



ADF INTERNATIONAL

**From:** Adina Portaru  
**Date:** 14 August 2017  
**Re:** **Draft Spanish Equality Bill (122/000097)**

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## Executive Summary

The Draft Bill 122/000097 (the “Equality Bill”) is a proposal presented by the Parliamentary Confederate Group of Unidos Podemos-En Comú Podem-En Marea which purports to fight against discrimination on the basis of sexual orientation, identity, gender expression, sexual characteristics, and in favour of the social equality of lesbians, gays, bisexuals, transsexuals, transgender and inter-sex people.

While the stated aim of the Equality Bill is laudable, this memorandum highlights some significant concerns that have been raised on a closer scrutiny of the Bill’s text, including:

- The unduly wide scope, covering areas which the European Union has found too controversial to legislate on (**Paras 3 – 11** below).
- The vague terminology, the subjectivity of the offences created, the reversal of the burden of proof resulting in a presumption of guilt (**Paras 12 – 21** below).
- Risks of opportunist litigation (**Paras 22 – 26** below).
- Significant infringement of freedom of expression, as well as far-reaching and disproportionate severity of offences (**Paras 27 – 44** below).
- Infringement on the right of parents to be the primary educators of their children (**Paras 45 – 53** below).

Overall, the Equality Bill in its current form legislates far beyond what is necessary to ensure equality in society, and in light of its expansive scope and the legal uncertainty resulting from the vague terminology used, it is likely to have a significant and detrimental impact on citizens’ fundamental freedoms.

For these reasons, we strongly encourage the Spanish Parliament to vote against adopting the Equality Bill.

## (a) Introduction

1. ADF International is an alliance-building legal organization that advocates for the right of people to freely live out their faith, with a particular focus on freedom of thought, conscience and religion around the world. ADF International holds special consultative status with the United Nations and accreditation at the European Parliament, the European Union Agency for Fundamental Rights, the Organization for Security and Cooperation in Europe, and the Organization of American States, and has argued, co-counseled and intervened in over 50 significant cases before the European Court of Human Rights.
2. This memorandum assesses the proposed Spanish Equality Bill, which purports to ‘fully guarantee the right to real and effective equality of gay people, lesbians, transsexuals, transgender and inter-sex, as well as their descendants, through the prevention, correction and elimination of all discrimination...’<sup>1</sup> This memorandum will show that, while the stated goal of the Equality Bill is laudable, the negative side-effects are numerous and far-reaching to such an extent that the legislation is likely to cause more problems than it would solve. The proposed wording of the legislation results in an unprecedented widening of the scope of anti-discrimination laws, which would significantly encroach on fundamental rights. The vague wording, the far-reaching penalties, the reversing of the burden of proof, and the curtailing of parents’ prior right to educate their children in accordance with their religious and philosophical convictions raise make this piece of legislation problematic and inconsistent with European and international human rights standards.

## (b) Scope of the Equality Bill

3. The Equality Bill has an extremely wide scope. It covers ‘all spheres of life...in particular the civil sphere, as well as work, social, health, education, economic and cultural spheres,’ and ‘personal situations’<sup>2</sup> (going far beyond EU law in this area). It also expands the ‘protected grounds’ to areas which are non-existent under EU anti-discrimination law. The wide scope of the Equality Bill is not in line with current EU legislation, is disproportionate, and is not justified by a proven necessity. The Bill also fails to show whether less restrictive means are available to achieve its aims.
4. The principle of equality has always played a central role in the formulation and implementation of human rights legislation. Equality, understood as *equality before the law*, and not as the right to be equally chosen as a service provider or a contracting partner, and the principle of non-discrimination, as a *guarantee to protect citizens from States’ abuse*, have both been included in virtually all treaties that followed the atrocities of the two world wars, such as, *inter alia*, the International Covenant on Civil and Political Rights (‘ICCPR’), the International

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<sup>1</sup> Equality Bill, Article 1. All translations are the author’s unofficial translations.

