

Submission to the
White Paper
Consultation on
Human Rights and
Equality



February 2015

About The People for Change Foundation

The People for Change Foundation's vision is of a just, fair and inclusive society where all members may reach their full potential unhindered by factors such as age, race, colour, gender, language, religion, political or other opinion, national origin, property, birth or other status. Since 2007, the People for Change Foundation (PfC) has been conducting on-the-ground legal and policy research in Malta in the fields of migration, asylum and racism in the European Union. The Foundation operates at the intersection between law, policy and social science, delivering analysis that is practical in input and pragmatic in outcome.

The People for Change Foundation was set up with the express aim of contributing to a multilateral process between different entities - governmental, non-governmental and academic - to conduct research in an area of direct relevance to the livelihood and quality of life of asylum seekers, and to address human rights concerns through international and national legal obligations and development.

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Introduction

The People for Change Foundation welcomes the positive step of the Maltese government, and particularly of the Ministry for Social Dialogue and Civil Liberties, to include civil society in the process of drafting and developing the Human Rights Act, which, in and of itself, is an important step in the ensuring and maintenance of political, social and civil rights in Malta.

A number of organizations have been working in the human rights sector for a number of years, particularly in the areas of children's rights, the rights of people with disabilities, gender equality and irregular migration. Yet participation in the law and policy making process has not always been encouraged or guaranteed. We therefore welcome this opportunity to share our views and suggestions and to offer our support and assistance in the way forward.

These recommendations are based on The People for Change Foundation's expertise and experiences in various fields of human rights, with a focus on migration and anti-racism as well as human rights education.

Strengthening Equality Beyond Legislation

The overarching aim of the white paper is to make Malta a global player when it comes to the protections and freedoms enjoyed under international human rights standards through the strengthening of both legislation as well as channels of prevention and redress. In so doing, any efforts need necessarily to move beyond the legal framework and to address the political and social realities, and in doing so apply a range of legislative and non-legislative measures across sectors and alongside numerous policy areas. Whilst this white paper focuses on the legal framework, any effort would need to consider policy options as well as educational and social measures that will impact on the implementation and enjoyment of fundamental human rights in Malta. The human rights and equality commission should therefore be tasked with the development and implementation of national strategies to combat various forms of discrimination, and parliament, as well as civil society, should be given the opportunity to monitoring the implementation, impact and outcomes of these measures not least through the availability of data. Moreover, any and all efforts to combat discrimination should take a strategic approach, with clear targets and thresholds against which the success or otherwise can be measures. Any evaluation of measures should consider short, medium and long term outcomes as well as outputs.

Human Rights Education

We welcome the mention in the white paper of human rights education. In our view, human rights education needs to be a core function of the human rights and equality commission. Human rights education must necessarily be understood broadly, moving beyond the teaching of human rights within the school context, and considering the involvement of a variety of formal, non-formal and informal educators as well as a range of institutions and organizations working with and amongst a cross-section of the population in Malta. For instance, a culture of

equality is difficult to be achieved if political discourse at the highest levels continues to depict migration as a problem and an invasion. Human rights education understood in this sense requires the uptake at all levels of society, ensuring that not only the text of the law becomes an educational tool but also the law making process becomes an educational process for lawmakers and the general public. There is a strong need to sell the importance of an act like this, not only to parliamentarians but also to the public at large. Politicians and policy makers should view developments towards human rights not as a partisan issue subject to party wrangling but as an issue of consensus and national cohesion.

We welcome the commitment to use the text of the law as an educational tool as well as the clarification of existing legislation, not least through the consolidation of existing protections into a single act.

Diversity and Discrimination Data

The white paper opens with the pledge of open society, celebration of diversity, and the recognition of social realities. This is a welcome direction for this ambitious project. In order to truly understand the diversity that is Malta, further **data** needs to be collected. We therefore call for the human rights and equality commission, to work with the National Statistics Office and other relevant national bodies in collecting and analyzing data on ethnic, religious and cultural diversity in Malta. In doing so, policy and social action will be committed to addressing both the conceptual notions of diversity and to move towards a more comprehensive understanding of the particular needs of the Maltese population, as it exhibits its particular brand of diversity. Beyond this, statistics about diversity in Malta would positively contribute to both data collection in discrimination itself, as well as the development of evidence based initiatives and action against discrimination, moving away from assumption based measures. Equality data refer to all types of disaggregated data used to assess the comparative situation of a specific

discriminated group or group at risk of discrimination, design public policies so that they can contribute to promoting equality and assess their implementation.

