

*Ir-Rappreżentant Permanenti tar-  
Repubblika ta' Malta*



*The Permanent Representative of the  
Republic of Malta*

GN 1/7/04 E - 015

3<sup>rd</sup> June 2021

**Joseph Cannataci**  
Special Rapporteur on the right to privacy

OHCHR  
Palais des Nations  
1211 Geneva

*Dear Special Rapporteur.*

I would like to refer to your communication AL MLT 1 /2021 dated 12 April 2021. In this regard, I am enclosing the response of the Government of Malta which I hope will address your concerns on the issues that you have raised.

I take this opportunity to reiterate Malta's strong support for your mandate, and for the work of the Office of the High Commissioner for Human Rights.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Christopher Grima'.

Christopher Grima  
Enc.



3 June 2021

Mr. Joseph Cannataci  
Special Rapporteur on the Right to Privacy

CC: Ms. Beatriz Balbin  
Chief  
Special Procedures Branch  
OHCHR

Dear Mr. Cannataci,

I wish to refer to your communication AL MLT 1/2021 dated 12 April 2021, concerning allegations that the Superintendent of Public Health has used powers granted to her by the Public Health Act of Malta which, unless constrained by adequate safeguards and remedies, risk leading to infringements of fundamental human rights, in particular the right to privacy.

In this regard, please find enclosed the relevant submission from the Government of the Republic of Malta, following an assessment of the laws in question by the relevant Maltese authorities.

Please accept the assurances of my highest consideration.

Sincerely,

Neville Aquilina

Director General  
DG Global Issues, International Development & Economic Affairs  
Ministry for Foreign and European Affairs

3<sup>rd</sup> June 2021

Ref: AL MLT 1/2021

The Republic of Malta takes note of communication AL MLT 1/2021 by the Special Rapporteur on the right to privacy, Profs. Joe Cannataci (hereinafter ‘Communication’), concerning:

*“allegations that the Superintendent of Public Health has used powers granted to her by the Public Health Act of Malta which, unless constrained by adequate safeguards and remedies, risk leading to infringements of fundamental human rights, in particular the right to privacy. The SR states that his reading of Malta’s relevant laws fails to find safeguards that ensure that all actions are necessary and proportionate, and points out that it is extraordinary that this power may be exercised even if no public health emergency has been declared”*

In reply to such communication, Malta is tendering the following submissions following an assessment of the laws in question within the context of Malta’s legal framework, inclusive of international legal obligations, and considering the current ongoing circumstances.

### ***Observations of the Special Rapporteur***

The Special Rapporteur made the following requests:

- 1. Please advise what adequate safeguards and remedies may already be provided for by Maltese law, and explain how they reflect Malta’s international obligations under human rights conventions it has ratified, notably ICCPR.*
- 2. If adequate for the safeguards and remedies are not already provided by Malta’s legal system, then I respectfully urge the Superintendent of Public Health to immediately retract her instructions permitting entry into private homes unless and until adequate safeguards and remedies have been provided by law.*

### ***Abstract***

The Republic of Malta cherishes its track record in so far as the right to privacy is concerned. It is also aware that *jus cogens* is not attached to the right to privacy and that consequently States have a margin of appreciation in the execution and enforcement of such rights.

Malta respectfully submits that in view of its size and dense population, the spread of infectious disease poses a much higher risk than in any other State. This together with a Mediterranean culture whereby the strength of family ties and friendship, together with the proximity within which everyone lives, create a higher chance of socialisation and, within these circumstances, the spread

of COVID-19. There is also a greater chance of private gatherings with a high number of people, such as parties, which undoubtedly defy efforts made by the general population to limit the spread of COVID-19 and more importantly, any attempt at extinguishing such disease.

The prevailing legal regime cannot be considered comparatively, that is in contradistinction with other regimes of other States, but must be recognised as a *sui generis* and truly extraordinary *corpus juris*.

Consequently the law needs to safeguard public health in a way which can be effective. For this purpose the Superintendent of Public Health has been vested with certain powers, which although may be deemed to embrace unfettered discretion, in practice are exercised in a non-arbitrary fashion.

