

**NGO SUBMISSIONS TO THE  
UNIVERSAL PERIODIC REVIEW (UPR) OF MALTA,  
DURING ITS 17<sup>TH</sup> SESSION (2013)**

SUBMITTED BY THE FOLLOWING ORGANISATIONS:



**aditus foundation (2011)** is an independent, voluntary and non-profit NGO established with a view to monitor, act and report on access to fundamental human rights. We believe in the universality, interdependence and indivisibility of all human rights.

[www.aditus.org.mt](http://www.aditus.org.mt)

*aditus coordinated this joint submission & contributed to all sections.*



**Integra**

**Integra foundation (2004)** is a non-profit organisation based in Malta, operating independently of any political, economic or religious affiliation at a global level. The Foundation's vision is that of supporting inclusive, non-discriminating and non-disabling societies, where all individuals have the right to human dignity, freedom, respect and social justice.

[www.integrafoundation.org](http://www.integrafoundation.org)

*Integra contributed to the General and the Migration/Asylum sections.*



The **Jesuit Refugee Service Malta (1993)** is the Malta branch of an international Catholic organisation working in 57 countries around the world. JRS Malta seeks to accompany, serve and defend the rights of asylum-seekers and forcibly displaced persons who arrive in Malta.

[www.jrsmalta.org](http://www.jrsmalta.org)

*JRS contributed to the General and the Migration/Asylum sections.*



**KOPIN (2000)** is a voluntary, autonomous, non-profit and non-governmental organisation based in Malta working in the field of North-South cooperation and global education.

[www.kopin.org](http://www.kopin.org)

*KOPIN contributed to the General and the Migration/Asylum sections.*



**Equal Partners Foundation (1999)** is a parent-run, non-profit foundation providing individualised support programmes to over 250 children and adults with disabilities and/or learning difficulties and their families.

[www.equalpartners.org.mt](http://www.equalpartners.org.mt)

*Equal Partners contributed to the General and the Disability sections.*

This is a Joint NGO Submission, with each organisation's substantive contribution made clear above. The organisations wish to note that the views of one organisation are not necessarily shared by the other contributing organisations.

March 2013

## EXECUTIVE SUMMARY

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1. This Joint NGO Submission is presented thematically, with concerns and recommendations divided into key sections also representing the areas of operation of the contributing organisations. We also hope that such thematic division will facilitate reading and referencing.
2. In each section, keywords are presented in **bold**.
3. The first section present **General** observations made by the contributing organisations, mainly about the absence of an accredited national human rights institution in Malta. We are also highlighting the fact that no national structured communication platform is available for civil society in its broadest form to engage in effective dialogue with the governmental authorities. Although *ad hoc* initiatives are seen at agency or department level, human rights dialogue remains a struggle for civil society, particularly for those working in the area of advocacy.
4. In the area of **Disability**, our concerns relate primarily to the educational system and how an inappropriate approach is preventing students with disabilities from successfully entering the labour market and achieving any degree of self-reliance. We are also flagging physical accessibility issues, also in relation to public transport as a key tool for persons with disabilities to engage in employment and also social activities.
5. A key area of concern in this section relates to sexual and reproductive health, an area shrouded in taboo and misconceptions that yet again impedes the holistic development of persons with disability since it denies access to a series of rights, including freedom of expression, to marry and found a family, to physical and psychological integrity, and to privacy.
6. With regard to **Migration/Asylum**, our key areas of concern relate to Malta's mandatory detention policy, that applies to all persons apprehended whilst attempting to enter the island without due authorisation. The policy applies indiscriminately to everyone, including asylum-seekers and vulnerable individuals, and is implemented through the use of sub-standard detention centres that raise concerns regarding the disrespect of human dignity. Procedural concerns are also key, insofar as it is effectively impossible for any migrant to challenge the legality of his/her detention.
7. We are also expressing our concerns at the treatment of migrant children and at policies and laws that do not cater for increasingly large number of migrants left stranded in Malta with little social support or future prospects.
8. The **LGBTI** section is largely focused on transgender persons, to emphasise their status as one of Malta's most vulnerable categories of persons. Despite recent legal developments, transgender persons do not enjoy legal recognition of their affirmed gender and regularly face tough obstacles in exercising their most basic and core human rights such as education and social assistance. Due to these obstacles, they are socially marginalised, victimised, bullied and often victims of violence. Institutionalised refusal to acknowledge their affirmed gender further exacerbates this situation.
9. We also highlight the absence of any form of legal recognition for same-sex couples, with all the social and legal implications attached to this lacuna.
10. Finally, we also present concerns relating to LGBTI families insofar as children of same-sex parents are being denied their fundamental human rights in violation of the best interests of the child principle.