Non-Discrimination Legislation

The white paper provides a useful and clear outline of the non-discrimination provisions found in national legislation – from the Constitutional Provisions to Primary and subsidiary legislation. An aspect that is missing from this overview is the **equality provisions adopted within the framework of immigration legislation**. For instance, Article 11 of the Status of Long Term Residences (Third Country Nationals) Regulations¹ provides that a third country national granted long term residences status in Malts shall enjoy equal treatment as Maltese nationals with regards to: employment, education, recognition of qualifications, social security, assistance and protection, tax benefits, access to goods and services, freedom of association and union membership, and freedom of movement within the Maltese territory. Article 12 of the Third Country Nationals for Scientific Research Purposes (Specific Admittance Procedure) Regulations² also provides that researchers holding a residence permit shall be entitled to equal treatment as nationals with respect to: recognition of qualifications, conditions relating to work, some aspects of social security, tax benefits, and access to goods and services. Article 13 of the Conditions f Entry and Residence of Third Country Nationals for the Purpose of Highly Qualified Employment Regulations³ provides for equal treatment for Blue Card holders, even if some limitations are imposed, in the areas of: working conditions, freedom of association, affiliation and membership of trade unions, education and vocational training, some aspects of social security, income related statutory persons, access to goods and services (with the exception of procedures for obtaining housing), and free access to the entire territory of Malta. We therefore call for the Equality and Human Rights Commission to consider these provisions as part of its core mandate

¹ Subsidiary Legislation 217.05 of the Laws of Malta

² Subsidiary Legislation 217.10 of the Laws of Malta

³ Subsidiary Legislation 217.15 of the Laws of Malta

and to enforce these equal treatment provisions in the same way as equal treatment provisions found in other pieces of legislation are enforced. More broadly, the Commission should be given the competence – legal, financial and capacity – to investigate and act in cases where immigration and border procedures and controls are carried out in a discriminatory fashion, and where racial discrimination in the form of racial profiling is applied in the execution of border procedures.

Equality, Human Rights and Integration

On page 7, the white paper refers to the 2015 Budget Speech regarding the setting up of an integration unit as bringing together civil liberties, equality, anti-discrimination and integration of immigrants. All efforts should be made to avoid a conflation of integration and anti-discrimination (on various grounds) and human rights issues. Integration includes a series of other aspects that, if considered solely as an aspect of equality and non-discrimination, risk not being adequately addressed including, *inter alia*, access to citizenship etc. Having said this, anti-discrimination is a core aspect of integration, after all, discrimination (most notably, but not limited to, racism and xenophobia) impedes integration whilst lack of integration hinders cohesiveness in society.

Beyond the Paris Principles

We welcome the commitment of the authorities as expressed throughout the white paper to adhere to the Paris Principles. Beyond these principles, we also recommend taking cognizance of other international and European instruments that in a variety of ways make recommendations regarding human rights bodies and equality commissions more broadly. These include:

1. The United Nations model legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination
2. The Council of Europe's European Commission against Racism and Intolerance General Policy Recommendation no. 2 on specialized bodies to

combat racism and xenophobia, anti-Semitism and intolerance at national level

3. ECRI's General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination

Proposed Equality Act

This section explores some of the statements set out in the white paper with regards to the Equality Act. The statements in italics are from the list on page 25 of the white paper whilst the bulleted points underneath each statement are our recommendations relating to that statement and the act more broadly.

A general provision against discrimination, including a definition of discrimination as well as the grounds covered

- The provision should include a non-exhaustive list of discrimination grounds, allowing for new manifestations of discrimination to be brought within the scope of the act and the competence of the equality body entrusted with its enforcement.