<sup>2</sup> Equality Bill, Articles 1(2) and 2(1).

Covenant on Economic and Social and Cultural Rights ('ICESCR'), and the European Convention on Human Rights ('ECHR').

5. The former Economic Community addressed the issue of non-discrimination, but in very specific and strictly defined areas, such as equal pay between men and women in the workplace<sup>3</sup> and discrimination solely on the basis of sex.<sup>4</sup> After the Treaty of Amsterdam entered into force,<sup>5</sup> the EU adopted a number of anti-discrimination Directives that regulated the principle of anti-discrimination in equally specific and well-defined areas (see table below).

	Employment	Goods and Services
Race	<b>YES</b> (2000/43/EC)	<b>YES</b> (2000/43/EC)
Sex	<b>YES</b> (76/207/EEC; 2006/54/EC)	<b>YES</b> (2004/113/EC)
Other characteristics e.g. religion or belief, sexual orientation, disability	<b>YES</b> (2000/78/EC)	<b>NO</b> (2008/0140 proposal)

6. Therefore, current EU Directives prohibit discrimination in the areas of employment and in the provision of goods and services, including housing, on the grounds of race and sex. EU Directives also prohibit discrimination in the area of employment on the grounds of religion or belief, disability, age or sexual orientation.

<sup>3</sup> EEC Treaty, Article 119, replaced by TFEU, Article 157 (former article 141 TEC)

<sup>4</sup> Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19; Council Directive 76/207/EEC of 9 February 1976 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 [1976], OJ L39/40; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979]; OJ L6/24; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986], OJ L225/40; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity (including agriculture) in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986], OJ L 359, repealed by Directive 2010/41/EU of the European Parliament and Council of 7 July 2010 [2010], OJ L 180/1; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992], OJ L 348/1; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave [1996], OJ L145; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L14/6

<sup>5</sup> This introduced Article 13 (Article 19 TFEU), according to which the EU's powers in the area of non-discrimination were enlarged: 'Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' The article is not directly effective and does not force Member States to act.

7. However, it is important to note that anti-discrimination in the area of goods and services, including media and advertisement, which the Equality Bill seeks to cover, *inter alia*, is not regulated at the EU level. In fact, the Proposal for an EU Council Directive in this area, the so-called ‘Equal Treatment Directive’<sup>6</sup> has been subject to stalled negotiations in the Council of the EU for more than six years.
8. The Equal Treatment Directive has proven to be so controversial in scope and problematic in the legal drafting that Member States have been unable to negotiate a compromise to secure unanimous approval.<sup>7</sup> The Equal Treatment Directive is currently the oldest Directive being negotiated in the Council of the EU, and both NGOs<sup>8</sup> and former EU officials<sup>9</sup> have urged the Commission to withdraw the proposal.
9. Besides attempting to regulate in an area which the Council has found too controversial to agree upon, the proposed Equality Bill would actually go much further than the Equal Treatment Directive. This is evident from the scope of the Equality Bill, which covers ‘all spheres of life,’ including all media content,<sup>10</sup> shows and cultural productions, cultural competitions, sporting events, documentary collections, learning materials in non-formal education and leisure activities.<sup>11</sup>
10. The widening of scope is also evident from the large number of ‘protected characteristics’ that the Equality Bill lists, many of which are vague, partially mutable and subjective. Gender identity, one of the grounds for non-discrimination which the Bill protects, refers to ‘the way a person *may feel*’;<sup>12</sup> ‘transgender reality’ encompasses ‘those *who identify themselves* as transvestites, cross-dressers, queers, gender queers, drag kings, drag queens...’<sup>13</sup> according to their ‘felt identity.’<sup>14</sup>

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<sup>6</sup> Proposal for a Council Directive on implementing the principle for equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM (2008) 426).