## GENERAL

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11. Malta has **no accredited national human rights institution (NHRI)**. Existing institutions (e.g. the Office of the Ombudsman, the National Commission for the Promotion of Equality, etc.) are not too effective and their mandates differ significantly. This leads to a fragmented approach with varying and inconsistent levels of protection for different themes, with some groups of persons having no specific agency mandated to protect their human rights.
12. Although judicial proceedings are available for human rights victims, we believe that a human rights agency should be mandated to operate in cases and areas without the need of individual victims, in order to adopt a general and flexible approach in line with the Paris Principles. Furthermore, **the judicial system is not necessarily the most accessible or effective means of redress for certain groups of victims**, as for example detained migrants and other victims requiring a more immediate form of redress.
13. Existing **institutions and measures to combat discrimination**, particularly that based on racial origin and sexual orientation/gender identity, are ineffective primarily due to the nature of the remedy offered, lack of trust of victims in the relevant procedures and agencies, and an environment of fear and disempowerment.
14. Malta has **no formal dialogue mechanism** to engage with civil society on issues pertaining to human rights. Whereas various agencies might have *ad hoc* systems, no nation-wide platform is available, rendering human rights monitoring and advocacy particularly challenging.

## PERSONS WITH DISABILITIES

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### Positive Developments

15. We support the enactment of *Equal Opportunities (Persons with Disability) Act*, 2000 (Chapter 413 of the Laws of Malta) which provided for the establishment of the Kummissjoni Nazzjonali Persuni b'Dizabbiltá (KNPD, National Commission Persons with Disability). Further legal initiatives include: *Legal Notice 461 of 2004*<sup>1</sup> brought into force the *Equal Treatment in Employment Regulations*, which augmented protection against discrimination on several grounds including disability; and *Legal Notice 53 of 2007*<sup>2</sup> which refers particularly to the provision of suitable accommodation to persons with disabilities<sup>3</sup>.
16. We also welcome the establishment of the *National Minimum Curriculum*<sup>4</sup>.
17. Furthermore, the *UN Convention on the Rights of Persons with Disabilities* was ratified on 9<sup>th</sup> November 2012<sup>5</sup>, showing a greater commitment towards securing an improved quality of life for disabled persons, including children.
18. Other positive initiatives include:
  - a. The establishment of learning support in State mainstream schools, provided by

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<sup>1</sup> Available at <http://justiceservices.gov.mt/LegalPublications.aspx?pageid=32&type=4>, accessed 8<sup>th</sup> March 2013.

<sup>2</sup> Ibid.

<sup>3</sup> European network of legal experts in the non-discrimination field, 'Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC. Country Report 2011 Malta. State of affairs up to 1st January 2012', available at <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>, accessed on 6th March 2013.

<sup>4</sup> Available at <http://www.curriculum.gov.mt/nmc.htm>, accessed 8<sup>th</sup> March 2013.

<sup>5</sup> Times of Malta, 'Malta ratifies the UN 'disability' convention', 8<sup>th</sup> March 2013

- facilitators and other **Learning Support Assistants (LSAs)**<sup>6</sup>;
- b. Pre-schooling facilities offered at home for children with a disability who have not yet attained the age of four years;
- c. Mainstream schooling by peripatetic teachers to hearing-impaired children; and
- d. The establishment of the **Home-Teaching Scheme** of the Ministry of Education catering for the instruction of children who are housebound, through visits by a specially designated teacher<sup>7</sup>.

