Strasbourg, 16 May 2018 **CDL(2018)014***

Opinion No. 920 / 2018 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MALTA

DRAFT OPINION

ON THE DRAFT ACT AMENDING THE CONSTITUTION, ON THE DRAFT ACT ON THE HUMAN RIGHTS AND EQUALITY COMMISSION, AND ON THE DRAFT ACT ON EQUALITY

on the basis of comments by

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I. Introduction

1. By letter of 8 March 2018, Dr Helena Dalli, the Minister for European Affairs and Equality of Malta, requested an opinion from the Venice Commission on the Draft Act Amending the Constitution (introducing the Human Rights and Equality Commission) (CDL-REF(2018)019), the Draft Act on the Human Rights and Equality Commission (CDL-REF(2018)013), and the Draft Act on Equality (CDL-REF(2018)014).

2. Ms Aurela Anastas (member, Albania), Mr Johan Hirschfeldt (substitute member, Sweden), Ms Monika Hermanns (substitute member, Germany), Mr Niall Crowley (expert, Ireland), and Ms Laurien Koster (expert, the Netherlands) acted as rapporteurs for this opinion.

3. On 3-4 May 2018, a delegation composed of Mr Hirschfeldt, Mr Crowley and Ms Koster, accompanied by Mr Grigory Dikov, legal officer at the Secretariat, visited Malta, and met with the representatives of the State authorities, politicians, NGOs and other stakeholders. The Venice Commission is grateful to the Maltese authorities for the excellent preparation of the visit.

4. *This Opinion was prepared on the basis of the contributions of the rapporteurs, was examined by the Sub-Commission on Fundamental Rights on …, and was subsequently adopted by the Venice Commission at its … Plenary Session (Venice, … 2018).*

II. Scope of the opinion; standards

5. The Draft Act Amending the Constitution introduces Article 64B, which establishes the Human Rights and Equality Commission (the HREC) as a constitutional body with a mandate in the field of equality and non-discrimination.

6. The Draft Act on the HREC describes the functions, composition, and powers of this body, as well as the procedures before it.

7. The Draft Equality Act develops the principles of non-discrimination and equality and extends them to several selected areas (employment, education, access to goods and services, etc.). It will be applied both vertically (between the State and the private actors) and horizontally (between private actors).

8. The present opinion is based, first of all, on relevant Council of Europe and other international human rights standards,[1] in particular, on the European Convention on Human Rights (the ECHR),[2] the case-law of the European Court of Human Rights (the ECtHR), and on the general policy recommendations of the European Commission against Racism and Intolerance (the ECRI). Second, the opinion refers to the legislation of the European Union (EU), in particular the European Charter of Fundamental Rights (European Charter), relevant EU directives, and the case-law of the Court of Justice of the European Union (the CJEU). Third, the opinion is based on the previous opinions of the Venice Commission in this field, and on good national practices.

[1] Most importantly, the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the opinion also relies on Paris Principles on the national human rights institutes (NHRI, hereinafter "the Paris Principles") and the general observations of the Sub Committee of Accreditation of The International Coordinating Committee of National Institutions for de Promotion and protection of Human Rights (ICC).

[2] Non-discrimination provision of the ECHR (Article 14 of the Convention and Protocol no. 12 thereto) are applicable primarily to the relations between public authorities and private persons. However, there is certainly an overlap between the Convention and the Draft Act. The Draft Act regulates the behavior of both public administration and private actors. The ECHR essentially focuses on the State's interference with the rights, but the ECtHR developed a theory of "positive obligations" which give the Convention some horizontal effect (albeit limited). Thus, it is not excluded that the Draft Act and the Convention will have to be applied simultaneously, and, therefore, need to be in harmony.

9. The scope of this opinion covers only the three Draft Acts submitted for review. Thus limited, the opinion does not constitute a full and comprehensive review of the entire legal and institutional framework which regulates issues of equality and non-discrimination in Malta. The opinion does not cover all aspects of the Draft Acts, but raises key issues and provides indications of areas of concern.

III. The Draft Act amending the Constitution and the Draft Act on the HREC

A. Outline of the functions and the composition of the HREC

10. Under the Draft Act on the HREC, this body is established to promote and protect human rights and the right to equal treatment and non-discrimination.[3] The notion of "human rights" is defined with reference to the constitutional rights, rights enshrined in the ECHR, as well as human rights enshrined in any other international treaty, "in so far as [such rights] are enforceable by any person according to, and as part of, the law of Malta, and those principles and, or practices recognised by the jurisprudence of the Maltese and international courts" (Article 2).[4]

11. Under Article 4 of the Draft Act on the HREC, it will be composed of a chairperson (the Commissioner), and "not less than eighteen but not more than twenty other members". Out of those 18-20 members 8 are *ex officio* members which represent Government-appointed commissioners on various human rights issues. The other 10 (or 11, or 12) are elected members:[5] they are elected by Parliament for four years from a list composed by the Speaker, following public consultations. For the Commissioner, nomination is made by the Minister.[6] All elected candidates are finally appointed by the President, who must act "in accordance with a resolution" of Parliament. "Ordinary" elected members of the HREC are elected by simple majority, whereas the Commissioner is elected by 2/3 majority (see the last phrase of Article 6 (2)). The HREC designates one of its members as a Deputy Commissioner, who should also be approved by a 2/3 majority in Parliament. The removal of the members of the HREC (including the Commissioner) is possible by simple majority in Parliament.

12. The HREC is to be a multi-mandate body, having a wide range of functions including: to educate the general public about non-discrimination and equality issues, to facilitate the implementation of the equality legislation, to participate in the development of State policies in this field and to monitor their implementation, to prepare reports and studies and make recommendations, to cooperate with the civil society, to receive complaints from the victims of human rights abuses or of discrimination and to provide assistance, including legal assistance, to them (Article 13). Most importantly, the HREC will establish and oversee a distinct Human Rights and Equality Board (the Board).

13. The task of the Board will be to investigate and decide on cases of alleged discrimination and human rights abuse (Article 22 of the Draft Act). Since the Draft Equality Act is to be applied horizontally (see below), this implies that the Board will be dealing with complaints directed against the State or against private persons.

14. The Board will be composed of the Commissioner of the HREC on an *ex officio* basis, a person holding a degree in law and having experience in issues relating to human rights and the principle of equal treatment, and three other persons who shall be suited to deal with issues

[3] With the establishment of the HREC, the functions of the former National Commission for the Promotion of Equality for Men and Women shall be terminated and transferred to the HREC.
[4] It is not entirely clear whether this qualifier - that the rights should be recognised in the Maltese law - relates only to the fundamental rights guaranteed by other international treaties, or also covers those rights which are protected by the Constitution or by the ECHR.
[5] The Venice Commission does not understand why the Draft Act does not fix the number of elected members of the HREC; the proposed solution - to have a variable number of elected members – appears quite unusual.
[6] The Minister responsible for the equality matters

relating to human rights and the principle of equal treatment, having professional experience in working within the human rights sector for at least five years (Article 23 (1)). The members of the Board (except the Commissioner) are appointed by the HREC, by a qualified majority of votes. They hold their office for a term of four years and may be re-appointed for one further term at the end of their term of office (Article 23 (3)). They can be dismissed by a majority of 2/3 of the Commission, no substantive conditions being attached to this dismissal. The Commissioner may be dismissed by a simple majority of Parliament, with the President's counter-signature, for "unfitness" to continue in office.

15. In respect of the complaints lodged before it, the Board will have important investigative powers. Thus, in the process of such investigations the Commissioner (who is the chair of the Board and of the HREC at the same time) will have the power to enter private premises without court warrant (except private homes), and "inspect" them as well (Article 25 (a)), request and inspect documents, subpoena witnesses (Article 33), etc. During such investigations, the Board will be empowered to order binding interim measures in certain circumstances.

16. Most importantly, following the examination of complaints, the Board will be entitled to make binding orders and request reparations to be made to the victims, award pecuniary and non-pecuniary damages (the latter up to a limit of 10.000 Euro). Decisions of the Board can be appealed to the Court of Appeal (Superior Jurisdiction).[7] Where the decision of the Board is ignored and no appropriate action is taken, the Board can impose a penalty up to a limit of 20.000 Euro in sum (Article 39 (1)) or 500 Euro per day (Article 39 (2)).

B. General overview of the proposed institutional model

17. There is a range of acceptable models of organisation of national human rights institutions and equality bodies.[8] The Draft Act on the HREC creates a centralized and largely autonomous human rights and equality body with broad competencies and powers. This is a welcome development; the constitutional entrenchment of such body is also positive, since it permits to preserve the HREC from political fluctuations.[9]

18. However, at least in one respect Malta goes further than what is *required* by the international and European standards with the establishment of the Board under the auspices of the HREC, and the powers given to the Board. As it will be demonstrated below, while the allocation of some adjudicative functions to equality bodies is suggested by the General Policy Recommendations (ECRI GPR) No. 2, the features of the Board and the extent of the powers attributed it to raise questions from a constitutional perspective and from the perspective of international human rights law.

[7] See Article 42 (1) of the Draft Act on the HREC.

