

# COMMENTS AND LETTERS

## Constitutional amendments

# Radical rethink required (1)



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The proposals to amend the constitution published by the government in late September fall far short of providing sufficient additional safeguards for the rights to privacy and freedom of expression.

On the contrary, they attempt to insert exemptions which are inadmissible under European law and which would put Malta in breach of its international legal obligations.

All citizens should be upset at this strange turn of events but especially so all members of Malta's LGBTIQ communities who should be up in arms about the failure to explicitly protect their right to private life at the constitutional level.

It is also somewhat surprising that a Labour government, which may have got many things seriously wrong but which recently blazed an enlightened trail when it came to LGBTI issues, seems to have lost the plot when it comes to constitutional change.

We should not miss out on an extremely rare opportunity to significantly strengthen protections for Maltese citizens under their supreme law, the constitution. Here's why.

The provisions for protecting privacy at the constitutional level have lain there neglected by government after government, Nationalist and Labour, for nearly 60 years.

In the first instance, between 1964 and 1987, the right to privacy was enshrined in (then) Article 33 (c), which was unenforceable in the very terms of the constitution. The incoming Nationalist government in 1987 was rightly concerned about the infringement of human rights in Malta and, thereafter, the right to privacy could be enforced largely through a lower-level law, when the European Convention on Human Rights was made enforceable through Act XIV of 1987.

With Malta gearing up for entry into the European Union, the right to privacy was also reinforced at a lower level when Malta's first Data Protection Law



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in 2003 introduced one of the most minimalist levels of protection in the EU. Since then, privacy has been reinforced somewhat by the introduction of the GDPR at EU level in 2016-2018 but not at the level of the highest law of the land, our constitution.

One would have thought that, come 2022, when finally contemplating the need to strengthen those provisions of Malta's constitution protecting the right to privacy, the government and its advisors would have taken the opportunity of studying developments in the field since 1964 and incorporated the latest thinking by providing significantly higher levels of protection. This is far from being the case.

Let us first establish a benchmark which would give an indication of what the government's proposals should have been offering. Ex-ministers of justice and prime ministers on both sides have changed and indeed exited political life in some instances, so it is opportune to now publicly remind our current set of parliamentarians of the proposals both Nationalist and Labour governments have received since 2012 and which they have failed to implement, despite overwhelming evidence at the international level that this is the way to go.

Despite the changes at the political level and the undoubted problems with institutional memory, had the government's lawyers entrusted with the task done their homework properly,

however, they would have discovered that, in 2021, the entire proposals had been made public in a book chapter<sup>1</sup> from which I shall reproduce the following.

I shall do so at length, since the Maltese public deserves to know the full text of what we should have expected to see in the government's proposals of September 2022. This article is also an open invitation to the government to explain why it did not instead offer the Maltese nation the following proposals for change in our constitution:

"Delete existing Art. 41 and instead insert new Art. 41

"Art 41 – Protection of right to free development of personality and associated rights

"(1) Every citizen and every natural person resident in Malta is entitled to respect of the supreme values of human dignity, the unhindered develop-

ment of human personality, justice and political pluralism which shall also be assured by:

"(a) the right to private and family life which includes:

"1. within the meaning of private life, the right to develop and maintain relationships with other people and the outside world. A person's sexual life is part of his private life, of which it constitutes an important aspect. Private life thus guarantees a sphere within which a person can establish relations of different kinds, including sexual ones and thus the choice of affirming and assuming one's sexual identity;

"2. within the meaning of family life, those relationships which arise out of marriage or co-habitation or a parent and his/her child or such other ties in substance indistinguishable from those created by the traditional family, irrespective of the existence of blood ties;

"3. informational self-determination that is the right of any natural person to choose to communicate or not to communicate information about himself or herself except where the requirement for such information is reasonably provided for by law;

"4. the right of every natural person and the obligation of all data controllers, (including all public bodies, legal and natural persons) to ensure that personal data is only collected, processed and retained in a secure manner for a public, legitimate and specified purpose for a justifiable

length of time. The natural person shall also have the right to be notified of the collection and existence of such personal data and to access, demand correction and, where appropriate, deletion of all such personal data. The law shall provide appropriate safeguards for the protection of such rights in a manner where personal data is construed as being any information which can be linked to an identified or identifiable individual;

"5. the right of any natural person to freedom from surveillance in both physical and virtual space except where such surveillance is carried out by the competent authorities when either an individual is under suspicion of having carried out or being about to carry out a specified criminal offence or for the detection and prevention of crime in a physical and public space, provided that such surveillance is not excessive and disproportionate in a free and democratic society;

"6. the right of any natural person to freedom from interference with private communication of any form or purpose whether such communication be in writing, spoken, electronic or any other form;

"7. the right of any natural person to freely dispose of himself/herself unless by this he infringes on the rights and freedoms of other or public order.

Part 2 will be carried tomorrow.

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<sup>1</sup> Mireille M. Caruana and Joseph A. Cannataci, 'The Implementation of European Privacy Law in Malta', book chapter in Sammut, Ivan & Agranovska, Jelena. (2021). The Implementation and Enforcement of European Union Law in Small Member States A Case Study of Malta 10.1007/978-3-030-66115-1.



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