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Country report

Non-discrimination

Malta

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EXECUTIVE SUMMARY

1. Introduction

At the end of 2013, the population of Malta was estimated to be 425,384.¹ According to the Labour Force Survey for the period October – December 2014, the number of employed persons was estimated at 180,124.

Various organisations in Malta, both governmental and non-governmental, actively seek to combat discrimination on various grounds. Besides the measures taken to implement the directives, the Government continues to seek dialogue and consultation with persons and entities working to combat and prohibit discrimination.

In 2014 there were three main legislative amendments. An amendment to the Equality for Men and Women Act² changed the burden of proof requirement whereby it is not incumbent on the defendant to prove that there has been no breach of equality rules. By virtue of an amendment to the Equal Treatment in Employment (Amendment)³ Act No. X of 2014, adopted on 17 April 2014, amendments were introduced to the Constitution of Malta so as to extend protection of the Fundamental Rights and Freedoms of individuals on the basis of sexual orientation.⁴

It is important to note that, in December 2014, a consultation process was launched⁵ proposing the introduction of an Equality Act and a Human Rights and Equality Commission. The Equality Act is proposed to supersede the current Maltese Equality for Men and Women Act, which no longer serves its purpose, as its distinctions in providing for different grounds have created an unwanted hierarchy of grounds. The new Equality Act is being proposed so as to present a less fragmented equality legal framework in Malta, and it also introduces provisions on intersectionality.⁶ The ultimate aim of this proposed Equality Act is to have all the relevant provisions of the following EU Directives included within one, comprehensive act of legislation: Directive 2000/43/EC, Directive 2000/78/EC, Directive 2004/113/EC and Directive 2006/54/EC.

The proposed legislative framework for the Human Rights and Equality Commission, which will address human rights issues and violations and will monitor and advise on human rights priorities in Malta,⁷ will focus on potential and current systematic violations of human rights,

¹ The number of foreign citizens residing in Malta in 2014 totalled 23,643.

² Introduced by Act XVIII of 2014.

³ LN 274 of 2014.

⁴ The Act introduced 'sexual orientation' and 'gender identity' as grounds on the basis of which discrimination is prohibited in the public sphere. More particularly, this therefore means that acts of discrimination on these grounds are forbidden in any law or in the conduct of a public entity. Prior to this extension, protection against discrimination was limited to the 'race', 'place of origin', 'political opinions', 'colour', 'creed' or 'sex' of an individual. Moreover, the Act introduced the principle that any law imposing qualifications related to sexual orientation or gender identity shall be held to be discriminatory in relation to calls for service as a public officer or service for a local government authority or body corporate established for a public purpose.

⁵ The White Paper presented on 10 December 2014 by the Minister for Social Dialogue, Consumer Affairs and Civil Liberties, Helena Dalli, launched a consultation process, which will close on 10 February 2015.

⁶ The eventual Act should contain a general provision against discrimination as well as positive equality duties and obligations. Additionally, a revised list of grounds of discrimination is to be included to ensure that all bases of discrimination are adequately included within one Act. Intersectional discrimination is also to be tackled with specific provisions within the proposed legislation. The provisions of this Act should cover all spheres of life, and shall include provisions that allow for NGOs to submit cases on behalf of victims and for the possibility of class action suits and the processing of cases of discrimination without the need to identify an individual victim. Finally, provisions allowing for dissuasive sanctions in cases of proven discrimination are also proposed.

⁷ The HREC will remain independent but directly responsible to Parliament. The HREC should be vested with the ability to issue opinions, make legislative and policy proposals and also criticise the Government or any of its entities, on human rights and equality matters.

and will contribute to preventing those violations (based on the Paris Principles).⁸ The HREC will be established by the proposed Human Rights and Equality Commission Act, and will be a legal successor to the present National Commission for the Promotion of Equality (NCPE).

2. Main legislation

The principles of equality of treatment and non-discrimination were first introduced into the Maltese Constitution of 1964.⁹ In 1987, the European Convention Act was enacted. Through this Act,¹⁰ Article 14 of the European Convention on Human Rights can be invoked before and enforced by the Maltese Courts in the event that a person is hindered in the enjoyment of the fundamental rights and freedoms provided for in the Convention on grounds of discrimination.

In addition to this, Malta has introduced a number of specific legislative acts to implement Council Directives 2000/78/EC and 2000/43/EC, in particular the Employment and Industrial Relations Act 2002,¹¹ the Equal Opportunities (Persons with Disability) Act, 2000,¹² the Equality for Men and Women Act, 2003,¹³ and Article 82A of the Criminal Code.¹⁴ Legal Notice 461 of 2004 filled the lacunae under the 2002 Act with regard to discrimination on the grounds of religion or religious belief, disability, age, sexual orientation, racial or ethnic origin, pregnancy or maternity leave, and gender reassignment in the field of employment. The latter regulations were amended by Legal Notice 53 of 2007 and refer, in particular, to the provision of reasonable accommodation to persons with disabilities and the defence of rights in line with the provisions of Directive 2000/78.¹⁵ In 2012, the definition of 'discrimination' under the Equality for Men and Women Act was extended to include not only discrimination based on sex or family responsibility but also sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity in the fields of employment, education, vocational training, financial services and advertising.

The Equal Treatment of Persons Order¹⁶ further implemented the provisions of Directive 2000/43/EC. Thus, the Commission for the Promotion of Equality for Men and Women was designated as the body responsible for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.¹⁷ Malta is also a party to various international human rights instruments that provide for protection against discrimination. As a general comment, little reference to local practice on the subject areas is made because there is little case law or publicly available material, and only sparse practice exists.

⁸ The HREC should be accessible to the public and will provide for accessible complaints procedures. The HREC is to have proper collaboration with different stakeholders, in its quest to establish the highest human standards in Malta.

⁹ The Maltese Constitution of 1964 provides for protection from discrimination on the basis of race, place of origin, political opinions, colour, creed, sex, sexual orientation and gender identity and also states that no law shall make any provision that is discriminatory either of itself or in its effect.

¹⁰ European Convention Act (Act XIV of 1987). This provides that the substantive Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms have become and are enforceable as part of the Laws of Malta.

¹¹ Act XXII of 2002, entitled the Employment and Industrial Relations Act.

¹² Act I of 2000.

¹³ Act I of 2003.

¹⁴ Chapter 9 of the Laws of Malta, which criminalises incitement to racial hatred.

¹⁵ By virtue of Legal Notice 54 of 2007, the Equal Treatment in Employment regulations were extended to employees in the public sector.

¹⁶ Legal Notice 85 of 2007.

¹⁷ In addition, this Order prohibits discrimination on the ground of race or ethnic origin in relation to (i) social protection, including social security and healthcare, (ii) social advantages, (iii) education, (iv) access to and supply of goods and services which are available to the public, and (v) housing. It is to be noted that by virtue of the Equality for Men and Women Act and the Equal Treatment of Persons Order, the remit of the NCPE relates to discrimination issues based on (i) sex/gender and family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity in employment; banks and financial institutions, as well as education; and (ii) racial / ethnic origin and gender in the provision of goods and services and their supply.

3. Main principles and definitions

All the grounds of discrimination mentioned in the directives are prohibited under Maltese law. The only ground which is specifically defined under Maltese law, however, is that of disability under the Equal Opportunities (Persons with Disability) Act, 2000.¹⁸

Legal Notice 461 of 2004 provides protection from harassment in matters of employment on all the grounds mentioned in the directives.¹⁹ Maltese law does not require that the effects of the harassment be cumulative.²⁰ In terms of Article 5 of the Equal Opportunities (Persons with Disability) Act, a person shall be deemed to discriminate against another if he subjects the latter to harassment.²¹

Article 3(1)(b) of the Equal Opportunities (Persons with a Disability) Act, 2000, provides that a person is considered to be acting discriminatorily when 'he treats or proposes to treat a person less favourably on the basis of a characteristic that appertains generally to persons who have such a disability or a presumed characteristic that is generally imputed to persons who have such a disability.' Furthermore, since Legal Notice 461 of 2004 and the Equal Treatment of Persons Order, 2007, provide for the prohibition of both direct and indirect discrimination, and as such definitions are taken from the Council directives, it may be argued that Maltese law prohibits discrimination on the grounds mentioned in the directives based on presumed characteristics.

The prohibition against victimisation is provided for under Article 28 of the Employment and Industrial Relations Act.²² This provision goes further than that required by Article 11 of the Employment Equality Directive, since it relates not only to breaches of the obligation of equal treatment but to any breach of the provisions of the Act.

Similarly, Article 7 of the Equal Treatment of Persons Order, as regards race and ethnic origin, and Article 5 of the Equal Opportunities (Persons with Disabilities) Act, as regards disability, both provide for a prohibition of victimisation and are in line with the provisions of the EU law requirements.²³ Furthermore, in terms of Article 4 of the Equality for Men and Women Act, it shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment.²⁴

¹⁸ Although this Act does not make any express reference to direct and indirect discrimination, the provisions of the Act clearly prohibit both forms of discrimination. Furthermore, Legal Notice 461 of 2004 and Legal Notice 85 of 2007 provide for the prohibition of both direct and indirect discrimination.

¹⁹ It defines harassment as a form of discriminatory treatment having the effect of violating the dignity of the person who is being harassed or where it has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected. Furthermore, it provides that a person shall also be deemed to have discriminated against another if the former neglects his/her obligation to suppress any form of harassment at their place of work or within their organisation.

²⁰ The prohibition of harassment is also mentioned under the Public Service Management Code.

²¹ Harassment is defined as subjecting a person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation by any means of written words, pictures or other material which could reasonably be regarded as offensive, humiliating, hostile, degrading or intimidating to such person.

²² This provides that if any person (a) files a complaint to the lawful authorities or initiates or participates in proceedings for redress on grounds of alleged breach of the provisions of the Act, or (b) discloses information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests, it is unlawful to victimise such person for having acted accordingly.

²³ This provides that it shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of the Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged discriminatory behavior, activities or practices.

²⁴ Furthermore, employers shall also be deemed to have discriminated against a person if such employers alter the working conditions, or the terms of employment of employees to the detriment of such employees after

Legal Notice 461 of 2004 prohibits instruction to discriminate in the field of employment and, under Legal Notice 85 of 2007, in respect of discrimination under directive 2000/43/EC. No such prohibition, however, exists under the Equal Opportunities (Persons with Disability) Act, 2000, or the Equality for Men and Women Act, 2003.²⁵ One notes however that the prohibition of instruction to discriminate under the Equal Treatment of Persons Order is more restrictive than under the provisions of the directive.

Article 2(3) of the Equal Treatment of Persons Order provides that a less favourable treatment which is based on a characteristic related to racial or ethnic origin and takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment shall not constitute discrimination where, by reason of the particular occupational activities concerned, or of the context in which they are carried out, the treatment is legitimate and the characteristic constitutes a genuine occupational requirement which is proportionate in the circumstances. One notes that the Equal Treatment of Persons Order provides a more restrictive reference under Article 2(3) when referring to the treatment being legitimate and not the objective in the test for genuine occupational requirement.

With regard to the occupational requirements laid down in the Employment Equality Directive, the Employment and Industrial Relations Act, 2002, as well as the Equality for Men and Women Act, 2003, contain provisions in this respect.²⁶

4. Material scope

Protection against discriminatory treatment under Maltese law is provided for under both general and specific laws. The Constitution of Malta and the European Convention Act contain a general prohibition against discrimination that could be taken to include all the fields of application listed in Article 3 of both directives.

The more specialised legislation contains specific anti-discrimination provisions in respect of certain spheres (mainly employment) or persons (discrimination on the basis of sex, race and ethnic origin, sexual orientation, gender identity and discrimination against disabled persons). In this case, the protection afforded by these laws extends to matters between private persons other than matters between private persons and public entities or authorities.

In fact, the Employment and Industrial Relations Act provides for the prohibition of discrimination in general. Similarly, the Equality for Men and Women Act prohibits discrimination in the field of employment, education, vocational training, the provision of financial services and advertising.

With respect to employment in the public sector, this is regulated by the Public Service Management Code and Legal Notice 54 of 2007 issued under the Employment and Industrial Relations Act, the provisions of which were extended to public sector employees. In cases of discrimination of employees in the public sector by public authorities, these employees can invoke the provisions of the Constitution and the European Convention Act.

Under the Employment and Training Services Act, 1990, it is illegal for a person to, *inter alia*, show favour to, or to discriminate against, any person for employment with any employer on

such employees have invoked any right accorded to them under this Act or claimed the performance in their favour of any obligation or duty under this Act.

²⁵ On a more general level, the Constitution of Malta provides that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

²⁶ Maltese law also provides for the provision of reasonable accommodation under subsidiary legislation issued in terms of the Occupational Health and Safety Authority Act 2000, as well as under the Equal Opportunities (Persons with Disability) Act 2000. In addition, the latter Act provides that employers must provide reasonable accommodation for employees with disabilities.

the grounds of race, colour, sex or creed or on the grounds of his party or other political beliefs or associations.

The Employment and Industrial Relations Act and the regulations issued thereunder prohibit discrimination in matters concerning vocational training and guidance and remuneration for work of equal value as provided for in Article 3(1)(b) and (c) of the two directives. Maltese law also prohibits discrimination on the grounds mentioned in Article 3(1)(d) of the directives. In cases of alleged discrimination in respect of the matters mentioned in paragraphs (e) to (h) of the Race Equality Directive,²⁷ the Equal Treatment of Persons Order, 2007, has transposed those provisions of the directive. The alleged victim can also seek to protect his rights by seeking redress under the Constitution, under the European Convention Act and under the Ombudsman Act.

As seen above, therefore, implementation applies to both the public and private sectors.

