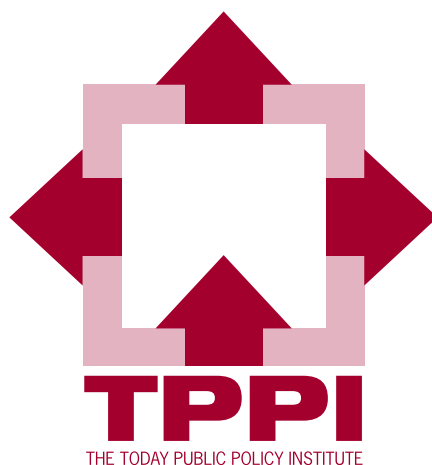


# **SAME SEX: SAME CIVIL ENTITLEMENTS**



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**Report Published by The Today Public Policy Institute**

Lead Author: Martin Scicluna  
Presented to the Prime Minister, May 2013

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- To seek solutions which are just, fair, equitable and workable and for the common good of Maltese society, regardless of background, gender or political affiliation.

**Same Sex: Same Civil Entitlements**

May 2013

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## CONTENTS

Introduction .....	1
PART I: The position in other European countries .....	4
PART II: Should Malta introduce civil unions or same-sex marriages? .....	5
PART III: The Maltese government's position .....	8
PART IV: Reasons for taking action .....	9
PART V: The introduction of a civil union scheme .....	10
PART VI: The benefits of a civil union scheme .....	12
PART VII: Some key aspects of legislation for consideration .....	13
PART VIII: Conclusions and recommendations .....	18
ANNEX A: Glossary of terms .....	21

# SAME SEX : SAME CIVIL ENTITLEMENTS

## Introduction

### Background

1. The introduction of divorce legislation in 2012 marked a notable advance for Maltese civil rights. Not since the mid-1970s, with the de-criminalisation of homosexuality and adultery, which until then were offences punishable by imprisonment, and the introduction of civil marriage, had Malta taken such an important step towards the extension of civil rights for a minority in society.
2. There remains another aspect of Maltese civil rights to be completed. This concerns the way another minority in society is treated. Lesbians, "gays", bi-sexuals, trans-gender and inter-sex individuals (LGBTI) – who, it is estimated, together comprise about 5% of Malta's population - are not protected under Maltese law.

### Glossary of Terms

3. A glossary of terms is attached at Annex A for ease of reference.

### Hate Crimes and Discrimination

4. Discrimination against LGBTI persons, at the work-place and outside it, is a fact. Inequality between heterosexual and non-heterosexuals (that is, lesbian, gay and bi-sexual persons) as well as between those who identify themselves with the sex attributed to them at birth and those who do not (known as trans-sexual or trans-gender) and inter-sex people is real and manifest in Malta.
5. Anecdotal evidence of harassment and bullying of homosexuals (so-called hate crimes) is common-place. Studies by the Malta Gay Rights Movement (MGRM) have consistently shown that between 8% and 10% of homosexuals are regularly subjected to some form of violence because of their sexual orientation. It is thought about two thirds of those affected are young women.
6. In the first ten months of 2010, twenty-eight persons committed suicide in Malta. At least eight of them (over a quarter) were young, homosexual individuals who may have been driven to suicide by bullying or violence at school, at work or even within their own families.
7. Another report by the EU Agency for Fundamental Rights – an agency set up to provide expert advice to EU institutions on a range of issues - entitled "Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe", conducted in the forty-seven Council of Europe countries, indicated that 40% of Maltese LGBTI respondents experienced harassment at their work-place. According to an ILGA-Europe study, an association working for human rights and equality for LGBTI people in Europe, only Cyprus has a worse track record on LGBTI issues than Malta within the European Union.

8. The anti-discrimination legislation flowing from the transposition into Malta's law of the EU's Employment Framework Directive has had only limited impact. The remit of the National Commission for the Promotion of Equality prevents it from tackling discrimination committed on grounds of sexual orientation. The part of the law that speaks of hate crimes is limited to racial hatred or xenophobia. The only legal protection for gay people refers to discrimination in terms of harassment.
9. There has been a neglect by Parliament of the plight of sexual minorities, a vulnerable group in society, consisting of homosexuals, bisexuals and trans-genders, as well as same-sex partners who live together and set up home together, who currently enjoy no proper rights or recognition. The situation has been allowed to fester for too long. There is a pressing need for appropriate legislation to be passed to end discrimination on grounds of sexual orientation and to punish homo-phobic hate crimes and bullying.