Malta has had to balance out the right to privacy with its obligation to prevent the spread of COVID-19. Moreover, the state has a general duty of care and responsibility to protect those within its territory.

### ***Submissions***

On the basis of an assessment of current applicable laws, outlined in more depth in Annex 1, we comment as follows:

#### ***Framework***

- I. Powers used by the Superintendent of Public Health are granted to her pursuant to the Public Health Act and its subsidiary legislation (vide Chapter 465 of the Laws of Malta);
- II. The Public Health Act does not require the making of a declaration of a public health emergency prior to the Superintendent being allowed, pursuant to the Act, to take action against any notifiable diseases and to issue orders accordingly (vide Chapter 465 of the Laws of Malta);
- III. COVID-19 has been declared a notifiable disease pursuant to the Act<sup>1</sup>;
- IV. Regulations and orders enacted to address COVID-19 have been, over the past 14 months, amended or revoked as circumstances required, and this with a purpose to control contagion but simultaneously abrogate laws which had served their purpose and were not required further;
- V. Authorised officers to whom powers have been delegated through a delegation instrument, and which instrument may be revoked, are obliged to carry out their duty in adherence with several conditions set out in the Public Health Act;
- VI. Delegation of the Superintendent of Public Health, which is revocable, has been granted to the Police Force, which has residual police powers in its own rights, Transport Malta

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<sup>1</sup> Notifiable Diseases : <https://deputyprimeminister.gov.mt/en/healthpromotion/idpcu/Pages/notifiablediseases.aspx> (accessed: 14/05/2021)



enforcement officers, Malta Tourism Authority officers and Local Enforcement Systems Agency officers. Authorised officers also include personnel from the Environment Health Directorate;

- VII. Malta has not derogated from the ICCPR or the ECHR and is thus currently still obliged to operate in full adherence with same international legal instruments;

#### *Redress*

- VIII. Actions of the Superintendent of Public Health are subject to review through Malta's judicial system and laws may be challenged through Malta's constitutional system;
- IX. Fines imposed pursuant to the Public Health Act and its subsidiary legislation may be challenged at two instances, in front of a Commissioner for Justice and in front of the Court of Magistrates, Criminal Jurisdiction; both on point of fact and law (vide Chapter 291 of the Laws of Malta);
- X. Government of Malta has set up a specific website<sup>2</sup> which is kept updated with relevant information for the public, such as: guidelines, helpline details, testing centres;
- XI. Persons who feel aggrieved by action taken by authorised officers have several fora for complaints, including the Ombudsman's Office;

#### *Entry*

- XII. The authorisation to enter into premises when required for purposes of public health, emanates from the Public Health Act;
- XIII. In practice authorised officers are accompanied by police officers and in most cases, will only call to a residential property when a third-party report/complaint is filed;
- XIV. Authorised officers request permission to enter the property and when refused await outside same property;
- XV. Following the Communication and observations, the Superintendent of Public Health has consolidated its internal position and *modus operandi* into a Standard Operating Procedure (SOP) setting out the manner in which enforcement of the legal notice in question is to be carried out (kindly see Appendix 1);

It is being reiterated that such laws are constantly being amended and that objective is to repeal same with updating of measures.

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<sup>2</sup> COVID-19 / Public Health Alert: <https://deputyprimeminister.gov.mt/en/health-promotion/covid-19/Pages/landing-page.aspx> (accessed: 14/05/2021)

## Annex 1

### 1. Applicable Law and Observations

The applicable Maltese law granting the Superintendent of Public Health (hereinafter the ‘Superintendent’) powers pursuant to matters relating to public health is Chapter 465 of the Laws of Malta, the Public Health Act, and its subsequent regulations:

#### 1.1. Public Health Act

The Public Health Act (hereinafter the ‘Act’) was enacted in 2003 by virtue of Act XIII of 2003 with a purpose to ‘*promote and protect health*’.

The Act outlines the responsibilities of the Superintendent, matters relating to administration of the Superintendent and matters relating to control of disease.