5. Enforcing the law

Maltese legislation lays down various courses of action that one may follow should an individual believe that they were subjected to discriminatory treatment. Apart from recourse to action before the courts, there exist other bodies where an alleged victim can address his or her complaint. These include the Industrial Tribunal (under the Employment and Industrial Relations Act, 2002), the National Commission for Persons with Disability (under the Equal Opportunities (Persons with Disability) Act), the National Commission for the Promotion of Equality for Men and Women (under the Equality for Men and Women Act), the Public Service Commission (under the Constitution of Malta), the Ombudsman (under the Ombudsman Act), the Broadcasting Authority (under the Constitution of Malta), and the Employment Commission (under the Constitution of Malta).²⁸

Access to the courts in cases of alleged breach of the provisions of the Constitution or of the European Convention Act is generally available to all. Persons who do not have adequate financial means to institute legal proceedings in Malta can apply for legal aid. Where this is not granted, costs can be seen as a deterrent. Delays in proceedings, which do occur, can also be seen as a deterrent.

As a rule, actions before such authorities are brought by victims themselves. However, both Legal Notice 461 of 2004 and Legal Notice 85 of 2007 provide that nothing shall prevent any association, organisation or other legal entity having a legitimate interest in engaging itself either on behalf of or in support of the complainant, with his or her approval, in any judicial or administrative procedure.

One entity that is legislatively empowered to assist a complainant of alleged discriminatory treatment is the National Commission Persons with Disability. Furthermore, Article 33A of the Equal Opportunities (Persons with Disability) Act provides that any association, organisation or any legal entity which has a legitimate interest in ensuring that the provisions of the Act are complied with may institute, on behalf or in support of the person against whom an unlawful act of discrimination has been committed under the Act, with his or her approval, proceedings for redress before the competent court.

In terms of Article 11 of the Equal Treatment of Persons Order, the Commissioner for the Promotion of Equality may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of the Order. He may also do so on receipt of a complaint in writing by persons who claim to be the victims of an act or omission. Under the Employment and Industrial Relations Act, where it is alleged that a worker has been

²⁷ Namely social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing.

²⁸ With respect to the Employment Commission, the Constitution limits the remit to discrimination on the basis of political opinion.

unfairly dismissed by an employer, or where there is an alleged breach of any obligation under Title I of the Act or any regulations thereunder, the matter shall be referred to the Industrial Tribunal by means of a referral made by the worker alleging the breach or by a person acting in his name.

The general principle under Maltese law is that the burden of proof lies on the person making the allegation. However, Legal Notice 461 of 2004 provides that, in any proceedings brought by a person claiming discriminatory treatment, it shall be sufficient for the claimant to prove that he or she has suffered discriminatory treatment, and the defendant has to prove that such treatment was justified. Similarly, the Equal Treatment of Persons Order and the Equality for Men and Women Act provide for the shifting of the burden of proof.²⁹

Sanctions for breaches are applied. These normally take the form of payment of compensation or damages. Criminal sanctions are applied in respect of criminal violations. It is pertinent to note that there have been no cases, whether before the courts or before the Ombudsman, on the amount of compensation to be awarded. Therefore there is no publicly available evidence to show how effective, proportionate or dissuasive the available sanctions are. It is felt, however, especially with regard to the sanctions under the Employment and Industrial Relations Act and under the Equal Treatment of Persons Order, that, since they do not provide for a cap on the damages which may be awarded, they are effective and sufficient.

Dialogue and/or consultation with the NGOs and/or social partners has taken place prior to the implementation of the laws, and continues to take place.

6. Equality bodies

The National Commission for the Promotion of Equality for Men and Women (NCPE) has been designated as the body in Malta to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin. The commission seeks to ensure that Maltese society is a society free from any form of discrimination in all sectors and at all levels with respect to training and employment, and the provision of services and benefits. The remit of the NCPE relates to discrimination issues based on (i) sex/gender and family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity in employment; banks and financial institutions, as well as education; and (ii) racial / ethnic origin and gender in the provision of goods and services and their supply, and these are the grounds which it deals with.³⁰ The remit of the NCPD is disability discrimination, and this organisation deals with all areas of disability.

7. Key issues

Under Maltese law one finds some instances where national provisions are more restrictive in scope than the provisions of the directives. The prohibition of instruction to discriminate under the Equal Treatment of Persons Order is more restrictive than under the provisions of the directive. Likewise the same Order provides a more restrictive reference under Article 2(3) when referring to the treatment being legitimate and to the objective as being a test for a genuine occupational requirement.

²⁹ This rule shall also apply where the commission itself takes action to refer an allegation of discrimination to the competent court on behalf of the person discriminated against or where it intervenes in support of a person alleging discrimination and taking action for redress.

³⁰ The scope of the National Commission for the Promotion of Equality is intended to be widened to become a Commission for Human Rights and Equality, acting as a national human rights institution as well as an equality body (NHREC), in accordance with the provisions established by European Directives on equal treatment. Hence, the NCPE will thus be able not only to build on work which has already been identified, but also to expand and strengthen its work and responsibilities in the field of human rights and equality.

A further feature to be noted as not being in line with the directives is that the duty to provide reasonable accommodation only arises out of the Equal Opportunities (Persons with Disability) Act 2000 and hence only applies to the field of employment, regarding employees with a disability and the exclusion of job applicants. In addition, in terms of the Equality for Men and Women Act, any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex or another sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, is deemed discriminatory, unless the said provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.³¹

In terms of the Equal Treatment in Employment Regulations, 2004, issued under the Employment and Industrial Relations Act, 'employers shall provide reasonable accommodation for persons with disabilities. In particular, employers shall take appropriate measures to enable a person with a disability to have access to, participate, or advance in employment, or to undergo training unless such measures would impose a disproportionate burden on the employer: provided that this burden is not disproportionate when it is sufficiently remedied by measures existing within the framework of the national disability policy.' What must be kept in mind here is that these measures refer to employees and do not cover 'job applicants', and hence are in breach of the directive.

It is interesting to note that, over the years, Maltese laws in the field of discrimination, in particular in those areas covered by the directives, have continued to evolve. A consultation process was recently launched with the aim of strengthening human rights and equality legislation in Malta. The Government expressed its belief that both the current legislative and infrastructural frameworks required reinforcement so as to provide Malta with an adequate human rights and equality mechanism. The intention is to gather feedback with a view to strengthening human rights and equality legislation, as well as strengthening the institutions that enforce such legislation so that the said institutions are in conformity both with the United Nations' model of a national human rights institution (NHRI), as laid out in the Paris Principles, and the European Union's equality body requirements, as laid out in EU equality directives. Equally important is the consultation process that was launched³² in December 2014, proposing the introduction of the Equality Act and a Human Rights and Equality Commission, as referred to above.

³¹ It is relevant to point out here that, despite the extension of the definition of discrimination in 2012 to grounds other than gender, the justification test is limited to factors unrelated to sex. A similar exclusion is not found in the directives.

³² The White Paper presented on 10 December 2014 by the Minister for Social Dialogue, Consumer Affairs and Civil Liberties, Helena Dalli, launched a consultation process, which will close on 10 February 2015.

RÉSUMÉ

1. Introduction

Fin 2013, la population maltaise était estimée à 425 384 habitants.³³ Selon l'enquête sur les forces de travail couvrant la période octobre-décembre 2014, le nombre de salariés s'établissait à 180 124 personnes.

Diverses organisations maltaises, à la fois gouvernementales et non gouvernementales, s'attachent activement à combattre la discrimination fondée sur différents motifs. Outre les mesures adoptées pour mettre les directives en œuvre, le gouvernement continue de chercher à instaurer un dialogue et une concertation avec des personnes et des entités qui luttent contre la discrimination et s'efforcent de la faire interdire.

Trois amendements législatifs importants ont été effectués en 2014. Un amendement de la loi sur l'égalité entre les hommes et les femmes³⁴ modifie l'exigence en matière de charge de la preuve par laquelle il n'incombe pas à la partie défenderesse de prouver l'absence de violation des règles d'égalité. Un changement de la loi n° X de 2014 sur l'égalité de traitement en matière d'emploi (amendement),³⁵ adopté le 17 avril 2014, apporte des modifications à la Constitution de Malte de manière à étendre à l'orientation sexuelle la protection des droits fondamentaux et des libertés fondamentales des personnes.³⁶

Il est important de signaler qu'un processus de consultation a été lancé en décembre 2014³⁷ concernant une proposition visant à mettre en place une loi sur l'égalité et une Commission pour les droits de l'homme et l'égalité. La loi proposée remplacerait la loi maltaise actuelle sur l'égalité entre les hommes et les femmes, qui ne remplit plus son objectif dans la mesure où les distinctions qu'elle établit dans le traitement des différents motifs ont créé une hiérarchie indésirable de ceux-ci. La nouvelle loi sur l'égalité vise à instaurer à Malte un cadre juridique moins fragmenté en matière d'égalité, et à introduire des dispositions relatives à l'intersectionnalité.³⁸ Le but ultime de la loi proposée est le regroupement dans un seul et même acte législatif général de toutes les dispositions pertinentes des directives suivantes de l'UE: la directive 2000/43/CE, la directive 2000/78/CE, la directive 2004/113/CE et la directive 2006/54/CE.

Le cadre législatif proposé en ce qui concerne la Commission pour les droits de l'homme et l'égalité (HREC), qui sera chargée des questions relatives aux droits fondamentaux et à leur non-respect, et qui surveillera et donnera des avis sur les priorités de Malte dans ce

³³ Malte comptait 23 643 ressortissants étrangers résidant sur son territoire en 2014.

³⁴ Introduit par la loi XVIII de 2014.

³⁵ Notice juridique n° 274 de 2014.

³⁶ La loi introduit «l'orientation sexuelle» et «l'identité de genre» en tant que motifs interdits de discrimination dans la sphère publique – ce qui signifie plus spécifiquement que des actes discriminatoires fondés sur ces motifs sont interdits dans toute disposition législative ou dans la conduite d'une entité publique. Avant cette extension, la protection contre la discrimination se limitait à la race, au lieu d'origine, aux opinions politiques, à la couleur de la peau, à la croyance ou au sexe. La loi instaure également le principe selon lequel toute loi imposant des restrictions liées à l'orientation sexuelle ou à l'identité de genre sera considérée comme discriminatoire dans le cadre d'offres d'emplois en qualité d'agent de la fonction publique ou d'agent d'une administration locale ou d'une personne morale instituée dans un but d'utilité publique.

³⁷ Le Livre blanc présenté le 10 décembre 2014 par la ministre du Dialogue social, de la consommation et des libertés civiles, Helena Dalli, a initié un processus de consultation qui sera clôturé le 10 février 2015.

³⁸ Cette loi éventuelle contiendrait une disposition générale contre la discrimination ainsi que des obligations positives en matière d'égalité. Une liste révisée des motifs de discrimination y serait par ailleurs incluse pour veiller à ce que tous les motifs soient incorporés de façon appropriée dans une même loi. La législation proposée comporterait également des dispositions portant spécifiquement sur la discrimination intersectionnelle. Les dispositions de cette loi couvriraient tous les domaines de vie. Elles permettraient notamment à des ONG de présenter des requêtes au nom de victimes et offriraient la possibilité d'intenter des actions collectives et d'obtenir l'examen d'affaires de discrimination sans devoir identifier une victime individuelle. Enfin, la proposition de loi contient également des dispositions autorisant des sanctions dissuasives lorsqu'une discrimination est établie.

domaine,³⁹ sera principalement axé sur les violations systématiques actuelles et potentielles des droits de l'homme, et contribuera à les prévenir (sur la base des principes de Paris).⁴⁰ La Commission pour les droits de l'homme et l'égalité sera instituée par la loi proposée sur les droits de l'homme et l'égalité, et sera le successeur juridique de l'actuelle Commission nationale pour la promotion de l'égalité (NCPE).

2. Législation principale

Les principes de l'égalité de traitement et de non-discrimination ont été initialement introduits dans la Constitution maltaise de 1964.⁴¹ La loi sur la Convention européenne a été adoptée en 1987. En vertu de cette loi,⁴² l'article 14 de ladite Convention européenne peut être invoqué devant les juridictions maltaises, lesquelles peuvent l'appliquer lorsqu'une personne est empêchée pour cause de discrimination d'exercer les libertés et droits fondamentaux que la Convention lui confère.

Malte a introduit en outre un certain nombre d'instruments législatifs spécifiques pour mettre en œuvre les directives 2000/78/CE et 2000/43/CE du Conseil: il convient de citer en particulier la loi de 2002 sur l'emploi et les relations de travail,⁴³ la loi de 2000 sur l'égalité des chances (personnes handicapées),⁴⁴ la loi de 2003 sur l'égalité entre les hommes et les femmes,⁴⁵ et l'article 82 bis du code pénal.⁴⁶ La notice juridique n° 461 de 2004 a comblé les lacunes de la loi de 2002 pour ce qui concerne la discrimination fondée sur la religion ou les convictions religieuses, le handicap, l'âge, l'orientation sexuelle, l'origine raciale ou ethnique, le congé de grossesse ou de maternité, et la conversion sexuelle dans le domaine de l'emploi. Ces dernières réglementations ont été amendées par la notice juridique n° 53 de 2007 et concernent plus particulièrement la disposition relative à l'aménagement raisonnable pour les personnes handicapées et à la défense des droits conformément aux dispositions de la directive 2000/78.⁴⁷ En 2012, la définition de la «discrimination» visée par la loi sur l'égalité entre les hommes et les femmes a été étendue de manière à couvrir non seulement la discrimination fondée sur le sexe ou la responsabilité familiale, mais également l'orientation sexuelle, l'âge, la religion ou les convictions, l'origine raciale ou ethnique, ou l'identité de genre dans les domaines de l'emploi, de l'éducation, de la formation professionnelle, des services financiers et de la publicité.