[8] Thus, the ECRI in GPR No. 2 allows that equality bodies can take different forms including single ground or multi-ground equality bodies and stand-alone or multi-mandate bodies and under § 10 that they should be assigned functions to promote equality and prevent discrimination and to support people experiencing discrimination and pursue litigation on their behalf. In addition, they may be assigned the function to take decisions on complaints (§ 10 (c)). EU Directive 2006/54/EC on equal treatment of men and women in employment provides that bodies overseeing implementation of the equal treatment principle "may form part of agencies with responsibility at national level for the defense of human rights or the safeguard of individuals' rights" (Article 20 (1)). The Vienna Declaration and Programme of Action (1993) recognises the right of each state to choose the legal framework for NHRIs that is "best suited to its particular needs at the national level" (§ 36).

[9] CDL-AD(2004)041, Joint Opinion on the Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, § 9.

C. Role of the Board in the proposed institutional model

19. In the proposed model, the Board, appointed by the HREC and institutionally connected to it, has broad investigative powers and enjoys a very wide competency which covers potential human rights violations and cases of discrimination.[10] The notion of "human rights" is defined in Article 2 of the Draft Act and includes (i.e. is not limited to) all basic rights and freedoms guaranteed by the Constitution and the ECHR. The Commissioner, as chair of the Board, will have investigative powers similar to those of a prosecutor or even judge – for example, the power to enter and "inspect" private premises (with some exceptions), to seize documents, and to summon witnesses.

20. Significantly, the Board will be entitled to make awards of civil nature (pecuniary and non-pecuniary damages), and to impose financial sanctions of punitive nature (for non-compliance with its rulings. Its jurisdiction will be alternative to the jurisdiction of the Civil Court (see Articles 27 and 28 of the Draft Equality Act). In sum, in many respects the Board will have the same powers as a court, and a very broad material competency (all human rights and equality matters). The Venice Commission will examine this situation from two points of view – constitutional and international.

1. From the constitutional perspective

21. The Venice Commission notes that new Article 64B is not very precise: it mentions that the HREC will have the power to *investigate* alleged cases "relating to equal treatment and the principle of non-discrimination". At the same time, the mandate of the HREC under the Draft Act on the HREC is larger – it will also deal with human rights abuses; this also follows from the name of this body. Furthermore, under the Draft Act on the HREC, the function of *investigation* belongs not to the HREC itself, but to the Board. Finally, pursuant to the Draft Act on the HREC, the Board will have the power not only to investigate, but also to render binding and enforceable decisions on the merits in individual cases. This *adjudicative* power of the Board – omitted from new Article 64B – is, however, the most important and problematic element of the whole reform.

22. ECRI GPR No. 2 states that an equality body "may also be assigned […] the function to take decisions on complaints (decision-making function)", and that the decision-making function "can be shared between equality bodies and the judiciary or be assigned entirely to the judiciary" (see § 10).[11] The Venice Commission, for its part, endorsed the establishment of specialised courts, operating in clearly defined areas of law which require special training and skills from the judges.[12] So, in principle, entrusting an equality body with a quasi-judicial function in a particular field is an acceptable solution.

23. However, specialised courts or other special-purpose adjudicative bodies should not undermine the authority of the basic judicial structures set out in the Constitution. The Maltese Constitution leaves space for other "adjudicative authorities" which are not ordinary courts but which may exercise judicial functions within the limits set by law.[13] At the same time, Article 46 of

[10] See Article 14 of the Draft Act on the HREC: the Board may "investigate any matter that concerns the breach of human rights and, or of the principle of equal treatment and non-discrimination", with human rights defined in terms of Article 2 of the Draft Act on the HREC.

[11] See also p. 8 of the FRA report on "Access to justice in cases of discrimination in the EU – Steps to further equality", where FRA recommended to "empower quasi-judicial-type equality bodies and other administrative/judicial institutions to take legally binding decisions. This would include the ability to issue proportionate, dissuasive and effective decisions, including awarding compensation and targeting systemic problems."

[12] See, for example, CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences).

[13] The general rule (giving the jurisdiction over human rights cases to the Civil Court) is applied, according to the Constitution, "without prejudice to any other action with respect to the same matter that is lawfully available" (Article

the Constitution of Malta provides that the Civil Court, First Hall, has the "original jurisdiction" to hear complaints based on the human rights provisions of the Constitution, including the non-discrimination provision contained in Article 45. On appeal, such cases are heard by the Constitutional Court. The question is whether the proposed model for the Board fits well with those constitutional provisions.

24. The reference to "human rights" in the title of the HREC in new Article 64B of the Constitution implies that its mandate extends to the area of human rights protection. This reading is confirmed by the proposed Draft Acts.[14] Thus, the jurisdiction of the Board overlaps with the jurisdiction of the Civil Court. The *extent* of this overlap will depend on several factors – for example, whether the Constitution guarantees horizontal effect to certain human rights (and in particular of the non-discrimination rule), whether the legal protection by the Civil Court covers both parties in human rights cases, whether the Civil Court hears only human rights cases opposing a private person and the State, or also cases between private persons, etc. In any event, the drafters were aware of the possibility of an overlap and provided that the Board and the Civil Court will have *alternative* jurisdiction over human rights and equality matters (see Articles 16. 28 (b) and (d), of the Draft Act on the HREC; see also Article 27 (1) of the Draft Equality Act). They also provided for two distinct chains of appeal: while the appeals against the decisions of the Civil Court in human rights cases lay within the Constitutional Court, the appeals against the decisions of the Board will be examined by the Court of Appeal.

25. As explained to the rapporteurs, in the Maltese system the Court of Appeal is composed of two chambers, one of which may also act as a Constitutional Court. The Draft Act does not provide that appeals against the decisions of the Board shall be decided by the "constitutional" chamber of the Court of Appeal. That means that, once the Board starts operating, very similar cases may end up in two different highest instances, which may lead to incoherence in the case-law, and, in any event, the parties to a dispute will have unequal rights to appeal.

26. In the opinion of the Venice Commission, this model may deprive the defendants of the "natural judge" and limit their access to a court.[15]. In fact, it will be for the plaintiff to choose whether to go to a Civil Court or to the Board; the defendant will have to follow the choice of the plaintiff. The Venice Commission recalls that, under the Draft Equality Act, the defendants may also be private individuals or private entities. Even if the concept of a "natural judge"[16] is not recognised in the Maltese legal theory, this situation puts the defendant at a disadvantage vis-à-vis the plaintiff. In addition, the defendant, in cases lodged before the Board, will not be able to appeal specifically to the Constitutional Court (since the decisions of the Board are appealed to the Court of Appeal) – which is a right guaranteed by the Constitution. These questions would not arise if the jurisdiction of the Board depended on the agreement of both parties in each case, or if the defendant was a State entity.

27. During the meetings in Malta, the underlying logic of this reform was explained to the rapporteurs. The current situation is characterised by high levels of under-reporting in relation to

46 (1)). Furthermore, the Civil Court may decline jurisdiction where "adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law". (Article 46 (2)). Article 99 of the Constitution stipulates that "there shall be in and for Malta such inferior courts having such powers and jurisdiction as may be provided by any law for the time being in force in Malta". Article 39 (2) of the Constitution proclaims that "any court or other adjudicating authority prescribed *by law* [italics added] for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial".

[14] See Article 27 (1) and Article 28 (1) of the Draft Equality Act; see also Articles 15, 16, 18, 19 and 22 of the Draft Act on the HREC.

[15] In addition, introduction of this new legal remedy, which is alternative to the Civil Court, should also be assessed from the standpoint of Article 13 of the ECHR, which requires the States to offer "effective remedies" against human rights violations.

[16] See CDL-AD(2017)031, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, § 87.

cases of discrimination and of human rights violations. Under-reporting is a product both of fears and perceptions among those experiencing discrimination and of complexities and barriers in the pathways to justice. The Board is thus expected to play a more pro-active role in the proceedings; there will be no need to be represented by a lawyer, legal costs will be consequently lower and the members of the Board will have a better knowledge of the characteristics and effects of discrimination. The Board is also expected to provide for a more accessible, informal and speedy legal avenue that breaks down these fears and perceptions.

28. The Venice Commission is cognizant that the effective protection of human rights and promotion of equality may be impeded by the existing flaws of a judicial system, such as high legal costs, excessive length of proceedings, lack of specialised training of judges, etc. However, such flaws should be fixed ultimately within the judicial system itself. There is a risk that the newly created Board will absorb most of the judicial powers of the Civil Court. If the Board is seen as a more "complainant-friendly" institution, or indeed more accessible, informal and speedy to the benefit of both parties, most of the human rights and equality cases (which are often the most high-profile and important cases in a legal system) will go there, and the Constitutional provision granting the Civil Court and the Constitutional Court the "original jurisdiction" over human rights disputes will become meaningless. The overlap of jurisdiction of the Civil Court and of the Board on such a broad range of issues may create other problems as well.[17]

29. In sum, the Venice Commission considers that giving adjudicative powers to the Board in the manner designed in the Draft Act may raise serious questions from the constitutional perspective. In the opinion of the Venice Commission, if the drafters wish to maintain the adjudicative function of the Board, they need to set up distinct limits for its quasi-jurisdiction, reconfigure its institutional architecture and revise the procedure before it (on this see more in the following section). The final say in these constitutional questions belongs nonetheless to the legislator and, ultimately, to the Constitutional Court of Malta.