##### 1.1.1. Responsibilities and Powers of the Superintendent

Pursuant to Chapter 465 of the Laws of Malta, the Superintendent of Public Health has the following responsibilities:

- 4. The Superintendent shall be responsible for public health in Malta and shall:*
- (a) ensure that the provisions of this Act and of regulations made thereunder are complied with;*
  - (b) develop and implement strategies to promote and improve public health;*
  - (c) issue standards for public health;*
  - (d) advise the Minister on matters regarding public health in general and on matters relating to this Act in particular;*
  - (e) carry out any other function assigned to him by this Act or any other law; and*
  - (f) perform any other act which may be necessary or conducive to the better performance of the functions and responsibilities assigned to him by this Act*

The Superintendent is authorised, pursuant to article 27(c) of the Act, to issue Orders intended to regulate matters relating to dangerous epidemics and infectious disease.

The Act outlines several provisions relating to prevention and control of disease, including for the issuance of directions to people with notifiable disease.

The Superintendent is authorised, pursuant to article 5 of the Act, to delegate his(her) powers to authorised officers:<sup>3</sup>

- 5.(1) The Superintendent may under such conditions as he may deem fit, delegate any of his powers under this Act to any person.*

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<sup>3</sup> An authorised officer is defined by the article of 2 of the Act as a: “*duly qualified person authorised by the Superintendent to carry out any functions under this Act and includes any nominated officer*”

*(2) Such delegation may be with respect to different parts or articles of this Act and to different persons or entities or to a combination and be subject to any direction by the Superintendent who may, at any time, revoke it*

### **1.1.2. Authorised Officers**

As outlined in the Act, **an authorised officer may be given the power to enter and inspect** areas, premises, bodies of water or vehicles, and may also require persons to answers any questions and/or produce records.<sup>4</sup>

When carrying out such duties, authorised officers are required to provide an identification document issued by the Superintendent<sup>5</sup> and give reasonable notice, **unless this defeats the objective of the intended exercise**. Article 6(2) imposes an obligation on the authorised officer to adhere to these conditions<sup>6</sup>. Authorised officers may also require the presence of a police officer.

The Superintendent has authorised several officers in writing with a purpose to enforce the provisions of the Act and its subsidiary legislation. Authority was delegated to the Executive Police, Transport Malta and the Local Enforcement System Agency. Delegated authorisation can be revoked by the Superintendent of Public Health.

Such authorisation may be revoked by the Superintendent of Public Health.

### **1.1.3. Notifiable Disease**

Pursuant to article 27(a)(i):

*The Superintendent may make, vary or revoke orders:*

*(a) (i) listing and categorising notifiable disease conditions;*

COVID-19 was listed and is categorised as a notifiable disease conditions.<sup>7</sup>

## **1.2. Legal Instruments pursuant to the Act**

Pursuant to the Act, a total of 44 legal instruments were enacted. Of these 44 legal instruments, 24 were repealed.

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<sup>4</sup> Act, article 6(1)

<sup>5</sup> Article 11 of the Act provides the following: *The Superintendent shall issue identification documents to authorised officers.*

<sup>6</sup> (2) An authorised officer shall, when exercising a power delegated to him by the Superintendent under the provisions of this Act -(a) provide an identification document issued by the Superintendent under article 11 when requested by the owner of the area, premises, body of water or vehicle;(b) give reasonable notice unless such notice would defeat the objective of the intended exercise.

<sup>7</sup> Notifiable Diseases : <https://deputyprimeminister.gov.mt/en/health-promotion/idpcu/Pages/notifiablediseases.aspx> (accessed: 14/05/2021)

Of the remaining 24 legal instruments, the legal notice in question i.e. Legal Notice 77 of 2021 as amended by Legal Notice 109 of 2021, Legal Notice 157 of 2021 and Legal Notice 182 of 2021 provides the following main text:

*2. Groups of persons who respectively between them live in more than four (4) different residences shall not gather in a residential property.*

*3. Any person who fails to abide by the provisions of these regulations shall be guilty of an offence and shall, on conviction, be liable to the payment of a penalty of one hundred euro (€100) for each and every occasion on which these regulations are breached.*

### **1.3. Safeguarding of Fundamental Human Rights**

The Constitution of Malta provides that:

*32. Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –*

*(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;*

*(b) freedom of conscience, of expression and of peaceful assembly and association; and*  
*(c) respect for his private and family life, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*