### International Treaty Obligations

10. Malta acceded to the International Covenant on Civil and Political Rights over twenty years ago. Article 26 of the Covenant states that "All persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. In this respect, the law shall prohibit any discrimination on any grounds ....".
11. Malta has also signed the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms which underlines the fundamental principle that all persons are equal before the law and are entitled to equal protection of the law. Protocol Number 12 of the Convention re-affirms the principle of non-discrimination and specifically that no-one shall be discriminated against by any public authority on any grounds, such as "sex, race, colour, language, religion, political or other opinion..."; but Malta has not yet signed this protocol.
12. Malta has committed itself to upholding international civil rights principles and it is failing to do so. The right to non-discrimination and equality before the law are among the most fundamental of all human rights principles. There is currently no single Maltese law that safeguards the position of LGBTI in society, and a whole raft of laws which deny basic financial and work-related entitlements to homosexual couples in such fields as housing, inheritance rights, fiscal benefits and entitlements.



## AIM

13. The aim of this report is to examine means of improving the civil rights of LGBTI persons in Malta by ending discriminatory treatment and, specifically, to consider the two options of introducing **either** a civil union scheme **or** same-sex marriage, and to make recommendations.

## ACKNOWLEDGEMENT

14. The Lead Author of this report acknowledges with gratitude the work contained in the study commissioned by the Malta Gay Rights Movement, written by Dr Neil Falzon in 2012, entitled “MGRM’s Position Paper on Marriage Equality”, on which he has drawn liberally.

## OUTLINE OF THE REPORT

15. This report is laid out in eight Parts as follows:
- **PART I:** The Position in Other European Countries.
  - **PART II:** Should Malta Introduce Civil Unions or Same-sex Marriages?
  - **PART III:** The Maltese Government’s Position.
  - **PART IV:** Reasons for Taking Action.
  - **PART V:** The Introduction of Civil Unions.
  - **PART VI:** The Benefits of a Civil Union Scheme.
  - **PART VII:** Some Key Aspects of Legislation for Consideration.
  - **PART VIII:** Conclusions and Recommendations.

## PART I

### THE POSITION IN OTHER EUROPEAN COUNTRIES

16. Attitudes to the legal recognition of same-sex relationships in Europe have been influenced by a wide range of considerations, from religion to history and culture. Sweden and Norway have been in the vanguard of extending civil rights to minorities and saw no problem in legislating for same-sex marriage, or full marriage equality. Catholic Spain and Portugal took this step despite much religious and political opposition. Belgium, Iceland, The Netherlands and, just recently, the United Kingdom and France have also legislated for same-sex marriage.
17. Other countries, on the other hand, like Germany, Denmark, Austria, the Czech Republic, Ireland, Hungary, Andorra, Liechtenstein, Luxembourg, Slovenia, Switzerland, France and Finland and the United Kingdom have introduced the concept of civil partnerships or civil unions as they are sometimes known.
18. In addition, Austria, Croatia, Czech Republic, Denmark, France, Germany, Ireland, The Netherlands, Norway, Portugal, Sweden and the United Kingdom also enjoy separate legislation giving so-called cohabitation rights.
19. There is no legal recognition of any kind for homosexual partners in Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Georgia, Greece, Italy, Latvia, Lithuania, Moldova, Monaco, Montenegro, Poland, Romania, the Russian Federation, San Marino, Serbia, Slovakia, the former Yugoslav Republic of Macedonia, Turkey and Ukraine.
20. Same-sex couples living in Malta are similarly excluded from any form of legal recognition.
21. The practices within Europe are a reflection of the various definitions attributed to marriage by governments stemming largely from their different cultures, history and traditions. They also reflect varying attitudes towards LGBTI persons and, more importantly, towards LGBTI relationships and modern extended family structures.