L'ordonnance sur l'égalité de traitement des individus⁴⁸ complète la mise en œuvre des dispositions de la directive 2000/43/CE. C'est ainsi que la Commission pour la promotion de l'égalité entre les hommes et les femmes a été désignée en tant qu'organisme en charge de l'égalité de traitement de toutes les personnes sans discrimination fondée sur l'origine raciale

³⁹ La Commission pour les droits de l'homme et l'égalité (HREC) restera indépendante mais rendra compte directement au Parlement. Elle devrait être dotée des compétences suivantes: émettre des avis, proposer des actes législatifs et des politiques, et critiquer le gouvernement ou n'importe laquelle de ses entités sur des questions touchant les droits de l'homme et l'égalité.

⁴⁰ La Commission pour les droits de l'homme et l'égalité (HREC) devrait être accessible au public et offrir des procédures de recours qui soient d'accès aisé. Elle devra dûment coopérer avec différentes parties prenantes dans son action visant à instaurer à Malte les normes les plus élevées en matière de droits fondamentaux.

⁴¹ La Constitution maltaise de 1964 garantit la protection contre la discrimination fondée sur la race, le lieu d'origine, les opinions politiques, la couleur de la peau, la croyance, le sexe, l'orientation sexuelle et l'identité de genre, et stipule qu'aucune loi ne créera de disposition discriminatoire intrinsèquement ou dans ses effets.

⁴² Loi XIV de 1987 sur la Convention européenne, qui prévoit que les articles de fond de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales sont incorporés en droit maltais, lequel peut être invoqué pour leur application.

⁴³ Loi XXII de 2002 sur l'emploi et les relations de travail.

⁴⁴ Loi I de 2000.

⁴⁵ Loi I de 2003.

⁴⁶ Chapitre 9 des lois de Malte, qui pénalise l'incitation à la haine raciale.

⁴⁷ En vertu de la notice juridique n° 54 de 2007, la réglementation sur l'égalité de traitement dans l'emploi a été étendue aux salariés du secteur public.

⁴⁸ Notice juridique n° 85 de 2007.

ou ethnique.⁴⁹ Malte est également signataire de divers instruments internationaux de défense des droits de l'homme qui assurent une protection contre la discrimination.

Il convient de préciser de manière générale que le peu de référence à la pratique locale dans les domaines visés s'explique par la rareté de la jurisprudence et des documents publics disponibles, et par une pratique elle-même très limitée.

3. Principes généraux et définitions

Tous les motifs de discrimination cités dans les directives sont interdits en vertu du droit maltais. Le seul motif spécifiquement défini dans la législation nationale est le handicap, en l'occurrence dans la loi de 2000 sur l'égalité des chances (personnes handicapées).⁵⁰

La notice juridique n° 461 de 2004 prévoit la protection contre le harcèlement en matière d'emploi pour tous les motifs mentionnés dans les directives.⁵¹ Le droit maltais n'exige pas que les effets du harcèlement soient cumulatifs.⁵² Aux termes de l'article 5 de la loi sur l'égalité des chances (personnes handicapées), une personne est considérée comme pratiquant une discrimination à l'égard d'une autre si elle soumet cette dernière à un harcèlement.⁵³

En vertu de l'article 3, paragraphe 1 sous b), de la loi de 2000 sur l'égalité des chances (personnes handicapées), une personne est réputée agir de manière discriminatoire lorsqu'elle «traite ou a l'intention de traiter une personne de manière moins favorable en raison d'une caractéristique appartenant généralement à des personnes handicapées ou d'une caractéristique présumée généralement attribuée à ces personnes handicapées». Étant donné en outre que la notice juridique n° 461 de 2004 et l'ordonnance de 2007 sur l'égalité de traitement des individus prévoient désormais l'interdiction de discrimination tant directe qu'indirecte, et que ces définitions sont tirées des directives du Conseil, on peut affirmer que la loi maltaise interdit la discrimination fondée sur les motifs visés par les directives sur la base de caractéristiques présumées.

L'interdiction de rétorsions est prévue à l'article 28 de la loi sur l'emploi et les relations de travail.⁵⁴ Cette disposition va au-delà des exigences imposées par l'article 11 de la directive

⁴⁹ Cette ordonnance interdit en outre la discrimination fondée sur la race et l'origine ethnique en ce qui concerne (i) la protection sociale, y compris la sécurité sociale et les soins de santé, (ii) les avantages sociaux, (iii) l'enseignement, (iv) l'accès aux biens et aux services et la fourniture de biens et services à la disposition du public, et (v) le logement. Il convient de signaler qu'en vertu de la loi sur l'égalité entre les hommes et les femmes et de l'ordonnance sur l'égalité de traitement des individus, le mandat de la NCPE porte sur les questions de discrimination fondée sur (i) le sexe/genre et les responsabilités familiales, l'orientation sexuelle, l'âge, la religion ou les convictions, l'origine raciale ou ethnique, et l'identité de genre dans le domaine de l'emploi; les banques et institutions financières, ainsi que l'enseignement; et (ii) l'origine raciale/ethnique et le genre dans l'accès et la fourniture de biens et de services.

⁵⁰ Bien que cette loi ne fasse aucune référence explicite à la discrimination directe et indirecte, ses dispositions interdisent clairement ces deux formes de discrimination. De surcroît, la notice juridique n° 461 de 2004 et la notice juridique n° 85 de 2007 prévoient l'interdiction de la discrimination tant directe qu'indirecte.

⁵¹ Elle définit le harcèlement comme une forme de traitement discriminatoire ayant pour effet de porter atteinte à la dignité d'une personne harcelée ou ayant pour effet de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant pour la personne qui s'y trouve soumise. Il prévoit en outre qu'une personne est également considérée comme ayant eu un comportement discriminatoire envers une autre lorsqu'elle a négligé son obligation de supprimer toute forme de harcèlement sur le lieu de travail ou au sein de l'organisation.

⁵² L'interdiction de harcèlement est également mentionnée dans le Code régissant les conditions de travail dans la fonction publique.

⁵³ Le harcèlement est défini comme le fait de soumettre une personne à toute forme d'acte, de requête, de comportement, y compris des paroles, de geste ou de production, présentation ou diffusion de textes, d'images ou d'autre matériel pouvant être raisonnablement considéré comme offensant, humiliant, hostile, dégradant ou intimidant pour la personne en question.

⁵⁴ Il prévoit que lorsqu'une personne (a) dépose plainte auprès des autorités compétentes ou engage ou participe à des poursuites en vue d'obtenir réparation en alléguant une violation des dispositions de la loi, ou (b) divulgue des informations, confidentielles ou autres, à un organe régulateur public à propos

relative à l'égalité de traitement en matière d'emploi et de travail puisqu'elle ne concerne pas uniquement le non-respect de l'obligation d'égalité de traitement mais le non-respect de toute disposition de la loi.

De même, l'article 7 de l'ordonnance sur l'égalité de traitement des individus, en ce qui concerne la race et l'origine ethnique, et l'article 5 de la loi sur l'égalité des chances (personnes handicapées) en ce qui concerne le handicap, contiennent tous deux une interdiction de rétorsion et sont conformes aux exigences du droit de l'UE.⁵⁵ En vertu en outre de l'article 4 de la loi sur l'égalité entre les hommes et les femmes, il est illégal pour un employeur de pratiquer une discrimination directe ou indirecte à l'égard d'une personne dans le cadre des modalités de décision ou des décisions concernant l'attribution d'un emploi ou dans le cadre des conditions dans lesquelles l'emploi est proposé, ou de la décision concernant un licenciement.⁵⁶

La notice juridique n° 461 de 2004 interdit l'injonction de discriminer dans le domaine de l'emploi, et la notice juridique n° 85 de 2007 interdit l'injonction de pratiquer la discrimination visée par la directive 2000/43/CE. Aucune interdiction de ce type n'est cependant prévue par la loi de 2000 sur l'égalité des chances (personnes handicapées) ni par la loi de 2003 sur l'égalité entre les hommes et les femmes.⁵⁷ Il convient de faire remarquer cependant que l'interdiction d'enjoindre à la discrimination contenue dans l'ordonnance sur l'égalité de traitement des individus revêt un caractère plus restrictif que les dispositions de la directive.

L'article 2, paragraphe 3, de l'ordonnance sur l'égalité de traitement des individus prévoit que le traitement moins favorable d'une personne basé sur une caractéristique liée à son origine raciale ou ethnique dans le but ou avec pour effet de porter atteinte à sa dignité et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant, ne constitue pas une discrimination si, en raison des activités professionnelles concernées ou du contexte de leur exécution, le traitement est légitime et la caractéristique constitue une exigence professionnelle véritable et proportionnée. Il convient de souligner que l'ordonnance fait une référence plus restrictive dans cet article lorsqu'il parle du traitement en termes de légitimité et non d'objet d'un test quant à une exigence professionnelle véritable.

En ce qui concerne les exigences professionnelles visées par la directive relative à l'égalité de traitement en matière d'emploi, la loi de 2002 sur l'emploi et les relations de travail et la loi de 2003 sur l'égalité entre les hommes et les femmes contiennent des dispositions à cet égard.⁵⁸

d'activités illégales ou frauduleuses qui seraient commises par son employeur ou des personnes agissant au nom et pour le compte de son employeur, toute mesure de rétorsion prise à l'encontre de cette personne parce qu'elle a agi de la sorte sera considérée comme contraire au droit.

⁵⁵ Ils précisent qu'il est illégal de prendre des mesures de rétorsion contre une personne parce qu'elle a déposé une plainte auprès des autorités compétentes ou parce qu'elle a engagé ou participé à des poursuites en vue d'obtenir réparation en alléguant une violation des dispositions de la loi, ou encore parce qu'elle a divulgué des informations, confidentielles ou autres, à un organe régulateur public à propos d'un comportement, d'actes ou de pratiques présumés discriminatoires.

⁵⁶ De surcroît, un employeur sera considéré comme ayant pratiqué une discrimination à l'égard d'une personne s'il modifie les conditions de travail ou d'emploi d'un salarié au préjudice du salarié en question après que celui-ci ait invoqué un droit que lui confère ladite loi ou ait réclamé l'exécution en sa faveur d'une quelconque obligation ou devoir conformément à ladite loi.

⁵⁷ Sur un plan plus général, la Constitution de Malte prévoit que personne ne sera traité de manière discriminatoire par quiconque agissant en vertu d'une loi écrite ou dans l'exercice d'une fonction publique ou d'une autorité publique.

⁵⁸ Le droit maltais prévoit aussi l'aménagement raisonnable dans une ordonnance prise en application de la loi de 2000 sur l'organisme pour la santé et la sécurité au travail, ainsi qu'au titre de la loi de 2000 sur l'égalité des chances (personnes handicapées). Cette dernière dispose en outre que les employeurs doivent prévoir un aménagement raisonnable pour les travailleurs handicapés.

4. Champ d'application matériel

La protection contre le traitement discriminatoire prévue par le droit maltais est assurée à la fois au titre de lois générales et de lois spécifiques. La Constitution maltaise et la loi relative à la Convention européenne contiennent une interdiction générale de discrimination qui peut être considérée comme couvrant tous les domaines d'application visés à l'article 3 des directives 2000/78/CE et 2000/43/CE.

La législation plus spécialisée contient des dispositions antidiscrimination spécifiques concernant certains domaines (principalement l'emploi) ou certaines personnes (discrimination fondée sur le sexe, la race ou sur l'origine ethnique, l'orientation sexuelle, l'identité de genre et le handicap). En l'espèce, la protection accordée par ces lois s'étend aux matières entre personnes privées autres que celles entre personnes privées et instances ou autorités publiques.

En réalité, la loi sur l'emploi et les relations de travail prévoit l'interdiction de discrimination en général. De même, la loi sur l'égalité entre les hommes et les femmes interdit la discrimination dans le domaine de l'emploi, de l'enseignement, de la formation professionnelle, de la fourniture de services financiers et de la publicité.

L'emploi dans le secteur public est réglementé par le code de gestion de la fonction publique et la notice juridique n° 54 de 2007 publiée au titre de la loi sur l'emploi et les relations de travail, dont les dispositions ont été étendues aux travailleurs du secteur public. En cas de discrimination pratiquée par des autorités publiques à l'encontre desdits travailleurs, ceux-ci peuvent invoquer les dispositions pertinentes de la Constitution et de la loi sur la Convention européenne.

En vertu de la loi de 1990 sur les services d'emploi et de formation, il est illégal entre autres de faire preuve de favoritisme ou de discrimination à l'égard d'une personne dans le cadre d'un emploi auprès d'un employeur quelconque pour des motifs fondés sur la race, la couleur de la peau, le sexe, les croyances, les opinions politiques et l'appartenance à un parti ou à autre association.

La loi de 2002 sur l'emploi et les relations de travail et la réglementation qui en découle interdisent la discrimination en matière de formation professionnelle et d'orientation professionnelle, ainsi qu'en ce qui concerne la rémunération pour un travail équivalent comme prévu à l'article 3, paragraphe 1, points b) et c), des deux directives. Le droit maltais interdit aussi la discrimination fondée sur les motifs visés à l'article 3, paragraphe 1, point d), des directives. En cas de discrimination présumée concernant les matières visées aux points e) à h) de la directive relative à l'égalité raciale,⁵⁹ c'est l'ordonnance de 2007 sur l'égalité de traitement des individus qui transpose les dispositions pertinentes de la directive. La victime présumée peut également faire valoir ses droits en demandant réparation en vertu de la Constitution, de la loi sur la Convention européenne et de la loi sur le Médiateur.

Comme indiqué plus haut, la mise en œuvre s'applique donc tant au secteur public qu'au secteur privé.

5. Mise en application de la loi

La législation maltaise prévoit différentes voies de recours à l'intention des personnes qui estiment avoir fait l'objet d'un traitement discriminatoire. Une victime présumée peut en effet introduire sa plainte en justice, mais également auprès d'autres organismes: le Tribunal du travail (en vertu de la loi de 2002 sur l'emploi et les relations de travail), la Commission nationale pour les personnes handicapées (en vertu de la loi sur l'égalité des chances

⁵⁹ À savoir la protection sociale, y compris la sécurité sociale et les soins de santé; les avantages sociaux; l'enseignement; et l'accès aux biens et services à la disposition du public et la fourniture de ceux-ci, y compris le logement.