2. From the perspective of the ECHR

30. The proposed model must also be scrutinized against international human rights standards, namely Article 6 of the ECHR which guarantees the right to an "independent and impartial" tribunal and to a "fair trial".

31. The Venice Commission recalls that "for the purposes of Article 6 § 1 of the Convention a tribunal need not be a court of law integrated with the standard judicial machinery [reference omitted], since a tribunal, within the meaning of Article 6 § 1, is characterised in the substantive sense of the term by its judicial function, that is to say, the determining of matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of requirements – independence, in particular of the executive, impartiality and guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself [reference omitted]".[18] Therefore, if the Board is to be considered as a "tribunal" within the meaning of Article 6 of the ECHR, this, normally, means that it should possess all basic characteristics of "independence and impartiality" and that in its proceedings it should provide "fair trial" guarantees.

[17] For example, if the same act of discrimination affects two or more people, they may choose different legal avenues. Indeed, under the Draft Act (Article 28 (1)) the Board may refuse to hear the case which is already being examined, in substance, by the Civil Court, but this is only the right of the Board and not a legal obligation. Interestingly, under Article 46 the Constitution the Civil Court may decline its jurisdiction "in any case where [the Civil Court] is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law." Thus, the same case may go back and forth between two jurisdictions.

[18] See, for example, ECtHR, *Olujić v. Croatia*, no. 22330/05, 5 February 2009, § 37; in this case the ECtHR decided that the National Judicial Council, in determining disciplinary liability of a judge, exercised judicial functions and was a "tribunal" for the purposes of Article 6 § 1 of the Convention and thus had to satisfy criteria of impartiality and provide for fair trial guarantees – and that despite the availability of an appeal to the Constitutional Court (see § 37).

32. It is important to note that under Article 42 of the Draft Act on the HREC decisions of the Board are appealable to the Court of Appeal. As repeatedly held by the ECtHR, "where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has 'full jurisdiction' and does provide the guarantees of Article 6 § 1".[19] That being said, the case-law of the ECtHR in this respect is evolving and is open to interpretations.[20]

33. However, there are issues in relation to the manner in which the Board is to operate that would need to be addressed. The availability of an appeal to the court of law does not seem to be sufficient, in the circumstances. It is not entirely clear whether the Court of Appeal will have full jurisdiction over the decisions of the Board. The Board may be considered[21] as having powers in the criminal sphere.[22] Finally, the Maltese Constitution appears to put "courts" and "other adjudicative authorities" in the same category insofar as it concerns the requirements of "independence and impartiality". Thus, Article 39 (2) of the Constitution proclaims that "any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial".

34. In such circumstances, the Venice Commission is led to consider that the Board should correspond to basic criteria for independence and impartiality and should provide, in its proceedings, guarantees of fair trial.[23] From this perspective, the model in the Draft Act on the HREC requires serious improvement.

35. None of the Board members is a judge (see Article 23 of the Draft Act). Only one of the members is required to have the qualification of being a lawyer (while additional qualifications and skills similar to those needed for judicial appointments are not required). The status – as regards the method of their appointment, remuneration, stability of tenure, early removal and discipline – of other Board members is far from the status of judges.[24] Indeed, given the special mandate of the Board, it should be possible to require from the members of the Board, in addition to ordinary judicial qualifications, some special training or experience in the field of equality and non-discrimination. Alternatively, the Board may include lay members with appropriate qualifications; however, the core of the Board composition should remain judicial in character.

36. The Board has strong institutional links with the HREC. As it will be shown below, while the HREC enjoys some autonomy, it is not independent to the extent that the governing majority in Parliament has decisive influence on the appointment of nearly all its members (see paragraphs 47 et seq. below). Further, the HREC plays a double role vis-à-vis the Board. The Draft Act allows the HREC to provide assistance to victims of human rights violations and discrimination (Article 13 (l)). Under Article 15 the HREC, acting *proprio motu*, may initiate proceedings before the Board. More generally, the HREC is afforded promotional functions including contributing to the State's policy in this field. These functions are important, but they require that the HREC is to

[19] *Fazia Ali v. the United Kingdom*, no. 40378/10, 20 October 2015, § 75, with further reference to *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A no. 58.

[20] See the discussion in CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, § 51, with further references to *Albert and Le Compte v. Belgium* and *Olujić v. Croatia*.

[21] Given its power to impose fines, in the maximum amount of 20.000 Euro, and given the punitive character of such fines.

[22] See, for applicable principles, *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73

[23] These guarantees of "independence and impartiality" should not necessarily be the exactly identical for the Board and for the ordinary courts. Ordinary courts' judges may enjoy a different status from the members of the Board - for example, have tenure until retirement (see Article 100 of the Maltese Constitution). That being said, the status of the members of the Board, conditions for their appointment and removal should be sufficient to guarantee their independence and impartiality.

[24] It is not excluded that the HREC may still play some limited role in the governance of the Board and appointment of some of its members.

play a pro-active role, and will not therefore be entirely impartial. At the same time the HREC is responsible for appointing four members of the Board (out of five), and "ensuring that the Board is performing its duties in accordance with the provisions of this Act" ((Article 13 (k)). The Commissioner plays the double role of chairing both organs. From the financial and administrative point of view, it is not clear whether the Board has sufficient autonomy from the HREC itself – it appears that the Board's budget will be managed by the HREC.

37. The Venice Commission repeats that the features of a Board with adjudicative functions requires further attention from the constitutional perspective. Assuming that this model can be accommodated with the Constitution, the members of the Board should have the same (or similar) qualifications and experience as required from the candidates to judicial positions (with additional requirements related to the knowledge of the non-discrimination, equality and human rights matters). The law should provide that the members of the Board have the same functional immunity as judges. The term of mandate of a member of the Board should be extended, and this mandate should be, in principle, non-renewable.[25] There should be a clearer institutional separation between the Board and the HREC.

38. A further issue of concern is the procedure of examination of individual complaints before the Board. It is not entirely clear, as it is not specifically provided, whether the proceedings before the Board are public and adversarial, and whether the decisions of the Board have to be published. If the Board is dealing with "civil rights and obligations" (which it does), proceedings before it should offer all the guarantees of "fair trial" required under Article 6 § 1 of the Convention – and this is even more important given the power of the Board to impose punitive fines, which may bring the whole situation within the ambit of Article 6 § 3 of the Convention, which imposes additional procedural requirements.

39. In sum, the Board's adjudicative functions extend to the determination of "civil rights and obligations" (and, probably, to the determination of criminal charges as well); however, having regard to its composition and to the status of its members, the Venice Commission is of the view that the Board, as currently proposed, is not sufficiently independent within the meaning of Article 6 of the ECHR, and the proceedings before it do not offer all the guarantees of a fair trial.[26]

D. Composition, functions and powers of the HREC

40. In this section the Venice Commission will examine the institutional and procedural characteristics of the HREC alone, setting aside its relations to the Board and the adjudicative function of the latter, those issues having already been addressed above.

1. Proper balance between "human rights" and "equality" mandates

41. The HREC is entrusted with two mandates: human rights and equality. In the preamble, the equality mandate seems to be diminished and accorded a subsidiary status ("the promotion and protection of human rights *including* [italics added] the right to equal treatment and non-discrimination").The key standard in relation to multi-mandate bodies is GPR No. 2 on Equality Bodies of ECRI. This provides that the equality mandate of such bodies should be established in terms of promotion and achievement of equality, prevention and elimination of discrimination and intolerance, including structural discrimination and hate speech, and promotion of diversity and of good relations between persons belonging to all the different groups in society (Article 4a). This is the first international standard to address the particular challenges that face multi-mandate

[25] The Venice Commission refers the Maltese authorities to the European standards and best practices in this matter, summarized in the Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004).

[26] And, as the Venice Commission indicated above, it is not certain whether these flaws are remedied by the availability of an appeal to a court of law against the decisions of the Board.

bodies in this field. It is not clear in the Draft Act in what manner time and resources are to be allocated between the two mandates of the HREC. GPR No. 2 sets out the need for such bodies to allocate appropriate human and financial resources to each mandate, provide clear leadership, promotion and visibility for the equality mandate and give adequate prominence to the work done under the equality mandate in reporting arrangements (Article 7).

42. This may be achieved in different ways. Thus, Article 5 of the Draft Act might require that a balance of experience and expertise across the fields of equality and human rights is to be achieved in the final composition of the HREC. Article 20 of the Draft Act might set out that the annual report of the HREC should include a report on the work done under each of the two mandates, and contain separate recommendations for action to improve the situation in each of the fields. The allocation of resources to its different functions and duties – within the limits of the general budget of the HREC – should rest essentially in the hands of the HREC itself. Otherwise the HREC's independence and its power to set priorities in this field may be compromised.[27] The legislation could encourage a balance in the allocation between the two mandates.

