



UNFULFILLED POTENTIAL: HUMAN RIGHTS AND EQUALITY COMMISSION BILL AND EQUALITY BILL



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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 these two important Bills. We have been following their development since their inception, regularly engaging with the Equality Ministry on their general approach as well as on their technical content. These submissions come after input provided to the Ministry in 2014¹ and 2016², and following participation in a series of meetings with Ministry officials and other stakeholders.

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. 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 which in some instances overlap, 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 difficulty that individuals and their legal advisors face when filing a complaint.

In view of the above, we feel that the two Bills have the potential of radically altering the face of Malta's human rights protective framework in a manner that renders it more accessible, inclusive and effective. The role of the new Commission to firmly ensure that human rights remain at the heart of law- and policy-making is fundamental to the respect and protection of the rights of all persons in Malta, particularly in a context with a very small number of NGOs acting as watch-dogs over State behaviour and activities.

Yet we are extremely concerned that the Bills' most recent versions pose a risk to these ambitious aims. Contrary to the requirements of the Paris Principles, the Commission and the Board will not be independent and impartial entities since the procedures for appointment of their members contain far too many direct connections to Government. It is our view that these connections will lead to a Commission and Board composed of members who are in some way tied to Government, thereby prejudicing the important and needed work of the two bodies. Our conclusion, therefore, is clear and inevitable: if the appointments procedures are not amended, we will have no other choice but to reject the Bills.

Our mission is to promote a society where all its members are able to access and enjoy all their fundamental human rights. The two Bills contain much promise, and we applaud the Ministry for their presentation. We are keen to see the two Bills adopted in a manner that truly strengthens the protection of human rights and the equality principle, and we hope that this input will assist law-makers in achieving these aims.

¹ http://aditus.org.mt/Publications/scopinginput_032014.zip

² http://aditus.org.mt/Publications/aditussubmissionsontheequalitybill_29012016.pdf

A D I T U S F O U N D A T I O N

aditus foundation is a young, independent, voluntary, non-profit and non-governmental organization established in 2011 by a group of young lawyers dedicated to ensuring human rights access in Malta. aditus' Director is Dr. Neil Falzon, and the current board is composed of Dr. Nicola Mallia (Chairperson), Dr. Michael Camilleri and Dr. Michael Ellul Sullivan.

Named for the Latin word meaning 'access', aditus foundation's mission is the attentive analysis of access in Malta to human rights recognition and enjoyment. In practical terms, aditus was established to monitor, report and act on issues of fundamental human rights access for individuals and groups.

aditus foundation was founded on the principles of the universality, interdependence and indivisibility of all fundamental human rights, and we strive to promote their understanding and application. Being a generic human rights NGO, we work to adopt a broad perspective for human rights in Malta, identifying themes such as discrimination and access to effective remedies. Furthermore, while focused on Malta, we work towards highlighting the regional and international implications of local obstacles to human rights access.

Our main activities include the identification of priority areas, formulating advocacy strategies and working towards improvement in legal and administrative standards. This includes offering pro bono legal information and advice. We focus our advocacy work on the government of Malta yet we also address the EU institutions, the United Nations, the Council of Europe and other relevant agencies. We remain in constant communication and cooperation with governmental, intergovernmental and non-governmental entities to maintain a comprehensive approach in our activities.

aditus is committed to engaging the general public in a human rights discourse that is well informed, unbiased and effective, through press statements and television and radio appearances. Further, aditus makes full use of the Internet to disseminate information, raise public awareness, gather advocacy support and establish contact with individuals and networks. We have a comprehensive website and a busy Facebook page and Twitter account.

aditus is the Secretariat for the Platform of Human Rights Organisations in Malta (PHROM), Malta's first and only national coalition of human rights NGOs.

Together with being registered with the Malta Commissioner for Voluntary Organisations, aditus has affiliations and memberships with the International Detention Coalition (IDC), the Platform for International Cooperation on Undocumented Migrants (PICUM), the European Council on Refugees and Exiles (ECRE), the European Network on Statelessness and the Anna Lindh Foundation. We are founding members of the national Coalition for Choice.

We are also members of the Consultative Forum of the European Asylum Support Office, and of the Fundamental Rights Platform of the European Union Agency for Fundamental Rights.

THE HUMAN RIGHTS & EQUALITY COMMISSION ACT

Definition of “human rights”

As a Member State of the European Union, Malta’s human rights framework also includes the *Charter of Fundamental Rights of the European Union*. This is a legally-binding instrument that, whilst complementing the European Convention on Human Rights, broadens the scope of human rights protection in some areas. A comprehensive definition of “human rights” in Malta cannot be complete without a specific reference to the Charter.

