

COMMENTS ON THE  
MARRIAGE BILL AND OTHER LAWS  
(AMENDMENT) BILL



JUNE 2017

# 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 24 June 2017, the Minister for European Affairs and Equality presented Parliamentary Motion No. 9<sup>1</sup> Marriage Bill and other Laws (Amendment) Bill. The Bill follows a number of measures taken by Government to recognise the legal status of same sex couples, to eliminate discrimination based on a person's LGBTIQ+ status and to improve their overall human rights protection.

Examples include the Civil Unions Act<sup>2</sup> (April 2014), the Gender Identity, Gender Expression and Sex Characteristics Act<sup>3</sup>, the Trans, Gender Variant and Intersex Students in Schools Policy<sup>4</sup> (June 2015), and the Trans, Gender Variant and Intersex Inmates Policy<sup>5</sup> (August 2016).

*A preliminary draft of the Bill was shared with the LGBTIQ Consultative Council<sup>6</sup> during a meeting on 25 April, and we are happy to note that many of the comments we had submitted are reflected in the Bill as presented to Parliament.*

The so-called Marriage Equality Bill's Objects and Reasons – as stated in the Bill itself – are to “modernise the institution of marriage and ensure that all consenting, adult couples have the legal right to enter into marriage.”

The aim of this document is to present our comments and feedback to the Minister for European Affairs and Equality, and to the Parliament of Malta, in order to strengthen the Bill's potential to broaden and strengthen marriage for all persons.

We welcome the opportunity to present our views on the important Bill, and look forward to engaging further with its legislative process.

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<sup>1</sup> See <http://www.parlament.mt/Motiondetails?mid=1176&legcat=14>.

<sup>2</sup> Available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12172&l=1>.

<sup>3</sup> Available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>.

<sup>4</sup> Available at

<https://education.gov.mt/en/resources/Documents/Policy%20Documents/Trans,%20Gender%20Variant%20and%20Intersex%20Students%20in%20Schools%20Policy.pdf>.

<sup>5</sup> Available at [http://homeaffairs.gov.mt/en/media/Policies-](http://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20(Final-%20Final).pdf)

[Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20\(Final-%20Final\).pdf](http://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20(Final-%20Final).pdf).

<sup>6</sup> See <http://socialdialogue.gov.mt/en/LGBTI%20Consultative%20council/Pages/Home.aspx>.

## 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.

*Our mission is to promote a society where all persons are able to access and enjoy all their fundamental rights. Where this is not possible, access to justice and remedies should be provided.*

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 whilst also addressing 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.

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. We also organise training projects regularly, targeting a variety of actors.

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

Together with 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), the [European Network on Statelessness](#) (ENS) 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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## GENERAL COMMENTS

As a NGO that has been consistently advocating for an improvement in the level of enjoyment of human rights by LGBTIQ+ persons, aditus foundation is extremely happy to see Malta adopting marriage equality legislation. It is our firm belief that all persons should be entitled to access and enjoy the right to marry and found a family, irrespectively of their sexual orientation, gender identity or other innate characteristic.

When advocating for the adoption of the Civil Unions Act, we had unequivocally stated that whilst the legal recognition of same-sex couples established through civil unions was a historical moment for Malta's human rights progress, falling on step short of introducing marriage equality was indeed a pity.

The Bill is essentially a law of language, to the extent that what is being said is far less important than how it is being said. By introducing a series of amendments to various legal instruments, the Bill seeks to render marriage – its processes but also its ensuing rights and obligations – as gender neutral as possible in the way it is described at law and, importantly, at the political and social levels.

Although understandably challenging for some sectors, this shift in perspective by no means diminishes the personal, social and national value of marriage but rather strengthens its possibility of being conceived of and approached in as most an inclusive and welcoming approach as possible.

Yet it is ambitious and incorrect to define the Bill as an instrument that will allow all consenting adults to enjoy the right to marry. Whereas the Bill focuses almost exclusively on broadening marriage for it to include same-sex couples, it maintains the discriminatory and degrading status quo whereby persons in an irregular migration status are denied access to marriage, due to their impossibility of producing the required documentation. The relevant authorities have done very little to seek alternative options with a view to resolving these difficulties, thereby continuing to deny marriage to an already marginalised population.

The Bill also ignores the challenges faced by refugees and migrants who remain bound by the civil status declarations they make before the Office of the Refugee Commissioner, usually within days of their arrival in Malta. There is a need for the Government to appreciate the state of mind, thought process and personal circumstances of a person landing Malta – in many cases following a gruelling journey by boat – and declaring the status of single or married, before taking that statement as eternally binding.