## PART II

# SHOULD MALTA INTRODUCE CIVIL UNIONS OR SAME-SEX MARRIAGE?

### Lack of Legal Recognition for Same-sex Couples

22. Same-sex couples in Malta currently have no way of gaining legally recognised status for their relationships. The current lack of legal recognition means that they are denied access to most of the rights or responsibilities that are given to married couples to reflect the commitment they have made to each other. Some rights do extend to unmarried couples, both same-sex and opposite-sex, but where rights are made available only on the basis of marriage there is currently no means for a homosexual couple to enjoy them since the parties are not lawfully permitted to marry one another.
23. For a same-sex couple, the denial of the opportunity to have their relationship recognised presents a number of day-to-day challenges when they attempt to organise their joint lives. There are many difficulties that arise from the law's failure fully to recognise committed same-sex relationships.

### A Cohabitation Law Not the Answer

24. Cohabitation law is by definition inferior to either same-sex marriage or a civil partnership union because it merely acknowledges the physical presence of two persons living under the same roof without the fundamental under-pinning of long-term commitment and love entailed by the kind of nucleus or extended family structure created between same-sex couples. This report therefore dismisses at the outset the concept of introducing some form of cohabitation law to solve the current deficiencies in LGBTI civil rights.

### OPTION 1: The Argument for Same-sex Marriage (Marriage Equality)

25. The argument adduced by those who favour marriage equality for all – both heterosexual and homosexual – is founded on the understanding that the right to marry should be recognised for everyone (so called marriage equality) without discrimination on grounds of sexual orientation. It is viewed as a fundamental human right in and of itself.
26. The inclusion of same-sex marriage in national legislation, it is averred, would not have any long-term negative impact on the institution of marriage, but would simply extend its benefits throughout society. Marriage equality for all would provide the legal recognition to same-sex couples, ensuring the enjoyment of all rights and obligations enjoyed by married men and women. Homosexual couples it is argued should enjoy such rights and the protection of the law equally as a family unit, and not in any lesser form of relationship.

27. On the other hand, those who oppose such a solution argue that this approach flies in the face of one of the most important purposes of marriage, which is for the procreation of children and the creation of a family, made up of a man and a woman. However, this argument overlooks the fact that there are many people who get married who are too old, too ill or infertile to procreate, but are still allowed to be married. It would clearly be wrong to argue that they should be excluded from marriage. Yet, that is what is asserted in the case of same-sex couples.
28. There are many heterosexual couples, such as widows and widowers of a certain age, who grow sufficiently fond of each other to live together in a new marriage and find that the arrangement orders their entire relationship, including their financial, domestic, fiscal and inheritance affairs. Others marry to express their loving commitment to each other while knowing that one has a medical condition that makes procreation unlikely or impossible. Those in favour of same-sex marriage question whether it is acceptable to say that love has no meaning except in a reproductive context. Having children has never been a condition for marriage.
29. The major argument in favour of same-sex marriage is that if marriage is considered intrinsically to be such a good thing for heterosexual couples, then in logic committed same-sex couples should not be excluded from benefitting from this institution. Homosexuality is not a threatening social reality, but one to be accepted and accommodated. Gay people have the same need and capacity for love and partnership as heterosexuals.
30. As the Coordinator for MGRM put it: "Whatever our sexual orientation, we are all raised in a society which continues to value the institution of marriage as the expression of a committed, loving and stable relationship. While some citizens might choose not to formalise their relationship, for same-sex couples this is not a choice, but as a result of an inherently discriminatory definition of marriage that excludes, and in so doing devalues their relationship".
31. "By preventing same sex couples from marrying, the State thrusts such families into legal limbo and excludes same-sex couples and their children from full membership in society. Same-sex couples therefore experience several kinds of State-sanctioned discrimination that adversely affects the stability of their relationship, their mental health, human rights and economic well-being that may in turn have a negative effect on society at large".
32. The one word that keeps recurring in the passage just quoted is "society". The issue turns essentially on how ready Maltese society would be to accept the logic of the arguments set out above that marriage, which has hitherto always been staunchly regarded as a relationship between a man and a woman, could in future be between two men or two women.
33. It is clear that the concept of marriage has not remained unchanged. For example, if Christian marriage were still as it was two thousand years ago it would be possible for a man to marry a twelve year-old girl he had never met, to own a wife as property and dispose of her at will, or to imprison a person who married someone of a different race. But such practices are no longer acceptable in Europe. Marriage has evolved constantly over time and is still evolving.