2. Functions of the HREC

43. New Article 64B of the Constitution mentions only the function of the HREC to "investigate alleged cases relating to equal treatment and the principle of non-discrimination". The entrenchment of the HREC in the Constitution is important but it should refer to the broad mandate it is to be granted to protect human rights, promote equality and combat discrimination. The title of the body implies that it will deal with a broad range of issues in the area of human rights and equality. It is unclear how the mandate and powers of the HREC correlate with those of other bodies which have similar or overlapping mandates and powers and which are set out in the Constitution, such as, for example, the parliamentary Ombudsman (Article 64A), the Public Service Commission (Articles 109 et seq.; this Commission deals with appointments of civil servants) and the Employment Commission (see Article 120 of the Constitution; the latter has an explicit constitutional mandate to prevent discrimination on the basis of political opinions). This should be clarified; otherwise the co-existence of several human rights and equality bodies may lead to an inefficient use of resources, and to the confusion and tactical or unwise choices amongst the complainants.

44. The functions of the HREC described in Article 13 of the Draft Act on the HREC are largely in accordance with those set out for equality bodies in the EU equal treatment directives. There are, however, some differences between Article 13 of ECRI GPR No. 2 ("Promotion and prevention competencies") and Article 13 of the Draft Act ("Functions of the Commission"). Thus, for example, the competencies to conduct inquiries and conduct and commission research (see Article 13 (c) and (d) of ECRI GPR No. 2), and to develop and support the implementation of standards for good practice, are not set out in the Draft Act with sufficient clarity.[28] There are further divergences from Article 14 of ECRI GPR No. 2 ("Support and litigation competences"). Another important missing element relates to the conciliation procedures which an equality body should normally be able to initiate, [29] and engaging in *amicus curiae* interventions. [30] The requirement of impartiality in Article 3 (2) of the Draft Act is problematic where it refers to the implementation of these particular functions. Further, it would be important to set out the

[27] It is unavoidable that the HREC will need to have a yearly budget approved by Parliament. It is also natural that this budget will set some priorities in spending; however, the budget should provide for significant flexibility, so that, within its limits, the HREC is capable of allocating resources according to its current needs.

[28] The Draft Act defines functions and powers of the HREC in a broad and all-encompassing manner. Thus, Article 13 (d) provides for submission of advisory reports which may involve research; Article 14 permits the HREC to "freely consider and report upon questions falling within its competence", which implies the power to conduct inquiries. It should be possible to interpret provisions of the Draft Act in the light of the relevant ECRI recommendations.

[29] Ibid, Article 14b

[30] Ibid, Article 14e

functions in Article 13 in terms of the broad mandate which is afforded to the body under the Draft Act (to protect human rights, promote equality and combat discrimination), and not just in the narrower terms of equal treatment.

45. A function which cannot be easily inferred from the Draft Act relates the fulfillment of the equality duties set out in Articles 14, 22, 23, 24, and 25 of the Draft Equality Act. As shown below, the "equality duties" are formulated in the Draft Equality Act as a general requirement, and not as a specific legal obligation with sanctions. However, such general requirement should result in practical steps taken by the relevant entities to study the issue, develop responses to fulfill the goals of the equality duties, and implement them. It would be important to involve the HREC in enabling this process. It is proposed to supplement Article 13 of the Draft Act with the function of the HREC to participate in "setting standards for the implementation of positive duties in relation to equality and human rights".[31]

46. GPR No. 2 on Equality Bodies in Article 4 (a) suggests that the equality body should include "elimination … of hate speech". The Draft Equality Act contains some regulations which address "hate speech" – for example, it prevents discrimination by harassment (which may sometimes amount to hate speech) and discriminatory statements in advertisement. The Venice Commission is mindful that grave forms of hate speech may be treated as crimes and hence fall within the competencies of police and prosecution services. The HREC could deal with combatting hate speech in general, without, at the same time, interfering in the exclusive domain of the prosecution and police authorities.

3. Composition of the HREC and status of its members: independence, effectiveness, accountability

47. The HREC is a relatively large body, especially for Malta (where Parliament has only 67 members, for example). This is partly due to the inclusion of eight *ex officio* members. This would seem designed to serve coordination between related bodies. However, the large size of the HREC may negatively affect its efficiency.[32] The goal of coordination may be better achieved otherwise (for example by creating a consultative standing committee including proposed *ex officio* members).

48. ECRI GPR No. 2 provides that an equality body should be "fully independent at the institutional and operational level". Section VIII of GPR No. 2 details minimal guarantees which should ensure such independence. The Venice Commission stresses that the "independence" in this context should not be necessarily equated to the "independence" of a judicial body (or a judicial governance body, like a judicial council). Thus, for example, the Paris Principles mention only pluralist composition of this body (reflecting the large spectrum of opinions and backgrounds), stability of mandate, appropriate infrastructure and funding.

49. The Draft Act contains several important safeguards which guarantee independence of the HREC. Thus, the HREC will have legal personality and a separate budget, to be approved by Parliament. The members of the HREC shall not be subject to the direction or control of any other

[31] See Article 13i of GPR No. 2

[32] Principles Relating to the Status of National Institutions (Paris Principles) of the UN state that the "national institution shall have an infrastructure which is suited to the smooth conduct of its activities" (Article 2 of the section on composition and guarantees of independence and pluralism). The Paris Principles suggest that national institutions should "maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions)" (point f under the section on methods of operation). The question is whether "maintaining contact" requires having ex officio members. ECRI GPR No. 2 also underpins the importance of coordination but recommends a different approach to that suggested in the Draft Act on the HREC. It recommends the use of cooperation agreements with organisations with similar objectives and action to achieved shared understanding of equality issues among them (Article 13o).

person or authority in the exercise of their functions under this Act (Article 3 (3)). The HREC will be free to define its own agenda and able to set its own priorities and start investigations *proprio motu* (Article 14 (a)). The members of the HREC will not, throughout their term in office, hold any position which is incompatible with the correct performance of their official duties or with their impartiality and independence. All that is positive.

50. Most of the elected members of the HREC are selected by a simple majority of Parliament. Only the Commissioner (the chair of the HREC) is selected by a two-thirds majority. The Venice Commission did not examine in detail how the *ex officio* members of the HREC are appointed, but from the explanations received during the visit it appears that all of them are Government-appointed. Thus, the overwhelming majority of the members of the HREC will receive their mandate from the governing majority.

51. The Venice Commission recalls its recommendations in respect of "the former Yugoslav Republic of Macedonia": "Given the important responsibilities and powers assigned to the Commission, the authorities are invited to consider the election of its members by a higher majority in the Parliament (for instance by a two-third majority), coupled with a mechanism against possible deadlocks".[33]

52. This recommendation stands; the governing majority has to reach a compromise with the opposition in appointing the members of the HREC. Other means of achieving this goal may also be devised instead of a qualified majority. In addition, the Draft Act could be more detailed on the process of shortlisting potential candidates in order that they are not chosen essentially along political lines. Little is said on the nomination of the HREC members other than the presentation of a list of nominees to Parliament "following a public consultation" (Article 6 (1)). ECRI GPR No. 2 recommends that appointment be made on foot of transparent, competency-based and participative procedures.[34] The Draft Act does not ensure *per se* "the pluralist representation of the social forces involved in the protection and promotion of human rights" such as NGOs active in the fight against discrimination, professional organisations, universities, etc. This is a key criterion set out by the Paris Principles. The Draft Act should be complemented in these directions.

53. The mandate of the members of the HREC may be terminated in certain pre-defined situations or when they are considered to be unfit to perform their duties (Article 10 (1) (c)), in cases of incompatibility, upon the resolution adopted by Parliament and the decision of the President. The notions of "unfitness" and "incompatibility" used in the text of the Draft Act open way to dismissal for reasons which are essentially political. It is necessary to amend this provision in order to protect the members of the HREC against arbitrary dismissals and develop some detail on the substantive conditions for dismissal. In particular, it is not clear if the member concerned will have the right to be heard and to challenge the dismissal before a court, whether the decision should be reasoned, etc. The Draft Act should provide for functional immunity for the members of the HREC in carrying out their functions. Furthermore, "as regards the dismissal of the members of the Commission, the majority required within the Committee on Elections and the Parliament should be at least equal to (and preferably higher than) the majority required for election."[35]

54. Article 50 requires the HREC to provide Parliament with a "business plan", which is a pre-condition for approval of the budget of the HREC. Whereas it naturally belongs to Parliament to define the level of funding of the HREC, the HREC should retain sufficient autonomy in setting its agenda and defining its priorities. Article 50 should not therefore refer to the "approval of business plan" by Parliament and should focus on the presentation and approval of a budget.

[33] CDL-AD(2018)001, § 52
[34] Article 23 of ECRI GPR No. 2 (on Equality Bodies to combat racism and intolerance at national level)
[35] CDL-AD(2018)001, § 52

IV. The Draft Equality Act

55. As regards the Draft Equality Act, the Venice Commission recalls that the hallmarks of a democratic society are pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities.[36] The Draft Equality Act serves to advance those goals, and this should be praised.