(personnes handicapées)), la Commission nationale pour la promotion de l'égalité entre les hommes et les femmes (en vertu de la loi sur l'égalité entre les hommes et les femmes), la Commission des services publics (en vertu de la Constitution de Malte), le Médiateur (en vertu de la loi sur le Médiateur), l'Autorité nationale de radio et télédiffusion (en vertu de la Constitution de Malte) et la Commission de l'emploi (en vertu de la Constitution de Malte).⁶⁰

L'accès aux juridictions en cas de violation alléguée des dispositions de la Constitution ou de la loi sur la Convention européenne est généralement ouvert à tous. Les personnes qui n'ont pas les moyens financiers d'intenter des poursuites judiciaires à Malte peuvent demander une aide juridique. Si celle-ci ne leur est pas accordée, les frais – tout comme les retards fréquents de procédure – peuvent s'avérer dissuasifs.

Les actions auprès des organismes précités sont, en principe, intentées par les victimes elles-mêmes. Toutefois, tant la notice juridique n° 461 de 2004 que la notice juridique n° 85 de 2007 disposent que rien n'empêche une association, organisation ou autre entité juridique quelconque y ayant un intérêt légitime d'entamer elle-même, au nom ou en soutien de la partie plaignante et avec le consentement de celle-ci, une procédure judiciaire ou administrative.

Une entité susmentionnée est habilitée par la législation à porter assistance à une victime présumée de traitement discriminatoire: il s'agit de la Commission nationale pour les personnes handicapées. Par ailleurs, l'article 33A de la loi sur l'égalité des chances (personnes handicapées) prévoit que toute association, organisation ou entité juridique ayant un intérêt légitime dans le respect des dispositions de ladite loi, peut engager, au nom ou en soutien de la personne à l'encontre de laquelle un acte discriminatoire a été commis au titre de ladite loi, moyennant son consentement, une procédure de redressement auprès de la juridiction compétente.

Aux termes de l'article 11 de l'ordonnance sur l'égalité de traitement des individus, le Commissaire en charge de la promotion de l'égalité peut procéder à une enquête sur toute action ou omission présumée illégale en vertu des dispositions de l'ordonnance. Il peut agir de même s'il est saisi par écrit d'une plainte de la part d'une personne se déclarant victime d'une action ou omission de cet ordre. La loi sur l'emploi et les relations de travail prévoit qu'en cas de présomption de licenciement abusif d'un travailleur par un employeur, ou en cas de présomption de non-respect d'une obligation quelconque en vertu du titre I de ladite loi ou de toute réglementation qui en découle, l'affaire est renvoyée devant le Tribunal du travail – ce renvoi étant demandé par le travailleur alléguant la violation ou par une personne agissant en son nom.

Le principe général veut, en droit maltais, que la charge de la preuve incombe à la personne qui formule le grief. La notice juridique n° 461 de 2004 prévoit toutefois, lors de toute action intentée par une personne alléguant un traitement discriminatoire, qu'il suffit que cette dernière prouve avoir subi un traitement discriminatoire et qu'il appartient ensuite à la partie défenderesse de démontrer que ce traitement était justifié. L'ordonnance sur l'égalité de traitement des individus et la loi sur l'égalité entre les hommes et les femmes prévoient eux aussi le renversement de la charge de la preuve.⁶¹

Des sanctions sont appliquées en cas d'infraction. Elles prennent habituellement la forme de versements d'indemnités ou de dommages-intérêts. Des sanctions pénales sont appliquées en cas d'infractions pénales. Il est utile de faire remarquer que ni les juridictions ni le Médiateur n'ont été saisis d'affaires portant sur le montant de l'indemnisation. On ne dispose

⁶⁰ En ce qui concerne la Commission de l'emploi, la Constitution en limite la compétence à la discrimination fondée sur les opinions politiques.

⁶¹ Cette règle s'applique également lorsque la Commission elle-même décide de renvoyer une allégation de discrimination devant la juridiction compétente pour le compte de la personne victime de discrimination, ou lorsqu'elle intervient pour soutenir une personne invoquant un acte discriminatoire et engageant des poursuites pour obtenir réparation.

dès lors d'aucun élément publiquement disponible permettant d'attester du caractère efficace, proportionné et dissuasif des sanctions. On a le sentiment toutefois, en particulier pour ce qui concerne celles qui sont prises au titre de la loi sur l'emploi et les relations de travail et de l'ordonnance sur l'égalité de traitement des individus, qu'étant donné qu'aucun plafond n'est fixé pour le montant des dommages-intérêts qui peuvent être alloués, les sanctions sont efficaces et suffisantes.

Un dialogue et/ou une consultation des ONG et/ou des partenaires sociaux ont eu lieu préalablement à la mise en œuvre des lois, et ce processus se poursuit.

6. Organismes de promotion de l'égalité de traitement

La Commission nationale pour la promotion de l'égalité entre hommes et femmes (NCPE) a été désignée comme l'organisme chargé de promouvoir à Malte l'égalité de traitement entre toutes les personnes sans discrimination fondée sur l'origine raciale ou ethnique. La Commission veille à ce que la société maltaise soit exempte de toute forme de discrimination, dans quelque secteur et à quelque niveau que ce soit, en ce qui concerne la formation et l'emploi, et la fourniture de services et de prestations. Le mandat de la NCPE couvre les questions de discrimination fondée sur (i) le sexe/genre et les responsabilités familiales, l'orientation sexuelle, l'âge, la religion et les convictions, l'origine raciale ou ethnique, et l'identité de genre dans les domaines de l'emploi, des banques et institutions financières, et de l'enseignement; et sur (ii) l'origine raciale/ethnique et le genre dans le domaine de l'accès et la fourniture de biens et de services, et tels sont les motifs dont traite la Commission.⁶² La Commission nationale pour les personnes handicapées a pour sa part un mandat qui couvre la discrimination fondée sur le handicap, et elle traite de tous les aspects relevant de ce motif.

7. Points essentiels

On trouve en droit maltais plusieurs exemples de dispositions nationales ayant un champ d'application plus restreint que celui des directives. Ainsi l'interdiction d'instruction de discriminer contenue dans l'ordonnance sur l'égalité de traitement des individus est-elle plus restrictive que celle contenue dans les dispositions européennes. Cette même ordonnance contient aussi une référence plus restrictive à l'article 2, paragraphe 3, qui parle du traitement en termes de légitimité et non d'objet d'un test quant à une exigence professionnelle véritable.

Il convient d'attirer l'attention sur un autre élément non conforme aux directives, à savoir que l'obligation de prévoir un aménagement raisonnable figure uniquement dans la loi de 2000 sur l'égalité des chances (personnes handicapées) et qu'elle s'applique dès lors exclusivement au domaine de l'emploi en rapport avec des salariés handicapés à l'exclusion de candidats à l'emploi. De surcroît, aux termes de la loi sur l'égalité entre les hommes et les femmes, tout traitement fondé sur une disposition, un critère ou une pratique qui désavantagerait particulièrement des personnes de l'autre sexe ou ayant une orientation sexuelle, un âge, une religion ou des convictions, une origine raciale ou ethnique ou une identité de genre différent(e)(s), est considéré discriminatoire à moins que cette disposition ce critère ou cette pratique ne soit approprié et nécessaire et puisse être justifié par des facteurs objectifs sans rapport avec le sexe.⁶³

Aux termes de la réglementation de 2004 relative à l'égalité de traitement dans l'emploi, adoptée en vertu de la loi sur l'emploi et les relations de travail, les employeurs doivent

⁶² Le champ d'action de la Commission nationale pour la promotion de l'égalité devrait être étendu pour qu'elle devienne une Commission pour les droits de l'homme et l'égalité (HREC) agissant en qualité d'institution nationale pour les droits de l'homme (NHRI) et d'organisme en charge de l'égalité conformément aux dispositions contenues dans les directives européennes relatives à l'égalité de traitement. La NCPE devrait dès lors être en mesure non seulement de poursuivre les tâches déjà déterminées, mais aussi d'étendre et d'intensifier son action et ses responsabilités dans le domaine des droits de l'homme et de l'égalité.

⁶³ Il convient de faire remarquer ici qu'en dépit du fait que la définition de la discrimination ait été étendue en 2012 à d'autres motifs que le genre, le test de justification se limite à des facteurs non liés au sexe. Une telle exclusion ne figure pas dans les directives.

prévoir un aménagement raisonnable à l'intention des personnes handicapées. Ils sont plus particulièrement tenus de prendre des mesures permettant à une personne handicapée d'accéder à l'emploi, d'y participer et d'y progresser, ou de suivre une formation, sauf si ces mesures représentent pour l'employeur une charge disproportionnée – cette charge n'étant pas disproportionnée lorsqu'elle est suffisamment compensée par des mesures en place dans le cadre de la politique nationale en matière de handicap. Il convient de rappeler ici que ces mesures concernent les salariés et ne couvrent pas les «candidats à l'emploi», ce qui constitue un non-respect de la directive.

Il est intéressant de souligner que les lois maltaises en matière de discrimination, dans les domaines visés par les directives en particulier, ont continué d'évoluer au fil des années. Un processus de consultation a été récemment initié dans une perspective de consolidation de la législation relative aux droits de l'homme et à l'égalité à Malte. Le gouvernement a fait part de sa conviction que les cadres législatifs et infrastructurels actuels devaient être renforcés de manière à doter le pays d'un mécanisme adéquat à ces égards. L'intention est de recueillir des retours d'information dans le but de consolider la législation relative aux droits de l'homme et à l'égalité, ainsi que les institutions qui appliquent cette législation afin que celles-ci soient conformes à la fois au modèle des Nations unies (institution nationale de protection de droits de l'homme ou NHRI) défini dans les principes de Paris, et aux exigences fixées par les directives européennes pour ce qui concerne les organismes de promotion de l'égalité de traitement. Un processus de consultation tout aussi important a été lancé⁶⁴ en décembre 2014 dans le cadre de la proposition visant à l'instauration d'une loi sur l'égalité et d'une Commission pour les droits de l'homme et l'égalité (voir plus haut).

⁶⁴ Le Livre blanc présenté le 10 décembre 2014 par la ministre du Dialogue social, de la consommation et des libertés civiles, Helena Dalli, a initié un processus de consultation qui sera clôturé le 10 février 2015.

ZUSAMMENFASSUNG

1. Einleitung

Ende 2013 hatte Malta Schätzungen zufolge 425.384 Einwohner.⁶⁵ Nach der Arbeitskrafterhebung für den Zeitraum von Oktober bis Dezember 2014 lag die Zahl der Beschäftigten geschätzt bei 180.124 Personen.

In Malta engagieren sich mehrere Stellen, sowohl der Regierung als auch Nichtregierungsstellen, aktiv im Kampf gegen Diskriminierung aufgrund unterschiedlicher Diskriminierungsgründe. Neben den Maßnahmen zur Umsetzung der Richtlinien unterhält die Regierung laufend einen Dialog und Konsultationen mit Aktivisten und Organisationen, die sich für die Bekämpfung und das Verbot von Diskriminierung einsetzen.

2014 gab es drei wichtige Gesetzesänderungen. Eine Änderung des Gesetzes zur Gleichstellung von Männern und Frauen⁶⁶ änderte die Beweislastregel, wodurch nun der Beklagte beweisen muss, dass er nicht gegen das Gleichbehandlungsgebot verstoßen hat. Durch eine Änderung des Gesetzes zur Gleichstellung im Arbeitsleben (Neufassung)⁶⁷ Nr. X aus dem Jahr 2014, angenommen am 17. April 2014, wurde der Schutz der Grundrechte und -freiheiten in Bezug auf die sexuelle Ausrichtung in die Verfassung der Republik Malta aufgenommen.⁶⁸

Es sei darauf hingewiesen, dass im Dezember 2014 im Rahmen eines Konsultationsverfahrens⁶⁹ die Einführung eines Gleichstellungsgesetzes und einer Kommission für Menschenrechte und Gleichstellung (HREC) vorgeschlagen wurde. Das Gleichstellungsgesetz soll das bestehende maltesische Gesetz zur Gleichstellung von Männern und Frauen ersetzen, das seinen Zweck nicht mehr erfüllt, weil seine Unterscheidung zwischen einzelnen Gründen eine ungewollte Hierarchie zwischen den Diskriminierungsgründen geschaffen hat. Das neue Gleichstellungsgesetz soll gemäß dem Gesetzentwurf einen weniger fragmentierten Rechtsrahmen für Gleichstellung in Malta schaffen und führt außerdem den Begriff der Intersektionalität ein.⁷⁰ Das Ziel des neuen Gleichstellungsgesetzes ist es, alle einschlägigen Bestimmungen der folgenden EU-Richtlinien durch ein einheitliches Gesetz umzusetzen: Richtlinie 2000/43/EG, Richtlinie 2000/78/EG, Richtlinie 2004/113/EG und Richtlinie 2006/54/EG.

Der im Entwurf vorgesehene Rechtsrahmen für die Kommission für Menschenrechte und Gleichstellung, die Probleme bei und Verstöße gegen die Menschenrechte ansprechen und die

⁶⁵ Im Jahr 2014 lebten in Malta insgesamt 23.643 ausländische Staatsbürger.

⁶⁶ Eingeführt durch das Gesetz XVIII aus dem Jahr 2014.

⁶⁷ LN 274 des Jahres 2014.

⁶⁸ Das Gesetz führt ein Verbot von Diskriminierung im öffentlichen Raum aufgrund von „sexueller Ausrichtung“ und „Geschlechtsidentität“ ein. Im Einzelnen bedeutet dies, dass Diskriminierung aus diesen Gründen in Gesetzen oder den Beschlüssen einer staatlichen Stelle verboten ist. Vor dieser Ausweitung war der Schutz vor Diskriminierung auf die Diskriminierungsgründe Rasse, Herkunftsland, politische Überzeugung, Hautfarbe, Glaube oder Geschlecht beschränkt. Ferner führt das Gesetz den Grundsatz ein, dass Gesetze als diskriminierend gelten, wenn sie bei der Ausschreibung von öffentlichen Ämtern oder Stellen in einer Kommunalbehörde oder einer Körperschaft, die für öffentliche Zwecke gegründet wurde, Qualifikationen vorsehen, die sich auf die sexuelle Ausrichtung oder die Geschlechtsidentität beziehen.

