'Effective NHRI can bridge the protection gap between the rights of individuals and the responsibility of the state.'

The National Commission for the Promotion of Equality is putting forward the following report on the consultation questions launched by MSDC regarding the proposal for the National Commission for the Promotion of Equality (NCPE) to become a National Human Rights and Equality Commission (NHREC).

Consultation Questions

Regarding the consultation question ‘Which Human Rights do you believe need further protection and promotion?’, NCPE’s feedback consists of:

- National Equality Legislation as it currently stands
- National Human Rights and Equality Legislation as it currently stands
- International and European instruments which NHREC’s Legal Basis should include

Regarding the consultation question ‘How can Malta better protect and promote human rights and equality overall?’, NCPE’s feedback consists of what should be included in a sound legal basis for the NHREC.

Regarding the consultation question ‘Are there any models that you would propose that government should consider looking at in terms of legislation, institutional frameworks or both? If yes, what is especially good about such models?’, NCPE’s feedback consists of:

- Institutional Framework
  - Minimum functions
  - Structured and Operations
- Legislative Framework
  - Current functions of NCPE
  - Paris Principles

NCPE Replies

1) Which human rights do you believe need further protection and promotion?

Human rights and equality are inalienable and all are important, there should not be a hierarchy of rights and it is for this reason that all human rights and equality issues should:

- be covered in the remit of the NHREC
- have a sound, non-fragmented and equal legal basis covering equality directives, civil and political rights and economic, social and cultural rights.

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1 http://www.asiapacificforum.net-establishment-of-nrhis/what-is-an-nhri
This remit will be added to an already existing remit regarding equality and non-discrimination, which is legislated for within NCPE’s remit via Chapter 456, Legal Notice 85/2007 and Legal Notice 181/2008.

NCPE acknowledges the enormity of the task of a thorough review of current human rights and equality legislation which would need to be amended to ensure equal coverage of all the grounds within NCPE’s current mandate and the extended mandate of the future NHREC that will cover other grounds.

It is for this reason that the NCPE suggests that there be one point of reference which would regulate human rights and equality within all legislation which would be generic and make any point of law which does not abide by human rights and equality baselines to be null and void.

It is also being suggested that the NHREC’s existence should be embedded in the Constitution.

2) How can Malta better protect and promote human rights and equality overall?

In order to comprehensively protect and promote equality, civil and political rights and economic, social and cultural rights, a sound legal basis should be developed which encompasses:

- the remit of the NHREC, covering all grounds on equal footing, removing inconsistencies in current legislation
- the Paris Principles as the minimum of this legal basis
- powers given to the NHREC to investigate and enforce (as outlined in paragraph 3.2.8)
- powers given to NHREC to be able to undertake investigations both in an *ex officio* manner as well as based on individual complaints with binding decisions
  - providing effective remedies and redress for victims
  - also able to take cases to court on behalf of individuals/groups once discrimination is found
- powers given to NHREC to be able to make recommendations to government on human rights, as is already done regarding equality issues
- NHREC should have an advisory function
- NHREC should have a monitoring function
- the NHREC should be headed by a commission (representative of diverse groups)
- A separation of regulatory and promotional functions

3) Are there any models that you would propose that government should consider looking at in terms of legislation, institutional frameworks or both? If yes, what is especially good about such models?

3.1 Institutional framework:

3.1.1 Minimum functions that would need to be included:

It is important to separate the functions of the institution into two, namely the protection and the
promotion functions, as outlined below:

**Human rights and Equality Protection**
- Investigation function (as outlined in section 3.2.8)
- Monitoring function
  - Situations in the country
    - Visiting places of detention
    - Observing events
    - Gathering information about incidents
    - Discussions with national authorities
  - Adherence to international goals (such as the MDGs)
  - Adherence and reporting on international conventions (such as CEDAW)
- Ex officio investigations to be substantiated by public experience (Public Inquiries)

**Human rights and Equality Promotion**
- Public Education
- Individual’s own human rights and equality
- Equal treatment and Non discrimination
- Others’ enjoyment of human rights and equality
- Where to find redress for discrimination
- Gender and Equality Mainstreaming
- Guidance on the application of domestic and international human rights and equality law
- Research upon which to base promotional work
- Reviewing documents to ensure inclusion of equality and human rights issues
- Campaigns
- Documentation centre
- Training
- Working with stakeholders
- Sensitisation of state entities and mainstreaming of equality and human rights.