A. General description of the Draft Equality Act

56. The Draft Equality Act prohibits discrimination on the basis of a number of "protected characteristics"[37] in a broad range of sectors, from employment to education.[38] It enumerates forms of discrimination,[39] and describes situations where a distinction on the basis of a "protected characteristic" does not amount to discrimination.[40] Significantly, it generalizes the *horizontal effect* of the non-discrimination and equality principles, which will henceforth be applied to the relations between private actors.

57. One element of inspiration for the Draft Equality Act has been the ratification by Malta of Protocol no. 12 to the ECHR.[41] The Draft Equality Act also absorbed many essential principles and approaches contained in the EU directives.[42] The Draft Act is ambitious in covering a broad range of grounds of discrimination in a variety of sectors.[43] However, the drafters had to accommodate concepts and terminology developed for different purposes. Thus, while the ECHR non-discrimination provisions are very general, the EU directives are more sector-specific and designed to prevent discrimination on certain specific grounds and in certain specific areas.

58. The drafters have overcome this difficulty by formulating the Draft Equality Act in relatively broad terms. It sets important general principles and formulates few specific rules. The success of this Draft Act, if adopted, will depend on future by-laws and on the practice of its implementation. This is of some concern given that the Board, composed entirely of lay persons (i.e. not judges), will have the task of interpreting the general principles contained in the Draft Act. However, as the Venice Commission held previously, "whether an act on discrimination issues should be abstract or concrete depends on national legal culture and context, on the state of the national legal community, on the administration and the courts."[44]

59. Once adopted, the Draft Equality Act will have to co-exist with other pieces of legislation which touch upon equality and non-discrimination.[45] Thus, for example, the Equal Opportunities (Persons with disability) Act of 2000 (as amended) prohibits discrimination on the basis of disability. Discrimination in employment is prohibited by the Employment and Industrial Relations

[36] CDL-AD(2013)022, Opinion on the issue of the prohibition of so-called "Propaganda of homosexuality" in the light of recent legislation in some Council of Europe Member States, § 40.
[37] Which are: age; belief, creed and, or religion; color, ethnic origin and, or race; disability; family responsibilities and, or pregnancy; family and, or civil status; gender expression and, or gender identity; genetic features; health status; language; nationality; political opinion; sex, sex characteristics; and sexual orientation (Article 4 of the Draft Equality Act).
[38] Such as access to goods and services to the general public, advertising, banking and insurance services, educational and vocational guidance, access to trade-unions, etc.
[39] Direct, indirect, by association, harassment, victimization, etc.
[40] Like measures of positive action or reasonable accommodation, special rules for the armed forces of Malta, use of financial or insurance risk assessment in access to the financial services, exception for ethos-based organisations etc.
[41] Protocol no. 12 to the ECHR entered into force in respect of Malta on 01/04/2016.
[42] Since the Republic of Malta acceded to EU on May 1st, 2004, Malta had the obligation to incorporate that stock of European antidiscrimination and equal treatment law into Maltese law.
[43] The Venice Commission notes that the Draft Equality Act does not, however, establish universally applicable anti-discrimination regulations; although the scope of this Draft Act is large, it is not all-encompassing.
[44] CDL-AD(2008)042, Opinion on the draft law on protection against discrimination of "The former Yugoslav Republic of Macedonia", § 23, § 29 and § 30.
[45] Article 31 expressly repeals only one piece of legislation, namely the Equality for Men and Women Act.

Act of 2002 (as amended). The Draft Equality Act does not have a constitutional status: it is not above all other laws and is not binding on Parliament. There must be a question as to how possible conflicts between this Act (once adopted) and other Acts (existing or future) will be resolved. Article 31 of the Draft Equality Act provides that in case of a conflict, "provisions of this Act" must prevail, and that the Act may be amended by Parliament only "expressly". It is questionable whether Parliament may limit its legislative power for the future in this fashion. In principle, "implicit" amendments to the Draft Act cannot be ruled out. Nonetheless, even if the Draft Act does not bind Parliament, it may still play an important (and very positive) role in shaping the State's anti-discrimination and equality policy. Finally, due to their horizontal effect the provisions of the Draft Act may be in tension with fundamental rights of third persons (as enshrined in Chapter IV of the Constitution). Article 6 of the Draft Equality Act seeks to resolve the potential conflicts, but possibly not all of them.

B. Forms of discrimination

60. Different forms of discrimination are generally well-defined in Article 5 of the Draft Equality Act; they include direct discrimination, indirect discrimination, discrimination by association, imputed discrimination, harassment[46] and sexual harassment.

61. However, this list is not complete. First, Article 5 of the EU Directive 2000/78/EC imposes on the employers the duty to provide "reasonable accommodation" to people with disabilities.[47] The Draft Act, by contrast, does not mention the denial of the "reasonable accommodation" of disabled people in the employment area as a form of discrimination. It is true that the "reasonable accommodation" concept is enshrined in the Equal Opportunities (Persons with disability) Act of 2000, and that Article 25 (5) of the Draft Act mentions "measures to take account of the specific needs of people with disabilities" as part of the general duty on the public sector. However, Article 25 (5) does not impose any specific duty on private employers vis-à-vis people with disabilities. The Draft Equality Act mentions "disability" as one of the protected characteristics (see Article 4) and is applicable in the area of employment (see Article 16). The Draft Act should deal with the issue of "reasonable accommodation" on the ground of disability in more detail,[48] and formulate the failure to provide "reasonable accommodation" to people with disabilities as a form of discrimination.[49]

[46] Definition of "harassment" (Article 5 (3) (c)) might be developed to exclude cases of negative assessment of performance and constructive work-related criticism - see EU Civil Service Tribunal, CST, F-12/13, *CQ v. European Parliament*, 17 September 2014, § 87.

[47] The ECtHR also derives from Article 14 of the Convention a positive duty to accommodate needs of persons with disability (albeit not in general but only in certain specific situations). See ECtHR, *Çam v. Turkey*, no. 51500/08, 23 February 2016; it should be noted, however, that in this case the ECtHR found a violation not because of the absence of "reasonable accommodation", but rather because the authorities failed to assess whether such "reasonable accommodation" of a blind girl's needs was feasible or not. See also *Guberina v. Croatia*, no. 23682/13, 22 March 2016, where the ECtHR concluded that the authorities' failure to provide tax exemption in connection with a severe disability of one of the family members constituted a breach of Article 14. Again, this finding was based on the "the absence of the relevant evaluation of all the circumstances of the case by the competent domestic authorities" (§ 98).

[48] The Draft Act does mention the concept of "reasonable accommodation" in Article 2 (on definitions). Article 2 attaches the principle of "reasonable accommodation" to all protected characteristics, and not only to the disability status – in this respect it goes beyond the EU directives.

[49] The Draft Act may extend the obligation of reasonable accommodation to the situations of pregnancy and alike. Family responsibilities and/or pregnancy is identified as one of the grounds covered in the Draft Act (Article 4). However, there are no provisions to require or to protect the making of adjustments in the workplace to accommodate specific needs of women during pregnancy or adoption or on or returning from maternity leave. The EU equal treatment directives specifically identify and prohibit pregnancy and maternity related discrimination. However, Directive 2006/54/EC further clarifies that its provisions are "without prejudice to [national] provisions concerning the protection of women, particularly as regards pregnancy and maternity" (Article 28). Therefore, although special positive measures to "protect pregnancy and maternity" is within the realm of the national law, nothing prevents the States to introduce them in their legislation as a legal duty of the employers, akin the "reasonable accommodation" of the needs of persons with disabilities.

62. The Draft Equality Act does not mention such forms of discrimination as segregation, communicating an intention to discriminate, and inciting and aiding another to discriminate. These forms of discrimination are contained in p. 6 of the ECRI GPR No. 7 and should be reproduced in the Draft Act.

63. There is a provision added to the definition of sexual harassment in Article 5 (3) of the Draft Equality Act, which states that the prohibition of sexual harassment is conditional on the behavior also being "a criminal offence and shall be punishable in accordance with the Criminal Code". It is to be noted that Article 2 (d) of EU Council directive 2004/113/EC defines "sexual harassment" without reference to its "criminal" nature. Sexually-colored remarks and behavior may be qualified as discrimination, even if they fall short of a criminal conduct, so this provision should be removed.

64. The Draft Act mentions multiple discrimination as a form of discrimination (Article 5 (2) (a)). However, this would need to be followed up with some implications if it is to have any meaning. In particular, the sanctions attendant on a finding of multiple discrimination would need to be harsher to address its greater severity of impact. Otherwise this focus adds little and it would be easier just to take cases on each of the grounds involved.

C. List of "protected characteristics"

65. Article 4 of the Draft Act enumerates "protected characteristics" which cannot, as a rule, be used to distinguish between categories of people in their treatment. The drafters had the difficult task of coordinating this list of protected characteristics, at the same time, with the EU directives in the matters of equality and non-discrimination, with the ECHR and the ECtHR case-law under Article 14 of the ECHR and Protocol No. 12 thereto, and with Article 45 of the Constitution of Malta, with all these authorities using different approaches. The EU directives speak only of *certain* protected characteristics. Article 4 of the Draft Act follows this approach. It contains a closed list of "protected characteristics" which is larger than those mentioned in the EU directives. So, from the perspective of the EU law, this list is satisfactory.