⁶⁹ Die Ministerin für sozialen Dialog, Verbraucherrecht und bürgerliche Freiheiten Helena Dalli hatte das Weißbuch am 10. Dezember 2014 vorgelegt, das öffentliche Konsultationsverfahren endete am 10. Februar 2015.

⁷⁰ Das kommende Gesetz soll ein allgemeines Diskriminierungsverbot sowie die Pflicht zu positiven Gleichstellungsmaßnahmen enthalten. Außerdem wird die Liste der Diskriminierungsgründe so überarbeitet, dass alle Gründe für Diskriminierung angemessen durch ein Gesetz abgedeckt sind. Auch für den Kampf gegen intersektionelle Diskriminierung sieht der Gesetzentwurf spezielle Bestimmungen vor. Das Gesetz wird für alle Lebensbereiche gelten und Bestimmungen enthalten, die Klagen von NRO im Namen von Opfern, Sammelklagen und Verfahren gegen Diskriminierung ohne Nennung einzelner Opfer ermöglichen. Schließlich enthält der Gesetzentwurf abschreckende Strafbestimmungen für Fälle, in denen Diskriminierung nachgewiesen wurde.

Menschenrechtspolitik in Malta überwachen und verbessern soll⁷¹, konzentriert sich die auf potenzielle und bestehende systematische Verletzung der Menschenrechte und wird dazu beitragen, diese Verletzungen zu verhindern (gemäß den Pariser Grundsätzen).⁷² Die HREC wird durch das als Entwurf vorliegende Gesetz über die Kommission für Menschenrechte und Gleichstellung eingerichtet und ist Rechtsnachfolgerin der heutigen Nationalen Kommission für die Förderung der Gleichstellung (NCPE).

2. Wichtigste Gesetze

Der Grundsatz der Gleichbehandlung und ein Diskriminierungsverbot wurden erstmals 1964 in die Verfassung Maltas aufgenommen.⁷³ 1987 wurde das Gesetz über die Europakonvention verabschiedet. Durch dieses Gesetz⁷⁴ kann Artikel 14 der Europäischen Menschenrechtskonvention vor maltesischen Gerichten geltend gemacht und von diesen durchgesetzt werden, wenn eine Person durch eine Diskriminierung daran gehindert wird, die in der Konvention festgeschriebenen Grundrechte und -freiheiten wahrzunehmen.

Außerdem hat Malta mehrere spezielle Rechtsvorschriften eingeführt, mit denen die Richtlinien des Rates 2000/78/EG und 2000/43/EG umgesetzt werden, insbesondere das Gesetz über Beschäftigungsverhältnisse 2002,⁷⁵ das Gesetz über Chancengleichheit (Menschen mit Behinderung), 2000,⁷⁶ das Gesetz zur Gleichstellung von Männern und Frauen, 2003,⁷⁷ und Artikel 82a des Strafgesetzbuchs.⁷⁸ Die rechtliche Mitteilung 461 von 2004 füllte die Lücken im Gesetz von 2002 in Bezug auf Diskriminierung aufgrund von Religion oder religiöser Überzeugung, Behinderung, Alter, sexueller Ausrichtung, Rasse oder ethnischer Zugehörigkeit, Schwangerschaft oder Mutterschaftsurlaub und Geschlechtsumwandlung im Arbeitsleben. Letztere Rechtsvorschrift wurde durch die rechtliche Mitteilung 53 von 2007 eingeführt und bezieht sich insbesondere auf angemessene Vorkehrungen für Menschen mit Behinderungen und den Schutz von Grundrechten gemäß den Bestimmungen der Richtlinie 2000/78.⁷⁹ 2012 wurde die Definition von Diskriminierung im Gesetz zur Gleichstellung von Männern und Frauen in den Bereichen Beschäftigung, allgemeine und berufliche Bildung, Finanzdienstleistungen und Werbung über die bisherigen Diskriminierungsgründe Geschlecht und familiäre Verpflichtungen hinaus auch auf sexuelle Ausrichtung, Alter, Religion oder Glaube, Rasse oder ethnische Zugehörigkeit und Geschlechtsidentität ausgeweitet.

Die Gleichbehandlungsverordnung⁸⁰ trug ebenfalls zur Umsetzung der Richtlinie 2000/43/EG bei. Damit wurde die Kommission zur Förderung der Gleichstellung von Männern und Frauen auch nominell verantwortlich für die Förderung der Gleichstellung aller Personen ohne

⁷¹ Die HREC bleibt unabhängig und ist direkt dem Parlament gegenüber rechenschaftspflichtig. Die Kommission soll die Befugnis erhalten, zu den Themen Menschenrechte und Gleichstellung Stellungnahmen abzugeben, Vorschläge zur Gesetzgebung und Politik vorzulegen und die Regierung und ihre Stellen zu kritisieren.

⁷² Die HREC wird der Öffentlichkeit offen stehen und niederschwellige Beschwerdeverfahren anbieten. Bei ihrem Auftrag, in Malta höchste Menschenrechtsstandards durchzusetzen, soll sie in angemessener Weise mit anderen Interessenorganisationen zusammenarbeiten.

⁷³ Die Verfassung Maltas von 1964 schützt vor Diskriminierung aufgrund von Rasse, Herkunftsland, politischer Überzeugung, Hautfarbe, Glaube, Geschlecht, sexueller Ausrichtung und Geschlechtsidentität und verbietet außerdem gesetzliche Bestimmungen, die entweder selbst diskriminierend sind oder sich diskriminierend auswirken.

⁷⁴ Gesetz über die Europakonvention (Gesetz XIV aus dem Jahr 1987). Das bedeutet, die wesentlichen Artikel der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten sind Teil des maltesischen Rechts und als solche direkt anwendbar.

⁷⁵ Gesetz XXII von 2002, mit dem Titel Gesetz über Beschäftigungsverhältnisse.

⁷⁶ Gesetz I von 2000.

⁷⁷ Gesetz I von 2003.

⁷⁸ Kapitel 9 der Gesetze von Malta, das Anstachelung zum Rassenhass unter Strafe stellt.

⁷⁹ Mit der rechtlichen Mitteilung 54 von 2007 wurden die Regeln zur Gleichstellung bei der Beschäftigung auf Arbeitnehmer im öffentlichen Sektor ausgeweitet.

⁸⁰ Rechtsmitteilung 85 von 2007.

Diskriminierung aufgrund von Rasse oder ethnischer Zugehörigkeit.⁸¹ Malta hat außerdem zahlreiche internationale Menschenrechtsabkommen unterzeichnet, die Schutz vor Diskriminierung bieten.

Ganz allgemein verweist dieser Bericht nur wenig auf die Rechtspraxis in diesem Bereich, weil es nur sehr wenig Rechtsprechung oder öffentlich zugängliches Material und damit kaum eine Rechtspraxis gibt.

3. Wichtigste Grundsätze und Begriffe

Alle in den Richtlinien erwähnten Diskriminierungsgründe sind nach maltesischem Recht verboten. Jedoch ist Behinderung der einzige Grund, der im maltesischen Recht gesondert definiert ist, nämlich im Gesetz über Chancengleichheit (Menschen mit Behinderung), 2000.⁸²

Die Rechtsmitteilung 461 von 2004 schützt vor Belästigung im Arbeitsleben wegen allen in den Richtlinien genannten Diskriminierungsgründen.⁸³ Nach maltesischem Recht müssen die Auswirkungen der Belästigung nicht kumulativ sein.⁸⁴ Nach Artikel 5 des Gesetzes über Chancengleichheit (Menschen mit Behinderung) gilt es als Diskriminierung, wenn eine Person Belästigung ausgesetzt wird.⁸⁵

Nach Artikel 3 Abs. 1 des Gesetzes über Chancengleichheit (Menschen mit Behinderung) von 2000 handelt eine Person diskriminierend, wenn sie „eine Person aufgrund einer Eigenschaft, die Personen mit einer entsprechenden Behinderung im Allgemeinen eigen ist oder zugeschrieben wird, weniger günstig behandelt oder in Aussicht stellt, sie weniger günstig zu behandeln.“ Da die Rechtsmitteilung 461 von 2004 und die Gleichbehandlungsverordnung von 2007 sowohl unmittelbare als auch mittelbare Diskriminierung verbieten und dabei die Begriffsbestimmungen der Richtlinien des Rates übernehmen, ließe sich außerdem argumentieren, dass das maltesische Recht Diskriminierung aufgrund einer Annahme der in den Richtlinien genannten Diskriminierungsgründe verbietet.

Ein Verbot von Viktimisierung findet sich in Artikel 28 des Gesetzes über Beschäftigungsverhältnisse.⁸⁶ Diese Bestimmung geht über die Anforderung von Artikel 11 der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung hinaus, weil sie sich nicht

⁸¹ Außerdem verbietet die Verordnung Diskriminierung aufgrund von Rasse oder ethnischer Zugehörigkeit in den Bereichen (i) Sozialschutz, einschließlich Sozialversicherung und Gesundheitswesen, (ii) soziale Vergünstigungen, (iii) Bildung, (iv) Zugang zu öffentlich verfügbaren Gütern und Dienstleistungen und (v) Wohnraum. Dazu ist anzumerken, dass das NCPE durch das Gesetz zur Gleichstellung von Männern und Frauen und die Gleichstellungsverordnung für Diskriminierung (i) aufgrund von Geschlecht und familiären Verpflichtungen, sexueller Ausrichtung, Alter, Religion oder Glaube, Rasse oder ethnischer Zugehörigkeit und Geschlechtsidentität in den Bereichen Beschäftigung, Banken und Finanzinstitute sowie Bildung und (ii) aufgrund von Rasse bzw. ethnischer Zugehörigkeit und Geschlecht bei der Bereitstellung von Gütern und Dienstleistungen zuständig ist.

⁸² Obwohl dieses Gesetz unmittelbare und mittelbare Diskriminierung nicht ausdrücklich erwähnt, verbietet es eindeutig beide Formen von Diskriminierung. Außerdem enthalten die Rechtsmitteilung 461 von 2004 und die Rechtsmitteilung 85 von 2007 Schutz vor unmittelbarer und mittelbarer Diskriminierung.

⁸³ Belästigung wird definiert als diskriminierende Handlung, durch die die Würde der belästigten Person verletzt oder ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird. Außerdem gilt es nach dem Gesetz als Diskriminierung, wenn der Arbeitgeber seine Pflicht vernachlässigt, jede Form der Belästigung am Arbeitsplatz oder innerhalb der Organisation zu bekämpfen.

⁸⁴ Ein Verbot von Belästigung ist auch in der Verwaltungsordnung für den öffentlichen Dienst enthalten.

⁸⁵ Belästigung wird definiert als unerwünschte Handlungen oder Verhaltensweisen, unter anderem durch Sprache, Gesten oder die Herstellung, Darstellung oder Verbreitung von Texten, Bildern oder anderen Materialien, die vernünftigerweise als beleidigend, demütigend, erniedrigend oder entwürdigend verstanden werden können.

⁸⁶ Nach dem Gesetz ist es verboten, Personen zu viktimisieren, die (a) bei den zuständigen Behörden Beschwerde einreichen oder aufgrund eines mutmaßlichen Verstoßes gegen das Gesetz Klage einreichen oder eine solche Klage unterstützen, oder (b) vertrauliche oder sonstige Informationen über mutmaßlich illegale oder korrupte Handlungen ihres Arbeitgebers oder im Namen oder Interesse ihres Arbeitgebers an die zuständige Regulierungsbehörde weitergeben.

nur auf Verstöße gegen den Gleichbehandlungsgrundsatz, sondern auch auf Verstöße gegen dieses Gesetz bezieht.

In ähnlicher Weise verbieten Artikel 7 der Gleichbehandlungsverordnung in Bezug auf Rasse und ethnische Zugehörigkeit und Artikel 5 des Gesetzes über Chancengleichheit (Menschen mit Behinderung) in Bezug auf Behinderung Viktimisierung und erfüllen damit die Anforderungen des EU-Rechts.⁸⁷ Außerdem ist es nach Artikel 4 des Gesetzes zur Gleichstellung von Männern und Frauen rechtswidrig, wenn Arbeitgeber bei den Verfahren, mit denen über die Auswahl von Bewerbern, die Bedingungen einer Beschäftigung oder Kündigungen entschieden wird, eine Person unmittelbar oder mittelbar diskriminieren.⁸⁸

Die Rechtsmitteilung 461 von 2004 verbietet die Anweisung zur Diskriminierung im Bereich Beschäftigung und die Rechtsmitteilung 85 von 2007 in Bezug auf den Anwendungsbereich der Richtlinie 2000/43/EG. Das Gesetz über Chancengleichheit (Menschen mit Behinderung), 2000, und das Gesetz zur Gleichstellung von Männern und Frauen, 2003, enthalten jedoch kein entsprechendes Verbot.⁸⁹ Es ist aber zu beachten, dass das Verbot der Anweisung zur Diskriminierung nach der Gleichbehandlungsverordnung restriktiver ist als die Bestimmungen der Richtlinie.

Nach Artikel 2 Abs. 3 der Gleichbehandlungsverordnung gilt eine weniger günstige Behandlung aufgrund einer auf Rasse oder ethnische Zugehörigkeit bezogenen Eigenschaft, die bezweckt oder bewirkt, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird, nicht als Diskriminierung, sofern die Ungleichbehandlung aufgrund des betreffenden Aufgabenbereichs oder in ihrem Zusammenhang rechtmäßig ist und die Eigenschaft eine wesentliche berufliche Anforderungen darstellt, die in dem Zusammenhang verhältnismäßig ist. Dabei fällt auf, dass die Gleichbehandlungsverordnung in Artikel 2 Abs. 3 einen eher restriktiven Verweis enthält, da nur die Ungleichbehandlung selbst rechtmäßig sein muss, jedoch nicht der Zweck der Ungleichbehandlung.

