

IMPROVED HUMAN RIGHTS HARMONISATION

Input to the Ministry for Social Dialogue,
Consumer Affairs and Civil Liberties,
January 2016

Equality Bill

An Act to prohibit discrimination in various spheres of life, to promote equality and prevent discrimination.

aditus
accessing rights

T A B L E O F C O N T E N T S

INTRODUCTION & BACKGROUND	3
MAIN OBSERVATIONS	4
OUR INPUT ON THE BILL.....	6
Definitions	6
Scope	7
Banks, Financial Institutions and Insurance Companies	9
Spouses of Self-Employed	9
Equality Duty	10
Public Administration and Equality Duty	10
Right of Action and Sanction	10

I N T R O D U C T I O N & B A C K G R O U N D

aditus foundation is pleased to present its feedback on the Equality Bill, as presented by the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties (MSDC) on 10 December, 2015. The Bill seeks to consolidate equality and anti-discrimination legislation currently in force, whilst also revising the list of anti-discrimination grounds and including new provisions relating to intersectional discrimination, third party interventions and positive duties.

aditus also welcomes the ratification of *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* and the setting up of the Human Rights and Integration Directorate within the MSDC.

As a member of the **Platform of Human Rights Organisations in Malta (PHROM)**, aditus contributed to the Platform's submission of initial feedback¹ to the consultation process launched on 10 December 2014 by MSDC *'Towards the Establishment of the Human Rights and Equality Commission: White Paper'*². Furthermore, we submitted technical input to the Public Consultation on National Migrant Integration Strategy 2015-2020³ in June 2015 together with Integra Foundation, JRS Malta, KOPIN and the Organisation for Friendship in Diversity.

In addition, aditus has given its contribution to the Platform's submissions to the public consultation on *Human Rights and Equality Commission Bill*, and fully endorses the contents of that document.

Therefore, our feedback should also be seen in the light of the above-mentioned documents and recommendations.

¹ PHROM Input to the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties 'Strengthening Human Rights through Dialogue', 18th February 2015 http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/L-8-2015%20-%20Consumer%20Alternative%20Dispute%20Resolution%20Regulations%202015/PHROM.pdf

² Details of this Consultation process are available here: http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/HumanRights.aspx.

³ NGO Submissions to the Public Consultation on National Migrant Integration Strategy 2015- 2020, 1st June, 2015 http://aditus.org.mt/Publications/ngoinputintegrationstrategy_03062015.pdf

M A I N O B S E R V A T I O N S

A comprehensive national framework that encompasses anti-discrimination legislation and supporting policies is crucial to mainstreaming and integrating people belonging to the various minority groups that exist within our society, such as gender and sexual minorities, religious minorities, racial or ethnic minorities, persons with a disability, age minorities and the like. Minority groups face daily discrimination in education, employment, accessing goods and services, access to housing and healthcare, in the neighbourhood, in the use of public transport, when approaching public officers and authorities, in accessing places of entertainment and also in places of worship.

Although minority groups face discrimination in various spheres of life the number of complaints filed with the various existing equality bodies remains low. This could be attributed to a number of factors, such as lack of information, procedures being too burdensome, lack of specialised legal support and fear.

The current legal framework is piecemeal and is found in various legal instruments, each having a different scope (in some instances overlapping), a variety of actions for redress and different reporting or equality bodies. This illustrates the complexity of both the legal framework and the procedural elements involved, resulting in the enormous difficulties that individuals and their legal advisors face when filing a complaint.

In view of the above:

- The creation of one equality body to which individuals can file a complaint in relation to prohibited grounds of discrimination is a positive step. Nevertheless, there needs to be clarity on the relationship and interplay between the Human Rights and Equality Commission⁴ and other equality bodies, such as the Ombudsman, the National Commission Persons with Disability and the Department of Industrial and Employment Relations;
- The consolidation of laws into one harmonised Equality Act, which includes standard definitions and procedures, was long overdue and can only better the possibilities for redress for those persons who feel aggrieved. It, however, remains unclear which laws will be consolidated into the recast Equality Act and which laws will be repealed.

⁴ In depth comments on the Bill towards a Human Rights and Equality Commission Act have been submitted through the Platform of Human Rights Organisations in Malta.

- The Act should reflect and make reference to Malta's international obligations under the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.

OUR INPUT ON THE BILL

Definitions

The Equality Bill (the “Bill”) prohibits discrimination based on one or more of the protected characteristics laid down in the Act. The protected characteristics are defined as the following: *“age; belief, creed or religion; disability; family responsibilities; family or marital status; gender expression or gender identity; HIV status; maternity; pregnancy; race, colour or ethnic origin; sex or sex characteristics; and sexual orientation”*.

