Towards the Establishment of the Human Rights and Equality Commission
NCPE’s feedback to MSDC’s White Paper Consultation

NCPE’s feedback provided in this report is two-fold:

1. Provisions in the White Paper that require more detail/revision
2. Items/areas that need to be included in the proposed legislative framework

- The Introduction makes reference to the ‘Directorate for Integration’ (pg.7) that will be set alongside the HREC and which will ‘develop strategies and programmes that reach Government targets with regards to civil liberties, equality and anti-discrimination and integration of migrants’. It is important that this Directorate be responsible for both equality on the different grounds and human rights.

  Recommendation: Hence, NCPE believes that the name ‘Directorate for Human Rights and Equality’ would be more fitting since this would more clearly convey to the general public the role of the Directorate.

- The Proposed Legislative Initiatives makes reference to the following proviso: “The Commission will have the power to investigate cases and provide binding opinions following the Equality Act” (pg. 23).

  Recommendation: NCPE proposes that the below listed aspects are clarified as follows:

  - The power vested in the Commission to investigate cases - this should include the power to hear any person and obtain any information and any document necessary for assessing situations falling within its competence (as outlined in its document ‘NCPE as NHREC’).

  - Provisions about binding opinions – these should also outline the way forward in cases where parties do not abide by an opinion issued by the HREC and thus remain in breach of equality and human rights legislation. As per NCPE’s feedback for the first consultation process, the NHREC should “have the competence to take cases to court on behalf of individuals/groups once discrimination is found” (section 3.2.8).

  - The cases that will be taken up for investigation – the White Paper seems to be addressing investigation and provision of binding opinions in connection with the Equality Act only. It is of utmost importance that NHREC can also issue binding opinions following investigations related to human rights matters as well as ex-officio cases. The Commission should also be allowed to decline cases which are frivolous or vexatious.

- The Proposed Legislative Framework for the HREC (pg. 29) outlines NCPE’s composition, appointment process, tenure and functions.

  Recommendation: In addition to the points delineated in the White Paper, NCPE emphasises its previous feedback 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” (section 3.2.8).

- The proposed Human Rights and Equality Commission Act will establish an HREC based on the Paris Principles (pg.25) that will have within its remit both human rights and equality. Its remit in relation to equality will be clearly outlined in the Equality Act.

  Recommendation:

  (i) With regards to human rights, NCPE believes that the Act should state that the HREC will cover all human rights provisions found in domestic law and in the ratified international
human rights treaties and conventions as well as any other European/international legislation dealing with human rights that is applicable to Malta.
(ii) It is further recommended that this provision is also extended to other Maltese legislation that will be enacted as well as to other international human rights legislation that will be ratified/signed in the future.

- **Recommendation:**
  (i) To include, as one of the roles of the HREC, the holding of regular **meetings with other equality bodies and bodies dealing with human rights** to discuss matters pertaining to equality and human rights, identify issues of concern and look into the possibility of joint actions.
  (ii) There could also be an annual round table event with the presence of all these bodies.

- **The Proposed Equality Act (pg. 25)** lists a number of additions to be made to Maltese equality legislation in its recasting. One of the items states that ‘**positive equality duties and obligations**’ will be included in the Act.
  
  **Recommendation:** NCPE believes that the Equality Act should be clear about the meaning of this phrase. If this is referring to the obligation of drawing strategies and actions aimed at pro-actively ensuring equality in different areas, this should, **inter alia**, include (refer to NCPE’s feedback on Strengthening Maltese Equality Legislation):
  - an obligation on private and public educational establishment to equality mainstream their services
  - an obligation on government and public authorities to have policies aimed at combating stereotypical and degrading representations in the media
  - equality mainstreaming of all legislation, policies, measures and practices in the public sector
  - regular reporting on strategies and actions undertaken to ensure **de facto** equality

