



THE EQUALITY BILL AND RELIGIOUS FREEDOM

A POSITION PAPER

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Introduction

1. The Church welcomes the introduction of a legal framework that can ensure that nobody would be treated less favourably in any sphere of life. The Equality Bill (No. 20235 – 19th July 2019), which brings together existing relevant provisions on equality legislation into a single act, intends to move in this direction.
2. A central focus of concern in Catholic social teaching is precisely the defence of the dignity of every individual, irrespective of one's characteristics. Equal treatment is one of the fundamental ways in which respect for human dignity is manifested especially in modern times. We have become increasingly conscious of our fundamental right to equal treatment, independently of who we are. The belief in the equal, unconditional and inherent dignity of every human person is at the heart of Christian belief and teaching and is endorsed in the framework of EU primary law.
3. This position paper is written at the request of the Catholic Church in Malta by a group of experts in law, ethics and theology, heads of schools, educators, and parents. It is written in response to the publication of the Bill No 96/97 currently debated in Parliament. Without imposing its moral teachings legislatively in a pluralistic society, the Church wants to participate in the public consultation on this Bill out of its concern that every human person matters.

The Object of the Bill

4. The object of the proposed legislation on equality is to prohibit discrimination in a fairly wide range of social practices or areas of social life. It would be illegal for any person, establishment or entity, whether in the private sector or within the public administration, to discriminate against any person on the basis of age; belief, creed or religion; disability; family responsibilities; family or marital status; gender expression or gender identity; HIV status; maternity; pregnancy; race, colour or ethnic origin; sex or sex characteristics; and sexual orientation. Such discrimination would be prohibited in relation to advertising; educational and vocational guidance; employment; employees' and employers' organisations; employment agencies; self-employment and occupation; banks and financial services; insurances and access to goods and services, including medical care, social services and housing.

5. In the European Union, the discussion on the Proposal for an EU Council Directive in this area, the so-called Equal Treatment Directive,¹ to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, has been going on for a number of years. Negotiations have proven to be so controversial that no consensus so far has been reached through a compromise among all Member States, presumably because of the complex and thorny problems that a legislative measure of this kind would raise in practice, including that of its unforeseeable impact and ramifications in the national legalisation. In previous years, however, the European Union had already adopted several Council Directives to promote equality.² It seems that it has been easier to find the unanimous approval on how the equality principle can be reasonably applied to specific areas of social life than on how the entire social life can be uniformly regulated in terms of equality. Uniformity in the implementation of the equality principle is obviously essential, since everyone is entitled to equality of opportunity and treatment. But the spheres and settings in which people live their own lives are not identical with each other. It is this variety that makes social life so enriching and full of so many possibilities for the individual.
6. The difficulties inherent in attempting to resolve the conflicts between the right to equality and the protection of difference are reflected in the fact that only 19 out of 47 democratic European states have ratified Protocol number 12 of the European Convention on Human Rights. This Protocol, which was intended to ensure equality and non-discrimination in all spheres of life, has been open for ratification since 2000.³

¹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - <http://data.consilium.europa.eu/doc/document/ST-9730-2016-INIT/en/pdf>

² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

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

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to goods and services and their supply.

Council Directive 2006/54/EC of 5 July 2006 implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Communication from the European Commission (22.12.2011 C(2011) 9497) containing Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgement of the Court of Justice of the European Union in Case C-236/09 (Test-Achats).

³ As the Equality Bill is much more detailed and specific on what constitutes prohibited conduct on the grounds of non-discrimination than Protocol 12 of the European Convention on Human Rights, it is understandable that the Bill would give rise to controversy on several issues.