1. "Protected characteristics" under the ECHR

66. By contrast, Article 14 of the ECHR and Protocol no. 12 thereto contain an *open* list of the "protected characteristics".[50] This open list is developed on a case-by-case basis; thus, the ECtHR regarded disability, age and sexual orientation as a protected characteristic, although they are not expressly mentioned in Article 14.[51] Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights also contains an open list.

67. Leaving aside the wisdom of using an open list,[52] the Venice Commission takes note of the fact that the Draft Equality Act uses a more restrictive approach than that adopted in the ECHR in

[50] In Protocol no. 12 they are defined as "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*."

[51] On sexual orientation see *Fretté v. France*, no. 36515/97, 26 February 2002, § 32; on age *see Andrle v. the Czech Republic*, no. 6268/08, 17 February 2011, on disability see *Glor v. Switzerland*, no. 13444/04, 30 April 2009.

[52] In CDL-AD(2008)042, § 41, the Venice Commission expressed a concern that adding too many grounds of discrimination (there were 17 of them in the Draft Act under examination) "may entail the risk that the concept of discrimination may become diluted in a way which could weaken the protection against more serious discriminatory actions". This is a fortiori true in regard of "open-list" clauses, which may also lead to an uncontrolled expansion of the notion of "discrimination". Indeed, this expansion may be well explained in some cases. Thus, there are various theories explaining why some categories should be "protected" while others are not (see, for example, the concept of "discrete and insular minorities" which, in the American constitutional theory, explains why some particular minorities should enjoy special protection of the law and, in cases of alleged discrimination, receive special attention from the courts). However, overly enthusiastic extension of the list of "protected characteristics" defies the historical purpose of the anti-discrimination clause and extends it to all possible distinctions which the

this area – the list of protected characteristics is closed. In addition, even within this closed list, there is a gap in the Draft Act because it does not mention some other grounds, which are expressly mentioned in Protocol no. 12, such as social origin, property, and birth.[53]

68. Thus, there is a risk that some particular ground, not mentioned in the Draft Equality Act, will once be declared a "protected category" under the ECHR. To avoid this, it would be advisable to "open up" the list contained in Article 4, or, at least, to supplement it with those "protected categories" which are expressly mentioned in Protocol no. 12.[54]

2. "Protected characteristics" under the Constitution

69. Article 45 of the Constitution of Malta contains a closed list of "protected characteristics", which is shorter than the one contained in the Draft Equality Act. For example, the Draft Equality Act refers to discrimination based on age, health and language, whereas such grounds are absent from the Constitution. Thus, on its face, the Draft Equality Act seems to establish a more "generous" anti-discrimination regime as the one required by the Constitution.

70. In principle, the legislator may raise the level of protection of basic rights and freedoms, the Constitution serving only as a bottom-line. The Venice Commission reiterates, however, that the regime introduced by the Draft Equality Act will also be applied horizontally, i.e. the non-discrimination clause may be invoked not only by individuals vis-à-vis the State, but also by individuals against other individuals and private entities. This may create a tension with the constitutional rights of the latter. Thus, for example, the prohibition to discriminate in employment, arguably, may limit the freedom of contract and of economic activity of the employers.[55] Further, the Draft Equality Act seems to generalize the notion of permissible positive action by extending it to *all* protected characteristics, and not only sex.[56] So, one may argue that the expansion of the list of protected characteristics expands the rights of some, but encroaches on the rights of others, and therefore, has to be accompanied by a constitutional amendment.

71. The Venice Commission acknowledges that, in most contexts, where a tension between new rules on discrimination and the constitutional freedoms arise, it may be solved through judicial interpretation. This follows from the Draft Act itself: under its Article 3, legislative provisions on non-discrimination and equality will be applied "without prejudice to Chapter IV of the Convention, and the European Convention Act".

72. Having said that, the Venice Commission notes that all those complex questions would not arise if the Constitution contained an open list of "protected characteristics". Such formula would accommodate both the ECtHR case-law (based on an open list) and other European or international standards based on closed lists. The proposed reform involves a constitutional amendment in any event; hence, amending Article 45 in this direction should not be onerous.

law may make between different groups, even where those distinctions do not necessarily deserve special protection.

[53] All grounds are covered with respect to ECRI GPR No. 7.

[54] Some of the "protected characteristics" mentioned in Article 21 of EU Charter are not listed in Article 4 of the Draft Act (social origin, membership of national minority, property and birth). It is unclear whether it is a conscious choice of the drafters or an omission.

[55] Provided that this freedom as such is recognized in the Maltese Constitution or in the constitutional theory – see, for example, Article 18 of the Constitution, which speaks of the duty of the State to "encourage private economic enterprise".

[56] See Article 45 (11) that speaks of "special measures aimed at accelerating de facto equality *between men and women*" (emphasis added).

D. Exceptions

73. Article 6 of the Draft Equality Act contains a long list of "exceptions" from the general non-discrimination rule. At the outset, it is noted that the word "exceptions" in this context is not very accurate. A differential treatment may be acceptable under European human rights law[57] to the extent that it can be objectively and reasonably justified.[58] These are not, strictly speaking, "exceptions" from the general non-discrimination rule, but examples of difference in treatment, which, as such, do not qualify as discrimination. However, for the sake of simplicity the term "exception" will be used below in the same meaning as in the Draft Act.

74. Article 6 (1) (b) formulates a general exception clause: less favorable treatment is permitted where it is "reasonable, proportionate and legitimate". Further this Article lists a number of sector-specific exceptions: differential treatment in the context of military service, "occupational requirement" exception for employment relations, "banking and insurance" policy exception for access to loans and insurances, religion/belief exception for ethos-based organisations, exception related to nationality and residence.[59] In addition, some of the subsequent articles dealing with specific areas in which discrimination is prohibited, also contain specific exception clauses.

75. The Venice Commission considers that the parts of the Draft Act speaking of "exceptions" need to be tidied up. Most importantly, the relation between the general exception clause (in Article 6 (b)) and the specific exception clauses covering specific sectors is not clear. Furthermore, some of the specific exception clauses are duplicated in Article 6 and in subsequent articles.[60]

76. Drawing from the ECtHR case-law, there is nothing wrong with a general exception clause like the one contained in Article 6 (b) of the Draft Act. Under the ECtHR case-law, justified differential treatment would not constitute discrimination.[61] Certain characteristics ("race", for example, or ethnic origin) can rarely, if ever,[62] justify a difference in treatment. For other characteristics differential treatment is more defensible: for example, gender,[63] age or health

[57] See for instance Art. 3 par 2 of the EU Directive 2000/43 and Art. 3 par 2, 4 and 6 of the Directive 2000/78.
[58] CDL-AD(2018)001, Opinion on the draft Law on prevention and protection against discrimination of Former Yugoslav Republic of Macedonia", § 37.
[59] For example, Article 6 (e) allows less favorable treatment on the basis of "protected characteristics" where it is justified by "the particular occupational activities" or the "context" in which they are carried on. Differential treatment in such cases may be explained by "genuine and determining occupational requirement", and must be proportionate. Article 6 (d) further provides that differential treatment on the grounds of age, health and disability status should be permitted in the armed forces.
[60] Thus, the exception related to the use of "protected categories" in the calculation of financial risks is mentioned twice – in Article 6 and in the specific articles on banking and insurance (Articles 10 – 13).
[61] See *Abdulaziz,Cabales and Balkandali v. the United Kingdom*: "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'" (judgment of 28 May 1985, Series A, No. 94, § 72). See also *Sejdić and Finci v. Bosnia and Herzegovina*, § 55, in the context of Protocol no. 12: "The notion of discrimination has been interpreted consistently in the Court's jurisprudence concerning Article 14 of the Convention. In particular, this jurisprudence has made it clear that "discrimination" means treating differently, without an objective and reasonable justification [emphasis added] persons in similar situations". The analysis of reasonableness of the justification is inherent to Protocol 12, as it is to Article 14 of the Convention (see, as an example, *Ramaer and Van Willigen v. the Netherlands* (dec.), application no. 34880/12, 23 October 2012, §§ 95 – 101).
[62] See, for the general principle, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009, § 44. It is possible to imagine extremely rare situations where a distinction based on the race (not amounting to an "affirmative action") would be justified; thus, if a theater wants to hire an actor to perform the role of Othello, it is reasonable to limit the pool of potential candidates to persons of African descent. This would be an occupational requirement justifying, under Article 4 of the Directive 2000/43/EC, differential treatment on the basis of race in the context of employment. However, such examples remain anecdotal and race is almost never constitutes a relevant consideration.
[63] Thus, in the context of armed forces, generalization made on the basis of gender in the context of special "commando" teams were considered to be well-founded by the CJEU – see *Angela Maria Sirdar v. The Army Board*

condition may be a valid basis for distinction in the employment sphere.[64] The ECHR approach is based on a general non-discrimination clause and on an equally general (catch-all) exception, which is then developed in the ECtHR case-law in different contexts.[65]

77. Previously, the Venice Commission noted that "several of the 'special exceptions' are unnecessary if there is a reference to objectively justified (and proportional) differential treatment included in the definition of 'discrimination' as such."[66] However, Malta has to comply not only with the ECHR, but also with the EU directives, which are formulated differently. EU directives speak of "justification" only in the context of *indirect* discrimination (or sex-based discrimination in relation to access to goods and services). As to the *direct* discrimination, it is prohibited outright, where (1) the distinction is based on race or ethnicity, or (2) where the distinction is based on other protected characteristics in the employment sphere.[67] In this last area, the EU directive speaks of the "genuine occupational requirements" which may justify the distinction.[68]

78. These differences may be merely terminological, but, in those two specific areas at least, it would be advisable to use the language of the Directives, and not to rely on the catch-all formula currently contained in Article 6 (b). This formula may be applicable to all other areas which are not covered specifically by the relevant EU directives.