Furthermore, the Bill also maintains the privileged position enjoyed by the Catholic marriages, whereby these are – if validly contracted – recognised by the State, and have the same civil effects as a marriage celebrated under the Marriage Act<sup>7</sup>. In an increasingly diverse Maltese society, where religious freedom and non-discrimination are Constitutionally protected, there is no reason why a revised Marriage Act should continue to exclude such recognition to marriages validly celebrated according to the rites of other religions and denominations.

aditus foundation also feels that the Bill needs to incorporate or trigger further amendments to truly ensure gender equality in marriage, beyond the linguistic changes proposed in the Bill. Examples of existing practices that act against the role of women in marriage, and therefore in society, include

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<sup>7</sup> Article 21(1) of the Marriage Act, available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=1>.

presumptions made (in practice, now in law) for the purposes of inland revenue and social security, as well as the impossibility of new fathers to spend quality time with their children.

aditus foundation therefore welcomes the Bill and is looking forward to appreciating its dramatic impact on the LGBTIQ+ community. We however strongly urge the Ministry to revise the Bill in order for it to truly fulfil its stated purpose: *“to modernise the institution of marriage and ensure that all consenting, adult couples have the legal right to enter into marriage.”*

## S P E C I F I C I S S U E S

### A list of specific amendments, or a general interpretation clause?

1. We are unclear as to the Bill's approach regarding the long list of proposed amendments to various legal instruments. Two confusing elements are identified:
  - a. the Bill specifies articles where, for example, "*husband and wife*" should be substituted by the word "*spouse*" whilst in Part V Amendment of the Interpretation Act it includes a general provision regarding the proposed new reading of "*husband*" and "*wife*" to include "*a spouse of either sex who has contracted marriage*". It is not clear why the legislator is adopting two amendment approaches that, when used in a combined fashion, create confusion and uncertainty;
  - b. the list of articles to be amended through the Marriage Bill is an exhaustive one, saving of course the newly-suggested provision in the Interpretation Act. Adoption of an exhaustive list is only efficient and effective where all possible scenarios are envisaged and catered for. Is the legislator able to guarantee that the articles listed in the Marriage Bill are the only articles in Maltese law where the terms "*husband*" and "*wife*" are adopted?

### RECOMMENDATIONS

Decide between a long list of articles to be amended, or a general interpretation clause.

If the former approach is adopted (list), then it is imperative that nothing is omitted so as to avoid instances of claimed inapplicability of the Bill.

### No transition period for married couples to adopt a Family Name

2. Article 30 of the Bill creates the concept of the Family Name, an introduction that we fully endorse as it regularises a situation that was discriminatory against both men – because they could not choose to change their surnames upon marriage – and women, since their surnames could not become the spouses' surname and neither could their children adopt their mother's surname as a family name.

No transition phase is allowed for already married couples who might wish to rethink and change their individual and married identities. This form of transition period was allowed during the implementation phase of the Convention for the Elimination of Discrimination Against Women (CEDAW), which allowed married women to revert to their maiden surnames within a six-month transition period.<sup>8</sup>

<sup>8</sup> Article 4(5) of the Civil Code, available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580>.



## RECOMMENDATIONS

As with the option of converting a civil union to a marriage, it should be possible for spouses to benefit from the choices created in Article 30.

## Confused articles

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3. Article 35 of the Bill seeks to amend Article 70 of the Civil Code, but fails to take account of Articles 69 (*When husband may not repudiate child*) and 70A (*Natural parentage*) of the Civil Code.

## RECOMMENDATIONS

Clarify Article 35.

## Use of “paternity” is incongruous

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4. Sub-article (5) of the amended Article 70, in the Bill’s Article 35, refers to a “*paternity test*”. Use of the term seems to be incongruent with the Bill’s aims.
5. The margin Explanatory Text to the amended Article 77A of the Civil Code, in the Bill’s Article 39, refers to “paternity”.

## RECOMMENDATIONS

Consider a revision of the term.

## “Religious body” definition is unharmonised

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6. The term “*religious body*” referred to in the newly-created Article 32A in the Marriage Act, in the Bill’s Article 92, is undefined. This, in itself, is potentially problematic yet exacerbated by the fact that it makes no reference to the Marriage Act’s provisions relating to the recognition of churches or religions (Article 17 and 37 of the Marriage Act).

## RECOMMENDATIONS

Revise Article 92 to ensure a relationship with existing provisions regarding recognition of churches or religions.

## Paternal authority and the minor’s right to marry

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7. Article 3 of the Marriage Act requires the consent of the person who exercises paternal authority in order for a person who is subject to such paternal authority to marry. The term ‘paternal authority’ is obsolete.