7. The crucial problem in the implementation of the right to equality is to find the right way of matching it with the right to be different. The principle 'different but equal' is a valid social principle. But so is the principle 'equal but different'. The Bill is evidently biased in favour of equality. It acknowledges, however, that there are legitimate differences between one sphere of social life and another - differences that call for a qualified application of the equality principle.
8. The purpose of this position paper is to focus on equality in relation to religious freedom. Churches and other organisations based on religion, among other things, stand for the freedom of people to think and live in a way that transcends conventional ways of thinking and living and especially to resist ideologies that those in power may want to propagate and sometimes even impose. Of course, it is true that Churches and religious organisations themselves have sometimes identified their respective faith or belief with ways of thinking and living that have not been fully open to those values that could promote human dignity and human rights and they were not sufficiently compliant with those norms that enable people to live in freedom and peace with each other. But this does not mean that the law should not acknowledge the distinctiveness of Churches and other religious organisations and that these institutions should not be actually free to carry out their activities in accordance with the tenets of their respective faith and their basic human right to religious expression, of course within reasonable limits.
9. After a brief consideration of the criteria which the Bill establishes to determine instances where 'less favourable treatment' may be justifiable in the case of religious practice and religious institutions, the paper will discuss the provisions on advertising, employment and education in so far as these affect religious institutions in trying to maintain their particular ethos. The paper will also draw attention to a very serious social and ethical problem relating to equality of access to goods and services, including medical care, social services and housing.

Religious Freedom and Equality

10. The Bill refers to 'religious services'.⁴ One may ask: what do 'religious services' mean? How far does the religious domain extend? The way in which the Bill articulates the provision regarding religion indicates that the underlying assumption is that religious practice is completely separate from other social practices. Now it is true that religious practice has its own distinctive features, but it is not completely separate from other social practices. This is clear from the history of world religions. In the case of Christianity, there has been a variety of human activities that the Catholic, Protestant and Orthodox Churches have

⁴ Article 6 (i)

taken up in the course of their work of evangelisation. The Churches have been and are still involved in charitable and educational activities, healthcare, counselling and various forms of ministry with families, youth and children. The engagement of the Churches in such activities has a religious dimension which should be respected by avoiding the imposition of any measure that can hinder them from giving that added value which they believe their faith can give to human life.

11. Of course, equality remains a fundamental human value which the Churches are called to defend and promote especially as this is an integral part of their faith in the universal fatherhood of God. But today it is obvious that not all the things that society has introduced and is promoting in the name of equality can be reconciled with the Christian belief and practice. So what the Bill is actually understanding by 'religious services' is a very serious matter of concern, because on it depend the kind and extent of freedom that we shall enjoy in the religious domain.

Today we have quite an elaborate account of religious freedom in a number of international legal documents. On a European level, one may consider Article 10 (1) and 10 (2) of the Charter of Fundamental Rights of the European Union and Article 9 of the European Convention of Human Rights. The text in Article 10 (1) of the Charter of Fundamental Rights of the European Union reproduces *verbatim* that in Article 9 of the European Convention of Human Rights. The text reads as follows:

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, practice and observance.

12. Like freedom of expression, the right to freedom of thought, conscience and religion constitutes one of the foundations of a pluralistic society. Religious freedom comprises three basic dimensions: an *individual* dimension or the right of the individual to choose one's own system of belief; a *collective* dimension or the right to associate with others sharing the same creed; and an *institutional* dimension or the right of faith communities to be recognised as social actors in their own right and having their own specific ethos. Religion, therefore, is not merely a set of ideas and beliefs that an individual is entitled to hold. It has an external dimension too and so religious freedom, rightly understood, includes the right to manifest one's religion, to act in accordance with religious rules and convictions in daily life and to establish, organise and manage those institutions required by the specific aims of particular religions. The importance of the

collective and of the institutional dimension of religious freedom has been regularly emphasised by the European Court of Human Rights.⁵

It therefore follows that the internal structure and organisation of a Church or a religious community falls within the scope of the freedom of religion protected by the Convention. It encompasses for example the right to self-determination, the right to organise her activities including the developing and keeping of an internal organisational structure, the choice of her employees and providing the religious principles which should be the basis of all her activities.

