

## NCPE's Input to the HREC and Equality Bills

### HREC Bill - Introduction

The Bill establishes the role, remit and powers of the Human Rights and Equality Commission. NCPE would like to underline the importance of having an HREC with adequate powers to enforce its decisions in the spheres of human rights and equality. It is only through such powers that the Commission will be able to ensure effective redress and deterrence for infringements of the Act. This will, in turn, build public trust in the Commission and its functions as well as guarantee effective access to rights.

On a separate note, the below feedback is based on a limited understanding of the Bill due to a number of missing Articles.

### NCPE input to the HREC Bill

Powers of the Commission

- In the provisions under the section *Powers of the Commission* there is no reference to taking cases to court on behalf of persons, or assisting in such cases.

Recommendation 1: An HREC should have the possibility of strategic litigation and, as per NCPE's feedback for the first consultation process, it should "*have the competence to take cases to court on behalf of individuals/ groups once discrimination is found*". A Commission which is effective in addressing cases of discrimination and human rights infringements will empower individuals to report such cases and reduce underreporting.

- One of the *Powers of the Commission* is "*to impose fines, periodic penalty payments or any other penalty in accordance with the provisions of this Act*". However, no provisions have been made in this regard.

Recommendation 2: There should be provisions about fines/penalties that should be given by the HREC for infringements of this Act.

- In *Finding and termination of an infringement of the right to equal treatment and non-discrimination* it is stated that a penalty can only be imposed in those cases where "*no action which appears to the Commission to be adequate and appropriate is taken by the entity concerned within the time fixed by the Commission.*" This does not give the Commission the power to impose a penalty/fine when finding an entity in breach of this Act. Fines can only be imposed when entities desist from following the Commission's guidance on the matter. Not all cases investigated by the Commission involve an ongoing case of discrimination that can be addressed by adequate and appropriate action.
  - There might be serious cases of discrimination and harassment which involve a past incident/s and which would merit the immediate imposition of a fine, besides guidance on adequate measures to prevent future cases.

- This, together with the lack of provisions on taking cases to court would limit the enforcement powers of the Commission and the public's perception of its effectiveness.

Recommendation 3: The Act should allow the Commission to impose fines as part of the decisions taken on the cases investigated.

- The Commission is given different powers in relation to *Finding and termination of a human rights infringement* and *Finding and termination of an infringement of the right to equal treatment and non-discrimination*. In the former, the HREC can only make *recommendations* for the prevention or cessation of an infringement. In the latter, the Commission will have the power to *require* entities to take measures to prevent the infringement or to bring it effectively to an end and, if no action is taken, fines can be imposed.

Recommendation 4: NCPE believes that the HREC should have the power to issue binding opinions following investigations related to human rights matters as well. This would avoid having a hierarchy of fundamental human rights, where the means of redress for those rights related to equality and non-discrimination would be more effective than those related to other fundamental human rights.

- Mediation
- There are no provisions with regards to a mediatory role of the Commission.

Recommendation 5: One of the functions of the Commission could be that of seeking an amicable settlement through conciliation (mediation). Legislation could outline the procedures for mediation such as who will be responsible to mediate and the time-frames for mediation.

- Investigations
- In *Refusal to Investigate* there is stated that the Commission may in its discretion decide not to investigate if in its opinion "*other adequate means of redress is or are available to the complainant under any other law.*" What is being meant by 'adequate means of redress'? Should, for instance, recourse to the Industrial Tribunal be considered an 'adequate means of redress'? Does this mean that the Commissioner can refuse to investigate reports in those cases where areas under this Act are also covered by other laws (such as discrimination in employment)?

Recommendation 6: NCPE suggests that this provision is removed from the Act so as to ensure that every person has equal access to redress from the HREC, as long as the case falls within the Commission's remit.

- In *Refusal to Investigate* there is stated that "*The Commission shall not proceed to investigate any complaint concerning any act which is the subject of an investigation by the National Commission Persons with Disability under the Equal Opportunities (Persons with Disabilities) Act*". Disability is one of the grounds covered in the Equality Act and there are provisions on lodging complaints alleging intersectional discrimination.