<sup>7</sup> For criticism of the Equal Treatment Directive, see Paul Coleman and Roger Kiska, ‘The Proposed EU “Equal Treatment” Directive: How the UK Gives other EU Member States a Glimpse of the Future’ [2012] 5(1) *International Journal for Religious Freedom* 113-128.

<sup>8</sup> On 2 December 2014 more than 50 NGOs asked the President of the European Commission, Jean-Claude Juncker, to drop the Equal Treatment Directive, in accordance with the principle of ‘political discontinuity.’

<sup>9</sup> On 7 December 2015, former EU Commissioner for Internal Market and Services, Frits Bolkestein, published an op-ed in which he strongly criticized the Equal Treatment Directive, saying that it is ‘an absurd legislative proposal’ that should ‘disappear from the Commission’s agenda.’ Frits Bolkestein, ‘Haal EU-richtlijn ‘Gelijke Behandeling’ van de agenda, de Volkskrant’ (*de Volkskrant*, 7 December 2015) <<http://www.volkskrant.nl/opinie/haal-eu-richtlijn-gelijke-behandeling-van-de-agenda~a4202743/>> accessed 14 August 2017. For the English translation of the article, see ‘Former Commissioner Bolkestein: ETD is an absurd legislative proposal’ (*respectfreedom*, 7 December 2015) <<http://www.respectfreedom.eu/former-commissioner-bolkestein-etc-is-an-absurd-legislative-proposal/>> accessed 14 August 2017.

<sup>10</sup> Equality Bill, Article 65.

<sup>11</sup> Equality Bill, Article 58.

<sup>12</sup> Equality Bill, Article 3(1) b.

<sup>13</sup> Equality Bill, Article 3(1) h.

<sup>14</sup> Equality Bull, Article 31(2).

11. The wide and untested nature of this list, combined with the problematic reversal of the burden of proof (see below), has negative effects on legal certainty, foreseeability and the predictability of the legislation, as well as, *de facto*, removing the presumption of innocence.

### **(c) Legal Concerns**

#### *Foreseeability, predictability and legal certainty*

12. The three main requirements for a piece of legislation are: a) certainty (the law must give anyone subject to it the ability to regulate their conduct), b) foreseeability (reasonable anticipation of the possible results of an action) and c) predictability (similar cases are treated alike).<sup>15</sup>
13. The Equality Bill does not meet these requirements, as it employs vague terms open to expansive interpretation, making it difficult for citizens to foresee the legal consequences of their acts:
14. For example, in wide-ranging language typical of the draft Bill, it indicates that:

The facts and suspicions from which the existence of discrimination can be presumed on grounds of sexual orientation, gender identity or expression, or sexual characteristics, can be proven by any kind of evidence, provided that it is lawful; without prejudice to the proceedings and the measures taken under the rules of organization, coexistence or discipline of the institutions and public services.<sup>16</sup>
15. The combination of the terms deployed, along with the wide scope of application and grounds that are partly subjective and in some cases mutable, render the application of the Equality Bill extremely problematic.
16. The subjective feelings and perceptions of an alleged victim of discrimination, could have life-changing consequences for someone publicly pursued in respect of such a claim. This means it would be impossible for citizens to have certainty as to whether or not their actions fall within the scope of the Equality Bill.
17. Consequently it will become harder for those who have their actions labeled as discriminatory to prove otherwise. The terms used mean that what may suffice in one case, may not in another. But in all cases, the starting point will be a problematic reversing of the presumption of innocence.

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<sup>15</sup> See the European Court of Human Rights ('ECtHR'), *Gorzelik and others v. Poland*, Appl. No. 44158/98, Judgment of 17 February 2004, para 64, *Larissis v. Greece*, Appl. Nos. 23372/94, 26377/94, 26378/94, Judgment of 24 February 1998, para 40, *Hashman and Harrup v. the United Kingdom* [GC], Appl. No. 25594/94, Judgment of 25 November 1999, paragraph 31, *Rotaru v. Romania* [GC], Appl. No. 28341/95, Judgment of 4 May 2000, para 52.