13. In line with a broad understanding of religious freedom, the European Union adopts a qualified approach to the implementation of the principle of equal treatment. In fact, there are specific provisions relating to the Churches and other religious organisations both in the Directives that the Council of the EU has already passed and in the Proposal for an Equal Treatment Directive on which the Council is still working. The latest draft Proposal for a Council's Equal Treatment Directive includes the following:

The Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief and does not limit the exclusive competence of the Member States in these matters.⁶

14. This provision would imply the recognition on the part of the European Union of the variety of ways in which the matter of the status and activities of Churches and other organisations based on religion or belief can be addressed responsibly by its Member States. One can, in fact, legitimately assume that the Member States, including our country, should try to find the most appropriate way in the local circumstances to implement the equality principle without infringing on any one of the fundamental dimensions of the right to religious freedom. Regrettably, the Bill does not seem to have been based on this assumption, as one can see from the relevant provisions relating particularly to advertising, employment and education.
15. In the context of the right to freedom of thought and religion, the issue of conscientious objection is at stake. Any legislation on non-discrimination should give due attention to the question of exercising the right to conscientious objection. This right is commonly associated with a form of legally permitted exemption from certain obligations or prohibitions with which one may disagree on religious, ethical, humanitarian, or allied grounds. Article 10 (2) of the Charter of Fundamental Rights explicitly provides that "the right to conscientious

⁵ COMECE, *Developing Fair Non-Discrimination. EU Legislation*. Commission of Bishops' Conferences of the European Community, Brussels, 2010, 28.

⁶ Article 3, par.4.

objection is recognised, in accordance with the national laws governing the exercise of this right”. Such provision indicates that the EU recognises the importance of the right to conscientious objection but leaves it up to the Member States to regulate these matters.⁷ Despite the fact that conscientious objection is commonly associated with the demand for exemption from military service, it does not exclude that the possible scope of the application of this right also extends beyond the field of military service in other spheres that regulate choices based on ethical imperatives (e.g. regarding health, education, provision of goods and services). The Bill is completely silent on this matter.

16. Freedom of religion can also be compromised by the Bill’s vague definitions of ‘harassment’ and ‘victim’ which are open to expansive subjective interpretations. The Bill states that direct discrimination

shall be deemed to occur where a person is treated less favourably than another person is, has been, or would be, treated in a comparable situation, on the basis of any one or a combination of any of the protected characteristics;⁸

Moreover, the Bill continues to clarify that “‘harassment’ shall be deemed to occur where an unwanted conduct related to one or more of the protected characteristics laid down under this Act, has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. [5. (3) c] The Bill goes further to define ‘indirect harassment’ as

any treatment based on an apparently neutral provision, criterion or practice, which would put persons having any one or a combination of any of the protected characteristics at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;⁹

Moreover, discrimination may occur on the basis of a single ground or on the basis of multiple grounds (5 (2) a and b)

17. The application of this very broadly defined concept of harassment to the area outside employment/occupation entails clear risks, not being sustained by the same rationale and justification existing for the area of employment and occupation. The relevant provision covers even non-intentional conducts and can

⁷ On April 12, Pope Francis backs conscientious objection rights for Christians - <https://cruxnow.com/church/2016/04/12/pope-backs-conscientious-objection-rights-for-christians/>

⁸ Article 5 (3) a

⁹ Article 5 (3) b

have a negative impact on the right to freedom of thought, conscience and religion and on the right to freedom of expression: people may feel inhibited from making a statement (including to explain sincerely held doctrinal religious convictions) if they fear a person might claim vaguely defined elements such as the 'violation of their dignity' or the 'creation of an offensive environment' (*chilling effect*). This broad definition of harassment is confirmed by the definition of "victim" which according to the Bill refers also to "mental or emotional harm":

victim refers to any natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by prohibited conduct under this Act; as well as family members of a person whose death was directly caused by prohibited conduct under this Act and who have suffered harm as a result of that person's death.