Furthermore, the definition omits jurisprudence of European courts thereby omitting relevant jurisprudence of the Court of Justice of the European Union (CJEU).

Recommendation

Include the *Charter of Fundamental Rights of the European Union* and European courts’ jurisprudence in the definition of “human rights”.

Definition of “person”

The Act limits its definition of “person” to natural entities, thereby categorically excluding legal persons. A major implication of this choice of definition is that legal persons are not able to file complaints before the Commission, requesting the Board to ascertain whether a violation of the principle of equality and non-discrimination has occurred (see Article 16).

Whilst it is true that traditional human rights theory has placed natural persons at the heart of human rights enjoyment, the Act cannot ignore the growing corpus of law and jurisprudence recognising that legal persons do in fact enjoy a degree of human rights freedoms and – therefore – are entitled to legal protection of those freedoms. Between 1998 and 2003, of the 3,307 judgements delivered by the European Court of Human Rights, 3.8% (126) originated from applications filed by companies or persons pursuing corporate interests. Human rights issues typically flagged by companies includes those affecting property rights, fair trial, and free expression³.

In order for the Board’s complaints procedure to be as accessible and effective as possible, the Act’s definition of “persons” must reflect international and European standards and jurisprudence in order to acknowledge to legal persons their human rights entitlements and protection thereof.

Recommendation

Include “legal persons” in the definition of “person”.

³ For example, in 2014 the Strasbourg Court ordered Russia to pay a company (Yukos) 1.9 billion Euros by way of damages (OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, 2012).

Appointment of the Commission

We feel that the method of appointment of the Commission fails to meet the Paris Principles' standards of independence and impartiality, and runs the risk of creating a Commission with primary allegiance of Government. Despite the welcome introduction of a number of measures to allay the concerns expressed in relation to the Act's original version, notably the more transparent procedure with a public consultation component, the appointment process renders the Commission vulnerable to indirect Government control.

The public consultation and the subsequent eligibility stage are undertaken by the Speaker of the House. This raises a number of concerns. In procedures involving an eligibility stage, this tends to be a formalistic procedure that involves little or no discretion and/or assessment at all, but it limited to a tick-box approach against a clear and concise checklist. The eligibility stage for the Commission appointment is not limited to a tick-box approach. Rather, the eligibility assessment does in fact require quite a high degree of evaluation and use of discretion on behalf of the assessor, being the Speaker. The Speaker will not merely be checking for academic qualifications and other documentary evidence, but will be asking difficult questions that relate to the nature of commitment required by Article 5(1)(b), to the meaning of 'consistent', to the kind of ability required in Article 6(2)(a). Furthermore, the Speaker is bound by the Act to base this assessment of "*documents presented by the nominated persons*" and is therefore prevented from conducting external checks and other forms of enquiries.

Finally, in relation to this specific stage of the appointment process, we underline that the manner of appointment of the position of Speaker of the House (simple majority of the Members of the House) and Parliamentary practice in this regard effectively mean that this crucial stage will be entirely and exclusively dominated by an official appointed by Government.

The second stage of the appointment procedure raises identical concerns, since implementation and decision-making power are handed to a Parliamentary Committee having a majority of members appointed by Government. A glance at the present Committee, essentially a group of homogenous men, underlines the high risk of failure of the entire procedure. Furthermore, whilst it is not our interest to comment on specific individual profiles, we must flag that a number of present members might not be the most appropriate individuals to be selecting the members of Malta's highest human rights entity.

Article 7(4) renders optional the organisation of pre-appointment hearings of persons nominated as Commissioners of Commission members, and Article 7(6) allows the presentation of written submissions but not of direct questions to nominated persons. In the interests of transparency and publicity, as a minimum in relation to the persons nominated as Commissioners, this ought to be converted to an obligation in order to enable the presentation of questions by the general public, civil society organisations, the media and other interested stakeholders.

In summary, in order to appoint the Human Rights and Equality Commission, a Government-appointed official will, behind closed doors, use his/her discretion to decide which nominations to present to a Parliamentary Committee, and which to discard.

Subsequently, a Committee with majority of Government-appointed Members will decide, possibly also behind closed doors, which forwarded nominations to present to Parliament for final vote.