**Advisory function**

### 3.1.2 Structure and Operations:

Malta already has an equality body, NCPE, and the extension of NCPE’s remit to become a Human rights and Equality Commission (NHREC) would lead to the inclusion of human rights and equality remit into NCPE’s work.

Equality Bodies who have their remit extended to become NHRECs can be **structured** in various ways.

There are three major ways that such mergers are structured in the European Union.

**NCPE would like to state that the two pillar approach as outlined below is not seen as viable.**

*two pillar approach* – two distinct sections of the organisation, one working on human rights

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2 Equality Bodies and National Human rights and equality Institutions, making the link to maximise impact. (Equinet Perspective, 2011). p. 11
and equality and one working on equality. There are then working groups which take up cross cutting issues that arise and ensure good communication between the two pillars.

pros of this approach: separate pillars with individuals working on areas they are most competent in.

cons of this approach: runs the risk of each pillar working in isolation of each other, therefore not leading to a comprehensive outcome.

‘integration approach’ – both equality and human rights are integrated within each area of the entity. High level staff need to have a competence in both equality and human rights. Specific initiatives then can separate equality and human rights.

Human rights and equality ‘proofing’ of all work needs to be carried out.

pros of this approach: joint work hopefully leading to comprehensive outcome.

cons of this approach: not as common in the EU, so less developed

‘mixed approach’ - is a mix of the two approaches above. Some departments have a distinct human rights or equality mandate and some departments integrate the two. The integrated departments would deal with cross cutting issues like research, communications, projects etc.

The above structures would deal with the internal structure of the entity, however, NHRECs can be accredited by the ICC based on the Principles relating to the Status of National Institutions (known as the Paris Principles). Fully compliant organisations receive an ‘A’ status and partially compliant organisations receive a ‘B’ status. In order to be a recognised NHREC and to have a status given by the UN, the operations of the entity must be based on the mentioned Paris Principles, as outlined below.

3.2 Legislative framework:

3.2.1 Functions of the Commission as they currently stand:

The Commissioner, with the assistance of the Commission, shall have the following functions, that is to say:

- to identify, establish and update all policies directly or indirectly related to issues of equality for men and women;
- to identify the needs of persons who are disadvantaged by reasons of their sex and to take such steps within its power and to propose appropriate measures in order to cater for such needs in the widest manner possible;
- to monitor the implementation of national policies with respect to the promotion of equality for men and women;
- to liaise between, and ensure the necessary coordination between, government departments and other agencies in the implementation of measures, services or initiatives proposed by Government or the Commission from time to time;
- to keep direct and continuous contact with local and foreign bodies working in the field of equality issues, and with other groups, agencies or individuals as the need arises;
- to work towards the elimination of discrimination between men and women;
- to carry out general and independent investigations with a view to determine whether the provisions of this Act are being complied with;

3 http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx
4 UNDP- OHCHR Toolkit for collaboration with National Human rights and equality Institutions (December 2010)
• to independently investigate complaints of a more particular or individual character to determine whether the provisions of this Act are being contravened with respect to the complainant and, where deemed appropriate, to mediate with regard to such complaints;
• to inquire into and advise or make determinations in an independent manner on any matter relating to equality between men and women as may be referred to it by the Minister;
• to provide independent assistance, where and as appropriate, to persons suffering from discrimination in enforcing their rights under this Act;
• to keep under review the working of this Act, and where deemed required, at the request of the Minister or otherwise, submit proposals for its amendment or substitution;
• to perform such other function as may be assigned by this or any other Act or such other functions as may be assigned by the Minister.

The above functions of NCPE as they currently stand will need to be reviewed to be fused with the basics of the Paris Principles, as outlined below:

3.2.2 Competence to promote and protect human rights and equality

Fundamentally, the Principles state that the institution shall be vested with the competence to protect and promote human rights, equality and non-discrimination.

3.2.3 A broad Mandate

This mandate must be outlined in legislation/constitution.