34. However, despite the changing nature of marriage, and the cold logic adduced in favour of marriage equality, the clinching argument may be that same-sex marriage *per se* is one step too far for Malta at this time. Ending unfair discriminatory treatment of same-sex couples is one thing, which most fair-minded people are prepared to recognise. But given the symbolic meaning of marriage in Maltese society, allowing homosexual couples to marry would be quite another. This is a fair argument that probably reflects majority opinion in Malta which should be respected. For this reason this option is not pursued further.

## **OPTION 2: Introduction of Civil Partnerships or Civil Unions**

35. The alternative solution, therefore, is the introduction of a civil partnership scheme or civil union. The overriding practical consideration in the formulation of such a scheme would be the need for civil unions to deliver the significant majority of the rights and obligations that marriage confers.
36. The introduction of civil unions would make a major difference to the currently vulnerable legal position of same-sex partners by giving them the opportunity to gain legal recognition for their relationship and by achieving concomitant rights and responsibilities. The legal limbo into which they have been thrust would be removed and the risk of offending the sensibilities of a large majority in present-day Maltese society would be avoided.
37. A civil partnership relationship with an intrinsic package of rights and responsibilities would provide legal recognition for those same-sex couples who choose to make such a commitment. Couples who register as civil partners would thereby gain many of the rights and responsibilities currently denied them.
38. Although there are strong arguments to be made for introducing the concept of same-sex marriages – as, indeed, many other European countries have done - it is concluded that it would be both premature and impolitic in the Maltese context to seek to introduce them here at this time. Instead, it is concluded that the introduction of a civil union scheme should be pursued.

## **PART III**

### **THE POSITION OF MALTA'S GOVERNMENT**

39. In its electoral manifesto of February 2013, the government pledged to introduce civil union legislation in Malta. It envisaged that a Consultative Council would be established to advise the government on the issues which have an impact on the LGBTI community. The new government would sign Protocol Number 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms to prevent discrimination on grounds of sexual orientation. It would also, it said, strengthen the policy on sexual discrimination in the public service, including the Armed Forces of Malta and the Malta Police Force.
40. This report is therefore written as a contribution to the deliberations of the Consultative Council being called by government.

## PART IV

### REASONS FOR TAKING ACTION

41. In many areas, so far as the law is concerned, same-sex relationships do not exist. This inequality is no longer acceptable. A new legal relationship would of itself promote a culture change that could make a real and positive difference to same-sex partners.
42. Civil unions would not only bring benefits to the individuals who formed them, but would also benefit society as a whole. It would do so by underlining the inherent value of committed same-sex relationships, by supporting stable same-sex couples and by valuing diversity in Maltese society.
43. A new legal relationship would, of itself, encourage a wider culture change that could make a real and positive difference to same-sex partners in relation to many aspects of their lives and, importantly, to the LGBTI community at large. For example, in areas such as funeral arrangements on the death of a partner and hospital visiting, same-sex partners have long suffered inadequate recognition. These issues arise at times of considerable emotional stress and the failure officially to acknowledge a committed same-sex relationship can be both painful and humiliating.
44. While it is recognised that some people deliberately choose to avoid formal commitments to each other, or to limit their liabilities in respect of each other, the introduction of a law to enable those who wish to adopt a civil union status will enable individuals to make their own choices, and so will not impose responsibilities on those who do not want them.
45. Equally, those who do not register in a civil union or civil partnership scheme will not benefit from the rights that may be attached to a civil union law. There will be legal certainty about who has 'opted in' and who has not, and when the legal relationship begins and ends. This level of certainty enables an assessment of when liabilities accrue and cease. Thus, clear legal rights and obligations will be created between civil partners.

## PART V

### THE INTRODUCTION OF CIVIL UNIONS

46. It is proposed that a civil union scheme would follow the registration model, requiring that the couple 'opt-in' by going through a public ceremony. Couples forming a civil partnership or union will have a new legal status of "civil partner". This civil union registration scheme would be confined to same-sex couples. Indeed, it is difficult to see what benefit there would be for an opposite-sex couple in choosing civil union over marriage and the registration legislation would make it clear that the scheme was restricted to same-sex couples.