- **‘A revised list of grounds of anti-discrimination.’** is also being proposed (pg.25).
  **Recommendation:** Beside all grounds already included in Chapter 456, it is important that the Equality Act contains, at least, the following grounds of discrimination (refer to NCPE’s feedback on Strengthening Maltese Equality Legislation):
  - nationality
  - language
  - political opinion
  - health
  - socio-economic status
  - physical appearance

- The proposed Equality Act will include ‘**provisions covering all spheres of life**’ (pg.25).
  **Recommendation:** In addition to the spheres already covered by Chapter 456 and its subsidiary legislation (employment, education, banks and financial services and provision of goods and services) the Equality Act should, at least, include also (refer to NCPE’s feedback on Strengthening Maltese Equality Legislation):
  - Participation in society, covering areas such as sports, culture, leisure, politics, media, trade-union membership, NGOs, employer organisations and professional registration
  - Discrimination by public officials in the exercise of their duty
  - Media (including positive duties and obligations)
  The Act should state that the spheres of life covered include, but are not **limited to** those being listed. This would ensure that the legislation covers **all** spheres of life.
**Recommendation:** The Equality Act should also contain (refer to NCPE’s feedback on Strengthening Maltese Equality Legislation):
- Prohibition of discrimination by association or assumption
- Harassment – current equality legislation only makes reference to *sexual* harassment
- Multiple Discrimination – the White Paper states that intersectional discrimination will be included in the proposed legislation. It is important that multiple discrimination is also mentioned since this would cover *additive* discrimination (when a person suffers discrimination on more than one ground) and not just discrimination occurring when two or more identities intersect.
- Refusing reasonable accommodation
- Positive action
- Equality mainstreaming

*Encl.:* ‘NCPE as an NHREC’ – NCPE’s feedback to MSDC’s first consultation process for the establishment of the HREC

‘*Strengthening Maltese Equality Legislation*’ – NCPE’s feedback for the Equality Act
NCPE as an NHREC

'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:

1 http://www.asiapacificforum.net/establishment-of-nrhis/what-is-an-nhri
• 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.

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
  o providing effective remedies and redress for victims
  o 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 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, NHREC 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;

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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
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 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;
• 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:

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.
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;
- 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.
Annex 1

_National Equality Legislation as it currently stands:_

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</td>
<td>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>
</tr>
<tr>
<td></td>
<td>Sex</td>
<td>Self Employment</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>
</tr>
<tr>
<td></td>
<td>Sex</td>
<td>Banks and financial institutions or insurance companies (launch or extension of business)</td>
<td>Assistance to proceed before the civil court/industrial tribunal</td>
<td></td>
<td>Genuine occupational requirement</td>
</tr>
<tr>
<td></td>
<td>Sex</td>
<td>Spouses of self employed workers</td>
<td></td>
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<td></td>
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<tr>
<td></td>
<td>Sex</td>
<td>Educational establishment or for any other entity providing vocational training or guidance</td>
<td>Proceedings before Civil Court</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 452</td>
<td>Sex</td>
<td>Employment</td>
<td>Proceedings before</td>
<td>Discrimination in access, employment</td>
<td></td>
</tr>
</tbody>
</table>
| L.N. 181 of 2008 | **Gender Equality** | Access to and Supply of Goods and Services | Investigation by Commissioner followed by mediation  
Assistance to proceed before the civil court  
Proceedings before Civil Court | Direct, Indirect, Sexual Harassment, harassment, instruction to Discriminate, Victimisation |
|----------------|-------------------|------------------------------------------|------------------------------------------|------------------------------------------------|
| L.N. 85 of 2007 | **Racial Equality** | Access to and Supply of Goods and Services | Investigation by Commissioner followed by mediation  
Assistance to proceed before the civil court  
Proceedings before Civil Court | Direct, Indirect, harassment, instruction to discriminate, victimisation |
| L.N. 461 of 2004 | **Discrimination on Ground of religion, Disability, age, sex, Sexual orientation, Race** | Employment | Director of DIER to request report from perpetrator  
Proceedings before the industrial tribunal  
Possible proceedings before Civil Court | Direct, Indirect, harassment, sexual harassment, instruction to discriminate, less favourable treatment of a woman related to pregnancy or maternity leave |
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, 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)
  o 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)
  o 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)
  o 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.
Strengthening Maltese Equality legislation