<sup>16</sup> Article 74(2).

### *The reversal of the presumption of innocence*

18. The European Court of Human Rights has said that ‘in the EU, procedural rights are seen as instrumental in enhancing mutual trust [and] indispensable for the mutual recognition of judicial decisions.’<sup>17</sup> The presumption of innocence is one of the basic procedural guarantees representing an essential element of the right to a fair trial. The principle demands that, when carrying out their duties, judicial authorities should not start with the presumption that the accused is guilty. The presumption is closely related to other procedural rights, including the rights to remain silent; not to incriminate one-self; not to cooperate; and the right to be present at trial. The presumption of innocence is enshrined in the ECHR,<sup>18</sup> the EU Charter of Fundamental Rights<sup>19</sup> and recognized in a large number of judicial decisions.<sup>20</sup>

19. The risk created by the unclear and vague legal drafting of the Bill is further exacerbated by the reversal of the burden of proof:

[W]hen the plaintiff or the concerned person complains of discrimination on grounds of sexual orientation, gender expression or identity, or sexual characteristics and provides grounded *suspicion*, the defending party or whomever has been charged with this discriminatory situation will have to provide a well-proven, objective and reasonable justification of the measures taken and their proportionality.<sup>21</sup>

20. This reversal becomes extremely problematic when combined with the vague and subjective grounds of discrimination (‘felt identity’, ‘trans-identity’, ‘identity-freely determined’) as contained within the proposed Equality Bill.

21. Consequently, a person accused of ‘discrimination’ is forced prove his or her innocence, whereas any person claiming to have been a victim of discrimination would be presumed to be such. It is almost impossible for a defendant to disprove that their actions did not ‘degrade’ or ‘offend’ the alleged victim, because the only standard for assessing this is the alleged victim’s own subjective perception. Therefore, the Equality Bill establishes what may be described as a ‘presumption of guilt,’ which contradicts established procedural rights.

### *Risk of opportunistic litigation*

22. In countries where similar (although not so far reaching) legislation has been adopted, experience has shown that these laws lead to strategically motivated lawsuits against both individuals and businesses. In the UK, for example, it is a common occurrence that NGOs with sufficient financial resources target alleged offenders by bringing claims against them. Litigation Associations are willing to support the actions because they receive a percentage of the compensation fee,

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<sup>17</sup> At a Glance, Strengthening the Presumption of Innocence in the EU, Plenary 14 January 2016

<sup>18</sup> ECHR, Article 6(2).

<sup>19</sup> The Charter of Fundamental Rights of the European Union, Article 48(2)

<sup>20</sup> See, for example, ECtHR, *Telfner v. Austria*, Appl. No. 33501/96, Judgment of 20 March 2001

<sup>21</sup> Equality Bill, Article 74 (emphasis added).

and then use that money to seek further cases, leading to endless frivolous and ill-founded suits.<sup>22</sup>

23. The risk of strategic litigation under the reversal of the burden of proof has been exemplified recently in *Kratzer* (Case C-423/15) pending before the Court of Justice of the European Union ('CJEU').<sup>23</sup> The case originates from the German Bundesarbeitsgericht (Federal Labour Court), which has submitted the following prejudicial questions:

1. On a proper interpretation of Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Article 14(1)(a) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), does a person who, as is clear from his application, is seeking not recruitment and employment but merely the status of applicant in order to bring claims for compensation also qualify as seeking 'access to employment, to self-employment or to occupation'?
2. If the answer to the first question is in the affirmative:  
Can a situation in which the status of applicant was obtained not with a view to recruitment and employment but for the purpose of claiming compensation be considered as an abuse of rights under EU law?