#### Purpose and Intended Effect

47. In outline, the main features of civil union legislation might be devised along the following lines. The same-sex couple would go through a public ceremony, which to all intents and purposes would be equivalent to that for civil marriages. Civil unions would be open to people of the minimum age for marriage in Malta and over.
48. They would be of the same sex and must not be close relatives. At the time of the ceremony, neither party must be married or in another civil union relationship. A couple intending to celebrate a civil union would face the same procedural hurdles as those marrying: notice of intention to formalise the relationship, declaration of no impediment, and so on. Like marriage, the ceremony would be a public event in a Registry Office or similar, as occurs with civil marriages in Malta today.
49. The purpose of legally recognising civil partnerships would be to give same-sex couples the opportunity of gaining legal recognition for their relationships through forming a civil union, and thus to gain rights and responsibilities attached to that legal relationship.
50. Civil unions will be an important equality measure for same-sex couples who are unable to marry. It will provide for the legal recognition of same-sex partners who wish to enter into same-sex couple relationships that are intended to be permanent. Civil unions provide a framework whereby same-sex couples would acknowledge their mutual responsibilities, manage their financial arrangements and achieve legal recognition as civil partners.
51. Same-sex couples currently face occasions in their joint lives where duties, obligations and protections available to spouses are denied them. The rights that would follow the formation of a civil union would apply not only during a relationship, but also on the break-up of a relationship or the death of a civil partner.

#### The Proposed Rights and Duties of Civil Partners

52. The rights, duties and remedies that arise as a result of opting in to a civil union should in general mirror those applicable to married couples.



53. The current unavailability of these legal rights can lead to difficulties in a variety of ways. Same-sex couples do not have the same protections as spouses when a long-term relationship comes to an end, and where one partner might reasonably expect to share in any division of property or to apply for maintenance from his or her former partner. This is particularly difficult if, for example, one partner has sacrificed their own career in order to support their partner's.
54. There are also instances when a Maltese national wishing to live with his or her same-sex partner who is not Maltese can be treated very differently to a Maltese national wishing to live with his or her foreign spouse. Unable to meet the residency requirements, they can often be forced to live apart for long periods of time.
55. Bereaved same-sex partners have in the past found themselves unable to achieve full recognition for the purposes of fatal accidents compensation and if a person dies without leaving a will same-sex partners do not have any rights under the intestacy rules.

## PART VI

### WHAT WILL BE THE BENEFITS?

56. In substance, therefore, the aim should be that civil unions will deliver a significant majority of the rights and obligations that marriage confers. While important rights and duties for same sex couples are currently absent, those that would be extended to civil partners would be substantial and beneficial and make a significant difference to the currently vulnerable legal position of same-sex partners.

#### Benefits of Stable Relationship

57. Above all, the availability of civil unions will encourage stable relationships, which are an important asset to society as a whole. It will reduce the likelihood of relationship breakdown, which has a proven link to both physical and mental ill-health. Strengthening same-sex couple relationships not only benefits the couples themselves, but also other relatives they support and care for and, in particular, their children as they grow up and become the couples, parents and carers of tomorrow.

58. Stable relationships also benefit the economy since it is expected that civil partners will share their resources and support each other financially.

#### Impact on Social Attitudes

59. Many lesbian, gay and bisexual people have been the victims of homophobic incidents, such as threats, intimidation, verbal abuse or physical assault. It cannot be coincidental that for as long as society chooses to treat same-sex couples as second-class relationships such discrimination will occasionally manifest itself in criminal and uncivilised ways.

60. The creation of a new legal relationship for same-sex couples will play an important role in increasing social acceptance of same-sex couples, reducing homophobia and discrimination and building a safer and more inclusive society.

61. The introduction of legislation will act as an important step in publicly valuing same-sex relationships where couples have made a serious decision to seek legal recognition of their commitment to one another. It will be much harder for people to ignore this commitment both in law and in everyday life.

62. By making a public declaration of their commitment, lesbian, gay and bisexual people will feel more confident that their relationship will be respected and appreciated by society. It is not acceptable that same-sex couples still have to struggle to have their kin and relationships recognised. Civil partnership will be a way through which society acknowledges and values their relationship.