What should be considered as discrimination

Grounds of discrimination: Chapter 456 covers six grounds of discrimination in employment, education and banks/financial services. To improve the anti-discrimination framework one should consider adding more grounds to those already covered. For instance, the current equality legislation covers race and ethnic origin, but not nationality. This makes it next to impossible to determine what constitutes ‘nationality’ and what can be considered as ‘race or ethnic origin’ since no objective criteria exit (and they can never exist, since here we are dealing with social processes) to make a distinction between the two.¹

Recommendation
There should be the addition of discrimination on the ground of nationality.² The inclusion of such ground would naturally come with a provision stating that it does not include discrimination based on generally binding regulations or on rules of international law. Another four grounds that one might consider including, and which are covered in a number of equality legislations in other European countries are: political opinion, health, physical appearance and socio-economic status.

Discrimination by association or assumption: Chapter 456 refers to the unlawfulness of direct/indirect discrimination and instructions to discriminate, but there is no specific reference to discrimination by association or assumption. Discrimination by association occurs when a person is discriminated against on the basis of being in association or relationship with a person/s who has one or more of the protected characteristics. Discrimination by assumption happens when one is discriminated against because s/he is thought to have one or more of the protected characteristics (even if this is not actually the case).

Recommendation
Legislation should make clear that discrimination by association/assumption is unlawful as any other form of discrimination, since the current legislation, by not mentioning the issue, leaves the question open to different legal interpretations.

Harassment: Chapter 456 only mentions sexual harassment, but there are no provisions covering harassment which has no sexual connotations.

Recommendation
Legislation should make clear that any form of harassment related to the grounds of discrimination, even when it does not have sexual connotations, is unlawful.

¹ For instance, Benedict Anderson (1991) defines nations as ‘imagined communities’. According to Anderson nations are products of modernity, where mass media plays an important role in creating a sense of collective identification with the idea of ‘a nation’.
² Ten countries have the ground of nationality included in their equality legislations: Belgium, Bulgaria, Czech Republic, France, Lithuania, Holland, Norway, Portugal, Romania and Slovenia.
Multiple discrimination and intersectionality: Two concepts which should be included in the equality legislation are 1) multiple discrimination and 2) intersectionality. The former refers to discrimination on more than one ground while the latter happens when discrimination arises from the intersection of two or more characteristics. While multiple discrimination is additive, meaning that one suffers discriminated in terms of characteristic X and characteristic Y, intersectional discrimination refers to discrimination that occurs because of one having X and Y together. For example, let’s say there is a company that does not want to employ a Muslim woman because they assume she would often be absent from work due to family responsibilities. On the other hand, that same company employs both non-Muslim women and Muslim men. This would be a case of intersectional discrimination since discrimination here is not happening because she is woman and she is Muslim (that would be a case of multiple discrimination) but specifically because she is a Muslim woman.

Recommendation
Legislation should allow people to file complaints both on multiple grounds and on discrimination that arises from the intersection of protected characteristics.

Refusing reasonable accommodation: Maltese equality legislation could be strengthened by including a provision stating that refusing reasonable accommodation should be considered a form of discrimination. The concept of reasonable accommodation is already an important part of policies and legislation protecting persons with disability—it is enshrined in the Equal Opportunities Act and a clause on reasonable accommodation is included in calls for employment issued by the public service.

Recommendation
The principle of reasonable accommodation should be widened to cover all grounds of discrimination. This would allow individuals to claim discrimination when an employer/service provider refuses to accommodate needs arising from one or more of the protected characteristics, as long as such accommodation does not create a disproportionate or undue burden on the employer/service provider.