#### **RECOMMENDATIONS**

Include an amendment to substitute the term ‘paternal authority’ to ‘parental authority’ in Article 3 of the Marriage Act.

### Impossibility for married couples to convert their marriage to a civil union

8. Article 95 offers partners who entered a civil union prior to the coming into force of the Marriage Act and other Laws (Amendment) Act the possibility to convert their legal relationship from a civil union to a marriage, in accordance with a procedure to be outlined by the Minister.

We welcome this approach in the Bill as it acknowledges the fact that same-sex couples could, until the entry into force of the Marriage Act, only enter a civil union and were unable to get married. Whilst Maltese law made no difference between civil unions and marriages, the impossibility of entering into marriage did not impinge on the nature of a couple’s rights and obligations, once they entered a civil union. As mentioned above, in the introductory section, the significance of introducing marriage equality into a context already offering civil unions that provide the highest level of legal recognition for couples, is attached to and dependant on the personal and social meaning of marriage.

Same-sex couples were granted rights and obligations through civil unions, but they remained excluded from full participation in one of Malta’s most popular and meaningful ‘rituals’.

The choice to convert, whilst having no impact on rights and obligations, offers the choice to participate – albeit in a delayed fashion – to the marriage ‘ritual’.

However, we also appreciate that a civil union is a form of legally-recognised bond with its own social and political significance that might not necessarily be considered inferior to marriage. A civil union is detached from the religious and social connotations of marriage, and sits more comfortably with feminist critiques of marriage.

Furthermore, denying the choice to convert a marriage to a civil union is not consistent with an approach based on freedom of choice, as espoused by the Bill.

#### **RECOMMENDATIONS**

Grant the choice to spouses to convert their marriage into a civil union, subject to the same conditions as for converting a civil union to a marriage.

### Personal marriage officiators are not provided for

9. In discussions preceding the Bill's presentation to Parliament, and in public statements by Ministry officials describing it, reference was made to the idea that it would broaden the scope of persons able to act as marriage officiators.

Our discussions centred around the idea that persons planning their marriage might want to have a close friend or family member officiating their marriage, thereby rendering it more personal and memorable. Whereas a policy decision was in fact taken to include this possibility, the Bill is silent on the matter.

Our suggestion was that any person should be able to attend a course that leads to a degree certifying the person's status as a Marriage Officiator. The course, also a potential source of public revenue, could readily be organised by entities such as the Public Registry itself, the Lifelong Learning Programme and also Local Councils. For this to be enabled, the Marriage Act needs minor modification, as suggested below.

## RECOMMENDATIONS

Amend the Marriage Act's Article 2 definition of 'Registrar' to include a person who has successfully obtained the certificate of Marriage Officiator.

Engage in discussions with the above-mentioned entities to encourage them to design and implement a Marriage Officiator course.

## Undocumented migrants may not marry

10. Undocumented migrants<sup>9</sup> living in Malta (some for over 5 years) and who are unable to present national identity documentation are not permitted to marry their loved ones.

Article 7 of the Marriage Act states that in order for the marriage banns to be published, as a required formality preceding a marriage, documentation on the name, surname, place of birth and residence of each of the persons to be married must be presented to the Marriage Registry. Often the name of the father and the name and surname of the mother of each of the persons to be married are also required. Birth certificates are also required, although the Registrar may accept alternative documentation if it is "*impracticable*" for the persons to obtain certificates of birth.

We appreciate the need for this information, as it guarantees the certainty and security of an important administrative procedure. However, in several cases it is relied upon to deny access to marriage to migrants who are unable to procure the required documents.

Firstly, it is to be noted that undocumented migrants – since they would not be in possession of a residence card issued by Identity Malta – might be considered as not legally present in Malta thereby unable to indicate Malta as their place of residence. In order for them to indicate their country of origin as a place of residence would be (1) factually incorrect and (2) dependant on them obtaining documents from there, requiring the possibility of travelling to there and back.

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<sup>9</sup> It is important to stress that we are not referring to beneficiaries of international protection.

Furthermore, there are several reasons explaining why undocumented migrants might be unable to procure documentation confirming any of the required information, in the vast majority of cases through no fault of their own: refusal of their national authorities to grant documents, statelessness (whereby the person is not the national of any state), inexistence of national documentation authorities, etc.

Attempts to resolve this matter with the Marriage Registry have proved futile, resulting in broken relationships, higher number of children born outside wedlock, increased feelings of loneliness, anxiety and uselessness.

We strongly feel that the needs of the state to ensure the credibility and security of an individual marriage cannot outweigh the fundamental human right to marry, to an extent that prevents the State from even exploring solutions based on alternative sources of information.