The above definition consolidates and widens the protected characteristics found in current legislation. However, the legislator has to be cautious of creating a protected characteristic such as *“HIV status”* without taking into consideration other medical conditions and thus creating a hierarchy of protection in favour of one group as opposed to another. A more generic and inclusive approach is preferred, as for example exists in the UK Equality Act (2010), where the legislator treats certain debilitating illnesses as a disability and provides that *“cancer, HIV infection and multiple sclerosis are each a disability”*⁵.

The protected characteristics include *“disability”*, however the draft is silent on its relationship with the Equal Opportunities Act (Persons with Disability) Act (CAP 413) and the National Commission Persons with Disability (KNPD). It is unclear whether CAP 413 will be repealed and the provisions under it absorbed by this Equality Act. The preferred approach should be the consolidation of all equality laws under one Act, including legislation relating to the protection against discrimination based on disability.

The definition of *“race, colour or ethnic origin”* includes, amongst others *“nationality”* which is also a positive widening of scope of anti-discrimination legislation. However, clarification on its relationship with Article 27(3) of the draft Bill is needed. Article 27(3) states that:

“This Act shall not apply to any differences of treatment based on nationality and are without prejudice to laws and conditions relating to entry into and residence of persons who are not Maltese nationals in Malta and to any treatment which arises from the legal status of these individuals concerned.”

Further clarity is also needed in the definition of *“maternity”* which presumably relates to unfavourable treatment when a woman is exercising or seeking to exercise, or has exercised the right to maternity leave.

⁵ Para 6(1) Schedule 1, Part 1, Equality Act, 2010

Similarly, the definition of “*pregnancy*” as “*the state of a person who has within the ovary or womb an implanted embryo, which gradually becomes developed in the latter receptacle*” is unclear and imprecise.

The definition of “*protected characteristic*” should be amended to also include “*political belief or activity*”, as listed in Article 21 of the Charter of Fundamental Rights of the European Union⁶.

The Bill also makes reference to “*ordinary discrimination*”, where ‘ordinary’ relates to normal, usual or commonplace behaviour. We believe discrimination should never be described as such, as the term can be somewhat misleading.

1. Some definitions need to be reworded for clarity and legal certainty.
2. Include “*political belief or activity*” as a protected characteristic.
3. The creation of a protected characteristic from a specific illness as is *HIV status*, as opposed to a general definition which could be wider in scope, creates a hierarchy between rights and should be avoided.
4. The Bill’s remit in relation to discrimination based on disability and the role of the KNPD vis-à-vis the Equality Commission needs clarification. A consolidated approach is suggested.

Scope

The scope of the Bill is laid down in Article 5 and includes advertising, education, employment, banks and financial services, insurance and access to goods and services.

Article 5(c) list “*employment*” within the Bill’s remit, yet it is unclear whether *Equal Treatment in Employment Regulations, S.L.452.95*⁷ will be repealed and the provisions absorbed within the Act. Specifically, as both legal instruments will be implementing *Council Directives 2000/43/EC, 2000/78/EC* and *2006/54/EC*⁸ there could be a possibility of conflicting provisions, interpretations and procedures. In

⁶ http://www.europarl.europa.eu/charter/pdf/text_en.pdf .

⁷Equal Treatment in Employment Regulations, S.L.452.95 <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11229>

⁸ Council Directive 2002/73/EC of 23 September 2002 amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions was repealed in 2009 by Directive 2006/54/EC.

addition, the role of the Department of Industrial and Employment Relations as an equality body established under S.L.452.95 in relation to issues pertaining to race and ethnic origins remains uncertain.

Furthermore, in accordance with *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* Article 5(b) should read “*education and vocational guidance*”. This should also be reflected in Article 8, which should read “Education and vocational training” and Article 8(1)(a) amended to read “*access to education*”, which would incorporate education at all levels.

The goods and services referred to in Article 5(i) should be widened to include access to law enforcement and judiciary services as services available to the public. Police and justice services have been deemed by the European Commission to be non-economic services that may be subject to rules relating to non-discrimination⁹.

Lastly, the scope of the Act could be further widened in order to encompass entertainment, sports and recreational activities and the enjoyment of civic rights and performance of civic duties.