• The Paris Principles describe the range of responsibilities that should be within the operational mandate of an institution as:
  • Providing opinions, recommendations, proposals and reports to government, parliament or other responsible organs on:
  • Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights and equality; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights and equality; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
  • Any situation of violation of human rights and equality which it decides to take up;
  • The preparation of reports on the national situation with regard to human rights and equality in general, and on more specific matters;
  • Drawing the attention of the Government to situations in any part of the country where principles of equality and human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
  • Encouraging the harmonisation of national legislation and practices with international human rights and equality instruments, as well as their effective implementation;

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5 The Paris Principles make clear that an institution must, first, have the power to provide advice on its own initiative, and not merely on the request of the authorities. Second, an institution must be free to publicise its advice without restraint and without requiring prior approval.
• Encouraging the ratification and implementation of international human rights and equality instruments;

• Contributing to country human rights and equality reports, including, where necessary, by expressing an independent opinion on matters discussed in them;

• Cooperating with international and regional human rights and equality organs, and other national institutions;

• Assisting and taking part in the development of education and research programmes in human rights and equality; and

• Sensitising people on human rights and equality and efforts to combat discrimination, especially racial discrimination, through publicity, information, education and the use of press organs.

The Principles have not been interpreted as requiring that an institution actually carry out all of the listed responsibilities, but rather as requiring that there be no statutory or constitutional limitations that would prevent an institution from engaging in them if it chose to do so. An institution may, for strategic or resource-related reasons, determine to emphasise some responsibilities over others.

3.2.4 Autonomy from Government

The most important principle, which is not always easy to achieve because funding comes mainly from government. However it is possible. (Courts are an example) One way to avoid this is for the entity to directly report to parliament as is outlined in the Belgrade Principles.

External to the NHREC, it would also be important to have a support structure in place, such as in the form of a Parliamentary Committee which would work on the human rights and equality issues which might need addressing.

3.2.5 Independence

This independence should be entrenched in legislation. Having clear legislation delineating the role and remit of the entity ensures:

• Permanence
• Transparency
• Independence

The entity should also be able to examine any human rights and equality violation within its jurisdiction.

Independence is imperative in operation and in funding.

• Conducting all work without any outside influence
• Able to draft its own procedures which external authorities cannot influence or change
• Decisions, reports or recommendations should not be subject to outside influence or prior approval.

• **Finances** should be sufficient to allow NHREC to have its own premises and staff in order to be independent from government. *(as per Paris Principles)*

• Separate legal personality enabling decisions and responsibilities to be undertaken independently

• How individuals are appointed and dismissed should also be outlined in the legislation for transparency. This should include method, criteria, duration and dismissal.

**In order to achieve this independence, it is important for the NHREC to be answerable to parliament, not to a ministry.**

### 3.2.6 Pluralism

The NHREC should be able to successfully work with governmental institutions as well as societal stakeholders and international institutions.

This pluralism is important to:

- Enhance independence
- Enhance credibility
- Enhance effectiveness

This can be done by:

- Having diversity in commissioners and staff, and/or
- Having working groups to advise on specific issues.
- Interacting with society including vulnerable groups, such as for training, research etc

### 3.2.7 Adequate Resources

Financial autonomy is crucial

- The entity must have control over its finances in order to be independent and autonomous.
- The source and nature of funding for an institution should be identified in the enabling law, which should guarantee, at a minimum, sufficient funding for the institution’s basic functions.

### 3.2.8 Adequate powers of investigation

The NHREC can consider any question within its competence and can carry out investigations without relating to a higher authority. It is imperative that the NHREC’s function related to the ability to investigate and enforce is kept separate from the other functions related to promoting human rights and equality.

Within the framework of its operation, the NHREC shall:

- Freely consider any question falling within its competence, whether it is submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

- Freely undertake investigations both in an *ex officio* manner as well as based on individual complaints with binding decisions

- have the power to provide effective remedies and redress for victims

- have the competence to take cases to court on behalf of individuals/ groups once discrimination is found
• Hear any person and obtain any information and any document necessary for assessing situations falling within its competence;

• Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

• Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly contacted;

• Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

• Maintain consultation with the other bodies responsible for the promotion and protection of human rights and equality (in particular, ombudsmen, KNPD, mediators and similar institutions);

• In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights and equality, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

3.2.9 Commissions with quasi-judicial competence

The quasi-judicial remit of the NHREC should be kept separate from the other sections of work carried out by the NHREC.