## **RECOMMENDATIONS**

Amend the Marriage Act to grant the Registrar discretion to assess, on a case by cases basis, the reasons why persons wishing to marry might not be able to present the required information or documentation. This discretion already exists in relation to certificates of birth.

## **Eternal validity of statements made by asylum-seekers**

11. Statements made to the Immigration Police and/or to the Office of the Refugee Commissioner by asylum-seekers regarding their civil status are, in practice, given the same legal recognition as official Acts made under the Civil Code. This legal recognition has serious implications on the person's life since all public entities will treat the persons in accordance with the civil status declaration made at the very early stages of Malta's asylum procedure.

In itself, a procedure requiring persons to declare their civil status and to be held responsible and accountable for their declarations seeks to ensure legal certainty and information consistency. However, there are several factors specific to the refugee and migrant flows reaching Malta in recent years that highlight the limitations of this procedure and the severe human impact of these limitations.

The vast majority of persons intercepted and rescued at sea were not in possession of official documents attesting their civil status, or of documents recognised by the Maltese authorities (e.g. marriage certificates prepared by religious authorities in a country of origin, or a country of transit). Furthermore, there are several reasons why – upon arrival in Malta – persons made statements that were not entirely true, usually due to lack of information, coercion or incorrect information.

It should also be kept in mind that until a few years ago, Malta automatically detained all persons rescued at sea. Malta's detention regime offered preferential treatment for couples and family units, securing joint accommodation and a speedy release from a detention centre where material living conditions were – at best – abysmal. We encountered several people, particularly women, who felt that the only way to escape months of life in Lyster Barracks or Safi Barracks was to declare to be married and, at times, to bear a child with men they hardly knew. In some cases, these decisions were taken by men and subsequently imposed on

women, highlighting the long-term impact of Malta's detention regime on so many people. Other cases where declarations upon arrival did not necessarily reflect actual status included:

- Victims of trafficking who was instructed to declare to be married to a particular individual;
- Persons who believed that by declaring to be married would be accommodated in a family-oriented reception centre, generally with better material conditions;
- Persons who believed that being unmarried improved their chances in the asylum procedure;
- Persons who thought the question asked whether the spouse was physically with them;
- Asylum-seekers who are so fearful of being persecuted that in their first contact with a government they create a new identity, hoping to be safe.

The status declared upon arrival and recorded in the asylum-seeker's file at the Office of the Refugee Commissioner becomes the person's civil status for all intents and purposes. A woman who declared to be married to the man who coerced her to do so is treated as a married woman for all her life in Malta, unless she is able to initiate cumbersome divorce or annulment proceedings. The refugee fleeing political persecution who declared to be single to protect his wife's identity will be forever single, and will face serious challenges applying for his wife to join him in Malta.

#### **RECOMMENDATIONS**

Explore procedures that would allow, on a case-by-case basis, refugees and migrants to rectify declarations made by upon arrival.

### Religious marriages, other than Catholic marriages, are denied automatic recognition

12. The Marriage Act does not grant recognition of and same civil rights to marriages performed according to religious rites that are not Catholic. Furthermore, Article 37 of the Marriage Act allows for the Government to enter into agreements regarding the recognition of marriages celebrated in accordance with the rules and norms of that church, religion or denomination. However, Article 37(2) states that such agreements must conform substantially to the provisions of the Agreement between the Holy See and Malta.

#### **RECOMMENDATIONS**

Amend the Marriage Act to extend the recognition and granting of same civil rights to marriages validly contracted according to all religious rites.

In addition, the Government should actively pursue the reaching of agreements to make a reality the possibility of recognition of marriages celebrated in accordance with other practices a reality.

### Equality in marriage

13. Whereas the Bill focuses much of its attention on equality at the point of entering marriage, and on linguistic changes across national legislation, little is done to promote and support gender-neutral policies governing married life after the contracting of marriage or civil union. Examples include the presumption (in practice, not law) that the husband is the responsible spouse for the purposes of income tax and the presumption (in practice, not law) that husband is the head of the household for social security benefits.

We are also concerned that the relationship between the father, or of the person not giving birth to the child, and a new-born child is presently ignored due to the dramatic difference between maternity and paternity leave. This discriminatory approach is particularly incongruent in a context where Malta is seeking to increase the rate of women in employment, redefine the concept of 'family' to make it more inclusive, and eliminate all forms of discrimination. Notably, adoption and foster care leave does not distinguish between parents.

#### **RECOMMENDATIONS**

Include amendments to ensure full gender equality in marriage for all, including the possibility of shared parental leave for both parents, irrespective of gender.