical interventions/procedures for a person to enjoy the right to gender identity.

Article 3 does not define the 'right to gender identity' as a fundamental human right, but merely labels it as a 'right'. This ought to be amended since the nature of a fundamental human right is quite different from that of a civil right, primarily in relation to:

- the State's authority to **grant and revoke** civil rights, with no such authority in relation to fundamental human rights as these are intrinsic to all human beings. By defining the right to gender identity as a civil right, the Bill is exposing itself to possible future revocations and amendments that could erode at the right's content;
- State obligations with regard to fundamental human rights are essentially to **respect, protect and fulfil** the rights of all persons, encompassing a series of legal, administrative, judicial, financial, social and other measures intended to secure the right's full realisation through individual and community empowerment. Article 3 and Article 14 attempt to list these measures yet this list seems to be exhaustive, thereby preventing an expansion and reinterpretation by the Maltese Courts of the right to gender identity in accordance with possible future developments. This flexibility, deemed necessary in human rights legislation and interpretation, might present difficulties in applying the right to specific contexts;
- Fundamental human rights are **universal**, and not granted to nationals or habitual residents alone. It is important to distinguish between the formulation of a right, and the establishment of eligibility or procedural criteria, with the former over-riding and directing

the latter.⁷ Limiting recognition of a fundamental human right to citizens or habitual residents could give rise to issues of discrimination based on nationality, race or ethnic origin where the distinction cannot be duly justified in accordance with established principles.

The notion of '**habitual residence**' is not clearly defined. It also places EU nationals resident in Malta in an unclear legal situation.

Remove Article 3 from the Bill and position within the **Constitution**, to truly elevate the right to gender identity to the status of a fundamental human right in principle and in legal description. This would also render applicable to the right the necessary protection, redress mechanisms, related jurisprudence and interpretation enjoyed by the fundamental human rights enshrined in the Constitution.

Reword the right to gender identity as being a right for **all persons**, and attach the Article's current wording to the Bill's eligibility criteria for the procedure to amend documentation.

Clarify the notion of '**habitual residence**' for this Bill's purposes.

Article 4 – Change of gender identity

As above-mentioned, we welcome removal of the requirement for an applicant to undergo sex-reassignment surgery or any other form of intervention prior to accessing the Bill's procedure. We also welcome removal of the requirement that the applicant be unmarried. The gravity of these two elements, currently required under the relevant Civil Code provisions, are extensively described in the MGRM report as potentially resulting in extremely serious human rights violations, as also high levels of distress, and psychological and physiological harm.

In relation to the transgender persons who are married⁸ at the time they trigger the procedure, it is important that the Bill does not exclude the rights, interests and obligations of the applicants' spouses. At no stage in the Bill is applicant's spouse referred to. This substantive and procedural gap is untenable as it challenges the notion of marriage as an institute based on mutual trust and support, entered into by two consenting adults and in accordance with established procedural criteria.

The Bill is rejecting a procedure that would require the spouse's consent, and this is an approach we endorse as it avoids problematic situations of refused consent, or a refusal to appear on the public deed before the notary. However we find it hard to accept the Bill's unilateral and individualistic understanding of human rights, and of the institute of marriage. It is unacceptable for the rights of the applicant to unequivocally and automatically override the rights of the spouse, without the latter ever being consulted or brought into the picture.

⁷ For example, The right to marry and found a family is a human right guaranteed to all persons, subject to the fulfilment of national marriage requirements that in no way can violate the right's spirit and content. The right to peaceful assembly is guaranteed to all persons, yet following the grant of required permits and authorisations that must nonetheless be established and implemented in accordance with strict criteria.

⁸ Interpreted as also including civil unions.

It is also noted, with satisfaction, that the Bill in its present format will result in the factual and legal recognition of marriages where both spouses are of the same gender⁹.

There is a discrepancy between the wording of Article 3 and Article 4 regarding who enjoys the right to gender identity and who may seek to change their gender identity, as habitual residents in Malta are included un Article 3 but not under Article 4.

Revise the procedure to ensure cognisance of the interests, rights and obligations of the applicant's spouse. The Court of Voluntary Jurisdiction could be explored, in an attempt to prioritise the amicable settlement of possible disputes or disagreements.

Clarify the discrepancy between Articles 3 and 4.

Article 5 – Functions of the Notary

The Bill replaces the current judicial procedure with a more straightforward one involving a notary registering a “*declaratory public deed*”, followed by actions taken by the Director of the Public Registry. This simplified procedure is a welcome change.

We are however not convinced that a public deed is the most appropriate procedure, since by definition a public deed is in fact a public document, searchable by any member of the public. This element would expose the gender identity history of any person accessing the Bill's procedure, potentially violating the right to privacy and family life, and other dependant rights. The sensitive nature of the deed's contents, appropriately necessitating the obligation of secrecy contained in Article 13, does not lend itself to a public deed to the extent that Article 13 is effectively incompatible with existing provisions regulating the duties of public officers to grant access to and provide copies of public deeds.

We also believe that it should not be the duty of a notary to “*explain to the applicant the legal implications of the change of the assigned gender*”.¹⁰ Notaries are already duty-bound to explain the contents of public deeds to persons appearing before them¹¹, but should not be the primary source of information for applicant's to understand and discuss the broader implications of a gender change. Such a discussion could potentially involve an assessment of social, economic, psychological considerations that notaries could not be in a position to discuss or explain. Since notarial professional training does not lend itself to such discussions, the Bill should not expect notaries to fulfil this very important legal obligation.