Positive equality duties and obligations

- We recommend that this idea be expanded to cover both:
 - Positive action measures aimed at overcoming discrimination
 - Strengthening the obligation on public and private actors to promote equality in their internal and external processes and dealings

A revised list of grounds of anti-discrimination to ensure that all basis of discrimination are adequately included

- The act should avoid situations that create a hierarchy between the grounds. Discrimination on all grounds should be covered.
- Discrimination on the basis of nationality should be prohibited, clarifying the confusion often created by the interplay between the national exemption in

the current equality legislation (and its European counterparts) and the notion of indirect discrimination. Combatting nationality discrimination is without prejudice to the rights of the State to control immigration but would go a long way in ensuring equal treatment for migrants living in Malta

- Protection against harassment on the basis of all grounds, including any and all forms of bullying based on any of the protected grounds
- Such a revision should consider moving away from the conceptual understanding of a discrimination ground on the basis of immutability and instead consider other notions, such as stigma, that could better underpin the realities of discrimination in Malta today. For instance, obese persons might face discrimination but are currently not protected if the list continues as is
- Ensure that cases of structural discrimination are adequately investigated and that proposals are made, and followed up, to ensure that such cases are adequately addressed

Provisions tackling inter-sectional discrimination

- Addressing inter-sectional discrimination needs to *move away from the current additive or cumulative approach. Instead, law makers should recognise the more complex and deeper dimension of 'intersectionality' that characterises multiple discrimination.* This change will remove unjustifiable legal barriers that individuals face when trying to prove discrimination on multiple equality ground.

Provisions Covering All Spheres of Life

- We welcome the commitment to have equality provisions that cover all spheres of life. In particular we understand this to include discrimination by both public and private bodies as well as individual landlords and employers. An unequivocal competence for the commission to review claims of discrimination against police and security services as well as border services (including, but not limited to, cases of racial profiling) should be ensured.

Provisions that allow: NGOs to submit cases on behalf of victims, class action, and cases of discrimination to be processed without the need of an individual victim

- This provision should be expanded to allow all civil society actors to submit cases on behalf of victims, including NGOs, Voluntary Organizations, trade unions, and small groups or informal organizations. This will ensure that, for instance, migrant community organizations that are in their infancy and have not yet registered with a relevant body, can support their members in bringing such cases
- In cases where there are individual victims who present their cases, the should be supported through
 - Provision of free legal assistance
 - Clear information about how to file complaints, and the procedures that follow
 - Expedient processes that do not create undue hardships for persons accused of discrimination or victims reporting cases
 - Ensuring that the complaints mechanism is not unnecessarily burdensome and that it doesn't deter victims of discrimination from coming forward and filing their complaints

Provisions that allow for dissuasive sanctions in cases of proven discrimination

- Such sanctions could and should move beyond the immediate payment of damages or fines and include other sanctions such as for instance prohibition from receiving public funding for persistent offenders
- Individuals or organizations (including companies) found to have discriminated may be obliged to undertake equality audits of their practices and to adopt and implement equality policies and to report back to the commission as the commission deems fit
- Beyond the notion of sanctions for the perpetrators of discrimination, the act should provide for **compensation** for victims including, for instance, payment of pecuniary and moral damages were relevant

- The process should be accessible in that the Human Rights Commission should be empowered to issue legally binding decisions (subject to the safeguarding of due process provisions and the right to appeal to a national court).
- Where appropriate, protection should be granted to individuals, organizations or other entities filing complaints with the human rights commission in order to mitigate the risk of victimization

All relevant provisions of Dir 2000/42/EC, Dir 2000/78/EC, Dir 2004/113/EC and Dir 2006/54/EC in one act

- Beyond the existing legislation, the act should also implement the wording and spirit of the horizontal equality directive which is still being debated by the European Union institutions.

Additional Points:

- All efforts must be made to ensure that everyone enjoys equality provisions and remedies are available and accessible to all, including those whose status in Malta is undocumented
- Discrimination victimization surveys are rare in Malta and the extent of discrimination often goes unknown. In order to adequately assess the success or otherwise of government efforts, the Human Rights and Equality Commission should commission victimization surveys on a regular basis

Proposed Legislative Framework for the Human Rights and Equality Commission

This section explores some of the statements set out in the white paper with regards to the Human Rights and Equality Commission Act. The statements in italics are from the list on pages 29 and 30 of the white paper whilst the bulleted points underneath each statement are our suggestions and recommendations relating to that statement and the proposed act more broadly.

Mandate

We endorse the proposed mandate of the commission to promote and protect human rights.