Recommendation 7: In cases where a complaint alleging intersectional discrimination is received, and where one of the intersecting identities is disability, the HREC should investigate the case in collaboration with the KNPD.

- The Bill does not state that HREC promotional functions should be separate from its investigative and enforcement functions.

Recommendation 8: 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*”. This would ensure that its investigations are independent and are perceived as such. This separation of functions is also endorsed by other equality bodies.

- The Act states that the Commission “...*shall suspend the investigation if any interested person shall file a complaint with the Ombudsman on the subject-matter of the investigation.*”

Recommendation 9: NCPE recommends that a complaint should be examined by the body where it is first lodged. If a complaint is first filed with the Commission, and then with the Ombudsman, the Ombudsman shall not proceed to investigate. Thus, it is being suggested that the second part of this paragraph is reworded accordingly.

- Human Rights
- In the *Interpretation* section the meaning given to human rights is limited to “*fundamental rights and freedoms enshrined in articles 33 - 45 (inclusive) of the Constitution of Malta and those fundamental rights and freedoms as set out in articles 2 to 18 (inclusive) of the Convention and articles 1 to 3 (inclusive) of the First Protocol, articles 1 to 4 (inclusive) of the Fourth Protocol, articles 1 and 2 of the Sixth Protocol and articles 1 to 5 (inclusive) of the Seventh Protocol to the Convention, which articles are reproduced in the First Schedule to the European Convention Act, and those fundamental rights and freedoms enshrined in other international human rights treaties ratified by Malta in so far as they enforceable by any person according to, and as part of, the Law of Malta*”.

Recommendation 10: 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 (refer to Annex for a broad list). This provision should also be 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.

- Powers to Enter Premises
- In *Power to Enter Premises* it is stated that the HREC “*may at any time enter any premises occupied by any government department or public authority, and inspect the premises and carry out therein any investigation falling within the scope of this Act.*”

Recommendation 11: This section could also state that the HREC may ask for the intervention of the police as part of investigations concerning private entities, when access to premises of any such entity is needed.

- In the *Power to Enter Premises* there is stated that “...*Commissioner shall notify the permanent head of the department or, as the case may require, the principal administrative officer of the organisation by which the premises are occupied.*”

Recommendation 12: Legislation should specify the procedure on how this notification should be done, including method of communication and timeline.

- Cooperation with other bodies
- In *Functions of the Commission* one of the roles outlined is “to maintain consultation, develop relations and, where it considers it so appropriate to better fulfil its functions, to co-operate with non-governmental organisations responsible for the promotion and protection of human rights or the elimination of discrimination or devoted to protecting particularly vulnerable groups”.

Recommendation 13: As part of its role the HREC should hold 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. There could also be an annual round table event with the presence of all these bodies.

- Resources
- The Finance section stipulates that “...expenses and resources for the performance of its functions and duties shall not exceed a maximum amount indicated in a financial plan approved by the House of Representatives each year.”

Recommendation 14: There could be stated that adequate resources should be allocated for the effective performance of all HREC’s functions and duties. Consequently, the HREC would be in a better position to obtain a Grade A under the Paris Principles.

- Other recommendations
- In *Finding and termination of an infringement of the right to equal treatment and non-discrimination*, sub-article 2 is missing.
  - In *Appointment and Composition* section there is stated that the Commissioner shall designate one of the Commission members as Deputy Chairperson.

Recommendation 15: This role should be renamed to Deputy Commissioner for consistency’s sake.

- In *Appointment and Composition* there is mentioned the “chairperson of the National Commission Persons with Disability”.

Recommendation 16: This should be revised to Commissioner of the Commission for the Rights of Persons with Disability, as per recent amendments to the Equal Opportunities Act.

- The language of the Act should be gender inclusive.

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## Equality Bill – Introduction

NCPE notes that the Equality Act addresses a number of weaknesses in the current equality legislation. However, NCPE is of the opinion that the Act is still quite limited in scope and there is room for extending protection against discrimination to more spheres of life and increasing the number of grounds on which discrimination is prohibited.