Sowohl das Gesetz über Beschäftigungsverhältnisse, 2002, als auch das Gesetz zur Gleichstellung von Männern und Frauen, 2003, enthalten Bestimmungen zu wesentlichen beruflichen Anforderungen gemäß der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung.⁹⁰

4. Sachlicher Anwendungsbereich

Das maltesische Recht bietet Schutz vor Diskriminierung sowohl in übergeordneten Rechtsvorschriften als auch in einzelnen Gesetzen. Die Verfassung Maltas und das Gesetz über die Europakonvention enthalten ein allgemeines Diskriminierungsverbot, das damit auch für alle Anwendungsbereiche gilt, die in Artikel 3 der beiden Richtlinien genannt sind.

⁸⁷ Die Bestimmung besagt, dass es rechtswidrig ist, Personen aufgrund einer Beschwerde bei den zuständigen Behörden oder aufgrund der Einreichung oder Teilnahme an einer Klage aufgrund eines Verstoßes gegen das Gesetz oder wegen der Weitergabe vertraulicher oder sonstiger Informationen über mutmaßlich diskriminierende Verhaltensweisen, Handlungen oder Praktiken an eine zuständige Regulierungsbehörde zu viktimisieren.

⁸⁸ Es gilt ebenfalls als Diskriminierung, wenn solche Arbeitgeber die Arbeits- oder Beschäftigungsbedingungen zuungunsten von Arbeitnehmern verändern, die ein ihnen nach diesem Gesetz zustehendes Recht geltend gemacht oder die Erfüllung einer nach diesem Gesetz bestehenden Verpflichtung des Arbeitgebers zu ihren Gunsten gefordert haben.

⁸⁹ Auf allgemeiner Ebene besagt die Verfassung Maltas, dass niemand durch die Ausführung eines Gesetzes, bei Ausübung eines öffentlichen Amtes oder durch die Handlungen einer öffentlichen Stelle diskriminiert werden darf.

⁹⁰ Das maltesische Recht schreibt außerdem in nachrangigen Rechtsvorschriften, wie dem Gesetz über eine Arbeitsschutzbehörde von 2000 sowie im Gesetz über Chancengleichheit (Menschen mit Behinderung) von 2000 angemessene Vorkehrungen für Menschen mit Behinderungen vor. Letzteres Gesetz verpflichtet Arbeitgeber, für Arbeitnehmer mit einer Behinderung angemessene Vorkehrungen zu treffen.

Die spezielleren Rechtsvorschriften enthalten Verbote von Diskriminierung in bestimmten Lebensbereichen (vor allem im Arbeitsleben) oder für bestimmte Gruppen (Diskriminierung aufgrund von Geschlecht, Rasse oder ethnischer Zugehörigkeit, sexueller Ausrichtung, Geschlechtsidentität und Diskriminierung von Menschen mit Behinderung). In diesem Fall erstreckt sich der Schutz durch diese Gesetze auf das Verhältnis zwischen Privatpersonen und nicht auf das Verhältnis zwischen Privatpersonen und öffentlichen Stellen oder Behörden.

Allerdings enthält das Gesetz über Beschäftigungsverhältnisse ein allgemeines Diskriminierungsverbot. Entsprechend verbietet das Gesetz zur Gleichstellung von Männern und Frauen Diskriminierung in den Bereichen Beschäftigung, allgemeine und berufliche Bildung, Finanzdienstleistungen und Werbung.

Die Beschäftigung im öffentlichen Sektor ist durch die Verwaltungsordnung für den öffentlichen Dienst und die gemäß dem Gesetz für Beschäftigungsverhältnisse erlassene Rechtsmitteilung 54 von 2007 geregelt, deren Bestimmungen inzwischen auch für Angestellte der öffentlichen Hand gelten. Arbeitnehmer im öffentlichen Sektor, die von einer öffentlichen Stelle diskriminiert werden, können sich außerdem auf die Verfassung Maltas und das Gesetz über die Europakonvention berufen.

Nach dem Gesetz über Arbeitsvermittlung und Fortbildung von 1990 ist es *unter anderem* gesetzwidrig, Personen aufgrund von Rasse, Hautfarbe, Geschlecht, Glaube oder aufgrund der Parteiangehörigkeit oder politischen Überzeugung bei der Vermittlung an einen Arbeitgeber zu begünstigen oder zu diskriminieren.

Das Gesetz über Beschäftigungsverhältnisse und die nach diesem Gesetz erlassenen Verordnungen verbieten Diskriminierung bei der beruflichen Bildung, Berufsberatung und Entlohnung für gleichwertige Arbeit gemäß den Vorgaben von Artikel 3 Absatz 1 b und c der beiden Richtlinien. Das maltesische Recht verbietet auch Diskriminierung aus den in Artikel 3 Absatz 1 d der Richtlinien genannten Gründen. Ein Diskriminierungsverbot in den in Buchstabe e bis h der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse⁹¹ genannten Geltungsbereichen wurde durch die Gleichbehandlungsverordnung von 2007 umgesetzt. Mutmaßliche Opfer von Diskriminierung können ihre Rechte jedoch auch schützen, indem sie sich auf die Verfassung, das Gesetz über die Europakonvention oder das Ombudsmanngesetz berufen.

Wie oben ausgeführt, wurde die Richtlinie daher im öffentlichen und im privaten Bereich umgesetzt.

5. Rechtsdurchsetzung

Personen, die glauben, diskriminiert worden zu sein, bietet das maltesische Recht mehrere mögliche Rechtsmittel. Neben einer Klage vor den ordentlichen Gerichten gibt es spezialisierte Stellen, bei denen ein mutmaßliches Opfer sein bzw. ihre Beschwerde vorbringen kann. Dazu gehören unter anderem das Arbeitsschiedsgericht (nach dem Gesetz über Beschäftigungsverhältnisse, 2002), die Nationale Kommission für Menschen mit Behinderung (nach dem Gesetz über Chancengleichheit (Menschen mit Behinderung)), die Nationale Kommission für die Förderung der Gleichstellung von Männern und Frauen (nach dem Gesetz zur Gleichstellung von Männern und Frauen), die Kommission für den öffentlichen Dienst (nach der Verfassung Maltas), der Ombudsmann (nach dem Ombudsmanngesetz), die Rundfunkaufsichtsbehörden (nach der Verfassung Maltas) und die Beschäftigungskommission (nach der Verfassung Maltas).⁹²

⁹¹ Nämlich, Sozialschutz, einschließlich Sozialversicherung und Gesundheitsversorgung, soziale Vergünstigungen, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich von Wohnraum.

⁹² Die Beschäftigungskommission ist nach der Verfassung ausschließlich für Diskriminierung aufgrund der politischen Überzeugung zuständig.

Bei Verstößen gegen die Verfassung oder das Gesetz über die Europakonvention kann grundsätzlich jeder Bürger vor einem ordentlichen Gericht Klage einreichen. Personen, denen die finanziellen Mittel für ein Verfahren fehlen, können in Malta Prozesskostenhilfe beantragen. Sofern der Antrag nicht bewilligt wird, können die Rechtskosten abschreckend wirken. Auch die manchmal sehr langen Verfahrensdauern könnten möglicherweise von einer Klage abschrecken.

In der Regel legen die Opfer selbst Beschwerde bei den genannten Stellen ein. Allerdings ist es Verbänden, Organisationen und anderen juristischen Personen mit einem rechtmäßigen Interesse nach Rechtsmitteilung 461 von 2004 und Rechtsmitteilung 85 von 2007 erlaubt, sich entweder im Namen oder zur Unterstützung des Klägers mit dessen Zustimmung an jedem Gerichts- oder Verwaltungsverfahren zu beteiligen.

Eine der Stellen, die gesetzlich zur Unterstützung von mutmaßlichen Diskriminierungsopfern berechtigt sind, ist die Nationale Kommission für Menschen mit Behinderungen. Außerdem können nach Artikel 33 A des Gesetzes über Chancengleichheit (Menschen mit Behinderungen) alle Verbände, Organisationen und anderen juristischen Personen mit einem rechtmäßigen Interesse an der Durchsetzung dieses Gesetzes im Namen oder zur Unterstützung der Person, die einer gesetzwidrigen Diskriminierung ausgesetzt war, mit deren Zustimmung vor dem zuständigen Gericht Klage einreichen.

Nach Artikel 11 der Gleichbehandlungsverordnung kann der Kommissar für die Förderung der Gleichstellung Untersuchungen zu jeder Handlung oder Unterlassung einleiten, die mutmaßlich gegen die Verordnung verstößt. Damit kann er auch auf die schriftliche Beschwerde von Personen reagieren, die sich als Opfer einer entsprechenden Handlung oder Unterlassung fühlen. Nach dem Gesetz über Beschäftigungsverhältnisse müssen Fälle, in denen einem Arbeitnehmer ungerechtfertigt gekündigt oder gegen eine der in Kapitel 1 des Gesetzes genannten Verpflichtungen verstoßen wurde, durch den betroffenen Arbeitnehmer selbst oder durch eine in seinem Namen handelnde Person vor das Arbeitsschiedsgericht gebracht werden.

Im maltesischen Recht gilt allgemein der Grundsatz, dass die Beweislast beim Kläger liegt. Nach der Rechtsmitteilung 461 von 2004 müssen Kläger bei Diskriminierungsklagen jedoch nur beweisen, dass sie weniger günstig behandelt wurden; der Beklagte muss dann beweisen, dass die Ungleichbehandlung rechtmäßig war. Auch die Gleichbehandlungsverordnung und das Gesetz zur Gleichstellung von Männern und Frauen enthalten eine entsprechende Umkehrung der Beweislast.⁹³

Verstöße gegen das Diskriminierungsverbot werden sanktioniert. In der Regel durch die Zahlung einer Entschädigung oder eines Schadensersatzes. Verstöße, die eine Straftat darstellen, werden strafrechtlich geahndet. Dabei sollte erwähnt werden, dass weder von einem Gericht noch vom Ombudsmann Urteile über die Höhe der Entschädigungen vorliegen. Deshalb gibt es keine öffentlich verfügbaren Daten, die zeigen, ob die Sanktionen wirksam, verhältnismäßig und abschreckend sind. Da jedoch weder das Gesetz über Beschäftigungsverhältnisse noch die Gleichbehandlungsverordnung eine Obergrenze für Entschädigungen vorsehen, kann man allerdings davon ausgehen, dass die Sanktionen wirksam und ausreichend sind.

Vor der Verabschiedung der Gesetze fand ein Dialog und/oder Konsultationen mit NRO und den Sozialpartnern statt. Dieser Dialog wird weiter fortgesetzt.

⁹³ Diese Regel gilt auch dann, wenn die Kommission selbst im Namen des mutmaßlichen Opfers eine Klage wegen Diskriminierung vor das zuständige Gericht bringt oder das Opfer bei seiner Klage und den Schadensersatzansprüchen unterstützt.

6. Gleichbehandlungsstellen

Die Nationale Kommission zur Förderung der Gleichstellung von Männern und Frauen (NCPE) ist inzwischen auch die Stelle, die in Malta für die Förderung der Gleichstellung aller Personen ohne Diskriminierung aufgrund von Rasse oder ethnischer Zugehörigkeit zuständig ist. Die Kommission soll gewährleisten, dass die maltesische Gesellschaft bei der beruflichen Bildung und im Arbeitsleben sowie bei dem Zugang zu Dienstleistungen und Vergünstigungen frei von jeder Form der Diskriminierung ist. Unter die Zuständigkeit der NCPE fällt Diskriminierung aufgrund von (i) Geschlecht und familiären Verpflichtungen, sexueller Ausrichtung, Alter, Religion oder Glaube, Rasse oder ethnischer Zugehörigkeit und Geschlechtsidentität in den Bereichen Beschäftigung, Banken und Finanzinstitute sowie Bildung und (ii) Rasse bzw. ethnischer Zugehörigkeit und Geschlecht beim Zugang zu und der Versorgung mit Gütern und Dienstleistungen, d. h. die Kommission behandelt diese Diskriminierungsgründe.⁹⁴ Die NCPD ist für die Diskriminierung Behinderter zuständig und befasst sich mit allen Aspekten von Behinderung.

7. Wichtige Punkte

Im maltesischen Recht gibt es Fälle, in denen der Anwendungsbereich der nationalen Bestimmungen enger gefasst ist als in den Richtlinien. So ist das Verbot der Anweisung zur Diskriminierung nach der Gleichbehandlungsverordnung restriktiver als die Bestimmungen der Richtlinie. Entsprechend enthält Artikel 2 Abs. 3 der Verordnung einen eher restriktiven Verweis, da Ausnahmen für wesentliche berufliche Anforderungen gelten, wenn die Ungleichbehandlung rechtmäßig ist und einem Zweck dient.