79. Some of the exceptions formulated in Article 6 and in subsequent articles are absent from Article 45 of the Constitution, or formulated differently.[69] Moreover, the Constitution does not contain a "general exception clause" similar to the one used by the Draft Act.[70] In this respect the Draft Act appears to be more restrictive than the Constitution. This difficulty may be, again, solved through interpretation. The fact that the law mentions certain specific exceptions (inspired by the EU law or by the ECtHR case-law), which are not formulated identically to the text of the Constitution, should not automatically invalidate the law. The Constitution should be interpreted in the light of the EU law and other international standards, and such *interprétation conforme* is usually capable of solving those divergences between the texts.

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and Secretary of State for Defence, 26 October 1999. That being said, the ECtHR noted that where military personnel is not involved in combat tasks, gender-based distinction is not justified. See *Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012, §§ 135 and 136.

[64] The first subparagraph of Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

[65] The scope of the margin of appreciation accorded to the State in regulating differential treatment of different classes of people will vary according to the circumstances, the subject-matter and its background (see, for example, the judgment of 28 November 1984 in the case of *Rasmussen v. Denmark*, Series A, No. 87, § 40).

[66] CDL-AD(2008)042, Opinion on the Draft Law on protection against discrimination of "the former Yugoslav Republic of Macedonia", § 73

[67] See the EU Council Directive 2000/43/EC, p. 2 (a) (on racial and ethnic discrimination); at the same time the language of justification by legitimate aim can be found in the EU Council Directive 2004/113/EC (on sex discrimination in relation to access to goods and services, p. 4 (5)).

[68] Council Directive 2004/113/EC of 13 December 2004 indicates in the preamble that "differences in treatment may be accepted only if they are justified by a legitimate aim" – even though the general definition of discrimination in Article (2) does not refer to "justification" and "legitimate aim". Article 2 (5) of Directive 2000/78/EC speaks of measures which are "necessary" to achieve certain legitimate aims (including, for example, public security and public order) and are not therefore discriminatory.

[69] For example, Article 45 § 4 (a) does not consider as discrimination any distinction made for the purpose of "appropriation of public revenues or other public funds"; the Draft Equality Act does not contain this exception, at least not explicitly. Article 45 § 4 (b) does not consider as discriminatory any distinction made between citizens and non-citizens of Malta; the rule on "citizenship exception" in Article 6 of the Draft Equality Act is formulated in a more qualified manner: distinctions based on nationality (i.e. citizenship) are permissible, but only "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". This formula is open to different interpretation, but the question remains whether this exception is of the same scope or narrower than the exception formulated in the Constitution (which implies that citizenship-based distinction would be legitimate in all contexts).

[70] Which says that differential treatment will not constitute discrimination if it is "reasonable, proportionate and legitimate" - see Article 6 (b) of the Draft Act.

80. This does not mean that the constitutional and legislative texts should be identical. The Constitution may identify the most important types of discrimination, as a guidance for the legislator and to the courts which will have to subject them to particularly exacting scrutiny. Similarly, the Constitution may define certain situations where the distinction is permissible and does not amount to discrimination, thus limiting the discretion of the legislator, and, at the same time, allow for a possibility to define other reasonable exceptions through a general exception clause (provided their compliance with the applicable international and EU standards).[71] This is another argument which may call for a revision of Article 45 of the Constitution.

E. Possibility of a positive action

81. The Draft Equality Act contains several provisions related to "positive action". Thus, Article 2 defines positive action as a "specific measure to prevent and, or compensate for disadvantages linked to any of the protected characteristics". Article 6 (c) stipulates that "measures of positive action or reasonable accommodation for the purposes of achieving substantive equality" are not deemed discrimination. This implies that positive action is *allowed* by the Draft Equality Act, which is in line with the approach adopted by the ECHR and in some other jurisdictions.[72] The legitimacy of positive action was also recognised by the Venice Commission.[73]

82. There is a question as to who will design those measures – the State itself, the HREC or private entities (industrial employers, universities, hospitals, supermarkets, etc.)? It should be remembered that a positive action puts one group in a position of advantage vis-à-vis some others, in order to achieve substantive equality. If this advantage is not well-justified, those other groups may complain of discrimination. Such measures, by their very nature, are temporary and need periodic reassessment in the light of the changing circumstances. The Venice Commission recalls in this respect that the CJEU subjects positive action based on certain protected characteristics to strict scrutiny.[74] US Supreme Court does the same; it considers, for example, that "race" remains a suspect classification even when it is used for good purposes, and must hence be subject to strict scrutiny.[75]

83. The Draft Equality Act is not particularly clear as to whether positive action in employment, access to goods, services etc. and its practical definition should be left in the hands of private entities : it simply indicates the positive actions are permissible. This means that it will be up to the courts to define, ultimately, whether the positive action taken by a private entity in each particular case was permissible or not. While the concept of "positive action" draws largely from

[71] The Venice Commission recalls its recommendations in CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg, where it noted that "In parallel to the provision on non-discrimination, a constitutional provision on equal opportunities might be added, in view of the development of constitutional law on this point" (§ 51).

[72] See, for example, ECtHR, *Andrle v. the Czech Republic*, no. 6268/08, 17 February 2011, where the Court held that "Article 14 does not prohibit a member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article" (§ 48). See also Article 23 of the EU Charter of Fundamental Rights, which states that "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex".

[73] See CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 4, § 24; reproduced in "The protection of minorities", Collection Science and Technique of Democracy, no. 9, p. 24, 1994.

[74] Positive action measures are subjected by the Luxemburg Court to a strict scrutiny – see CJEU, C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen*, 17 October 1995; but see more flexible approach in CJEU, C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, 11 November 1997.

[75] See the landmark cases of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

the EU Directives,[76] it remains vague and incomplete, and does not give private entities any specific guidance as to what may be done to promote equality, and what may not be done.[77]

84. The definition of "positive actions" in the Draft Equality Act does not address their temporary character. ECRI GPR No. 7 in § 5 refers to the adoption of *temporary* special measures, which should be discontinued once the intended objectives have been achieved. The Venice Commission also reiterates its earlier recommendation made in respect of the "former Yugoslav Republic of Macedonia" that positive action (or "affirmative measures") are not contrary to the principle of equality "as long as they are temporary and aim to overcome an existing discrimination".[78]

85. Finally, the principle of proportionality should be embodied here as a guiding principle for the legislature and the administration in determining necessary positive measures.[79]

F. Equality duty of the public administration and of the private actors

86. ECRI GPR No. 7 provides detail on the equality duties of the public administration in Article 27 of the Explanatory Memorandum. It states that these obligations "should be spelled out as clearly as possible in the law", and the public authorities "could be placed under the obligation to create and implement 'equality programs' drawn up with the assistance of the" equality body. It further suggests that "it would be desirable were the private sector also placed under a similar obligation".

87. Article 25 speaks of the equality duty *of the public administration*. It provides that "public administration must … have due regards to the need to […] advance equality of opportunity". P. (4) of this Article stipulates that "the public administration … shall … (c) take steps to meet the needs of persons with protected characteristics who would be disadvantaged unless such measures are implemented, and (d) implement measures to enable the participation in public life or in any other activity by persons who share a protected characteristic when participation by such persons is disproportionately low".[80]

88. Article 22 includes a general duty on all duty bearers under the Draft Act to take steps or prevent discrimination against any other person with a right to be present in the entity. Article 23 (1) and Article 24 of the Draft Equality Act establish the duty *of private actors* (employers and providers of goods and services) to "take, within their capacity, effective measures to prevent all forms of discrimination". These various equality duties could usefully be tidied up.

89. The formulas used in the Draft Equality Act to define the "equality duty" are quite vague. Speaking of the equality duty on private actors, it would be advisable to indicate more precisely what exactly is expected from educational establishments, employers and providers of goods and services, what specific measures they may be required to take in order to promote diversity, substantive equality, etc. (if it is not done already by the sectoral legislation). Equality policies or equality action plans have been required of these entities in other countries.

[76] The definition draws significantly but not completely from the EU equal treatment Directives. These include for the purpose of positive action as being 'with a view to the achievement of full equality in practice'. This could usefully be included.

[77] Thus, the Draft Equality Act does not specify which groups, based on "protected characteristic" would deserve a particular positive action, why, and what sort of measures may be required to advance the *de facto* equality.