## PART VII

### KEY ASPECTS OF LEGISLATION FOR CONSIDERATION

63. There are a number of aspects of civil union legislation to which Parliament will wish to give particular consideration when drawing up the main features of a civil union law. Legislation should be guided by the broad thrust that civil unions should have largely the same impact as marriage. The sections that follow highlight some of the key issues to which legislators will wish to give consideration and are put forward as a basis for further discussion.

#### Discrimination and Conflicts of Interest

64. By way of preamble it is important to reiterate that the underlying purpose of the law will be that discrimination on the basis of being a civil partner will be prohibited. It should stipulate that in relation to matters concerning conflicts of interest the partners will be regarded as if they were spouses. The civil partner – and notably the child of one's civil partner if there is one – will be treated as 'connected relatives' for the purpose of various measures affecting conflicts of interest.

#### Children

65. Perhaps the most sensitive area for consideration will concern how children of civil partners will be treated. The science about the best parenting structure for a child's upbringing is still in its infancy. Some studies argue that there is no scientific evidence to show that the effectiveness of good parenting is directly related to the parents' homosexual or heterosexual orientation. Others argue that the ideal environment for raising children is with a stable biological mother and father. No other parenting arrangement, it is contended, affords as many emotional advantages as being raised by a biological mother and father joined in a life-time commitment.
66. What is abundantly clear, however, is that the existing scientific research does not provide definite answers or solid empirical evidence for or against same-sex parenting. In such a sensitive area, it would seem sensible that a longitudinal scientific study should be established specifically examining this issue before irrevocable long-term decisions under a law are taken.
67. Based on the outcome of such a study, all other factors being equal, the legislation should seek to cater for same-sex couples with children. It should give due regard to any children who may reside with same-sex civil partners. While marriage legislation generally requires the courts to have regard to children in a family unit as well as the adults, the equivalent provisions under a civil union law should address the position of children.
68. The law should also have clear provisions for access to the children of any former marriage as well as for adoption.

69. The protections afforded in respect of the civil partners' shared home should make reference to the accommodation needs of dependent children as a relevant criterion.
70. A dissolution of a civil union should not be obtained without having regard to whether proper provision has been made for any dependent children.
71. It is becoming increasingly evident that many homosexual couples do in fact live with children normally from previous relationships. In maintenance and dissolution cases the court must take into account a civil partners' obligations towards his or her own biological children. In deciding the amount of maintenance to be awarded or in considering the remedies on dissolution, the courts should also take into account these obligations. While this falls far short of requiring support for the child by the non-biological partner, it may indirectly lead to such a result.
72. A child living with civil partners will not be able to claim maintenance from the partner who is not the biological parent. Nor will the child have any legal right to claim from that partner's estate on death (unless the latter made a will in the child's favour).

## Adoption

73. The Convention on the Rights of the Child, Article 3(1) states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
74. Sexual orientation should not influence whether a person is allowed to adopt a child or not. The suitability of a person cannot be determined by sexual orientation or marital status. Maltese law allows single people to adopt. The criterion in deciding adoption should be the best interests of the child regardless of whether the person doing the adopting is homosexual or heterosexual.
75. While in the eyes of some it might seem preferable for children to be adopted by married couples, it would be wrong to deprive a child of a loving home with a homosexual couple. All prospective adoptive parents, whether a couple or single, gay or heterosexual, should undergo the same process and be allowed to adopt if they show themselves to be suitable parents. *Appogg* lays down that all adoption applications are treated equally "ensuring that the applicant(s) can provide an environment that ensures the physical, emotional and psychological well-being of the minor to be adopted". The civil union scheme should in principle reflect the same approach and specific conditions.

## Succession

76. The civil union scheme should provide the same succession rights for civil partners as for the spouses of married couples. The legal entitlements of civil partners should mirror those applicable to married couples. Civil partners would formally be recognised as each other's next-of-kin. A civil partner would have the right to claim from the estate of a deceased

partner, whether or not the latter made a will. Where the deceased dies without making a will, the partner would be entitled to part of the estate even if the deceased had children.