Eine weitere Abweichung von den Richtlinien ist die Tatsache, dass die Pflicht zu angemessenen Vorkehrungen nur im Gesetz über Chancengleichheit (Menschen mit Behinderung) 2000 vorkommt, und damit nur für die Beschäftigung von Arbeitnehmern mit Behinderungen und die Bewerberauswahl gilt. Nach dem Gesetz zur Gleichstellung von Männern und Frauen gelten außerdem Vorschriften, Kriterien oder Verfahren, die Personen aufgrund von Geschlecht oder sexueller Ausrichtung, Alter, Religion oder Glaube, Rasse oder ethnischer Zugehörigkeit oder Geschlechtsidentität gegenüber anderen Personen in besonderer Weise benachteiligen können, als Diskriminierung, es sei denn, die betreffenden Vorschriften, Kriterien oder Verfahren sind angemessen und notwendig und durch sachliche Gründe gerechtfertigt, die nicht mit dem Geschlecht zusammenhängen.⁹⁵

Nach der Verordnung über Gleichbehandlung im Arbeitsleben, 2004, die gemäß dem Gesetz über Beschäftigungsverhältnisse erlassen wurde, sind Arbeitgeber verpflichtet, für Menschen mit Behinderungen angemessene Vorkehrungen zu treffen. Insbesondere müssen Arbeitgeber Menschen mit Behinderung durch angemessene Vorkehrungen den Zugang zu Beschäftigung, Beförderung und beruflicher Weiterbildung ermöglichen, sofern diese Vorkehrungen den Arbeitgeber nicht unverhältnismäßig belasten. Es liegt dann keine unverhältnismäßige Belastung vor, wenn sie durch Maßnahmen im Rahmen der maltesischen Behindertenpolitik angemessen gefördert werden. Hierbei ist zu beachten, dass sich diese Vorkehrungen auf Arbeitnehmer beziehen, jedoch nicht auf „Bewerber“, was gegen die Richtlinie verstößt.

Das maltesische Antidiskriminierungsrecht hat sich in den vergangenen Jahren weiter entwickelt, insbesondere in den Anwendungsbereichen der Richtlinien. Vor kurzem wurde ein Konsultationsverfahren mit dem Zweck eingeleitet, die Gesetzgebung Maltas im Bereich Menschenrechte und Gleichstellung weiter zu stärken. Die Regierung verlieh ihrer

⁹⁴ Es ist geplant, den Zuständigkeitsbereich der Nationalen Kommission zur Förderung der Gleichstellung zu erweitern und sie unter dem Namen Kommission für Menschenrechte und Gleichstellung (HREC) als Menschenrechts- und Gleichbehandlungsstelle im Sinne der europäischen Gleichbehandlungsrichtlinien neu zu gründen. Damit wird die NCPE nicht nur ihre bisherigen Aufgaben weiter ausüben können, sondern auch ihre Arbeit und Kompetenzen in den Bereichen Menschenrechte und Gleichstellung erweitern und vertiefen.

⁹⁵ Hierbei ist zu beachten, dass die Definition von Diskriminierung im Jahr 2012 zwar auf weitere Diskriminierungsgründe ausgeweitet wurde, bei den sachlichen Gründen jedoch nur das Geschlecht ausdrücklich ausgeschlossen wird. Die Richtlinien enthalten diese Einschränkung nicht.

Überzeugung Ausdruck, dass die bestehenden Gesetze und die Rahmenstruktur gestärkt werden müssen, damit Malta über angemessene Mechanismen für Menschenrechte und Gleichstellung verfügt. Ziel des Verfahrens ist es, zu analysieren, wie der Rechtsrahmen im Bereich Menschenrechte und Gleichstellung sowie die Institutionen, die das Recht durchsetzen, so gestaltet werden können, dass sie dem Modell einer nationalen Menschenrechtsinstitution (NHRI) der Vereinten Nationen im Sinne der Pariser Grundsätze und den Anforderungen an eine Gleichbehandlungsstelle genügen, die in den Gleichbehandlungsrichtlinien der EU vorgegeben sind. Ebenso wichtig ist das oben bereits erwähnte Konsultationsverfahren, das⁹⁶ im Dezember 2014 zum Entwurf eines neuen Gleichstellungsgesetzes und einer Kommission für Menschenrechte eingeleitet wurde.

⁹⁶ Die Ministerin für sozialen Dialog, Verbraucherrecht und bürgerliche Freiheiten Helena Dalli hatte das Weißbuch am 10. Dezember 2014 vorgelegt, das öffentliche Konsultationsverfahren endete am 10. Februar 2015.

INTRODUCTION

The national legal system

The Maltese Constitution contains limitations on parliamentary sovereignty. An extensive and judicially enforceable bill of rights, as well as judicial review of the constitutionality of legislation, is incorporated therein. It sets limitations on governmental power and provides remedies for cases of abuse, guaranteeing protection for the fundamental rights and freedoms of the individual vis-à-vis the state, and it provides for independent courts to secure that protection.

Thus, the Constitution is supreme over the executive and legislative branches, and the constitutional system provides for a system of checks and balances among and between the executive, the legislature and the judiciary. The Constitution of Malta was amended in April 2001, entrenching the system of local government. It is now stipulated that the 'territory of Malta shall be divided into such number of localities as may by law be from time to time determined, each locality to be administered by a Local Council elected by the residents of the locality and established and operating in terms of such law as may from time to time be in force'.⁹⁷

The Constitution provides for the setting up of the legislature, and all bills are presented to Parliament. Once they are approved, receive the consent of the President, and are published, they become Acts of Parliament, with the full force of law. Acts of Parliament may empower the Minister responsible for the said Act with the power to issue regulations, orders or bye-laws by virtue of Legal Notices. A Legal Notice is deemed to be subsidiary legislation, having the full force of law, without the need to obtain parliamentary approval, given that the power to issue the regulations, bye-laws and/or orders was approved in the principal Act.

It is also pertinent to note that Malta is a party to several international human rights treaties, and had ratified various conventions such as the United Nations Convention on the Rights of Persons with Disabilities.⁹⁸ Treaties and conventions do not automatically become part of the domestic law, however, until such time as they are incorporated into domestic law by legislation. Until such time, therefore, the provisions of the relative Conventions cannot be directly enforced by the Maltese Courts. It should be noted, however, that the European Convention on the Protection of Human Rights and Fundamental Freedoms was incorporated into domestic law in 1987,⁹⁹ giving Maltese citizens the right to individually petition the European Court of Human Rights once domestic remedies have been exhausted.

⁹⁷ Article 115A of the Constitution of Malta.

⁹⁸ In December 2013 a circular was issued to all Government heads to draw attention to the United Nations Convention on the Rights of Persons with Disabilities and the Optional Protocol, both of which were ratified by Malta in October 2012 and came into effect in November 2012 following a wide-ranging consultation process with all stakeholders. It was reiterated that the CRPD is based on the principles outlined by the social model of disability, essentially stating that all of society needs to take responsibility for the engagement and full and unconditional inclusion of people with disabilities in the community. Within this framework the notion of Universal Design is decisive. This entails addressing attitudinal barriers as well as removing and possibly eliminating socially constructed structural barriers completely. In addition, it aims to provide the space that will allow disabled people to be part of mainstream society.

⁹⁹ European Convention Act, 1987 (Act XIV of 1987).

List of main legislation transposing and implementing the directives

Malta has introduced a number of specific legislative enactments to implement Council Directives 2000/78/EC and 2000/43/EC.

Name of law	Date of adoption	Date of entry into force	Date of latest amendments	Grounds covered	Material scope
Employment and Industrial Relations Act (EIRA) ¹⁰⁰	02.12.2002	27.12.2002	20.02. 2015	Marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association	employment
Equal Opportunities (Persons with Disability) Act ¹⁰¹	10.02.2000	01.10.2000		Disability discrimination	employment, education, provision of goods and services, access, accommodation
Equal Treatment in Employment Regulations ¹⁰²	05.11.2004	05.11.2004		religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, gender reassignment	employment
Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations ¹⁰³	13.03.2007	13.03.2007		religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, gender reassignment	employment

¹⁰⁰ Act XXII of 2002.

¹⁰¹ Act I of 2000.

¹⁰² Legal Notice 461 of 2004.

¹⁰³ Legal Notice 524 of 2007.

Equal Treatment in Self-Employment and Occupation Order ¹⁰⁴	03.04.2007	03.04.2007		religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, gender reassignment	Self employment
Equal Treatment of Persons Order ¹⁰⁵	03.04.2007	03.04.2007		Racial or ethnic origin	Equal treatment of persons irrespective of race and ethnic origin
Equality for Men and Women Act ¹⁰⁶	09.12.2003	09.12.2003		sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, actual or potential pregnancy, or childbirth	Equal treatment of persons irrespective of sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, actual or potential pregnancy, or childbirth

¹⁰⁴ Legal Notice 86 of 2007.

¹⁰⁵ Legal Notice 85 of 2007.

¹⁰⁶ Act I of 2003.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Malta includes the following articles dealing with non-discrimination:

Chapter IV – Protection of Fundamental Rights and Freedoms	
Article 45	Protection from discrimination on grounds of race etc

Chapter II of the Maltese Constitution¹⁰⁷ lays down a number of principles that, according to Article 21 of the Constitution of Malta, are not, however, judicially enforceable. These principles cover, *inter alia*: the right to, and the protection of, work; the right to free education in state schools; the equal rights of men and women; and the right to social assistance and insurance.

Chapter IV of the Constitution¹⁰⁸ provides for those Fundamental Rights and Freedoms of the Individual in respect of which an aggrieved person may apply to the Court¹⁰⁹ for redress. The rights thereunder are directly applicable. *Inter alia*, Article 32 provides that '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' subject to the respect of the rights and freedoms of others.

The principles of equality of treatment and non-discrimination under Article 45 of the Constitution of Malta relate to protection from discrimination on the basis of race, place of origin, political opinions, colour, creed,¹¹⁰ sex, sexual orientation or gender identity. This list is ground-specific and exhaustive and also provides that no law shall make any provision that is discriminatory either of itself or in its effect. Article 45(3) states that: "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."¹¹¹

In fact, the Maltese Courts have held that, if there is any other consideration upon which the discrimination is based besides those mentioned, such discrimination will not be deemed unconstitutional.¹¹² The Maltese Constitution does not make specific mention of

¹⁰⁷ Articles 7 to 21 (inclusive).

¹⁰⁸ Articles 32 to 47 (inclusive).

¹⁰⁹ An aggrieved individual may seek enforcement of these rights by means of an application before the First Hall of the Civil Court, with final appeal at national level to the Constitutional Court. Procedures are inexpensive and regulations currently in force provide that all human rights cases are to be heard as expeditiously as possible.

¹¹⁰ One notes the use of the term 'creed' here as opposed to 'religious belief', as found in national anti-discriminatory provisions under employment law. 'Creed' is not defined under the Constitution but is commonly defined as a statement of belief, normally a religious belief.

¹¹¹ The Act amending the Constitution – Act X of 2014 - introduced 'sexual orientation' and 'gender identity' as grounds on the basis of which discrimination is prohibited in the public sphere. More particularly, this therefore means that acts of discrimination on these grounds are forbidden in any law or in the conduct of a public entity. Prior to this extension, protection against discrimination was limited to 'race', 'place of origin', 'political opinions', 'colour', 'creed' or 'sex' of an individual. Moreover, the Act introduced the principle that any law imposing qualifications related to sexual orientation or gender identity shall be held to be discriminatory in relation to calls for service as a public officer or service for a local government authority or body corporate established for a public purpose.

¹¹² *Dr Walter Cuschieri et v. The Hon. Prime Minister et noe* – Constitutional Court – 30 November 1977.

the words 'ethnic origin' in Article 45. However, one may try to argue that this may be implied through the words 'race' and 'place of origin'. Likewise, the Constitution does not make specific reference to age or disability, and the same cannot be implied from the specific grounds mentioned. However, protection under these grounds is afforded under specific national legislation.

To date, the Maltese Courts have not had to attempt to interpret the terms 'race' and 'place of origin' as also including ethnic origin. This deficiency is, to a certain extent, remedied by the European Convention Act, 1987, in that a person who alleges breach of the enjoyment of the fundamental rights and freedoms provided for in the Convention on grounds of discrimination may apply to the Maltese Courts for redress. In fact, since the grounds of non-discrimination under Article 14 of the European Convention for Human Rights are merely illustrative, proceedings in respect of alleged discrimination can be instituted on a wider range of grounds than those that could be invoked under Article 45 of the Constitution of Malta. Therefore, alleged victims of discriminatory treatment based on disability or age may invoke Article 14 of the Convention. It is to be noted that the right to protection from discrimination under Article 45 of the Constitution of Malta is an independent right and can therefore be invoked even if there is no breach of any other article of Chapter IV of the Constitution.¹¹³

The Constitutional provisions apply to all areas covered by the directives. Their material scope is not broader than those of the directives.

The constitutional anti-discrimination provisions are directly applicable.

The constitutional equality clauses cannot be enforced against private actors (as opposed to the state).

¹¹³ As held by the Constitutional Court in the case of *Victoria Cassar v. Malta Maritime Authority et al* (2 November 2001) the protection from discriminatory treatment under the Constitution is guaranteed as being specific, autonomous and independent from other rights and freedoms. In this context, the discrimination itself is considered to be the basis for the action and therefore there is no need to make any reference to any other fundamental right or freedom.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law and are found under the following Maltese legal instruments:

- Constitution of Malta – race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity. It is to be noted that there is no definition of the terms 'race' and 'colour' under the Maltese Constitution;
- European Convention Act, 1987 – sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status;
- Employment and Industrial Relations Act, 2002, and the legal notices issued thereunder – marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion, membership in a trade union or in an employers' association, racial or ethnic origin, age and sexual orientation religion or religious belief, pregnancy or maternity leave, gender reassignment;¹¹⁴
- Equal Opportunities (Persons with Disability) Act, 2000 - disability on the basis of physical, intellectual, sensory and/or mental impairment;
- Equality between Men and Women Act, 2003 – sex, family responsibility, sexual orientation, age, religion or belief, racial or ethnic origin or gender identity;
- Equal Treatment of Persons Order, 2007 – race and ethnic origin.