### Issues and Considerations

19. Within the educational system, it seems that **student integration is prioritized over student inclusion**.
20. With regard to the above-mentioned LSAs, these are generally viewed as alternative teachers for the child with disability. The current model **highlights the child's exclusion** from the class setting, focusing on differences and the child's particular needs, rather than promoting empowerment through inclusion. We have received reports of children with disability being sent home whenever the LSA is not present or when exams are taking place, further highlighting a non-inclusive approach.
21. We are also concerned that the current required qualifications to become an LSA are far too low, not reflecting the highly technical and challenging tasks performed.
22. At primary, secondary and MATSEC<sup>8</sup> level there is no established notion of **differentiated exam papers** to ensure proper and effective academic assessment and therefore appropriate continuing access to education. In several reported cases, children with disabilities were unable to sit for yearly or end-of-school exams, despite possibly spending the entire academic year engaged in intense academic efforts. The long-term impact of these obstacles is primarily noted with regard to onward difficulties accessing the labour market and achieving minimum levels of self-reliance.
23. Despite legal and institutional developments, **physical access** to several buildings, including those of a public nature, remains problematic. Such a hindrance may also be observed in relation to a number of public schools. We have received reports of children with disabilities not being able to pursue their studies (general or specific) due to classes being located on higher and inaccessible levels<sup>9</sup>.
24. Access to public transport is also greatly hindered since the vast majority of public buses are not equipped with the necessary access functionalities.
25. Of serious concern are reports of parents expressing a wish to sterilize their children as a perceived means to preventing grandchildren with disabilities, preventing possible sexual abuse of their children, or protecting their children from possible emotional turmoil. We underline that **forced sterilization** is a serious, permanent and very intrusive medical intervention and should only be considered in the context of serious medical needs, and as far as possible with the person's full and informed consent.

### Recommendations

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<sup>6</sup> UN, 'Second periodic report of States parties due in 1997 Malta', 5 May 2010.

<sup>7</sup> Ibid.

<sup>8</sup> The Matriculation and Secondary Education Certificate (MATSEC) Examinations Board was established in 1991 by the Senate and Council of the University of Malta. The Board was entrusted with the development of an examination system to replace the GCE Ordinary and Advanced level examinations set by UK examination boards. The new board also took over the function of the Matriculation Board which also used to set examinations at Ordinary and Advanced level in a number of subjects.

<sup>9</sup> See Committee on the Rights of the Child, 'General Comment' (2006) paragraphs 39-40.

26. Discourse and policy approaches should shift from an integration-based perspective to one focused on **inclusion**, in line with the overall spirit of the **CRPD**.
27. **Universal Design** (Article 2 of CRPD) should be adopted as a mainstream approach across all policy areas, and the private sector should be encouraged and supported to also embrace it.
28. Persons with disabilities should be **actively included** within policy and legal discussions on themes affecting them directly or indirectly, through process methodologies that ensure their effective mainstreaming at the local and national levels.
29. Broader **public consultation** with civil society is required. In this regard, we recommend the establishment of an appropriate coordinating mechanism between various government and non-governmental institutions.
30. Access to public transport services ought to be ensured, including accessible information at bus stops.
31. Implement a more inclusive approach ensuring full access to information by persons with disabilities on all existing organisations and services so as to ensure that decisions are informed and free.
32. Within public and private educational systems, implement a class model approach whereby the classroom's entire educational needs are taken into account, moving away from dealing with inclusion matters on an individual basis to a **truly mainstreamed and comprehensive approach**.
33. LSAs should receive on-going professional education, and the necessary qualifications to undertake LSA duties should be raised to guarantee a more professional approach.
34. Engage with persons with disabilities and their families on discussions about **sexual and reproductive health**.