[78] CDL-AD(2008)042, Opinion on the Draft Law on protection against discrimination of "the former Yugoslav Republic of Macedonia", § 51.

[79] CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania, § 9.

[80] The Venice Commission has already commented on the absence in the Draft Act of the specific duty of employers to make reasonable accommodation for people with disabilities. The same concerns the duty to accommodate specific needs of women during pregnancy or adoption or on or returning from maternity leave (see paragraph 61 above).These duties should be formulated in the Draft Equality Act as an obligation of the employers.

90. As regards the equality duty of the public administration, the Draft Act provides for several more specific obligations: thus, Article 25 (2) speaks of an "equality program", to be adopted by the public administration within one year. Furthermore, the Article 25 p. (4) requires that 40% of appointees in the official bodies should be of a different sex;[81] Article 24 (c) requires to follow the principle of universal design. Otherwise, the Draft Equality Act is not very specific about the equality duty on the public administration and provides no sanctions for its breach.

91. Article 25 may be interpreted as conferring on the public administration a very broad mandate to take *any* action it sees fit to advance equality. Such interpretation is potentially dangerous. In doing so the public administration may encroach on the rights and legitimate interests of private persons, whereas the extent of any such interferences should normally be defined in the *law*.[82]

92. It is recommended to specify that the "equality duty" of the public administration does not mean that it has the power to create new enforceable obligations for private actors, which go beyond such obligations as are *specifically indicated in the law* (i.e. in this Draft Act or in other applicable legislation). At the same time, it should be possible to include to the Draft Act *more specific* measures which need to be taken by the private actors and/or public administration in this sphere.[83] The HREC should play a key role in the development of such standards, to be incorporated in the legislation.

G. Burden of proof

93. Article 30 of the Draft Equality Act sets out the rules on the shifting burden of proof to be applied in discrimination cases before the HREC and the courts. In particular, the alleged victim of discrimination is only required to make out a *prima facie* case of discrimination, on foot of which the defendant is required to prove that "less favorable treatment was justified in accordance with the provisions of this act". This helps to ensure stronger protection against discrimination as it facilitates considerably the chance of proving discrimination.[84] These provisions comply with the EU Directives.[85] However, the drafters should clarify how the burden of proof is applied to the exceptions contained in Article 6, and how it is applied in situations involving positive action. Furthermore, the burden of proof should not necessarily be distributed in this manner in cases commenced by the HREC *proprio motu*.

[81] Speaking of "positive action" on the basis of sex, the Venice Commission recalls that such measures should be treated with particular care - see CJEU, C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, 6 July 2000. Any such rule should include a savings clause (permitting *ad hoc* consideration of the candidates' individual circumstances), and those measures should be temporary. The ECtHR, on its side, also applies strict scrutiny to any distinctions based on sex, even aimed at "advancing equality". See *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2005-X: "As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention." See also CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, § 24; CDL-AD(2009)024, Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, § 20.

[82] As the Venice Commission stated in the Rule of Law Checklist, CDL-AD(2016)007, § 49, "Unlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems." See, also, *mutatis mutandis*, USSC, *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).

[83] For example, ECRI GPR No. 7, in § 9, calls for a duty to be placed on public authorities to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. The duty to conduct such "equality audit" in awarding contracts and grants may be specifically mentioned in the Draft Act.

[84] See CDL-AD(2018)001, Opinion on the draft Law on prevention and protection against discrimination of "the Former Yugoslav Republic of Macedonia", § 82.

[85] See Article 8 par. 1 of EU Directive 2000/43 and Article 10 of Directive 2000/78.

H. Hate speech

94. The Draft Equality Act amends Article 82a of the Criminal Code on the incitement to hatred. This offence is now defined as "incitement to violence or hatred" against classes of population enumerated in this article (which are defined essentially with reference to the "protected characteristics" enumerated in Article 4 of the Draft Equality Act). Since new Article 82a criminalizes different forms of expression, it is important to ensure that constitutionally and internationally guaranteed freedom of expression is not violated. Criminalization of calls for violence does not raise any issue. By contrast, the notion of "hatred" is more difficult to define. For the ECtHR, the freedom of expression covers not only inoffensive ideas that are favorably received by public, but those that "offend, shock or disturb the state or any sector of the population".[86] It is not always easy to say when an "offending" or "shocking" form of expression becomes "hate speech"; the ECtHR in such cases applied contextual and multi-factor analysis.[87] While there is no simple definition of "hatred",[88] it should be distinguished from simple criticism of ideas or practices, shared by members of the protected group. An addition to Article 82a, pointing in this direction, would be welcome.[89]

V. Conclusion

95. The Draft Act on the Human Right and Equality Commission aims at establishing a human rights and equality body (the HREC) which will have a very broad mandate, diverse functions and strong powers, and which will enjoy considerable autonomy. The Draft Act amending the Constitution elevates this body to the constitutional level. The Draft Equality Act re-defines the notion of equality and non-discrimination, extends it to several sectors (employment, education, access to goods and services, etc.), and proposes a comprehensive description of possible exceptions from the general rule, as well as sanctions for its breaches.

96. The main aim of the three Draft Acts is to incorporate into the Maltese law international and European standards in the field of non-discrimination and equality, and to do so in a comprehensive manner. This aim is generally achieved. The effort of the drafters, their openness to dialogue,[90] and their dedication to the cause of equality and non-discrimination deserve praise.

[86] See *Handyside v. the United Kingdom,* no. 5493/72, 7 December 1976.
[87] See *Perinçek v. Switzerland* [GC], 15 October 2015, no. 27510/08, §§ 204 et seq.
[88] In ECRI GPR No. 15 hate speech is defined as "advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat" in respect of certain minorities on the ground of their race, age, disability etc. For the ECRI, incitement to commit certain unlawful acts is "an especially serious form" of hate speech; the ECRI is convinced that "criminal prohibitions are necessary in circumstances where hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it". In other words, ECRI links criminal liability with the incitement to "acts". The ECtHR case-law does not exclude criminal liability for forms of expression which do not lead to specific unlawful acts. For example, denial of Holocaust is punishable by criminal sanctions in several European countries, and such criminal convictions do not necessarily violate Article 10 of the Convention (see *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015, § 39). So, for the ECtHR, a link to specific unlawful acts is not a necessary element for prohibiting a certain category of speech. That being said, debates surrounding historical events should be allowed (see *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010), especially when proceeded in a scholarly and dispassionate manner.
[89] As the Venice Commission held previously, "the application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and oral discourse and ideology" (CDL-AD(2008)026, Report on the Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, § 58).
[90] As the rapporteurs learned during the visit, the three Draft Acts appeared as a result of a long process, which involved preparation of a concept paper and of the consecutive drafts, and in which the authorities conducted several rounds of public consultations with essential stakeholders.

97. In certain areas the Draft Acts goes *beyond* what it strictly required by the EU law and international standards. In particular, some of the elements of the proposed reform need to be revised, in order to avoid possible conflicts with the Constitution of Malta, the European Convention on Human Rights (ECHR) or the EU directives. The most important recommendations in this respect are as follows:

- The Draft Act on the HREC is ambitious in the protection of victims of discrimination: it sets up a Human Rights and Equality Board (the Board) which will have a very broad competency and will *de facto* perform a judicial function. In principle, it should be possible to entrust the Board with some quasi-judicial functions. However, the proposed model (with the overlapping competency of the Board and of the Civil Court, with two distinct chains of appeal, with the choice of jurisdiction belonging solely to the plaintiff, with the Board not being independent, not having judicial members, being closely linked to the HREC, and not offering procedural guarantees of a fair trial) is problematic from the constitutional perspective and may raise issues under the ECHR. Thus, if the judicial function of the Board is maintained, the Venice Commission recommends a comprehensive revision of the design of the Board in the light of Article 46 of the Constitution, and Article 6 of the ECHR.
- The Draft Act on the HREC does not sufficiently guarantee the independence of this body. The process of selection of candidates and election of its members by Parliament (through qualified majority) should ensure – by an open and participatory procedure – a pluralist composition of this body, and representation of various sectors of society and political currents in it. Further, the Draft Act should ensure that its members have sufficient stability of mandate and are not removed for political reasons. The proposed size of the HREC is excessive.
- The functions of the HREC could be expanded. In particular, it should be able, in specific cases, to enable mediation, and serve as *amicus curiae* in cases before the courts that are relevant to its mandate. It should also be able to conduct general inquiries and to participate in developing and promoting standards in relation to good practice and in relation to the equality duties. It should be able to participate in combatting hate speech.
- A general "equality duty" of the public administration proclaimed in the Draft Equality Act should not mean that the public administration has the power to create new enforceable obligations for private actors. Such obligations may be imposed only by the legislator;
- The Draft Equality Act should set out more precisely specific positive duties of employers, educational institutions, providers of goods and services etc., and public administration aimed at advancing equality and promoting diversity under these equality duties. The Draft Equality Act should mention explicitly the duty of the employers and providers of goods and services to take "reasonable accommodation" measures in respect of disabled persons.

98. The Venice Commission remains at the disposal of the Maltese authorities for further assistance in this matter.