24. The facts of the case<sup>24</sup> are as follows: Mr. Kratzer, the plaintiff, is allegedly a vexatious litigant. He is a lawyer specialising in anti-discrimination litigation, who appears to apply regularly for job vacancies for which he is not suitable. When his applications are rejected, he files a lawsuit claiming he had been discriminated against. In the specific case being considered, Mr. Kratzer alleges that the insurance company which rejected his application (R+V Allgemeine Versicherung AG), discriminated against him on the basis of his age. On the contrary, the company claims that the position that Mr Kratzer applied was actually that of a trainee, which was clearly unsuitable for a lawyer with 15 years of professional experience. Apparently, this is only one of many job applications made by Mr Kratzer, where he uses the rejection as a pretext for filing lawsuits against the employers where he applied. According to the *Spiegel*, Mr Kratzer was successful

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<sup>22</sup> Paul Coleman and Roger Kiska, 'The Proposed EU "Equal Treatment" Directive: How the UK Gives other EU Member States a Glimpse of the Future' [2012] 5(1) International Journal for Religious Freedom 113-128.

<sup>23</sup> 'Request for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 31 July 2015 — Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG Judgment in *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*' (*EUR LEX*) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CN0423&qid=1460716365597>> accessed 14 August 2017.

<sup>24</sup> Bundesarbeitsgericht, 'BUNDESARBEITSGERICHT Entscheidung vom 18.6.2015, 8 AZR 848/13 (A) ECLI:DE:BAG:2015:180615.B.8AZR848.13A.0' (*Bundesarbeitsgericht*) <<http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2015&anz=34&pos=0&nr=18119&linked=entsch>> accessed 14 August 2017.

in one important case before the Bundesarbeitsgericht, in which it pressed charges against the Charité Hospital in Berlin.<sup>25</sup> The Hospital had been looking for a young professional, not a lawyer. In many cases he has been able to negotiate out-of-court-settlements with companies that have been unwilling to go through the full length of an expensive lawsuit, and so prefer to settle the matter quickly.

25. This case gives a glimpse of the types of action that could increase under the proposed Equality Bill.
26. The Equality Bill lacks the necessary guarantees or safeguards to prevent such litigation. This will have a negative impact on the corporate and personal images of those targeted and the possible closure of small businesses which are not able to cope with long, expensive trials, or the cost of fines.

### *Undermining Freedom of expression*

27. Freedom of expression is a fundamental freedom. Accordingly, the right to speak freely features prominently in all of the international human rights treaties.
28. Article 19 of the Universal Declaration of Human Rights ('UDHR'), Article 19 of the ICCPR and Article 11 of the EU Charter of Fundamental Rights – all protect and guarantee freedom of expression
29. A General Comment by the UN Human Rights Committee states:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.<sup>26</sup> They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.<sup>27</sup>

30. In keeping with other international human rights bodies, the European Court of Human Rights has had a longstanding tradition of giving robust protection to freedom of expression.
31. Article 10 of the Convention provides that 'everyone has the right to freedom of expression,' and the Court has stated on numerous occasions that freedom of expression has a 'special importance' under the Convention.<sup>28</sup> Moreover, Article 10 not only protects the substance of the ideas and information expressed but also

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<sup>25</sup> Elke Spanner, 'Erst Die Absage, Dann Der Prozess' (*Spiegel*, 13 November 2015) <<http://www.spiegel.de/karriere/berufsleben/diskriminierung-bei-der-bewerbung-anwalt-aus-muenchen-gilt-als-agg-hopper-a-1062076.html>> accessed 14 August 2017.

<sup>26</sup> Citing Communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007; No. 628/1995, *Park v. Republic of Korea*, Views adopted on 5 July 1996.

<sup>27</sup> Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, para 2.