- This should translate into strategic goals including:
 - Adherence to and promotion of highest standards of good governance internally and externally
 - Effectively taking on the role of outcomes focused strategic regulator and trusted partner of governmental, business and civil society stakeholders in the promotion and protection of human rights
 - Becoming a center of excellence for human rights promotion and protection
- The mandate to manage a complaints mechanism should not be limited to equality legislation but should also be extended to cover other areas of human rights
- Beyond the safeguarding of rights nationally, we must ensure that Malta's foreign policy decisions as well as its international responsibilities including those for instance to labor rights on Maltese registered vessels, its actions and positions within international organizations most notably the United Nations and the European Union, its deployment of international aid both multilateral and bilateral, as well as its acquisition of natural resources are based on principles of human rights, and that the safeguarding of rights be not merely a national consideration but that it should be extended to populations whose wellbeing is affected by Maltese national, foreign and economic policy

General Principles

The Human Rights and Equality Commission should:

Have its role clearly defined in relation to government and judicial institutions and in relation to civil society and vulnerable groups / communities

- In order to ensure the credibility of the HREC it is necessary to ensure that all stakeholders are well aware of its function and what can be expected from the commission (and what should not be expected therefrom)
- Clarity of purpose is a critical aspect of good governance that should be applied to and by the HREC

Adopt a strategic programme-led approach as opposed to a complaints-led approach

- Whilst we agree with the need to have a strategic approach to human rights and equality issues, the human rights and equality commission act should ensure that the legislative and operational framework is such to ensure that individuals or organisations having specific complaints are able to file such complaints and have them dealt with expeditiously despite the concern not falling squarely within the specific strategic priorities at any given time.
- We re-iterate our call for the new commission to update adopt and implement the National Action Plan Against Racism and Xenophobia drafted by The People for Change Foundation for the National Commission for the Promotion of Equality

Encourage Consultation and Participation

- Consultation and participation should be continuous and effective and not be limited to lip service or the creation of talk shops with no realistic impact on policy direction

Ensure that its management and staff are qualified, committed, representative and independent

- We fully endorse this requirement not least because these requirements are basic to the credibility that the HREC will hold at all levels – political and community.
- Members of the Commission should be nominated for approval on the basis of an open application/nomination merit based system. Members should be individuals with a solid background in human rights and equality and should cover a broad range of areas within human rights.

Address economic, social and cultural rights

- *The full range of human rights should be considered. In order to effectively engage with this, HREC should work closely with all relevant bodies in Malta.*
- *Beyond addressing the cumulative of all rights, the HREC should consider and actively engage with the interdependence of human rights*

Be and/or become more accessible

- We fully endorse this principle as a critical requirement for the effective functioning of the commission especially as the body entrusted with investigating individual cases of discrimination
- Part of ensuring accessibility involved outreach to communities at risk of discrimination. The HREC should work with stakeholders working on the ground to ensure that the commission is accessible
- The People for Change Foundation recalls its Report Racism Malta Project – an initiative aimed at supporting victims of racism and racial discrimination in accessing remedies

Evaluate its performance in a consistent manner

- Any evaluation should consider short, medium and long term outcomes rather than focusing exclusively on outputs

- The evaluation process should include victims of discrimination who have sought the assistance of the commission, organizations working in the field of human rights and input from all relevant stakeholders
- Internal evaluations should also be supplemented by external, independent evaluations and members of the commission and staff members should be accountable for the performance of the commission (provided the commission is provided with adequate resources to efficiently exercise its duties).

Compositions, appointment process, tenure and functions

The NCPE will be transformed from an equality body with limited powers into a fully fledged human rights and equality commission

- We welcome the proposal to expand the scope of the Equality commission to cover human rights more broadly.
- We consider it necessary however that the scope of the Commission be clearly defined, so that there is clarity of purpose. Depending on the coverage entrusted to the Commission, its resources will necessary need to vary, as will its networks with other relevant stakeholders at the national, European and international level.

The new Commission will no longer fall under a Ministry, but will instead be directly responsible to Parliament

- We fully endorse this proposal as a step towards ensuring the independence and impartiality of the Commission. The Commission should present to Parliament regular updates and reports both regarding its own functioning and the human rights situation in Malta and these documents should be made public.

The financial and political independence of HREC will be guaranteed by law

- We fully endorse this proposal as a step towards ensuring the independence and impartiality of the Commission. The budget of the Commission should be such as

to ensure its proper functioning, taking into account the extensive scope entrusted to the Commission under this white paper.