Some comfort is offered by the requirement of a two-thirds majority resolution for the selection of the Commissioner, yet this comes after ample filtering by the earlier stages. Furthermore, the safety clause in the proviso to Article 7(11) could serve as a work-around to this minor buffer.

Recommendation

Remove the Speaker's exclusive authority from the eligibility stage and require a publication of all received nominations, including the excluded ones.

Remove the Public Appointments Committee's exclusive authority from the selection stage.

Render public hearings compulsory, as a minimum for the role of Commissioner.

Termination and resignation

We see no reason why the President ought to be involved in termination procedures, where this Office played no role in the appointment of any Commission members.

Furthermore, we are concerned that the Act lacks the legal authority to confer such duties onto the Office of the President.

Also, in the case of resignation of a Commissioner member, it is not clear if the remaining time spent by the replacing member counts as a term or otherwise for the purposes of Article 9.

Recommendation

Streamline termination procedures with (improved) manner of appointment.

Clarify whether time spent by a replacing member counts as a term for the purposes of Article 9.

Validity of proceedings

Article 11(4) protects Commission proceedings in situations where defects in appointments transpire at a later stage. Whilst we appreciate the need to ensure a high level of stability and security for such proceedings, we nonetheless feel that the parallel need to ensure a high level of quality is far more important. This clause has the potential of tainting the entire Commission with proceedings prejudiced by situations of inappropriate conduct in the appointments procedure.

Recommendation

Remove Article 11(4).

Power of the Commission to take up human rights cases, including cases questioning the constitutionality of specific legal provisions

Article 14(u) is problematic in the way it seems to create *locus standi* for the Commission before Malta's Courts, without offering details as to how this power will be implemented, how it sits with judicial procedural rules (for example, under the Code of Organisation and Civil Procedure) and how it relates to the Constitution itself. Specifically, it is not clear if through this provision legislators are proposing to do away with the juridical interest requirement for human rights cases.

Recommendation

Revise or clarify Article 14(u).

Annual Report

The provision describing the Commission's duty to present an annual report does not specify that the report should also include a detailed financial report.

Recommendation

Ensure that the Commission's annual report also includes financial reporting.

Standing Advisory Committee

In view of on-going developments in several areas, we feel that the list of entities that are members of the Standing Advisory Committee should not be a closed one but that it should allow for the possibility of adding/amending members to reflect developments (e.g. creation of new Commissioners, amendment of mandates, etc.)

Recommendation

Create a facilitated procedure for amending the composition of the Standing Advisory Committee.

Commission requesting the Board to initiate proceedings

Whilst the measure introduced in Article 15 is a welcome initiative, we feel the need to caution against an over-zealous approach that might infringe on individual choices of victims or potential victims, including confidentiality, employment, reprisals, etc.

In implementing this provision, the Commission needs to ensure that the rights of victims or potential victims are in no way prejudiced through its requests to the Board to initiate proceedings, where relevant.

Recommendation

A duty of ensure the protection of victims or potential victims should be incorporated in the provision.

Composition of the Board

We cannot accept a Board, with the competence to decide on complaints of alleged violations of the right to equal treatment and non-discrimination, that is entirely composed of members appointed by the Prime Minister. Although a practice that is widespread and customary in Malta, particularly for quasi-judicial administrative tribunals, we have repeatedly expressed our concerns at this practice and its impact on fundamental rights enjoyment. We also feel that it is insufficient to package this appointment mechanism with provisions stating that *“the Board shall not be subject to the direction or control of any other person or authority”* (Article 22(2)). Our concerns are exacerbated by the length of term of Board members.

In our activities we come across several such tribunals, Board or Committees composed of persons appointed not for their expertise or experience but for their allegiance to the appointing Minister or political party in Government. These appointments damage the integrity of Malta’s governance system and act as obstacles between individuals and the rights they are attempting to enjoy or seek redress for. These concerns, in their broader application, are also flagged in the 2019 Council of Europe report on the rule of law in Malta.

Recommendation

Revise the manner of appointment of Board members.

Refusal to hear

The proviso to Article 31(3) states that, where the Board refuses to proceed on a complaint due to any of the reasons listed in sub-article (1), the Commission will review this decision but no judicial review will be available.

The Act does not clarify the procedure to be adopted by the Commission to conduct this review, nor does it explain the criteria the Commission will rely on in order to assess the Board’s decision. Also, this authority to review a Board’s decision raises questions as to the relationship between the two bodies and, if any, the hierarchy between them. Importantly, we are not clear as to the role of the complainant in this review process as well as to its possible outcomes.