<sup>28</sup> See *Ezelin v. France* (1992) 14 E.H.R.R. 362 para 51. Article 11 of the European Convention on Human Rights provides that 'Everyone has the right to freedom of peaceful assembly.' The two freedoms are closely linked and in *Ziliberg v Moldova* (Application No 61821/00) 4 May 2004, the Court observed that 'the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society.'



their form.<sup>29</sup> In the seminal case of *Handyside v. United Kingdom*, the Court explained the importance of freedom of speech to democracy itself:

Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.<sup>30</sup>

32. Therefore, it is not just inoffensive speech that is protected by Article 10. This has been the long-standing view of the Court and has meant that, as the following cases demonstrate, many "offensive" forms of expression have been protected by Article 10.
33. In *Gündüz v. Turkey*,<sup>31</sup> the leader of an 'Islamic sect' was convicted for making a series of offensive remarks on television. In particular he referred to children that are born following a civil ceremony marriage as "piçs" – a particularly pejorative term designed to cause offense. The European Court found that the conviction was a violation of Article 10.
34. In *Giniewski v. France*,<sup>32</sup> a journalist was convicted for defamation for making racially defamatory statements against the Christian community. In particular, the applicant had written that the doctrine of the Catholic Church contained the seeds of anti-Semitism that fostered the idea and implementation of the Holocaust. The European Court again found the conviction to be in violation of the Convention, stating that although the published text 'contains conclusions and phrases which may offend, shock or disturb some people, the Court has reiterated that such views do not in themselves preclude the enjoyment of freedom of expression.'<sup>33</sup>
35. In the case of *Klein v. Slovakia*,<sup>34</sup> the applicant was convicted for 'defamation of nation, race and belief' for writing an article in which he criticized the Archbishop of Trnava, Slovakia, at one point calling him an "ogre". The domestic courts held that, 'The article in question is vulgar and it ridicules and offends. In the view of the Regional Court it therefore enjoys no protection.' However, the European Court did not agree and, despite noting that the article was a 'strongly worded pejorative opinion' containing 'oblique vulgar and sexual connotations,' and aimed at a particular individual, the Court held that the conviction was in violation of Article 10 of the Convention.

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<sup>29</sup> *De Haes v. Belgium* (1997) 25 E.H.R.R. 1, para 48.

<sup>30</sup> *Handyside v. UK* (1976) 1 E.H.R.R. 737 para 49.

<sup>31</sup> *Gündüz v. Turkey*, (App no. 35071/97), 4 December 2003.

<sup>32</sup> *Giniewski v. France* (2007) 19 E.H.R.R. 34.

<sup>33</sup> *Giniewski v. France* (2007) para 52.

<sup>34</sup> *Klein v. Slovakia* (App no. 72208/01), 31 October 2006.

36. The Court has stated that any exceptions to the right to freedom of expression must be ‘construed strictly and the need for any restrictions must be established convincingly,’<sup>35</sup> and only ‘convincing and compelling reasons’ can justify a restriction on freedom of expression.<sup>36</sup>

### Penalties

37. In opposition to the robust protection of freedom of speech in International and European law, the Equality Bill undermines freedom of expression and opens the door to wide-ranging State censorship with onerous penalties for violations. According to the Bill, a *minor infraction* is “...uttering, by any means or method, expressions, images of graphic contents of any kind which are offensive or degrading by reason of sexual orientations, identity, or gender expression or sexual characteristics against LGBTI people or their families.”<sup>37</sup>
38. Repeating such opinions or posting them online elevate the infractions to ‘serious’. The penalties for merely expressing a view or an opinion are inappropriate and grossly disproportionate: up to 3,000 EUR for a single instance, and 3,001 to 20,000 EUR for repeated minor violations, for one serious violation or for any violation online, even a minor one. In addition, the Court may impose one or more secondary penalties including a prohibition on accessing any kind of public assistance for up to one year, and a prohibition on signing any agreement with any public entity for a period of one year.
39. The provisions of the Equality Bill confer an extraordinary amount of power on the State to police the speech of its citizens. Once the premise that the State can give or take away the right to speak freely is accepted, there is no logical stopping point.
40. The Equality Bill itself defines ‘*very serious infractions*’ as:

Calling for public acts by any means or procedures of any kind that have as their objective to promote, encourage, or incite, directly or indirectly, discrimination, hate or violence against people by reason of sexual orientation, identity, or gender expression or sexual characteristics.