## **MIGRATION & ASYLUM**

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### **Positive Developments**

35. We welcome the introduction of the right to request a **review of a person's detention** under the *Immigration Act*, whenever it is felt that the period of detention is unreasonable, established in 2004<sup>10</sup>. We also welcome the extension of this possibility to review the legality of a person's detention. However we remain concerned at the ultimate ineffectiveness of this remedy, resulting in the effective impossibility of a detained person to challenge the legality of his/her detention.
36. Since Malta's membership of the European Union, it has **transposed all relevant legislation**, resulting in a marked improvement in the nature and quality of rights and procedures afforded to migrants, asylum-seekers and refugees. Yet we remain concerned at the stark gap between the law and the harsh reality faced by persons seeking refuge in Malta.
37. We welcome the fact that the Office of the Refugee Commissioner automatically grants **Temporary Humanitarian Protection to all minor asylum-seekers**, since this ensures their protection until they turn eighteen. Furthermore the recent efforts to organise **information sessions** by the Office of the Refugee Commissioner upon arrival, with specially conceived material and use of interpreters, represents a significant improvement in the asylum procedure.
38. The creation of the **Temporary Humanitarian Protection (THP) and Temporary Humanitarian Protection New (THPN)** statuses is a welcome introduction, although their definition and content remain undefined and discretionary.

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<sup>10</sup> UN, 'Second periodic report of States parties due in 1997 Malta', 5 May 2010.

39. We note with satisfaction efforts by authorities to improve the **living conditions** of persons detained in Lyster Barracks, largely funded by the European Union. This has been done through various renovation efforts, as well as through the organisation of a series of activity-based projects.
40. We welcome the introduction and implementation of a government policy whereby persons deemed to be **vulnerable** are kept in detention for as short a time as possible.

### General

41. The **THP and THPN statuses** are not established by law, but are policy decisions without any legal definitions or criteria. For example, access to healthcare is uncertain.
42. Migrants released from detention but who have not been recognised as refugees or granted any form of protection, live in a **legal limbo**. Whereas they are granted the possibility to access regular employment and healthcare, they have little or no access to education and social welfare. Unable to be returned to their countries of origin, they have limited future possibilities, running the risk of becoming marginalised and excluded.
43. As highlighted in ‘*Access to health care and living conditions of asylum-seekers and undocumented migrants in Cyprus, Malta, Poland and Romania*’ (2011)<sup>11</sup> and ‘*Bridging Borders*’ (JRS, 2012), migrants face challenges when seeking to **access healthcare services**, including communication difficulties, lack of trust in the system, lack of understanding of the way the system works, lack of clarity regarding legal entitlements, poor living conditions, lack of cultural competence among staff and prejudice or hostility.
44. The legal entitlements of beneficiaries of subsidiary protection are vague and only guarantee a basic standard of living, with difficulty. The term “*core welfare benefits*” is not defined in national law and practice has revealed the severe limitations of current policy. Migrants with other statuses, excluding refugees, are in a more problematic situation due to the absence of policy and legal provisions regulating their situation.

### Detention and Open Centres

45. Malta implements a policy of **mandatory and automatic migrant detention**, found to violate fundamental human rights by the European Court of Human Rights in *Louled Massoud v. Malta*<sup>12</sup>. It is regrettable to note that since then no effective changes were made to the policy to bring it in line with human rights standards. Due to this long-standing concern, further applications were brought before the ECtHR, and are currently pending<sup>13</sup>.
46. The policy and its implementation raise a series of concerns<sup>14</sup>:

<sup>11</sup> Available here [http://interwencjaprawna.pl/docs/wpdt2011\\_1\\_en.pdf](http://interwencjaprawna.pl/docs/wpdt2011_1_en.pdf), accessed on 10th March 2013.

<sup>12</sup> Available here <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100143>, accessed 10th March 2013.

<sup>13</sup> *Ibrahim Suso Musa v. Malta* (42337/12), available here <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114705>; and *Aslyia Aden Ahmed v. Malta* (55352/12), available here <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114704>.

<sup>14</sup> See Human Rights Watch, ‘*Boat Ride to Detention*’, 2012, available at <http://www.hrw.org/reports/2012/07/18/boat-ride-detention-0>, Council of Europe’s Commissioner for Human Rights, ‘*Report by Thomas Hammarberg following his visit to Malta from 23 to 25 March 2011*’, 2011, available at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstraneImage=1858117&SecMode=1&DocId=1749792&Usage=2>, Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘*Report to the Maltese Government on the visit to Malta carried by the CPT from 19 to 26 May 2008*’, 2011, available at <http://www.cpt.coe.int/documents/mlt/2011-05-inf-eng.pdf>, International Commission of Jurists, ‘*Malta: not here to stay*’, 2012, available at <http://www.icj.org/malta-not-here-to-stay/>.