We also refer to extensive local jurisprudence criticising legal measures that bar access to judicial review procedures in relation to administrative authorities. The jurisprudence is clear in stating that these legal measures will be entirely ignored in order to give full effect to principles of justice and the right to effective remedy.

Recommendation

Rethink the relationship between the Commission and the Board.

Clarify the procedure whereby decisions taken by the Board not to proceed on a complaint may be reviewed, to ensure a full respect of principles of natural justice.

Appeals from Board decisions

Article 45(2) states that, following an appeal from a Board decision, the Board will file a written reply on the said appeal. It is not clear in what capacity the Board will be writing its reply: is the Board a party to the appeal procedure, meaning that the appellant ought to file the case versus the Board? Or is the Board submitting a reply as a third party?

Also, whereas the Act requires that the Board be served with a copy of the appeal application, this requirement does not apply to the other entity involved in the original proceedings before the Board. In view of the above query, it is not clear whether the Act envisages this entity as having an active role in the appeal proceedings.

Recommendation

The Board should not be a party to the appeal process and should not be treated as such.

Parties to the appeal process ought to be the same as those before the original Board proceedings.

T H E E Q U A L I T Y A C T

aditus welcomes the ratification of and the inclusion of the reference to *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* within the text of the draft Bill. However, we also recommend that the Act makes reference to Malta's international obligations under the Charter of Fundamental Rights of the European Union and the European Social Charter.

Article 3 lays down that certain discriminatory practices will be null and void after the entry into force of the act, these being:

- any provision or practice contrary to the principle of equal treatment in any individual or collective contracts or agreements;
- internal rules of undertakings;
- or rules governing any registered organisation.

However, the scope of the Act is much broader than the above, and includes prohibited practices beyond the employment sector. It is suggested that this article is amended to include the nullity of all prohibited practices including any laws, regulations and administrative provisions contrary to the principle of equal treatment.

Protected Characteristics

The Equality Act Bill (the "Bill") prohibits discrimination based on one or more of the protected characteristics laid down in the Act. The protected characteristics are defined in **Article 4** as the following: "*age belief, creed or religion, colour, ethnic or national origin, or race, disability, family responsibilities or pregnancy, family or civil status, gender expression or gender identity, genetic features, health status, language, nationality, political opinion, property, sex or sex characteristics, sexual orientation, and social origin*".

Disability

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 Commission for the Rights of Persons with Disability (CRPD). Although there is a cross-reference to the Equal Opportunities Act (Persons with Disability) Act in relation to the definition of "*disability*", there is no further clarity as to the relationship between the CRPD and the Human Rights and Equality Commission and their overlapping roles. Furthermore, both Acts allow for the filing of complaints on discrimination grounds based on disability with the CRPD and the Equality Board, and the possibility to institute civil proceedings albeit with varying remedies.

Nationality

The inclusion of "*nationality*" is also a positive widening of scope of anti-discrimination legislation, however, clarification on its relationship with the exception listed in Article 6(o) of the draft Bill is needed.

Article 6(o) lays down that one of the exceptions to the non-discrimination principle within the act is "*less favourable treatment on the basis of nationality, in relation 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.” It should be noted that under European Union law, EU citizens enjoy equal treatment with Maltese nationals and therefore this provision would be in breach of Article 18 of the Treaty on the Functioning of the European Union.

Health Status

Health status has been included as a protected characteristic, replacing HIV status in the older draft. Health status is defined as *“refers to the bodily or mental well-being of a person, including the presence or absence of any health condition, disease or illness”*. It is not clear what discrimination based on the *“absence of”* a health condition would entail and the definition would be far clearer if it only refers to chronic or debilitating illnesses, as opposed to the absence thereof.

Recommendation

The remit of the Act in relation to discrimination based on disability and the role of the CRPD vis-à-vis the Equality Commission and the Equality Board needs clarification.

Revise the wording of Article 6(o) of the draft bill to clarify that this exception relates to laws relating to the mode of entry and residence in Malta of third-country nationals.

Clarification on definition of *“health status”*.

Discrimination

Article 5(3)(c) lays down that harassment may amount to discriminatory behaviour and this may also constitute a criminal offence under Article 251A of the Criminal Code.

Recommendation

Article 6(b) is drafted in such a broad and general manner that could be a catch-all exception for any less favourable treatment at law or policy on any of the protected grounds, except colour, ethnic origin or race. This is even more so when the sub-article does not include any reference to the burden of proof being on whoever claims that the law or policy is reasonable, proportionate and legitimate.