The Bill reduces 'certainty' regarding when citizens are, or are not, within the legal boundaries to the subjective feelings and perceptions of an alleged victim of discrimination. Moreover, those citizens who may be accused of discrimination will find it harder to prove otherwise. This situation gets more complicated with the reversal of the burden of proof endorsed by the Bill. The presumption of innocence is one of the basic procedural guarantees, respecting an essential element of the right to a fair trial. In practice, this means that, when carrying out their duties, judicial authorities should not start with the presumption that the accused is guilty. Article 31 of the Bill states that:

- (1) In any proceedings under articles 28 and 29, it shall be sufficient for the plaintiff to establish before the Court or before the Board those facts from which it may be reasonably presumed that the alleged victim has been discriminated against on the basis of one or more of the protected characteristics.
- (2) It shall be incumbent on the defendant to prove that there has been no breach of the principle of equal treatment, or that such less favourable treatment was justified in accordance with the provisions of this Act, and the Court or the Board shall uphold the complaint if the defendant fails to prove that the unlawful act was not committed.¹⁰

This article creates risks when combined with the vague definitions of 'discrimination' and 'victim'. Whoever is accused of 'discrimination' must prove his or her innocence, whereas the person claiming to be the victim of discrimination would be exonerated from bringing objective evidence. The Bill is not in line with standard procedural rights. The alleged victim's own subjective perception is the only standard for assessing the grounds of discrimination.

¹⁰ Article 31 (1) (2)

18. The question of religious symbols is mentioned in the Bill. But only those of a cultural value are immune from the provisions of this Bill. The current draft Proposal for a Council's Equal Treatment Directive contains the following article on religious symbols which is an extremely delicate matter reserved to the Member States: "The Directive is without prejudice to national measures authorising or prohibiting the wearing of religious symbols and does not limit the exclusive competence of Member States in these matters" (Art. 3(3) a). Similar provisions have been omitted from the Bill. The Bill would in general benefit from the inclusion of a provision clarifying that the mere expression of a personal opinion or the display of religious symbols or messages are to be presumed not to constitute harassment.

Advertising

19. Advertising is normally associated with marketing. One may perhaps argue that, generally speaking, it is not applicable to religion. In fact, religions do not advertise but proclaim, preach and teach. So what the Bill is prohibiting in relation to advertising may seem to be inapplicable to religious activities in which a religious message, along with a set of ethical convictions, is being communicated in private or in public. But this may not be the case at all in the context of the definition that the Bill gives to advertising. Advertising is broadly defined and the contours of what would be lawful and what would be unlawful are not clearly drawn out.

20. By "advertisement", the Bill means:

The publication, display or broadcasting of, or the causing to be published, displayed or broadcasted of, any advertisement which promotes discrimination or which is discriminatory or which might reasonably be understood as indicating an intention to discriminate shall be unlawful.¹¹

According to the proposed legislation, discriminatory conduct would include: "any advertisement which promotes discrimination or which is discriminatory or which might reasonably be understood as indicating an intention to discriminate."¹²

It is clear that the Bill is extending the concept of 'discriminatory conduct'. It includes not only discriminatory advertising but also advertising that promotes discrimination and advertising that might reasonably be understood as indicating an intention to discriminate. What is being understood by 'promotion' is not spelled out at all. For instance, would a display of a notice, billboard or flyer promoting traditional marriage be prohibited, because it can be subjectively

¹¹ Article 9

¹² Article 9

perceived as harmful to some groups? Besides, will not the prohibition of advertising that might reasonably be understood as indicating an intention to discriminate put everyone *at risk not only of being accused but of having to prove in court* that there was no intention to discriminate? It is true that what is reasonable and unreasonable cannot be determined in an arbitrary manner. But anyone can make an accusation and the accused will be 'burdened' with the task of proving that the accusation is unreasonable. All this, however, will involve a judicial process which may indeed absolve the accused at the end but only after undergoing perhaps years of unnecessary trouble of court proceedings.

21. As the proposed legislation is shifting the burden of proof from the one making the allegation of misconduct to the defendant, the freedom of individuals and organisations, including Churches and faith-based communities, will be placed under severe and unnecessary constraints in presenting their own beliefs and convictions.
22. Analogous observations can be made regarding the Bill's provisions on employment and education.