- a. **Appalling material living conditions.** Safi Barracks consists of two warehouses, where conditions are extremely poor. In Lyster Barracks, recently refurbished, conditions are still far from ideal. All centres are cold during winter months, with no systematic provision of warm clothing, with migrants often lacking basic items such as socks, closed shoes, underwear and soap for washing clothes. Although single women are no longer detained with men, couples are detained together without any provision for privacy or security;
  - b. Whilst we welcome the reduced duration of time spent **minors in detention**, they could still spend some two to three weeks awaiting the issue of necessary documentation and placement in a non-custodial facility. Unaccompanied minors whose age is disputed remain detained with adults throughout the age assessment procedure. The Committee on the Rights of the Child recently noted concerns with regard to these procedures;
  - c. Impossibility of effectively **challenging the legality** of one's detention;
  - d. Detention centres are run by either **army officers or retired security personnel**, mostly male. There are no caring professionals working in detention on a permanent basis;
  - e. Only very limited **training** is provided to Detention Service personnel;
  - f. Although instances of **violence and ill-treatment** have reduced significantly over the last five years, there are still occasional incidents where excessive force is used, at times with tragic results. Such incidents occur mostly in contexts such as protests or escape from detention, when force is used to assert control over detainees. The **deaths** of Mamadou Kamara (June 2012) and Christian Ifeanyi (April 2011) are two examples of such incidents. Other examples include the incidents occurring at Safi on 13<sup>th</sup> and 24<sup>th</sup> March 2008, and 16<sup>th</sup> August 2011. We further note that the findings of the inquiries into the deaths of the two migrants remain unpublished, with little or no visible action taken thereon;
  - g. Disciplinary rules in detention remain unclear, arbitrarily implemented with no mechanism in place for the systematic review of the conduct of Detention Service personnel;
  - h. The Board of Detention Visitors, mandated to **monitor conditions** in detention centres, has an extremely limited mandate without the necessary resources to implement its monitoring duties. Furthermore, its establishing law does not grant it sufficient authority to have any real impact;
  - i. Detained migrants requiring in-patient treatment for **mental illnesses** are accommodated in Ward 8B at Mount Carmel Hospital. Conditions in this ward are extremely harsh, described in detail by the Council of Europe's Committee on the Prevention of Torture in its report following its 2008 visit to Malta.
47. Conditions in government-run accommodation centres (**Open Centres** – OCs) differ. In the smaller centres, most of which house families or unaccompanied minors, conditions are acceptable and the level of care provided is adequate. In the larger centres, conditions are **generally poor** and the small staff to resident ratio means that the level of care and support provided is very low. The creation of a Care Team within the Agency for the Welfare of Asylum-Seekers (AWAS) to provide support to OC residents who need support is a positive step, however more needs to be done to ensure that the needs of residents in OCs are adequately catered for.
48. To date Malta has no policy on **integration** – this is true for all categories of migrants. This, coupled with the fact that there is no one single authority charged with dealing with issues relating to integration means that legal and policy questions take much longer to be addressed and are rarely dealt with in a holistic and coordinated manner.

## Recommendations

49. As a matter of urgency, **improve material living conditions** in administrative detention centres
50. **Revise the mandatory detention policy** to bring it in line with international and regional human rights standards regarding deprivation of liberty;
51. Actively explore the possibility of resort to **alternatives to detention**, particularly in the case of children;
52. Revise the Open Centre system so as to shift towards a **community-based approach** that promotes and supports the integration of refugees and migrants and offers protection services to those who might require them;
53. Revise the mandate of the Board of Detention Visitors for it to effectively monitor detention centres in line with **UN CAT** and other relevant instruments;
54. Engage in **constructive dialogue** with all relevant stakeholders, including NGOs and migrant and refugee groups, to regularly revisit and revise laws, policies and practices.