Approval of Members and of the Executive Director becoming a prerogative of Parliament

- Moreover, consensus should be sought between the two sides of the house, in order to ensure that the Commission enjoys the support and credibility of both Government and Opposition

The HREC will be vested with the ability to issue opinions on human rights and equality matters, make legislative and policy proposals and where necessary criticize the government

- The act should provide for human rights impact assessments to become a core element of the law making process and for the HREC to be tasked with issuing its opinion on all legislation being passed through parliament
- A key role of the HREC should be to mainstream human rights and equality into all areas of policy. This includes, but is not limited to the creation of an ongoing open channel of communication with government and civil society departments and organizations in order to prevent and address human rights issues at their early stages

The HREC will be vested with the ability to perform human rights and equality investigations, as it deems necessary

- Where relevant, the human rights and equality commission should be empowered by law to engage in legal proceedings before national (and where relevant European) courts
- The investigation of claims of human rights violation and the issuance of legally binding decisions should be a core function of the commission and one for which it enjoy powers akin to a quasi judicial body

The complaints mechanism will be widened and will no longer rely exclusively on cases brought forward by individual victims

- See comment above regarding expanding the scope of who might be able to report

The HREC will be encouraged to work closely with civil society, ideally through the setting up of a space that serves as their forum within HREC's structure

- We endorse the principle behind this proposal and call for it to be strengthened so that the legislation setting up the act itself sets up the consultative forum, including by stipulating the minimum number of meetings to be held every year
- Membership of the forum should be open to all organizations irrespective of size and scope with merit based selections being made if and where required
- The forum's function should be clearly stipulated ensuring that members of the forum have a clear understanding of their role and can monitor the impact of their work

General Competences and responsibilities

Produces and disseminates analyses and research on human rights issues

- These analysis can be run internally or via external research organizations and should be widely disseminated including a clear outline of the methodology used. The aim of this research and analysis should clearly be to provide a solid evidence base for legislative and policy

Carries out specific projects to promote equal treatment and advises those who may have been discriminated against

- This is a critical role for the human rights commission and should be expanded to cover all areas of human rights covered by the Commission
- Such promotional activities should include clear and concise information on remedies available to victims of discrimination and human rights abuse and the channels for accessing them

Maps out human rights challenges in Malta as well as yearly improvements in the area through an annual report

- An official annual report on the State of Human Rights in Malta will help generate political and public debate on issues around human rights and will help raise awareness of the priority being given by the Maltese authorities to respect human rights
- The preparation of such a report should be informed by wide consultation with relevant stakeholders both within government and civil society. Practices such as those adopted by the European Asylum Support Office which call for NGO input should be encouraged, and the report should be presented to the forum (discussed above) for feedback
- A number of NGOs already produce annual updates – including The People for Change Foundation’s Malta Human Rights Report, and the annual reports of international NGOs like Amnesty International and Human Rights Watch. The EU Fundamental Rights Agency also commissions annual updates on various human rights issues.

Collaborates and co-operated with existing institutions the functions of which are safeguarding specific rights, such as the National Commission for Persons with Disability and the Commissioner for Children

- If the HREC is to cover ‘the full range of human rights instruments’ then the collaboration and cooperation of the HREC, needs to be expanded in order to include, beyond KNPD and the Commissioner for children a series of other bodies including:
 - The Visitors Board for Detained Persons and the Visitors Board for Prisons
 - The Data Protection Commissioner
 - The Office of the Ombudsman

Additional Points:

- Beyond providing a space for civil society, the Human Rights Commission should also be a space for individuals and entities involved in human rights in Malta to develop their capacity. For instance, members of committees such as the Visitors Boards' should be able to receive capacity building from the commission. As such, capacity building for human rights' stakeholders in Malta should be added as a general responsibility of the HREC.

- If the HREC is to be credible, it must abide by the following principles of good governance:
 - Independence
 - Openness and transparency
 - Accountability
 - Integrity
 - Clarity of purpose
 - Effectiveness

- The impact of business on human rights is ever increasing and as such, the HREC should be required to engage with the business community in order to address issues such as diversity management, labour exploitation and the avoidance of child labour.

Looking Ahead – Our Commitment

At The People for Change Foundation we welcome both the impetus provided for human rights through the proposals in this white paper and the opportunity to contribute with our thoughts and suggestions. We reiterate our commitment to working with the Ministry for Social Dialogue and Civil Liberties and all other stakeholders with a view to supporting the further development of these legislative proposals and the achievement of the broader goals set out in the white paper.



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