*38. (1) Except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others on his premises.*

*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision –*

*(a) that is reasonably required in the interest of defence, public order, public morality or decency, public health, town and country planning, the development and utilisation of*

*mineral resources, or the development and utilisation of any property in such a manner as to promote the public benefit;*

*(b) that is reasonably required for the purpose of promoting the rights or freedoms of other persons;*

*(c) that authorises a department of the Government of Malta, or a local government authority, or a body corporate established by law for a public purpose, to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property or installation which is lawfully on those premises and which belongs to that Government, that authority, or that body corporate, as the case may be; or*

*(d) that authorises, for the purpose of enforcing a judgment or order of a court, the search of any person or property by order of a court or entry upon any premises by such order, or that is necessary for the purpose of preventing or detecting criminal offences, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

## **Article 8**

### *Right to respect for private and family life*

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right **except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.***

### **1.4. Observations**

The discretionary powers granted to the Superintendent of Public Health are outlined in the Public Health Act, which Act clearly provides that the Superintendent may authorise officers to enter into premises, including residential properties, pursuant to the Act and with a purpose to enforce such Act and its regulations.

Following the Communication, the Superintendent of Public Health has consolidated its internal position and *modus operandi* into an SOP setting out the manner in which enforcement of the legal

notice in question is to be carried out. For the avoidance of any doubt, SOP clarifies procedures which were already adopted.

Authorised officers do not carry out patrols specifically for purposes of identifying offences with the parameters of Legal Notice 77 of 2020. In practice authorised officers are accompanied by police officers and visits to residential properties are carried out when a third-party report/complaint is filed. Most cases of visits to residential properties were carried out after reports of house parties and either upon complaints of third-parties or persons who knew about such gatherings. The purpose of such visits is to ‘break up’ the gathering and ensure that COVID-19 restrictions are respected.

There were no reported issues of forced entry.

Authorised officers request permission to enter the property and have been reported to wait outside same property when entry is refused.

## **2. Status of Malta’s International Obligations**

Malta has not formally derogated from the International Covenant on Civil and Political Rights and neither from the European Convention of Human Rights and is operating within the parameters of the same conventions.

## **Appendix 1**

### **COVID-19 Transitioning - Guidance document for Enforcement Entities for the investigation of complaints with regards to Groups of persons In Residential Properties.**

The following guidance document is being issued by the Superintendent of Public Health and requires authorised officers to act in strict adherence of guidance.

#### **Understanding how COVID-19 spreads.**

Current research suggests that the SARSCoV-2 virus (the virus that causes COVID-19) is transmitted from person to person:

- Through respiratory droplets produced when an infected person coughs, sneezes or talks loudly.
- Between people who are in close contact with one another (within about 2 metres).

There is also a possibility that a person can get COVID-19 by touching a surface or object that has the COVID-19 virus on it and then touching their own mouth, nose, and eyes.

Most persons infected with COVID-19 experience mild symptoms and recover. However, some people develop more serious complications and may require hospital care. Risk of serious illness increases with age, for people with weakened immune systems and people with conditions such as diabetes, heart, and lung disease.

#### **Scope of this guidance document**

The scope of this guidance document is to give clear guidance and working practices in order to enforce Subsidiary Legislation 465.56 - Groups of Persons In Residential Properties Regulations. All authorised officers as per Chapter 465 - Public Health Act are responsible for the enforcement of the above-mentioned legislation.

Protocol to be followed by all authorized officers shall be the following:

- After being contacted by a complainant, the authorised officers shall investigate the complaint on the same day of the alleged gathering taking place.
- In terms of Article 6 of the Public Health Act authorised officers may at any reasonable time enter and inspect any premises.
- Upon arriving at the alleged address authorised officers are to identify themselves and show a valid identification card.
- The authorised officer is to inform the owner/tenant of the alleged address where the event is taking place about the complaint which merits further investigation.
- In case approval to enter the residence has been given by owner/tenant and the gathering by the group of persons who respectively between them live in more than four residences has been confirmed legal action is to be taken.
- Attendees shall on conviction be liable to a penalty of one hundred euro (€100) in terms of S.L. 465.56 - Groups of persons in Residential Properties Regulations.