## LGBTI

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### Positive Developments

55. We welcome the adoption in 2012 of **hate crime legislation** that extended the scope of existing legislation from race and creed to also include sexual orientation and gender identity<sup>15</sup>. We are pleased to acknowledge that the changes were brought about as an immediate political and legal reaction to a violent incident against two young girls earlier in 2012<sup>16</sup>.
56. We also welcome the extension of the remit of Malta's main **equality body**, the National Commission for the Promotion of Equality, to include sexual orientation and gender identity, albeit within limited spheres of activity<sup>17</sup>.
57. We also welcome the position taken by the MEP's in support of a resolution to condemn homophobic laws and discrimination in Europe adopted by the European Parliament<sup>18</sup>.
58. Act XVIII of 2004 of the Laws of Malta amended the *Civil Code* to establish a procedure whereby a post-operative **transgender** person may file a case in court requesting an annotation to be made in his/her act of birth reflecting the affirmed gender and also the new name.

### LGBTI Youth in Education

59. The **Malta Gay Rights Movement's (MGRM)** survey on sexual orientation and gender identity discrimination against lesbian, gay, bisexual and transgender persons in Malta in 2006-2008<sup>19</sup> found that 73.8% of the respondents felt the need to conceal their orientation

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<sup>15</sup> Laws of Malta, *Criminal Code*, Cap 9.

<sup>16</sup> See Times of Malta, 'MGRM welcomes approval of hate crime law', available at <http://www.timesofmalta.com/articles/view/20120620/local/mgrm-welcomes-approval-of-hate-crime-law.425092>, accessed 7th March 2013.

<sup>17</sup> Malta Independent, 'NCPE with an extended remit', 5th August 2012, available here <http://www.independent.com.mt/articles/2012-08-05/news/ncpe-with-an-extended-remit-314147/>, accessed 11th March 2013.

<sup>18</sup> Times of Malta, 'Gay lobby welcomes resolution', 27th May 2012, available at <http://www.timesofmalta.com/articles/view/20120527/local/Gay-lobby-welcomes-resolution.421429>, accessed 12<sup>th</sup> November 2012.

<sup>19</sup> Available at <http://www.maltagayrights.org/publicationsselected.php?title=LGBT%20Discrimination%20in%20Malta>, accessed 7<sup>th</sup> March 2013.



- from other students. Indeed, the survey also found a positive correlation between the degree of **concealment** of one's relationship and one's level of education, with respondents having tertiary education tending to conceal their relationship more than others.
60. Furthermore, 78.6% of the respondents said they concealed their sexual orientation and/or gender identity from teachers, the most common reason being fear that the teacher will not be sympathetic, possibly indicating that teachers might not project themselves as being open to LGBT students. Due to this fear, it seems that LGBT children who experience **homophobic and transphobic bullying** are not willing to turn to teachers for support and the matters go unreported.
  61. The report further found that 16.7% of those who were subjected to physical violence experienced **violence by fellow students** at school, 11.3% of all respondents were harassed at an educational institution, and an alarming 53.3% of those who were under 18 years of age reported at least three incidents of **psychological harassment** by fellow students. The ages of the perpetrators varied, and included children less than 12 years of age for 6 respondents, yet in most cases it involved fellow students in their age group.
  62. All this indicates that **homophobic bullying** at Maltese schools is rife and needs to be addressed with urgency.

### **Recommendations**

63. Broaden and enhance the **national anti-bullying policy** to ensure inclusion of a specific reference to homophobia and transphobia. Alternatively, introduce specific anti-homophobic and anti-transphobic bullying policy.
64. We recommend that **diversity awareness** and education in Maltese schools is specifically included in the national curriculum, to be coupled with specific activities promoting respect for LGBTI students.