Education

23. The Bill prohibits discrimination in (a) access to any course, vocational training or guidance, (b) award of educational support for students or trainees, (c) selection and implementation of the curricula and (d) assessment of the skills or knowledge of the students or trainees.¹³ Besides, it obliges educational establishments and entities providing vocational training, within the limits of their competence, (a) to ensure that curricula and textbooks do not propagate discrimination and (b) promote diversity and respect towards all persons regardless of whether they fall under any one or more of the protected characteristics.¹⁴
24. These provisions are of particular concern to the Catholic Church which is the major religious institution in Malta offering a fairly broad range of educational services particularly through its schools. Catholic schools are bound to nourish and promote a Christian spirit in the mind and conduct of their students. They can do this especially by creating and maintaining a Christian *ethos* within their environment. Surely, the defence and promotion of equality is an essential part of their mission. Catholic schools are called to teach their pupils and students not to judge and much less condemn any person but to esteem and love other people irrespective of their characteristics. But showing esteem for everyone does not mean renouncing to one's principles or discarding specific norms or (that may or

¹³ Article 14 (1)

¹⁴ Article 14 (2)

not be related to religious belief) for evaluating different forms of conduct. This is precisely the reason why certain provisions in the Bill are of particular concern to the Catholic Church and perhaps to other religious organisations as well.

25. The proposed legislation will be placing a very broad responsibility on educational establishments and vocational training entities with no clear and definite boundaries of what would be legally prohibited or permitted. These establishments or entities shall be obliged not just to ensure that curricula and textbooks do not propagate discrimination (which is already a legal obligation with a wide scope and very general criteria to follow) but also to promote diversity and respect towards all persons regardless of whether they fall under any one or more of the protected characteristics (which is a legal obligation that is much wider and confusing by tying together the two principles of 'promotion of diversity' and 'promotion of respect').
26. The law should allow for free and incumbent teaching at the Church/faith-based schools. It should be formulated in a way as to recognise the complexity of reconciling in practice equality of treatment with the diversity of ways of thinking and living, especially in the sphere of education. It is precisely to allow the Member States ample freedom in the organisation of their respective educational systems that the current Draft of the EU Proposed Equality Treatment Directive says that the Directive would not be applicable to how the Member States may wish, among other things, to set up and manage educational institutions, the content of teaching and of educational activities and the development of curricula¹⁵ and it would not be applicable also "to differences of treatment based on a person's religion or belief in respect of admission to educational institutions, the ethos of which is based on religion or belief, in accordance with national laws, traditions and practice."¹⁶

It is unfortunate that the freedom which the European Union is allowing its Member States under the current Equality Directives and envisaging under the proposed Equality Treatment Directive in the implementation of the equality principle will apparently be used by the Maltese Government to restrain the freedom which the Catholic Church, other Churches and other religious organisations currently have in the administration of their respective institutions. The challenge which our society, like every other society, has is how it can consolidate and expand further everyone's freedom to work on his or her own or in association with others for the common good, with full respect of each other's beliefs and convictions.

27. The church feels that any structure or organisation and workings which fall within the scope of the freedom of religion as enshrined in article 40 of the Constitution

¹⁵ Article 2 (b)

¹⁶ Article 2 (e)

and Article 9 of the First Schedule to the European Convention Act encompassing the right to self-determination, the right for the institution or community to organise their activities, including the developing and keeping of an internal organisational structure, the choice of their employees, and providing the religious principles which should be the basis for all the activities of these institutions and communities should not be covered by this Bill.

The Church also feels that nothing in the Bill should prejudice the right of Churches and other public or private organisations, the ethos of which is based on belief, creed or religion, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

28. Article 14 should be amended as follows:

14. (1) In the implementation of any measures under this article, due account shall be taken of the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions in accordance with Article 2 of Protocol 1 of the European Convention of Human Rights as incorporated into Maltese Law in the First Schedule to the European Convention Act (Cap. 319).