If the NHREC is to continue having a quasi-judicial competence, it should be authorized to hear and consider complaints and petitions concerning individual situations related to human rights and equality. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the NHREC, the functions entrusted to the NHREC may be based on the following principles:

• Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

• Informing the party who filed the petition of his rights, in particular the remedies available to them, and promoting their access to them;

• Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

• Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.
The national Equality Legislative Framework consists of different fragments of legislation with different grounds being protected in different methods. This fragmented legislation needs to be strengthened and equal coverage of all grounds of discrimination needs to be ensured. The following represents an indication of the major differences:

<table>
<thead>
<tr>
<th>Legal Framework</th>
<th>Ground</th>
<th>Sector</th>
<th>Measure of Redress</th>
<th>Type of Discrimination</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 456</td>
<td>Sex Family responsibilities</td>
<td>Employment, Self Employment</td>
<td>Assistance to lodge a complaint</td>
<td>Direct, Indirect, Sexual Harassment</td>
<td>positive action for the purpose of achieving substantive equality for men and women.</td>
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<tr>
<td></td>
<td>Sexual orientation</td>
<td></td>
<td>Investigation by Commissioner followed by mediation (non-binding decision)</td>
<td>Treating a woman less favourably for reasons of actual or potential pregnancy or childbirth; treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex and, or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity;</td>
<td>Indirect discrimination may be proved by any means of evidence including statistical evidence.</td>
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<td></td>
<td>Age</td>
<td></td>
<td>Assistance to proceed before the civil court/industrial tribunal</td>
<td></td>
<td>Genuine occupational requirement</td>
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<tr>
<td></td>
<td>Religion or Belief</td>
<td></td>
<td>Proceedings before Civil Court</td>
<td></td>
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<td></td>
<td>Racial or ethnic origin</td>
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<td></td>
<td>Gender identity</td>
<td>Banks and financial institutions or insurance companies (launch or extension of business)</td>
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<td>Spouses of self employed workers</td>
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<td></td>
<td>Educational establishment or for any other entity providing vocational training or guidance</td>
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<tr>
<td>Chapter 452</td>
<td><strong>Sex</strong></td>
<td>Employment</td>
<td>Proceedings before Industrial Tribunal</td>
<td>Discrimination in access, employment conditions, work management, pay, victimisation, harassment, sexual harassment</td>
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<tr>
<td><strong>L.N. 181 of 2008</strong></td>
<td><strong>Gender Equality</strong></td>
<td>Access to and Supply of Goods and Services</td>
<td>Investigation by Commissioner followed by mediation, Assistance to proceed before the civil court, Proceedings before Civil Court</td>
<td>Direct, Indirect, Sexual Harassment, harassment, Instruction to Discriminate, Victimisation</td>
<td></td>
</tr>
<tr>
<td><strong>L.N. 85 of 2007</strong></td>
<td><strong>Racial Equality</strong></td>
<td>Access to and Supply of Goods and Services</td>
<td>Investigation by Commissioner followed by mediation, Assistance to proceed before the civil court, Proceedings before Civil Court</td>
<td>Direct, Indirect, harassment, instruction to discriminate, victimisation</td>
<td></td>
</tr>
<tr>
<td><strong>L.N. 461 of 2004</strong></td>
<td><strong>Discrimination on Ground of religion, Disability, age, sex, Sexual orientation, Race</strong></td>
<td>Employment</td>
<td>Director of DIER to request report from perpetrator, Proceedings before the industrial tribunal</td>
<td>Direct, Indirect, harassment, sexual harassment, instruction to discriminate, less favourable treatment of a woman related to pregnancy or maternity leave</td>
<td></td>
</tr>
</tbody>
</table>
National Human rights Legislation as it currently stands:

Below is a non-exhaustive list of Maltese legislation which mentions forms of human rights and equality (excluding those mentioned above). This list also needs to be non fragmented and comprehensive.