The proviso of Article 6(j) relating to the private life of the teachers outside that establishment should be amended. It should be noted that the protected characteristics in the Act are an integral part of the person that has such characteristic and any school policies (based on belief, creed or religion) should not interfere with the private life of the teacher inside and outside the establishment.

For Article 6(k) clarify the provision and what is meant by *“accessing the teaching of the subject”*, possibly to *“in the employment of teachers for the teaching of religious subjects and ancillary activities to that subject”*.

Amend Article 6(m) to include at the end of the sub-article the words *“by any institution or community, the ethos of which is based on that belief creed or religion”*.

Amend Article 6(n) to include at the end of the sub-article the words *“by any political party, its administration and candidate within such political party”*.

Revise the wording of Article 6(o) of the draft bill to clarify that this exception relates to laws relating to the mode of entry and residence in Malta of third-country nationals.

Application

The scope of the Bill is laid down in Article 7 and includes advertising, education, employment, banks and financial services, insurance and access to goods and services.

It is still unclear whether *Equal Treatment in Employment Regulations*, S.L.452.95⁴ will be repealed and its provisions absorbed within the Act. Specifically, as both pieces of legislation will be implementing *Council Directives 2000/43/EC*, *2000/78/EC* and *2006/54/EC*⁵ there could be a possibility of conflicting provisions, interpretations and procedures.

Furthermore, in accordance with *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* Article 7(d) should read “education and vocational guidance”.

Recommendation

Clarification relating to the relationship between the Act and the *Equal Treatment in Employment Regulations*, S.L.452.95 is needed.

Access to Goods and Services

The goods and services referred to in Article 8(1) should be widened to include access judiciary services as services available to the public. Justice services have been deemed to be non-economic services that may be subject to rules relating to non-discrimination by the European Commission⁶.

The draft needs to be clear in its scope and in what falls outside its remit. The draft Bill implements a number of Directives (Council Directive 2000/78/EC and Council Directive 2000/43/EC) which have also been implemented by the following legislation:

- 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

It is unclear whether the above will be repealed, and what the relationship between the two existing pieces of legislation will be if such are not repealed.

⁴*Equal Treatment in Employment Regulations*, S.L.452.95

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11229>

⁵ 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.

⁶ 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>

Recommendation

Clarification relating to the relationship between the Act and the *Equal Treatment in Employment Regulations, S.L.452.95* is needed.

Include judiciary services as a service under Article 8(1) of the Act.

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

Spouses of Self-Employed

Article 21 of the Bill obliges the self-employed spouse to pay a fair compensation to their spouse who participates the activities and carries out the same or ancillary tasks as their self-employed spouses. This article seeks 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*. Article 7 of the Directive states that “Where a system for social protection for self-employed workers exists in a Member State, that Member State shall take the necessary measures to ensure that spouses and life partners ... can benefit from a social protection in accordance with national law.”

The Directive further obliges Member States, in Article 8, to take necessary measures to ensure that female spouses or partners may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.

It is unclear whether Articles 7 and 8 of the Directive are being implemented through Article 21 of the Act, or whether they have been elsewhere implemented under Social Security legislation.

Recommendation

Revisit Article 21 relating to spouses of self-employed persons and amend the relevant social security provisions and schemes to allow for social protection and maternity allowance for spouses that habitually participate in the activities of the self-employed worker.

Remedies

Under the Bill an injured party has the right to recourse, either in the First Hall Civil Court or in front of the Equality Board. In order for the procedures to be in line with those found in Article 19 of the Human Rights and Equality Commission Bill, we suggest amending Articles 28 and 29 to include the right for any association, organisation, or legal entity to file an application in Court or a complaint with the Commission *on behalf or in support of a person* who believes that he is a victim of an infringement of the right to equal treatment and non-discrimination.

Furthermore, we suggest adding on a new sub-article to both Article 28 and 29 to allow for any association, organisation, or legal entity to lodge a complaint even in cases where no one specific person is identified as a victim of an infringement of the right to equal treatment and non-discrimination.

The current draft only allows for the intervention on behalf or in support of an individual which is completely different procedure and in conflict with the provisions of in the Human Rights and Equality Commission Bill.

Recommendation

Amend Article 28 and 29 to reflect Article 19 of the Human Rights and Equality Commission Bill, 2019 to include the right of associations to file applications or complaint on behalf of a specific individual and when no specific person is identified as a victim.