(2) Discrimination in education, vocational training or guidance shall include less favourable treatment in the:

(a) access to education, including any course, vocational training and, or guidance of all types and at all levels, including practical work experience;

(b) award of educational support for students or trainees;

(c) selection and implementation of the curricula; and

(d) assessment of the skills or knowledge of the students or trainees.

(3) It shall be the duty of educational establishments and entities providing vocational training, within the limits of their competence and ethos of such establishment or entities to:

(a) ensure that curricula and textbooks do not propagate discrimination; and

(b) promote diversity and respect towards all persons regardless of whether they fall under any one or a combination of any of the protected characteristics.

29. Article 6 (k) should be amended as follows:

6 (k) less favourable treatment on the grounds of belief, creed or religion in relation to –

(i) any of the following:

- the content of teaching, whether of the subject of religion or of any other subjects,
- educational activities,
- the development of curricula,
- the admission to educational institutions,

the ethos whereof is based on a belief, creed or religion shall constitute a genuine, legitimate and justified requirement; or

(ii) the exercise of the right to conscientious objection with regard to choice based on ethical imperatives including, but without prejudice to the generality of the foregoing, health, education, and provision of goods and services;

Access to Goods and Services

30. In principle equal access to goods and services can be considered to be a basic requirement of distributive justice. However, excessive legislation can put Christian entrepreneurs into a conflict of conscience. This would go against their right to religious freedom and conscientious objection. Reasonable accommodation should be allowed to avoid creating legal uncertainty. In the case of banks and financial services, the Bill makes a certain allowance precisely in view of the nature of these services. As they are exposed to risk, banks and financial institutions, including insurance companies, are allowed to make conditions under which the facility or insurance cover is offered or withheld in so far as these conditions “reflect genuine considerations based on the financial risk in the grant of such facilities.”¹⁷

31. There is one particular matter that needs to be clarified regarding the provisions of the Bill on the access to goods and services. As these services include medical care, one should ask whether the provisions that Chapter 524 (*The Embryo Protection Act*) sets to regulate access to medical services required for assisted human procreation will be retained. This is quite a relevant question to raise,

¹⁷ Article 6 (g)

since the proposed legislation is not exempting these services and is clearly saying that:

If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.¹⁸

Moreover, Article 3 of the Bill states that:

Without prejudice to Chapter IV of the Constitution, the European Convention Act, and any provision of this Act, any provision or practice contrary to the principle of equal treatment in any individual or collective contracts or agreements, internal rules of undertakings, or rules governing any registered organisation in terms of applicable law, enacted following the entry into force of this Act, shall be considered null and void.¹⁹

If the Equality Act will extend access to medical services relating to assisted human procreation to everyone, the public should be properly and adequately informed about the serious implications of this proposed legislation on such a socially, ethically and religiously sensitive matter. It would certainly not be in the public interest for the Government to try to bypass the complex and highly sensitive issues relating to human procreation under the pretext of legislating to ensure equal access to “health and medical care and other medical services.”²⁰

¹⁸ Article 32 (3)

¹⁹ Article 3

²⁰ Article 8, 1(b)

Conclusion

32. The Church is one among several organisations that have a stake in what the Equality Law shall be requiring for the implementation of equality across practically all areas of social life. It has focused on matters that are very closely related to its mission, because it believes that religious freedom, as a universal human right, should not be unduly restrained as a result of an inadequate understanding of the principle of equality. The purpose of the present position paper has been to explain that, rightly understood, equality is perfectly reconcilable with freedom, including religious freedom. As has been noted, the Bill itself assumes that a number of qualifications need to be made in relation to the implementation of equality in the different spheres of social life. The inadequacies of the Bill with respect to equality within the religious domain lie precisely in not taking sufficient account of the qualified way in which it has to be implemented in this domain without prejudice to religious freedom and consciousness objection.

Rev Professor Emmanuel Agius (Chairperson)

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