Reoffending by publication on the Internet or social media of expressions, images of graphic content of any kind that is offensive or degrading by reason of sexual orientation, identity, or gender expression or sexual characteristics against LGBTI people or their families.<sup>38</sup>

41. Not only would unpopular, offensive or disturbing views be purged from public life and from the online sphere, but the Equality Bill would ensure that the perpetrator

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<sup>35</sup> *Şener v. Turkey*, App no. 26680/95, § 39, ECHR 2000-III. See also *Thoma v. Luxembourg*, App no. 38432/97, paras 43, 48, ECHR 2001-II; see also *The Observer and The Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 30, para 59.

<sup>36</sup> *Id.*, para 40.

<sup>37</sup> Equality Bill, Article 94(2).

<sup>38</sup> Equality Bill, Article 94(4).

is not in the position to express his or her view any more. The sanctions for 'very serious offences' are penalties between 20,001 to 45,000 EUR. In addition, secondary penalties can be imposed, such as:

- a) Cancellation of activities or services for a maximum time period of 2 years.
- b) Deprivation of the corresponding license or authorization.
- c) Closing of the premises open to the public for a maximum period of 2 years.
- d) Prohibition to have access to any kind of public assistance from the Administration a time period of up to 2 years. In case of relapse or reiteration, it can reach a maximum time period of 5 years.
- e) Prohibition to hire with the Administration, its autonomous bodies, or public entities up for a period of up to 2 years. In case of relapse or reiteration, it can reach a maximum time period of 5 years.
- f) Temporary disqualification for a period of up to 2 years for the provision of public services. In case of relapse or reiteration, it can reach a maximum time period of 5 years

42. The media itself will not be able to operate freely, but is likely to be subjected to strict monitoring and censorship. According to the Equality Bill,

Broadcast content and advertisements will be watched over so that they are respectful towards LGTBI persons.

Media and communication will be watched over so that they include in their programs for all ages, the diversity of sexual orientation, identity and gender expression including the family diversity of LGTBI.<sup>39</sup>

43. Citizens' freedom is at the heart of a democratic society. This includes the freedom to agree, to disagree, to argue, to criticize, to make concessions and compromises and also to maintain and promote democratic values. Such values are turned on their head by the Equality Bill, which carries a significant risk of shutting down debate and having a chilling effect on citizens' speech.

44. The severity of sanctions and the subjective nature of the offences will:

- a) Increase litigation: because of their subjectivity and ambiguity, 'hate speech' laws open the door to baseless litigation and the criminalization of "rational" or "normal" speech on unclear and unsubstantiated grounds. Even if the courts ultimately rule that a person accused of "hate speech" is innocent of the crime, the stigmatization and hardship endured by having to fight the criminal accusations can last a lifetime and destroy a reputation.
- b) Require the judicial assessment of the content of certain speech, but resort to unclear (moral and legal) criteria for this assessment. The vague definitions of infractions will result in highly subjective assessments and

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<sup>39</sup> Equality Bill, Article 65 (3) and (4).

means that they will be (or risk being) inconsistently interpreted and arbitrarily enforced.

- c) Make the offences essentially subjective, vague and elusive, and based more on the hearer's subjective perceptions and feelings than the speech itself.
- d) Shrink the boundaries of free speech and create a chilling effect. Given the highly subjective nature of "offensive speech", citizens will avoid engaging in "sensitive" or possibly "offensive" topics for fear that this might be qualified as infractions and lead to a criminal investigation. This would overall create a climate of suspicion and mistrust, given that everyone can report everyone for alleged "offensive speech". Additionally, 'not facilitating the work or partially refusing to cooperate with authorities investigating offensive speech will, in the long term, constitute thought-policing and pressure to "report" friends and family members to the authorities.