### **Intersex and Transgender Persons**

65. With regard to the above-mentioned court procedure whereby post-operative transgender persons may have their personal documentation rectified to reflect their affirmed gender, local jurisprudence has underlined the impossibility of pre- and non-operative transgender persons to avail themselves of this procedure. We submit that a state-imposed requirement for a person to undergo sex reassignment surgery in order for the state to recognise their true gender runs ***“counter to the respect for the physical integrity of the person”***<sup>20</sup>. Furthermore, a number of serious implications are witnessed due to the required that transgender persons undergo this serious surgical intervention to have their gender recognised at law.
66. In several public institutions, **gender segregation** is the preferred policy and practice approach. The residential care system, including orphanages and shelters, is in most cases segregated by the child's officially recognised gender once the child reaches the age of nine years. This recognition is largely based on the gender assigned to a person at birth on the basis of primarily physical characteristics. In public schools, children are gender-segregated at the age of eleven. Such division also exists within Corradino Correctional Facilities, and also within its section for the detention of minors 'Youth Offenders Unit Rehabilitation Services' (Y.O.U.R.S.).
67. Negative impacts of this automatic registration and treatment based on official documentation may be seen in the cases of four pre-operative transgender women

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<sup>20</sup> Council of Europe, Commissioner for Human Rights, Issue Paper: *Human Rights and Gender Identity* (July 2009), available at [http://www.coe.int/t/commissioner/Ativities/IPList\\_en.asp](http://www.coe.int/t/commissioner/Ativities/IPList_en.asp), accessed 26th September 2010, pg. 18.

- (including one teenager) **aditus foundation** met with at Corradino Correctional Facilities, together with the **Malta Gay Rights Movement**. The four women were treated as men, resulting in a series of harrowing experiences and violations of their personal dignity:
- a. Placement in the male section, leading to **humiliation, bullying, verbal abuse, insults and jeering**;
  - b. Denial of permission to possess bras, resulting not only in physical discomfort but in a physical appearance that attracts further **degrading and humiliating** comments and behaviour;
  - c. Absence of any clear, objective and non-arbitrary rules for procedures and decisions on clothing, personal possessions, etc. Instead, decisions seem to be taken on an individual and discretionary basis. This lack of transparency, clarity and accountability should be avoided;
  - d. With regard to **body searches** and other security measures, the four women, including the teenager, were regularly searched by male security officers;
  - e. Regularly singled-out and excluded from activities conducted in the main yard and other areas, on the pretence that they ‘saunters around and attracts vulgar comments and behaviour’;
  - f. Denial of permission to possess items other female inmates are authorised to possess, including hair clips, make-up and particular items of clothing.
68. We are concerned that any person experiencing these above-average stress levels is unnecessarily exposed to an environment that further exacerbates feelings of exclusion, lack of physical protection, loneliness and **discrimination**. In the case of minors, our concerns are clearly aggravated by the person’s increased vulnerability.

#### **The case of Joanne Cassar vs. Malta at the European Court of Human Rights**

69. The human rights challenges faced by transgender persons may be seen in the on-going case of Joanne Cassar<sup>21</sup>. Ms. Cassar is a post-operative transgender woman who underwent the above-mentioned court procedure, in terms of Maltese civil legislation, to rectify all her personal documentation and be recognised as a woman. She and her then partner applied for marriage banns as they intended to marry. Following a series of challenges in the local courts, including at the Constitutional level, Ms. Cassar was denied her right to marry on the ground that the law would not recognise her as a woman but retain the acknowledgement and recognition of the gender assigned at birth – male. The Courts argued that the *Civil Code* procedure was only intended to avoid public embarrassment for post-operative transgender persons and not to provide **comprehensive legal recognition** of one’s affirmed gender. Ms. Cassar filed an application before the European Court of Human Rights claiming a series of violations of her human rights.
70. In July 2012, **aditus foundation** and the **Malta Gay Rights Movement** submitted a third party intervention<sup>22</sup> in support of Ms. Cassar’s application wherein we highlighted the human rights concerns raised by the national procedure for transgender persons to rectify their documentation. All these concerns are further contained in a comprehensive

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<sup>21</sup> Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111018>, accessed 8<sup>th</sup> March 2013.

<sup>22</sup> <http://aditus.org.mt/aditus/Documents/JoanneCassar3rdPartySubmission%28July2011%29.zip>, accessed 11<sup>th</sup> March 2013.