## Tax and Social Welfare

77. As to tax and social welfare, it would seem sensible to seek to equalise the position of civil partners and married persons under the relevant social security and tax acts. The new scheme should seek to treat the position of civil partners and married persons in the social welfare code in the same manner.

## Pensions

78. In relation to pensions, civil partners should be placed in the same position as heterosexual spouses by entitling a surviving civil partner to a survivor's pension in the same way as a surviving spouse. The relevant pension and finance legislation should be amended in order to make provision regarding the pension rights of surviving civil partners and dependants. For purely private pensions, amendments to non-discrimination law should ensure that civil partners could not be treated differently to married couples.

## Housing

79. The legislation should provide for equal rights to heterosexual couples as regards entitlement to social housing.

## Family Law

80. It would appear sensible that the registration scheme should also provide for the same orders as under Maltese Family Law. These include maintenance orders, property adjustment orders, sale of the home or other property, pension adjustment orders and orders regarding inheritance. As is the case under marriage law, an application can be made at any time to vary these. The civil partnership scheme should also provide the same protections against domestic violence as given to married and divorced couples.

## Home Ownership

81. Where the partners share a home (regardless of who owns it), a civil partner should not be able to sell, lease or mortgage the shared home, or offer it as a security for a loan, without the prior written consent of the other civil partner.

## Dissolving a Civil Partnership

82. A civil union should only be ended by formal dissolution or annulment, or on the death of one of the parties. Dissolution is a court-based process and “irretrievable breakdown” should be the sole ground for the Court to grant a dissolution.
83. In line with Malta’s Divorce Law, a civil union would formally be ‘dissolved’ where the parties have lived apart from each other for at least four years of the previous five years.
84. The legislation should codify the same grounds for annulment as Malta’s marriage law. ‘Living apart’ should require more than mere physical separation, but pre-supposes a mental element that the partners intend to live separate lives.
85. Importantly, the rules on the recognition of foreign dissolution should be similar to those for foreign divorces under Maltese law.
86. The court must be satisfied that proper provision has been made for each partner. Once a dissolution is granted, the couple may agree terms but may avail themselves of a variety of court-ordered remedies identical to those available following a divorce. These include maintenance, lump sum payments, orders conferring a right to claim from a partner’s pension and orders dividing property between the partners. These remedies are granted at the Court’s discretion, based mainly on the partners’ respective resources and needs. A person who enters into further civil union will be precluded from making further claims against his former civil partner.

## Maintenance

87. The legislation should also provide for ‘maintenance’ along the same lines as those applicable to married couples. This will allow each civil partner to claim financial support (if needed) from the other. The civil union scheme should ensure that maintenance orders for any children can be made against the non-biological civil partner. The scheme should also reflect the requirement of the divorce law that if a spouse has acted *in loco parentis*, he or she can be obliged to pay maintenance for that child. The UN Convention on the Rights of the Child requires that the best interest of the child be a primary consideration in all matters affecting them. The civil union scheme should show due regard for their interests.

## Recognition of Foreign Relationships

88. Malta’s law on Freedom of Movement within the European Union has been amended to remove discrimination against EU nationals in same-sex relationships with “Third Country Nationals” (that is, nationals from non-EU countries). Similar provisions under the law need to be made in the case of LGBTI persons in Malta. Provision should be made for the recognition of civil partnerships or civil unions celebrated abroad provided they are exclusive and permanent in nature and confined to couples of the same-sex.

## Discrimination

89. The civil union scheme should ensure protection against discrimination for civil partners in employment, goods, facilities and services on grounds of civil union by amending the relevant employment, consumer and industrial relations Acts already in force accordingly as appropriate.

## Transsexuals

90. Malta has not yet made provision in legislation for the right of transsexuals to have their true gender identity recognised. A proposed Gender Identity Bill was in the pipeline under the last Administration but never reached Parliament. For example, a woman who was identified as a man at birth, has undergone surgical gender reassignment and subsequently the gender on her birth certificate was changed. But she was refused the right to marry her boy-friend despite the fact that her marriage would be fully in line with heterosexual marriage. Government action may be in hand to think through the consequences under Family Law and civil partnership law and to correct the current legal anomaly to allow such individuals either the right to marriage or to enter into a civil union.