The Bill needs to be clear in its scope and in what falls outside its remit. Therefore, a comprehensive list of existing legislation that will be repealed by the consolidation of laws in one Equality Act needs to be included, if such is the intention of the legislator. Legislation that may need to be repealed includes the following:

- Equal Treatment in Employment Regulations, S.L.452.95
- Equal Treatment of Persons Order, S.L. 460.15
- Equal Treatment in Self Employment and Occupation Order, S.L. 460.16
- Equal Opportunities Act (Persons with Disability) Act (CAP 413) and all subsidiary legislation pertaining to it.

5. Clarification is needed relating to the relationship between the Act, specifically Article 5(a), and the *Equal Treatment in Employment Regulations, S.L.452.95*. This would include the relationship between the Department of Industrial and Employment Relations and the Equality Commission.
6. Widen the scope to include recreational and sports activities and civic participation.

⁹ European Commission, "Services of general interest, including social services of general interest: a new European commitment", Communication of General Interest [COM(2007)725] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007-0725:FIN:EN:PDF>

7. Revisit the laws that could be repealed and harmonised within the Act.

Banks, Financial Institutions and Insurance Companies

The Bill makes reference to the services offered by banks, financial institutions and insurance companies in Article 6(3)(e) (Prohibited Conduct), Article 15 (Banks and Financial Institutions) and Article 16 (Insurances). Firstly, the terms used through the Bill should be defined in line with or with reference to the Insurance Business Act (CAP 403), Financial Institutions Act (CAP 376) and the Banking Act (CAP 371). Secondly, insurance service providers should be included in Article 6(3)(e) together with banks and financial institutions.

Due to the specific nature of the services offered in the banking, financial institutions and insurance sectors, and in view of the risk elements involved, it is suggested that the Government consults with the corresponding associations and regulators. Specific issues relating to protected characteristics such as sex and disability need to be meticulously assessed, as are issues such as pre-existing insurance policies or financial services. aditus is also concerned at the interplay between this Act and the Gender Identity, Gender Expression and Sex Characteristics Act in relation to accessibility of health insurance services to the transgender community.

8. Consult with professionals in the insurance, banking and financial services sector.

Spouses of Self-Employed

Article 14 of the Bill obliges the self-employed spouse to pay a fair compensation to their spouse who participates in the activities and carries out the same or ancillary tasks as their self-employed spouses. This article, although seeking to implement *Directive 2010/41/EU of the European Parliament and the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, is incongruous in an Act establishing anti-discrimination provisions. *Directive 2010/41/EU* seeks to oblige Member States to ensure that spouses that participate in the activities of their self-employed spouse benefit from social protection in accordance with national law and that female spouses are granted sufficient maternity allowance.

9. Revisit Article 14 relating to spouses of self-employed persons

Equality Duty

The duty of ensuring that the principle of equal treatment in Article 18 should be extended to impose the obligation on public authorities, the public sector, national institutions and national regulating bodies. This duty is different to the obligations imposed on the public administration in Article 20, as discussed in further detail below.

10. Extend the duty of equality to public authorities, the public sector, national institutions and national regulating bodies

Public Administration and Equality Duty

Article 20(c) should oblige the public administration to carry out equality mainstreaming on all protected characteristics in the formulation of laws, regulations and policies and activities relating to all the sectors listed in Article 5 (Scope) of the Bill and not just to employment issues.

11. Equality mainstreaming should be carried out for all protected characteristics across the sectors within the Act's remit.

Right of Action and Sanction

The Act needs to ensure that the right of action created under this Act and any right of redress existing under the Industrial Tribunal, the Human Rights and Equality Commission, the Department of Industrial and Employment Relations and the National Commission Persons with Disability do not conflict. There needs to be clarity as to the jurisdiction of the respective court or deciding authority, possibly with the inclusion of a suspensive provision if any court or tribunal is seized of any dispute under the Act. Should the Human Rights and Equality Commission be the primary quasi-judicial body to take cognisance of grievances under the Act with a possibility to appeal to the Court of Appeal (Superior Jurisdiction)? Or should there be multiple possibilities to file a complaint in whichever forum the applicant deems to be more effective?

The sanctions that may be imposed by the Courts in accordance with Article 23(2) can include moral or non-material damages suffered. However, Article 25 states that any offence under the Act shall be liable to 5,000 Euros. Firstly, the amount capped to 5,000 Euros is on the low-side compared to the damages that could be suffered by serious breaches of the Act.

12. Clarify the inter-relationship between the different fora in which an applicant can file a complaint.

13. Increase the fine that may be imposed for breaches and clarify the relationship between Article 23(2) relating to the imposition of moral damages and Article 25. Are sanctions capped at 5,000Euros?