Article 5(4) is not required as the above-mentioned Chapter 55 stipulates time limits for filing public deed.

Either alter the procedure for it not to be based on a public deed, or accept in principle and in law (especially with regard to Article 13) that public deeds registered in terms of the Bill will be publicly available.

⁹ The same factual and legal situation is already endorsed by the Civil Unions Act, for such marriages contracted overseas.

¹⁰ Article 5(2).

¹¹ In accordance with the ‘Notarial Profession and Notarial Archives Act’, Chapter 55 of the Laws of Malta.

Delete Article 5(2), with the understanding that the Bill will presume an informed decision being taken by an applicant.

Ensure harmony between the Bill and Chapter 55 of the Laws of Malta.

Article 6 – Gender register

Use of the terminology “*following an application by the Notary*” is confusing as it is unclear whether the Bill is requiring a formal application in terms of Maltese judicial procedure (“*rikors*”), or whether it is merely requiring a notification by the notary to the Director.

Clarify the procedural requirement contained in Article 6 in terms of the relationship between the notary and the Director.

Article 8 – Minors

We welcome referral to the Court of Voluntary Jurisdiction for matters involving minors, and of the insistence that the child’s best interests be the paramount consideration.

With regard to the best interests principle, we feel that reference to the United Nations Convention on the Rights of the Child (CRC) is superfluous as the best interests principle is already squarely enshrined in Maltese law.

Article 8 should reflect the notion of self-determination, as also contained in Article 4(1), in order to strengthen the notion that the procedure will only be triggered on the basis of due consideration of the child’s best interests.

Sub-article (4) relates to situations where the gender of a child is not declared at birth, but established at a later date. It is not clear why for such cases the Bill does not contain a procedure similar to the ‘regular’ rectification of gender identity issues, namely through the Court of Voluntary Jurisdiction. The increased level of protection offered by the Court, although possibly more cumbersome, should be provided equally to all minors whose gender particulars are being amended.

The Bill is unclear as to how proceedings before the Court of Voluntary Jurisdiction will be conducted to ensure their full confidentiality, also in accordance with the principle contained in Article 9.

Terminologically, it is incorrect for Article to state, “*requesting the Court to change the recorded gender*” as the Bill is not creating a procedure to amend acts of birth, but for notes to be added onto to them. Other instances of use of the word “*change*” are found in the Bill.

Revise the procedure for establishing a child’s gender for the first time, in those situations where this is not declared at birth. We recommend streamlining procedural steps in order to guarantee higher levels of protection for all children.

Consider removing the reference to the UN Convention on the Rights of the Child.

Insert the notion of self-determination.

Provide increased guarantees as to the confidentiality of procedures before the Court of Voluntary Jurisdiction.

Article 9 – Change of the act of birth; Article 10 – Foreign decisions

Article 9(2) provides that adults may access the Bill’s public deed procedure once, following which a court order would be required to once again change one’s gender. Article 10 stipulates the obligation of Maltese public and private entities to recognise gender identity decisions taken by overseas courts or authorities.

These provisions raise the following questions:

- Should it be concluded that persons who were minors at the time of the change to their gender may, in adulthood, access the public deed procedure and subsequently the court order procedure?
- Although the sub-article refers to a court order, no information is provided as to what procedure should be resorted to in order to obtain the said court order?
- What is the status of the foreign decision in the Maltese context in particular relation to the provisions of Article 9(2)?
- How should the Bill, the Notary or the Court of Voluntary Jurisdiction treat a foreign decision not to accept an individual’s request to change gender?

Article 10 also provides for the recognition of “*a gender marker other than male or female, or the absence thereof*”. Whilst appreciating the Bill’s attempt to be inclusive of efforts by other States at regulating gender identity and intersex issues, we feel that far more clarity is required on how recognition of such other markers, or of their absence, will be regulated in Malta. This particularly in view of the fact that several areas of Maltese law require confirmation of a persons’ gender either for pure information/registration purposes or – importantly – for the recognition of civil rights and obligations.

Provide clarity on the queries relating to ‘subsequent changes’, the court order procedure, negative foreign decisions.

Article 11 – Changes in other official documents

The Bill is unclear as to the consequences of a failure to request the cancellation of an Identity Card, in replacement of a new one, within a stipulated timeframe.

Does the procedure trigger the automatic cancellation/amendment of personal details from all State databases, or is the cancellation/amendment exclusively dependant on actions initiated by the individual? How will harmonisation be secured across all State databases, including those affecting elements such as social security and income tax?

Consider establishing automatic cancellation/amendment of personal details within all State databases following a stipulated timeframe, and therefore irrespectively of actions of the applicant.

Article 14 – Anti-discrimination and promotion of equality

We reiterate our observations made in relation to Article 3 regarding the duties of States under human rights law, reinforcing our recommendation that Article 3 be deleted and the right to gender identity be inserted in the Constitution as a fundamental human right. This ‘move’ would render superfluous much of Article 14 as its provisions create obligations already in place for all fundamental human rights enshrined in the Constitution.

We further feel that Article 14 is further unnecessary following inclusion of sexual orientation and gender identity as prohibited grounds of discrimination in the Constitution, as mentioned above.

In addition to these considerations, it is important to note that duplication of legal norms is a perilous exercise. This not merely from a legal efficiency perspective, but also in order to avoid potential clashes between legislation giving rise to legal uncertainty as to the nature and extent of one’s fundamental human rights. We feel that the excessive, heavy and unclear formulation of much of Article 14 lends itself to such legal uncertainty, confusion and risks creating dangerous legal lacunae.

Delete Article 14.