## NCPE's input to the Equality Bill

- List of EU Directives
- The Act starts by giving a list of all EU Directives related to equality and non-discrimination.  
Recommendation 1: NCPE thinks that the Act should go over and above what is covered by these Directives. Moreover, there are other domestic laws which cover aspects of these Directives.
- Discrimination by Association or Assumption
- There is no mention of discrimination by association or assumption. This would leave related questions open to different legal interpretations.  
Recommendation 2: The Act should explicitly state that discrimination by association or assumption is unlawful.
- Reasonable Accommodation
- The Act makes reference to reasonable accommodation in *Prohibited Conduct* and states that reasonable accommodation measures should not be considered a form of discrimination.  
Recommendation 3: There could also be provisions stating that *refusing* reasonable accommodation should be considered a form of discrimination.
- Mainstreaming
- Article 21 (c) states that public administration must have due regard to the need to “*Promote equality and gender mainstreaming when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas of employment, including promotion and vocational training and as regards working conditions...*”.  
Recommendations 4-6:
    - i) This provision should be extended to all areas of government besides employment.
    - ii) It should mention that the needs of vulnerable groups must be taken into consideration and addressed.
    - iii) The obligation to equality and gender mainstreaming should be more clearly spelled out. It could be rephrased as follows:  
“...*due regard to the need to...*  
(c) *Equality and gender mainstreaming when formulating and implementing laws, regulation, administrative provision, policies and activities in the areas of employment, including promotion and vocational training and as regards working conditions...*”
- Positive Action
- The Act could 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.  
Recommendation 7: Equality law should have an article specifically stating that, when needed and within the legal parameters, positive action is an effective way of bringing about equality. Moreover, this should not be limited to gender but should be applicable to all grounds.
- Media
- The Act prohibits discrimination in advertising.

Recommendation 8: The Equality Act 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.

- Pay
- In *Employment*, one of the areas where less favourable treatment is prohibited is Pay.

Recommendation 9: To strengthen protection in this area one can refer to *Provisions from the Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency may be considered in relation to pay*.  
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014H0124>

- Goods and Services
- Article 18 covers discrimination in the access to goods and services.

Recommendation 10: A provision can be added to ensure that more favourable treatment for specific groups of persons is not considered as discrimination. (ex. cheaper bus tickets for older persons or persons with disability). Recital of the draft 'Horizontal Directive' can be referred to (although this is specifically on 'age' and it is still being discussed): *"Differences in treatment in connection with age may be permitted under certain circumstances if they are objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In this context, differences of treatment where more favourable conditions of access are offered to persons belonging to specific age groups, in order to promote their economic, cultural or social integration should enjoy a legal presumption of not being discriminatory."*

- Private/Public Sector
- Article 21 places several obligations on public administration.

Recommendation 11: Article 21 could also apply to the private sector.

- Right to Action
- Article 26, *Right to Action*, refers to action in courts.

Recommendation 12: A reference should be made to lodging a complaint with the HREC.

- Grounds of Discrimination
- The Equality Act covers a limited number of grounds of discrimination.

Recommendation 13: As per NCPE's previous feedback, the following should also be included: political opinion, health, socio-economic status and physical appearance.

- Definitions
- Article 2 gives a number of definitions.

Recommendations 14-16:

i) The following terms could be added and defined in Article 2: positive action; mainstreaming; genuine occupational requirement; and instructions to discriminate.

ii) The following definitions should also be included:

- "*Language*" includes spoken and signed languages and other forms of non spoken languages;
- "*Communication*" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-

reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

- "Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

iii) Reference to multiple discrimination as well as discrimination by association or assumption should be included in the Act and defined accordingly in Article 2.

- Children
- In *General Principles*, Article 5 states that *"In all actions concerning children, the best interest of the child shall be the primary consideration"*.

#### Recommendations 17-18:

i) There needs to be a clarification on what will be required from the HREC in cases involving children.

ii) The role of the Commissioner for Children should also be clarified in such context.

## **ANNEX**

### ***National Human rights Legislation as it currently stands:***

A non-exhaustive list of Maltese legislation which mentions forms of human rights and equality:

- 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)
- Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Ratification) Act, 2014 (Cap. 532)
- 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 HRECs:

- 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.
- European Convention on the Exercise of Children's Rights.
- Council of Europe Convention on Action against Trafficking in Human Beings.
- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.