### *Parental rights*

- 45. By making no reference to the rights of parents, the Equality Bill stands in stark contrast to the well-established international legal norms which see parents as primarily responsible for raising their children.
- 46. The right of parents to be the primary educators of their children is a fundamental right<sup>40</sup> and included in a number of international human rights treaties. The UDHR makes it clear that 'parents have a *prior right* to choose the kind of education that shall be given to their children.'<sup>41</sup>
- 47. In this well-established capacity, parents have both the greatest rights and the greatest responsibility in educating their children. In the educational process, State institutions should assist parents; schools must seek their cooperation and not artificially displace the rights of children and the rights of parents by imposing on children an education contrary to the one they receive from their parents.
- 48. The UN Convention on the Rights of the Child clearly outlines that among the most important rights of the child are precisely the right to parental love and the right to education. It also explicitly notes that the rights of parents are not juxtaposed to the rights of children.<sup>42</sup>
- 49. Article 2 Protocol 1 of the European Convention on Human Rights protects the rights of parents in the context of the education and teaching of their children:

In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of

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<sup>40</sup> *Folgerø and Others v. Norway*, App no 15472/02 (ECtHR, 29 June 2007) 84 e.

<sup>41</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 26 (3). (emphasis added).

<sup>42</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 UN Doc A/44/49 (CRC) Articles 5 and 18.

parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

50. However, Article 20 bis of the Equality Bill departs from this understanding, by highlighting that:

Within their respective competencies, [the State and Autonomous Communities] will provide insurance and coverage relating the sexual reassignment process according to their scope of services in each of them. Transsexuals and transgenders *above 16 years-old*, will be able to provide their informed consent on their own, in order to access to surgical sexual reassignment. From the *moment of puberty* they will allowed to give their informed consent to access hormonal blockers and hormonal crossed treatment.

51. These provisions could result in an infringement of the right of parents to ensure their children receive education and teaching in conformity with their own religious and philosophical convictions.

52. For instance, parents would not be able to oppose and seek medical help for their child who suffers from gender dysphoria. Children would be given a *carte blanche* to take life-impacting decisions without the involvement of their parents, and without the evaluation of a specialist, psychologist or peers. Instead of covering free medically-controversial treatments (hormone-blockers, hormonal cross-treatment), the State – through the General Administration of the State and Autonomous Communities – should protect and should respect the fundamental rights of its citizens. The Equality Bill also does not protect the rights and well-being of children, since it offers a radical life-changing solution to what could be a temporary phase. Administering hormone-blockers is an intrusive and far-reaching technique which can have many side effects, especially where a child decides to stop the treatment or repeats it over a long period of time.

53. Furthermore, according to the Equality Bill, controversial comprehensive education plans are proposed,<sup>43</sup> which could also result in a severe infringement of the right of parents to ensure their children receive education and teaching in conformity with their own religious and philosophical convictions.

#### **(d) Conclusions**

54. In light of the concerns raised above, the Equality Bill in its current form legislates far beyond what is necessary to ensure equality in society, and in light of its expansive scope and the legal uncertainty flowing from the vague terminology used, it is likely to have a significant detrimental impact on citizens' fundamental freedoms.

55. Furthermore, the proposed reversal of the burden of proof would make it difficult for defendants to prove their innocence and open the door for opportunistic lawyers to commence strategic litigation at great cost to businesses and citizens.

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<sup>43</sup> Equality Bill, Article 40.

56. The Equality Bill stands in stark opposition to the well-established legal norms of ensuring that parents are free to educate their children in accordance with their philosophical and religious convictions, as well as the jurisprudence of the European Court of Human Rights which robustly protects freedom of expression, extending to speech which is even offensive, shocking or disturbing.
57. Giving strong protections to freedom of speech does not come without risk - in a society that tolerates a wide scope of speech there is always the risk that other citizens will be hurt and offended by what they hear. But it is a price worth paying. True freedom of thought, conscience and religion depends on it. A free and diverse society depends on it. Once society accepts that the State can widely censor public debate through the coercive criminal law, there is no logical stopping point.
58. For these reasons, we strongly encourage the Spanish Parliament to reject the Equality Bill.