- report<sup>23</sup> urging the Malta to revise its gender identity legislation in order to bring it in line with international and regional human rights standards. Main concerns include:
- a. A court procedure is often expensive, public & intrusive;
  - b. The *Civil Code* provisions require that the transgender person presenting the application be unmarried, thereby limiting its accessibility to unmarried persons or, indirectly, coercing persons to **terminate an existing marriage**. The latter scenario is particularly harrowing for persons who ‘come out’ as transgender at a late stage in their lives, possibly after having married and formed a family;
  - c. As mentioned above, the requirement to undergo **permanent sterilisation** by way of sex reassignment surgery, is a very serious violation of a person’s right to physical integrity, to form a family, to freedom of expression and to personal privacy;
  - d. The Court procedure does not seem to have any legal value, other than that of amending the applicant’s documentation. **No legal recognition** is formally granted to the affirmed gender for purposes of, for example, marriage, pensions, social welfare, etc.
71. Furthermore, we are also concerned that the requirement to undergo sexual reassignment surgery prior to having one’s gender acknowledged has a severe impact on transgender children and youth. **aditus foundation** is aware of situations of young children being **denied access to public schooling** due to Malta’s refusal to recognise their gender, as being different from that assigned at birth. In such cases, the bests of the child principle seems to be disregarded in the overriding interest of public policy.

### **Recommendations**

72. Revise current legislation to ensure that transgender persons are treated by the law as members of their affirmed gender without the requirement to undergo sex reassignment surgery, which is equal to forced and permanent sterilisation;
73. Ensure respect for the **best interests of the child** principle in situations of transgender children.

### **LBGTI Families**

74. Malta offers absolutely **no form of legal recognition** of same-sex relationships. Beyond denying the right to marry and found a family to persons living in Malta, this legal vacuum is also problematic in the context of non-Maltese couples within a form of legally recognised relationship and travelling to Malta, where their relationship and acquired rights and obligations are effectively nullified.
75. With regard to children having same-sex parents, Maltese law only recognises the biological parent as the legal parent of the child, with consequences on the exercise of parental authority as well as on possible eventual termination of the parental relationship. One of the persons in a same-sex couple moving to Malta with children will be effectively stripped of all **parental rights and obligations**. Further child-specific issues include:
  - a. Unrecognized LGBT co-parents face severe difficulties on a daily basis in important matters affecting the child as, for example, schooling, travelling, medical treatment and religious affiliation. It is emphasized that the ultimate damage being done is in fact to the child’s best interests;

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<sup>23</sup> Malta Gay Rights Movement, ‘A Proposed Gender Identity Act for Malta’, December 2010, available at [http://www.maltagayrights.org/cms/pdfs/A%20Proposed%20Gender%20Identity%20Act%20for%20Malta\\_web.pdf](http://www.maltagayrights.org/cms/pdfs/A%20Proposed%20Gender%20Identity%20Act%20for%20Malta_web.pdf), accessed 24th October 2012.

- b. People who play an actual parenting role in the child's life should be able to exercise the child's legal representation;
  - c. The invisibility of an LGBT co-parent could also lead to the related invisibility of the child's siblings;
  - d. In the **immigration** context, unrecognized LGBT persons may be prevented from living in the same country as their families;
  - e. The **matrimonial home protection**, and other property related protection regimes, denied to unrecognized LGBT families could endanger the child's physical security, particularly in the eventuality of the death of the person with whom the child's home is associated;
  - f. Children are not automatically entitled to the inheritance of their unrecognized LGBT co-parent;
  - g. The legal framework that is triggered when marriages break down is also intended to offer maximum protection to the children. Unrecognized same-sex relationships do not trigger these protection mechanisms, leaving the children vulnerable to **abuse and emotional turmoil**.
76. It is not possible for same-sex couples to **adopt**. Maltese adoption legislation limits adoption to either married couples or to single persons, supporting the awkward policy approach that a single person is *ab initio* a better parent than a homosexual couple. Furthermore, adoption of a child by the partner of a biological or adoptive parent is not currently possible, denying this partner parental rights and responsibilities at law.

### **Recommendations**

77. Introduce **marriage equality**, recognising the full equality of all persons irrespectively of their sexual orientation. This measure would also regulate the several forms of existing LGBTI families, thereby ensuring legal protection for all individuals including children and vulnerable adults. Being a marriage regime, it would be based on the principle of mutual recognition and also impact ancillary areas such as fiscal obligations, migration, inheritance, etc.