- Constitution
  - Individual petition to courts on human rights and equality violations delineated in constitution itself.
- Criminal Code (Cap. 9)
  - Incitement to hatred
    - In some cases, penalty increased by 1 or 2 degrees when motivated by one of the grounds (gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion)
- Civil Code (Cap. 16)
- Police Act (Cap. 164)
  - To apply law without discrimination on any ground as outlined in Act
- Press Act (Cap. 248)
  - Publication, distribution or broadcast of racism or similar offences
- Marriage Act (Cap. 255)
- Prisons Regulations (S.L. 260.03)
  - Application of rules impartiality (based on grounds of discrimination as outlined in Regulations)
- Extraditions Act (Cap. 276)
  - Not extraditing if request for return of a person is based upon race, political opinion, place of origin, nationality or any other ground as outlined in Act
  - Not extraditing if because of the above-mentioned grounds, an individual’s liberty will be removed, punished or prejudiced in their trial
- European Convention Act (Cap. 319)
  - Individual petition to the ECtHR
    - European Convention of Human rights and equality (and protocols) enforceable as part of Maltese legislation
- Education Act (Cap. 327) Teachers Code of Ethics and Practice (S.L. 327.02)
  - demonstrate respect for diversity, maintain fairness and promote equality
- Employment and Training Services Act (Cap. 343)
  - Employment into public service/sector cannot show favour to, or uses discrimination on the grounds of race, colour, sex, creed or on the grounds of his party or other political beliefs or associations.
- Broadcasting Act (Cap. 350)
  - Audiovisual media services shall not contain any incitement to hatred based on race, sex, religion or nationality.
  - Also see: Requirements as to Standards and Practice on the Promotion of Racial Equality (S.L. 350.26)
- Gaming Act (Cap. 400)
No person shall be refused admission to a casino by reason of his race, place of origin, political opinion, colour, creed, sex or physical infirmity.

- Persons with a disability act (Cap. 413)
- Refugees Act (Cap. 420)
- Procedural Standards in Examining Applications for Refugee Status Regulations (420.07)
- Electronic Commerce Act (Cap.426)
  - restriction or derogation in relation to any cross-border transaction to protect against incitement to hatred.
- Electronic Commerce (General) Regulations (S.L 426.02)
  - restriction or derogation in relation to any cross-border transaction to protect against incitement to hatred
- Data Protection Act (Cap. 440)
- Employment and Industrial Relations Act (Cap. 452) and subsidiary legislation
- Equality For Men and Women Act (Cap. 456) , subsidiary legislation and also including Legal Notice 85/2007 and Legal Notice 181 of 2008
- The Domestic Violence Act (Cap. 481)
- Freedom of Information Act (Cap. 496)
- Public Administration Act (Cap. 497)
  - Public employees shall not harass or discriminate in work practices on the ground of sex, marital status, pregnancy, age, race, colour, nationality, physical or intellectual impairment, sexual preference, or religious, political or other convictions / allegiances when dealing with their colleagues and members of the public.
- Sports Act (Cap. 455)
  - The State recognises that no discrimination should be permitted on the grounds of sex, race, colour, religion or political opinion or residence within different localities of Malta in the access to sport facilities or to sport activities.
- Passenger Transport Services Regulations (S.L 499.56)
- Mental Health Act (Cap. 525)

International and European instruments which NHREC’s Legal Basis should include:

- The main international human rights and equality instruments which are used by NHRECs are the:
  - Universal Declaration of Human rights and equality
  - International Convention on the Elimination of Racial Discrimination;
  - International Covenant on Civil and Political Rights (+ 2 Optional Protocols);
  - International Covenant on Economic, Social and Cultural Rights (+ Optional Protocol);
  - Convention on the Elimination of All Forms of Discrimination Against Women (+ Optional Protocol);
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (+ Optional Protocol);
  - Convention on the Rights of the Child (+ 2 Optional Protocols);
  - International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families;
  - International Convention for the Protection of All Persons from Enforced Disappearance;
  - Convention on the Rights of Persons with Disabilities (+ Optional Protocol);
  - The European human rights and equality instruments which are used by NHRECs are the:
  - Convention for the Protection of Human rights, equality and Fundamental Freedoms;
  - Charter of Fundamental Rights of the European Union.
  - European Convention for the Prevention of Torture and Inhuman or Degrading Treatment
or Punishment.

- European Social Charter.
- Council of Europe Convention on Action against Trafficking in Human Beings.