



ADF INTERNATIONAL

ECOSOC Special Consultative Status (2010)

UNIVERSAL PERIODIC REVIEW – FOURTH CYCLE

**Submission to the 45th Session of the Human Rights Council's
Universal Periodic Review Working Group**

July 2023

Geneva, Switzerland

MALTA

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Introduction

1. ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people.
2. This report outlines how Malta's proposed equality legislation lacks appropriate safeguards for freedom of religion or belief, freedom of expression, as well as freedom of conscience.

(a) Equality Bill

3. In December 2014, Malta's Minister for Social Dialogue, Consumer Affairs, and Civil Liberties initiated a consultation process regarding an Equality Bill.¹ This process resulted in the introduction of two separate bills known as Bill 96 and Bill 97.² The stated objective of Bill 96 is to prohibit discrimination in various spheres of life, both in the private sector and within the public administration. Bill 97 aims to establish the Human Rights and Equality Commission.
4. The dual bill legislation underwent a final round of public consultation before being presented to Parliament in 2017. Discussion commenced in November 2019 and parliamentary debates are still ongoing, indicating that the legislative process is still in progress.

Lack of Safeguards for Freedom of Religion or Belief

5. Numerous stakeholders, including educators, doctors, employers, organisations, parents, faith groups, and schools, have expressed concern regarding Bill 96 in its current form. Their primary concern is that the bill does not acknowledge the distinctive nature of churches and religious organisations, arguing that that these institutions should have the freedom to carry out activities in accordance with the tenets of their respective faith and their fundamental human right to freedom of expression, including religious expression, as protected by international human rights law.³ The Pharmacy Council of Malta, representatives of the medical profession, the Catholic Church, and others have suggested a number of amendments aimed at ensuring that freedom of religion or belief (FoRB) is safeguarded.⁴ Regrettably, these amendments have not yet been considered.
6. Within its section on discrimination, Bill 96 includes a religious exemption: religious institutions or communities would not be discriminatory if they engage in "less favourable treatment on the grounds of belief, creed or religion in relation to the access to its internal workings, the ethos of which is based on that belief, creed or religion".⁵

¹ The National Commission for the Promotion of Equality, Annual Report (2014) <<https://parlament.mt/media/78786/05031.pdf>>.

² Draft Equality Bill (Bill No. 96) <<https://humanrights.gov.mt/en/Documents/Equality%20Bill.pdf>>; Draft Human Rights and Equality Commission Bill (Bill No. 97) <<https://www.parlament.mt/media/101106/4-bill-97-the-human-rights-and-equality-commission-bill.pdf>>.

³ Archdiocese of Malta 'The Church's concern about certain provisions of the Equality Bill' (October 2016) <<https://church.mt/the-churchs-concern-about-certain-provisions-of-the-equality-bill/>>.

⁴ Times of Malta 'Pharmacists join call for conscientious objection in Equality Bill' (October 2020) <<https://timesofmalta.com/articles/view/pharmacists-join-call-for-conscientious-objection-in-equality-bill.823159>>.

⁵ Draft Equality Bill (Bill No. 96), Article 6(i) <<https://humanrights.gov.mt/en/Documents/Equality%20Bill.pdf>>.

A similar exception applies to religious services provided by religious institutions and communities, where less favourable treatment “constitutes a genuine and determining requirement for the propose of a legitimate aim, and the application of that requirement is a proportionate means to achieve that aim”.⁶ In essence, religious institutions have a right to apply differentiated treatment based on specific circumstances, such as the hiring of church staff, in accordance with their religious beliefs.

7. This exemption, however, is significantly weakened by the provision that it “shall not apply in relation to the provision of goods and services by that institution or community...”.⁷ The term “religious services” is thus interpreted in a narrow sense, and only includes convocations for religious purposes. This restriction becomes problematic when it comes to the provision of goods and services that are closely linked to achieving religious aims but are not carried out on behalf of a public authority.
8. Bill 96 thus does not provide sufficient guarantees to FoRB and opens the door to significant state interference in church autonomy. Ethos-based business and associations should be able to preserve their identity and individuals conduct their business in a manner which does not violate their religion or belief.

Lack of Safeguards for Freedom of Expression

9. Advertisement is another area of the bill that lacks appropriate protection for fundamental freedoms, especially freedom of expression. Article 9 of Bill 96 states that “the publication, display or broadcasting of, or the causing to be published, displayed or broadcasted of, any advertisement which promotes discrimination, or which is discriminatory, or which might be reasonably be understood as indicating an intention to discriminate shall be unlawful”.⁸
10. This overly broad prohibition is problematic insofar as the concept of “discriminatory advertisement” is not clearly defined. As accurately highlighted by the Malta Catholic Church in its position paper, it remains highly unclear what constitutes an advertisement that promotes discrimination: “What is being understood as ‘promotion’ is not spelled out at all. For instance, would a display of a notice, billboard or flyer promoting traditional marriage be prohibited, because it can be subjectively perceived as harmful to some groups?”.⁹ Moreover, the definition of “advertisement” provided in this Bill may well include religious activities in which a religious belief or message is communicated.¹⁰

Lack of Safeguards for Freedom of Conscience

11. Bill 96 also fails to address the issue of conscientious objection, creating irresolvable moral dilemmas for religious individuals and entities who would be forced to make choices incompatible with their deeply held beliefs.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid, Article 9.

