

Mandate of the Special Rapporteur on the right to privacy

REFERENCE:
AL MLT 1/2021

12 April 2021

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 37/2.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received 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.**

According to the information received:

On 1 April 2021, during a COVID -19 Media Briefing, the Superintendent of Public Health, Charmaine Gauci announced that she had delegated authority, by the powers granted to her by the Public Health Act of Malta, to the police and officers from the Local Enforcement System Agency, Armed Forces of Malta, Transport Malta, the Malta Tourism Authority, and Environmental Health to enforce measures under this Act that have been implemented during the current pandemic.

Thus, by means of this delegated authority, the Superintendent of Public Health has advised that the police, acting on a report can enter houses and that other officers (specified above) have also been delegated authority to enter houses and carry out inspections. The Superintendent reportedly stated that officials only had the authority to enter residences on the basis of a report or reasonable suspicion that there are a number of people gathering together in breach of the regulations.

The laws of Malta, and specifically Art. 6 of Cap 465, do indeed grant the Superintendent of Public Health, the extraordinary power of entering the domestic residence of a private individual without a judicial warrant being required for such a breach of privacy. However, just as extraordinary is the fact that this power may be exercised even if no public health emergency has been declared.

May I draw your Excellency's attention that such unfettered powers, the wisdom and constitutionality of which may be in doubt¹, must be exercised in compliance with Malta's existing obligations under international law, especially those which require the application of the principles of necessity and proportionality.

I have no doubt that the Superintendent of Public Health of Malta is attempting to fulfil her duties in very difficult circumstances and that the measures she

¹ The key word here is unfettered. The constitutionality of such powers would be less in doubt had these been placed under specific constraints such as measures provided for by law aimed at ensuring respect of the principles of necessity and proportionality.

has authorized are made in the interest of public safety, but I am also duty bound to point out that with such great power comes great responsibility. This includes the responsibility to ensure that any actions taken in virtue of the Public Health Act have a specific and explicit legal basis through laws which also provide adequate measures clearly identified as safeguards and remedies aimed at ensuring that all actions are necessary and proportionate. My detailed reading of Malta's relevant laws fails to find such safeguards, not even in the subsidiary legislation relating to COVID-19 measures.

It would *prima facie* be disproportionate for any officer acting under powers delegated by the Superintendent of Health to enter any premises merely on the basis of, for example, a simple report by a neighbour, an action which lends itself far too easily to the hostility which often exists between neighbours.

I have very carefully perused the Mandatory Standards and Guidelines published by your Ministry², and I fail to find any provisions which may constitute adequate safeguards and remedies which Malta has undertaken to give in such circumstances.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

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 the human rights conventions it has ratified, notably ICCPR.
2. If adequate 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 for by law.

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I respectfully urge that the execution of this measure be suspended, pending the full review of its necessity and proportionality, in the light of Malta's international human rights commitments.

My interest in writing to your Excellency is to ensure that, where such safeguards and remedies are missing, then they be urgently introduced into Maltese

² <https://deputyprimeminister.gov.mt/en/health-promotion/covid-19/Pages/mitigation-conditions-and-guidances.aspx>

Law. This letter is also an open invitation to the Superintendent of Public Health, the State Advocate and the Attorney General of Malta to contact me directly in an effort to discuss and otherwise identify those legal provisions which may need to be introduced.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

I remain at your disposal to discuss my concerns and recommendations outlined in this letter and for any other consultation., I may be contacted directly on my mobile phone +356 99 42 6133, e-mail jcannataci@sec.research.um.edu.mt and through Sonia Cronin, Human Rights Officer, Office of the United Nations High Commissioner for Human Rights (scronin@ohchr.org).

Please accept, Excellency, the assurances of my highest consideration.

Joseph Cannataci
Special Rapporteur on the right to privacy

Annex
Reference to international human rights law

In connection with the above concerns, I refer to the obligations of your Excellency's Government under article 17 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Malta in 1990, guaranteeing the right not to be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.

I also bring to your attention the Article 12 of the Universal Declaration of Human Rights prohibits any arbitrary interference with a person's privacy, family, home or correspondence. The right to privacy is essential to human dignity, and any restriction in its enjoyment must be prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.

Apart from the United Nation's jurisprudence on necessity and proportionality, I also draw your attention to the Constitution of Malta and to its obligations in respect to Art. 9 of Convention 108 and Article 11 of Convention 108+ of the Council of Europe. Malta has deposited its instruments of ratification of Treaty No 223 on the 20 November 2020 and is thus formally bound by the provisions of e.g. Article 11 where exceptions to protections granted under any form of data protection laws can only be made where "such an exception is provided for by law, respects the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society for... public safety".