## Immigration

91. The legislation should impose the same rights on civil partners as married persons under the law on immigration and nationality. A civil partner of a person with long term residence should be entitled to the same benefits as a spouse and the civil partner of a person granted protection by Malta should be eligible for family reunification in the same way as a spouse would be. For immigration purposes, civil partners should be treated as members of each other's family, though this does not necessarily guarantee a right to residence.
92. The position of a civil partner should also be equalised with that of a spouse for the purpose of citizenship or the rights of non-EU spouses of EU nationals.

## PART VIII

# CONCLUSIONS AND RECOMMENDATIONS

### Conclusions

93. It is concluded that the benefits to Maltese society of recognising same-sex relationships by the establishment of a civil union scheme would be considerable. So long as society chooses to treat homosexual couples as being in a second-class relationship, LGBTI people will continue to be the victims of homophobic incidents, such as threats, intimidation, verbal abuse or physical assault.
94. The creation of a new legal relationship for same-sex couples would play an important role in increasing the social acceptance in Maltese society of gay men, lesbians, bisexuals and trans-genders, removing discrimination and thus building a more inclusive and fairer society.
95. Civil unions would also provide a framework for same-sex couples to acknowledge their responsibilities, manage their financial affairs together and achieve legal recognition as civil partners.
96. The introduction of legislation to enact such rights would act as an important step in publicly accepting stable, same-sex relationships, where couples have made a serious decision to seek legal and permanent recognition of their relationship. Civil unions would be a way through which society would acknowledge their relationship and overcome the stigma that currently attaches to them.

### Recommendations

97. It is therefore recommended that:
  - The conclusions in paragraphs 93 to 96 above should be noted;
  - Formal recognition should be given to the rights of same-sex couples through the enactment of civil union legislation on the lines set out in paragraphs 64 to 92 of this report;
  - A longitudinal scientific study should be established to look at the sensitive issue of the effects on children in same-sex relationships before determining how legislation in this regard should be framed;
  - Anti-discrimination legislation should be enacted to safeguard the rights of LGBTI people as set out in this report;
  - The Maltese Criminal Code should be amended to make homo-phobic and trans-phobic violence and hate-crimes a criminal offence;



- The relevant employment and industrial relations laws should be amended to curb harassment and discrimination on grounds of sexual orientation and gender identity;
- Amendments should be made to the terms of reference of the National Commission for the Promotion of Equality to extend its responsibility to cater for cases of discrimination on grounds of sexual orientation and gender identity;
- The government should ratify Protocol 12 to the European Convention on Human Rights and Fundamental Freedom as soon as possible;
- Subject to affordability, and duly recognising the current tight budgetary situation, the government should consider the inclusion of gender reassignment surgery and hormone therapy for trans-gender persons as part of the public health service.

## ANNEX A

### GLOSSARY OF TERMS

TERM	EXPLANATION
Adoptive parent	A person who has legally adopted a child.
Birth father	A father listed on a child's birth certificate.
Birth Mother	A woman who gives birth to a child.
Bisexual	Those sexually attracted by persons of both sexes.
Gay	Popular colloquial word for a male homosexual, also sometimes applied to female homosexuals.
Homosexual	A person who feels sexual attraction only to a person of the same sex (sometimes also referred to as 'gay').
Heterosexual	A person who feels sexual attraction to someone of the opposite sex.
Inter-sex	The condition of being intermediate between male and female. Existing between the sexes.
Trans-gender or trans-sexual	Having the physical characteristics of one sex and the psychological characteristics of the opposite sex.
Legal parent	A person noted as a parent on a child's birth certificate or an adoptive parent (adoption being the lawful taking of and responsibility for another parent's child as one's own).
Lesbian	A homosexual woman.
Opposite-sex couple	A <i>de facto</i> couple where one member is the opposite sex to the other
Opposite-sex family	An opposite-sex couple with one or more children.
Opposite-sex partner	One member of an opposite-sex couple.
LGBTI	The acronym for Lesbian, Gay, Bisexual, Trans-gender and Inter-sex persons.
Same-sex couple	A <i>de facto</i> couple where one member is the same sex as the other
Same-sex family	One same-sex couple with one or more children
Same-sex partner	One member of a same-sex couple

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