⁹ The Church in Malta ‘The Equality Bill and Religious Freedom, A Position Paper’ (October 2016) <https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/Church%20in%20Malta%20-%20Position%20Paper%20on%20Equality.pdf>.

¹⁰ Ibid, Article 2.

12. Various critics of the bill, particularly doctors and pharmacists, have put forth proposals for legal safeguards in their professions. They have suggested the inclusion of clauses that would allow them to protect their conscience on religious or ethical grounds. The Medical Council of Malta, the only legally recognized institution responsible for regulating the medical and kindred professions, whose members are partly elected and partly nominated by the government, has issued a statement urging the government to include a conscientious objection clause into the Equality Bills. The Council's appeal has gained support from a myriad of organisations, including the Medical Association of Malta, the Malta Employers' Association, the Association of Independent Schools, and parents' associations.¹¹ However, these proposed legal safeguards have not been integrated into the bill.
13. The need for a conscientious objection clause is especially crucial in light of a provision in Bill 96, which grants it supremacy vis-à-vis other laws, except for the Constitution.¹²

Lack of Legal Certainty

14. Freedom of religion or belief and freedom of expression are severely threatened by the Equality Bill's vague definitions of "harassment" and "victim". Bill 96 lacks sufficient clarity in determining the legal boundaries regarding individuals' actions, especially in relation to the subjective perceptions of an alleged victim of discrimination.
15. According to Bill 96, discrimination may occur in the form of harassment, "which shall be deemed to occur when there is unwanted conduct related to one or a combination of any of the protected characteristics, which has the purpose or effect of violating the dignity of a person, in particular when creating and intimidating, hostile, degrading, humiliating or offensive environment".¹³
16. A victim is defined as "any person who has suffered harm, including physical or mental harm or economic loss, which was directly caused by prohibited conduct under this Act; as well as the immediate family members of a person whose death was directly caused by prohibited conduct under this Act and who suffered harm as a result of that persons' death".¹⁴
17. Therefore, the combination of the vague and subjective terms employed, on the one hand, and the unclear, and in some cases, mutable subjective and objective scope of application, on the other, presents severe challenges in terms of legal certainty, foreseeability and predictability that need to be addressed as a matter of urgency.
18. In particular, the fact that it would be impossible for individuals to have certainty as to whether or not their actions fall within the scope of the Maltese Equality Bill – if adopted in its current form – will make it harder for anyone to defend themselves against claims of discrimination.

¹¹ Times of Malta 'Conscientious objection and the equality bills' (September 2020)

<<https://timesofmalta.com/articles/view/conscientious-objection-and-the-equality-bills-tonio-borg.818872>>.

¹² Draft Equality Bill (Bill No. 96), Article 32(3)

<<https://humanrights.gov.mt/en/Documents/Equality%20Bill.pdf>>.

¹³ Ibid, Article 5(3)(c).

¹⁴ Ibid, Article 2.

The Reversal of the Burden of Proof

19. The presumption of innocence is an essential aspect of the right to a fair trial and the rule of law. In the case of Bill 96, however, there is a shocking departure from this principle. Article 22 of Bill 96 states that:

“In any proceedings under Articles 21 it shall be sufficient for the plaintiff or the person instituting the said proceedings to establish, before the Court or before any other competent authority, facts from which it may be presumed that the person has been treated less favourably, directly or indirectly, on the basis of one or more of the protected characteristics laid down under this Act, and it shall be incumbent on the defendant or on the person against whom such proceedings are brought to prove that there has been no breach of the principle of equal treatment, or that such less favourable treatment was justified in accordance with the provisions of this Act, and the Court or other competent authority shall uphold the complaint if the defendant or the person against whom the proceedings before the competent authority are brought fails to prove that he did not commit an illegal act.”

20. This provision creates inherent risks, particularly when read in conjunction with the vague definitions of “discrimination” and “victim” in the bill. It effectively shifts the burden of proof onto the defendant, requiring them to prove their innocence, while automatically assuming the claimant’s status as a victim of discrimination. Accordingly, disproving subjective perceptions of intimidation or offense would become nearly impossible, as the standard for assessment would be solely based on the alleged victim’s subjective perception.

21. If adopted in its current form, the Equality Bill would establish what can be seen as a "presumption of guilt," which undermines the principles of fairness and impartiality in the judicial process and opens the door to violations of the right to a fair trial.

(b) Recommendations

22. In light of the aforementioned, ADF International suggests the following recommendations be made to Malta:

- a. Ensure that the proposed Equality Act, if adopted, does not undermine human rights and fundamental freedoms as protected under international human rights law and the Constitution of Malta, particularly freedom of thought, conscience and religion and freedom of opinion and expression;
- b. Guarantee the right to conscientious objection in all relevant fields;
- c. Ensure that the right to due process, to a presumption of innocence and to a fair trial, as guaranteed under the International Covenant on Civil and Political Rights, is fully respected in existing and new legislation;
- d. Conduct a comprehensive review of domestic legislation in order to enhance protection for the human rights to freedom of thought, conscience and religion, and freedom of opinion and expression.



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