What areas should be covered

Goods and Services: The two legal notices dealing with discrimination in the provision of goods and services cover only two grounds of discrimination: gender and race/ethnic origin. This makes legislation very weak in terms of protecting individuals from discrimination in this sphere. It is also difficult for the general public to understand, and frustrating for an equality body to explain, that there are less grounds covered in goods and services than there are in employment.

Recommendation
In any revised legislation, the grounds covered in goods and services should encompass all grounds covered in employment.
**Participation in society**: Legislation that prohibit discrimination in the areas of employment, banks and financial services, education and goods/services leaves uncovered a number of important areas and leads to several situations where it unclear if a case falls within the scope of the legislation. These could include cases related to culture, sports, leisure, trade-union and politics.

**Recommendation**
This gap can be addressed by including a prohibition of discrimination in relation to participation in the different spheres of society. This would encompass participation in entities and events related to sports, culture, leisure, politics and the media. It could also include specific reference to trade-union membership, NGOs, employer organisations and professional registration.

**Discrimination by public officials in the exercise of their duties**: The two legal notices outlining discrimination in goods and services do not cover all possible instances of discrimination in the provision of services. Such could be the case when discrimination happens within the area of law enforcement. For instance, if a person is stopped by a traffic police officer or a warden and s/he is racially abused, there are currently no provisions within the equality legislation which clearly state that such behaviour is prohibited.

**Recommendation**
This could partly be addressed by including a provision which prohibits discrimination by public officials in the exercise of their duties.

**Media**: Article 16K(c) of the Broadcasting Act prohibits commercial communication that is discriminatory, while Article 6 of the Press Act prohibits threats, insults, persecution and contempt of a person or a group on ten different grounds. However, there is no specific reference to media in Chapter 456 and the two legal notices.

**Recommendation**
Equality legislation could set an obligation on the national government to have national policies aimed at combating stereotypical and degrading representations (related to the covered characteristics) in broadcasting, printed and social media. A reference could also be made to the Broadcasting Authority as having an obligation to ensure that such portrayals are eliminated from Maltese broadcasting. This could also be backed up by the setting up of an Advertising Code that would include definitions of what should be considered as stereotypical and degrading adverts. Moreover, it would be important to keep abreast with international developments on possible legal frameworks aimed at controlling degrading content in the social media that could cause harm to the groups mentioned in the equality legislation.

**Education**: Chapter 456 covers the area of education, but it is not entirely clear what this legislation actually covers in relation to this area. Article 2 mentions ‘access to vocational or professional training’ and it is only in Article 8 that ‘educational establishments’ are mentioned.

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3 Gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion/belief, political or other opinion, and disability
Recommendations
Legislation could more clearly state that no discrimination is permitted by ‘educational establishments’. This would cover anything related to education and training. Equality law could also set an obligation on educational establishments to equality mainstream the services they offer. A government policy requiring Ministries, departments and public entities to gender mainstream their policies, planned actions and practices is already in place. The inclusion of equality mainstreaming in legislation would extend this obligation to the private sector and would also encompass mainstreaming on all grounds. Thus, equality law would go beyond simply ensuring that there is no discrimination. It would put an obligation on educational establishments to acknowledge and include diversity in the services they provide and the resources they use.

Positive Action: Current legislation makes only a marginal reference to positive action (it simply states that positive actions in relation to gender should not be considered discriminatory).

Recommendation
Equality legislation should give more importance to the concept of positive action. This would be in line with Article 45(11) of the Maltese Constitution which mentions the possibility of adopting special measures aimed at accelerating *de facto* equality. Thus, equality law should have an article specifically stating that, when need and within the legal parameters, positive actions is an effective way of improving equality. Moreover, this should not be limited to gender but should be applicable to all grounds.