In December 2014 a White Paper for public consultation was published on the proposed introduction of the Equality Act. This new law is proposed to supersede the current Maltese Equality for Men and Women Act, which no longer serves its purpose as its distinctions in providing for different grounds created an unwanted hierarchy of grounds. The new Equality Act is being proposed so as to present a less fragmented equality legal framework in Malta. The Act should contain a general provision against discrimination as well as positive equality duties and obligations. Additionally, a revised list of grounds of discrimination is to be included to ensure that all bases of discrimination are adequately included within one Act. Intersectional discrimination is also to be tackled, with specific provisions within this proposed legislation. The ultimate aim of this proposed Equality Act is to have all the relevant provisions of the following EU Directives included within one, comprehensive act of legislation: Directive 2000/43/EC, Directive 2000/78/EC, Directive 2004/113/EC and Directive 2006/54/EC.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The only ground which is defined under Maltese law is the ground of disability under the Equal Opportunities (Persons with Disability) Act, 2000. This Act defines disability as a physical, intellectual, sensory or mental impairment which, in interaction with various barriers, may hinder one's full and effective participation in society on an equal basis with others. The Act further defines impairment in the context of disability as meaning any loss, restriction or abnormality of psychological, physiological, or anatomical structure or function.

Article 40 of the Constitution of Malta provides that 'all persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious

¹¹⁴ Gender reassignment was introduced by virtue of an amendment in 2014 to LN 461 of 2004, whereby the definition of discriminatory treatment was widened to include the following: 'in so far as the ground of sex is concerned, any less favourable treatment of a person who underwent or is undergoing gender reassignment, which for the purpose of these regulations shall mean where a person is considering or intends to undergo, or is undergoing or has undergone, a process, or part of a process, for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'.

worship'. This article is one which requires not less than two-thirds of all members of the House of Representatives for the purposes of amendment.

Maltese law does not provide definitions of the terms 'conscience' and 'religion'. It is assumed that the interpretation of these words should be according to their meaning in common usage.

Through the enactment of the European Convention Act,¹¹⁵ Malta adopted the European Convention as part of its domestic law. Thus, Article 9 of the European Convention on the right to freedom of thought, conscience and religion, together with the case law developed by the European Commission and the European Court, became applicable in Malta. Under Maltese law there is no legislation which regulates the establishment and recognition of religious communities. Thus, there exists no legal requirement for recognition and no system of registration of the same.

2.1.2 Multiple discrimination

In Malta, prohibition of multiple discrimination is not included in the law. Currently there are no specific provisions which deal with the matter but, in the White Paper on the proposed Equality Act, mention is made of the introduction of provisions on intersectionality. Currently, there are no legal restrictions which prevent a person from claiming discrimination on one or more grounds under one or more laws.

In Malta there is no case law dealing with multiple discrimination:

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Malta the following national law prohibits discrimination based on perception or assumption of what a person is: The Equal Opportunities (Persons with a Disability) Act, 2000, specifically makes reference to a person having a presumed characteristic. Thus, Article 3(1)(b) of the Act provides that a person is considered to be acting discriminatorily when 'he treats or proposes to treat a person less favourably on the basis of a characteristic that appertains generally to persons who have such a disability or a presumed characteristic that is generally imputed to persons who have such a disability.' No other national legislation provides for discrimination by assumption on any of the other grounds covered by the directive.

b) Discrimination by association

In Malta, national law does not make specific reference to the prohibition of discrimination based on association with persons with particular characteristics, nor have there been any national cases which have dealt with the prohibition of discrimination based on association with persons with particular characteristics.

National law contains definitions on discrimination which reflect the definitions found in the directives and therefore the interpretation given in the *Coleman v Attridge Law* and *Steve Law* case would have to be mirrored if a similar case were to be brought before the national courts.

¹¹⁵ Act XIV of 1987.

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In Malta, direct discrimination is prohibited in national law. It is defined.

The Equal Treatment in Employment Regulations issued under the Employment and Industrial Relations Act, 2002, provide for a prohibition against direct discrimination. Regulation 3(2)(a) provides that direct discriminatory treatment shall be taken to occur where one person is treated less favourably than another is, has been, or would be, treated in a comparable situation on any of the grounds referred to in sub-regulation (1) of this regulation. This provision is taken from Article 3 of the directives and is therefore compatible therewith.

In terms of the Equal Treatment of Persons Order of 2007, 'discrimination' means direct or indirect discrimination based on racial or ethnic origin. In terms of Article 2(2), 'direct discrimination shall be taken to occur where a person is treated less favourably than another person is, has been, or would be, treated in a comparable situation.'

The Equality for Men and Women Act, 2003, does not make direct reference to direct or indirect discrimination, other than where reference is made to the use of statistical evidence in proving indirect discrimination. However, in terms of Article 2, 'discrimination' is defined as discrimination based on sex or because of family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds. Furthermore, discrimination includes treating men and women less favourably on the basis of parenthood or family responsibility or for some other reason related to sex or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity.

The Equal Opportunities (Persons with Disability) Act, 2000, does not make any express reference to direct and indirect discrimination. In fact, there is no specific definition of discrimination or discriminatory treatment in the Act. Instead, there is a list of those instances which are deemed to constitute discrimination under the Act. Direct discrimination is clearly prohibited under Articles 3, 5 and 6.

Article 3 deals with disability discrimination in terms of less favourable treatment:

'A person shall discriminate against another person on the grounds of disability in any circumstances relevant for the purposes of any provision of this Act, if:

- in circumstances which are similar or not materially different, he treats or proposes to treat a person, who has a disability, less favourably than he treats or would treat a person who does not have such a disability; or
- he treats or proposes to treat a person less favourably on the basis of a characteristic that appertains generally to persons who have such a disability or a presumed characteristic that is generally imputed to persons who have such a disability'.

In terms of Article 5, discrimination on the grounds of disability could also arise if the disabled person is treated less favourably than others because he/she is accompanied by or possesses any assistive means. The Act defines assistive means as any palliative or therapeutic device, any prosthetic apparatus, or any other apparatus or means, including trained animals, that may be required by a person with a disability specifically because of that disability. Furthermore, in order to eliminate discrimination prohibited by the Act, a person is deemed to discriminate against another on the grounds of disability where he/she

fails to publicise, in an effective manner, those goods, facilities and services provided by him/her to persons with a disability.

Article 6 refers to that discrimination to which a person may be subjected due to the fact that he/she is accompanied by an assistant due to his/her disability: 'A person shall discriminate against another person on the grounds of disability if he treats or proposes to treat another person less favourably than he treats or would treat others who do not have such a disability because of the fact that such other person is accompanied by:

- an interpreter; or
- a reader; or
- an assistant; or
- a carer,

who provides interpretative, reading or other services to such other person because of the disability of such other person or because of any matter related to that fact, whether or not it is the practice to treat any person who is accompanied by an interpreter, a reader, an assistant or a carer, as the case may be, less favourably.'

b) Justification of direct discrimination

Legal Notice 461 of 2004¹¹⁶ provides for differences based on occupational requirements. Thus, any difference of treatment based on a characteristic related to grounds of religion or religious belief, disability, age, sexual orientation or racial or ethnic origin shall not constitute discriminatory treatment where, by reason of the nature of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

With regard to access to employment, including the training leading thereto, a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

No situations are provided under the Equal Treatment of Persons Order as to when direct discrimination may be justified.

As noted above, in terms of the Equality for Men and Women Act, discrimination includes the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities or because of their sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity. A justification is mentioned under this provision, but it must be based on factors unrelated to sex, despite the fact that the relevant provisions cover various other grounds. It is not clear why the Act provides for this limitation and restricts the justification to factors unrelated to sex.

2.2.1 Situation testing

a) Legal framework

In Malta the law is silent on situation testing.

b) Practice

¹¹⁶ Regulation 4.

In Malta there is no evidence that situation testing is used in practice. Although the Maltese Courts do look at legal developments in other countries to assist them in reaching their decisions, this in practice is not obligatory. It could be implied, however, that, given the absence of specific provision made in the Code of Organisation and Civil Procedure, situation testing could be permitted. It is therefore not entirely clear whether or not situational testing would be accepted as evidence in judicial, administrative or other procedures.

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In Malta, indirect discrimination is prohibited in national law. It is defined.

The Equal Treatment in Employment Regulations also provide for the prohibition of indirect discrimination. Regulation 3(2)(b) provides that 'indirect discriminatory treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular race or ethnic origin or having a particular religion or religious belief, disability, age, or sexual orientation at a disadvantage when compared with other persons.' The prohibition against indirect discrimination is taken from Article 2(2)(b) of Council Directive 2000/78, and is therefore compatible with the provisions of the said directive. In fact, the same test which applies to Article 2(2)(b) of Council Directive 2000/78, to determine whether there has been indirect discrimination or otherwise, applies to Regulation 3(2)(b) of this Legal Notice.

In terms of Article 2 of the Equal Treatment of Persons Order of 2007, 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person 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.' This definition is in line with the provisions of Council Directive 2000/43/EC.

Article 5(4) of The Equal Opportunities (Persons with Disability) Act, 2000, provides a prohibition against indirect discrimination in providing that 'a person shall be discriminating against another person on the grounds of disability if he subjects such other person to a particular disadvantage through an apparently neutral provision, criterion or practice.' It can also be argued that Article 4 of the said Act provides for indirect discrimination whereby a person shall be deemed to discriminate against another person on the grounds of disability if that other person is required to comply with a requirement or condition with which the majority of persons who do not have the disability comply or are able to comply, and (a) which is unreasonable in the circumstances of the case; and (b) with which that other person does not comply or is unable to comply.

The Equality for Men and Women Act does not make specific reference to indirect discrimination, other than where reference is made to the use of statistical evidence in proving indirect discrimination. However, in terms of Article 2, the definition of 'discrimination' includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on the mentioned grounds. For the purposes of this Act, discrimination includes any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, unless the said provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex. While the reference to indirect discrimination replicates that which is provided for in the directives, the same cannot be said for the justification and the provision that the same must be unrelated to sex.

b) Justification test for indirect discrimination

As noted above, in terms of the Equality for Men and Women Act, any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex or another sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, unless the said provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex, is deemed discriminatory. It is relevant to point out here that, despite the extension of the definition of discrimination in 2012 to grounds other than gender, the justification test is limited to factors unrelated to sex. A similar exclusion is not found in the directives.

As there have been no judicial pronouncements in Malta on indirect discrimination, one cannot detail the legitimate aims which have been or which would be accepted by the national courts.

In the NCPE report for 2012, reference is made to the conclusions reached in *I'm Not Racist, But...*, a project co-funded by the EU PROGRESS 2007-2013 funds. Research was carried out on immigrant and ethnic minority groups and housing and accommodation. It was reported that the conclusions from the qualitative research exercise showed numerous examples of direct and indirect housing discrimination in Malta. This is particularly true in the case of certain Maltese citizens limiting access to housing to migrants. The research results also confirm that migrants and ethnic minorities living in Malta are not aware of their rights or of ways to seek remedies for damage suffered with regard to accessing housing and experiencing racial discrimination. This accounts for the absence of complaints brought forward, despite the conclusions reached.

c) Comparison in relation to age discrimination

In Malta, national law does not provide for how a comparison in relation to age discrimination is to be made.

2.3.1 Statistical evidence

a) Legal framework

In Malta there are national rules permitting data collection.

The Data Protection Act, 2001, regulates the collection and processing of personal data. Data which relates to race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union, health, or sex life is classified as 'sensitive personal data', and the processing of such data is subject to stricter regulation than the processing of other personal data.¹¹⁷ In fact, sensitive personal data may only be processed if the data subject has either given his/her explicit written consent to processing or has made such data public.¹¹⁸

However, this strict requirement is relaxed in connection with necessary processing carried out by the employer in order to comply with his duties or to exercise his rights under any law regulating conditions of employment.¹¹⁹ It is important to note that the employer is still obliged to adopt appropriate safeguards to ensure that such data is processed in accordance with the provisions of the Data Protection Act.

Furthermore, in terms of the Persons with Disability (Employment) Act,¹²⁰ which obliges employers to employ a certain quota of persons with disability,¹²¹ employers are required

¹¹⁷ Article 2.

¹¹⁸ Article 12(2).

¹¹⁹ Article 13(a).

¹²⁰ The Laws of Malta, Chapter 210.

¹²¹ According to Legal Notice 157 of 1995, the quota is 2 %.

to keep a register containing the number and the names of the disabled persons employed by them, the number and the names of registered persons¹²² employed by them and such other matters as shall be necessary to show compliance by the employer with the provisions of this Act.¹²³

When collecting relevant data for the purposes of the national census, the provisions of the Data Protection Act, 2001, must be adhered to. Article 16 of the Data Protection Act states that sensitive personal data may be processed for research and statistics purposes, provided that the processing is necessary for the performance of an activity that is carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data is disclosed.

While statistics may be used to develop and implement positive action, there is no documentary evidence to prove such use.

In Malta, statistical evidence is permitted by national law in order to establish indirect discrimination. Maltese law does not specifically prohibit the use of statistical evidence to establish indirect discrimination. Reference is made to the use of statistical evidence only under the definition section of the Equality for Men and Women Act,¹²⁴ which provides that indirect discrimination may be proven by any means of evidence including statistical evidence. No such reference is made in any other relevant legislation, and therefore there is nothing statutorily provided which can confirm that this form of evidence can be used when alleging discrimination under any other legislation.

b) Practice

In Malta, statistical evidence in order to establish indirect discrimination is not used regularly in practice. To date, there has been no case law in Malta relating to the admissibility or otherwise of statistical evidence and the conditions of its eventual admissibility, and neither have there been any reported cases where the Court was reluctant to use statistical data as evidence in Court. Although the Maltese Courts do look at legal developments in other countries to assist them in reaching their decisions, this is not obligatory in practice.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Malta, harassment is prohibited in national law. It is defined.

The Equal Treatment in Employment Regulations extended the protection from harassment in matters of employment on all the grounds mentioned in the two directives. The regulations define harassment as a form of discriminatory treatment which violates the dignity of the person who is being harassed or which has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected.

Regulation 3(3) of the said Legal Notice does not require that the effects of the harassment be cumulative. Furthermore, Regulation 3(4) provides that a person shall also be deemed to have discriminated against another if the former neglects his obligation to suppress any form of harassment at their place of work or within their organisation.

¹²² Chapter 210 obliges the Employment and Training Corporation (ETC) to keep a register of persons with disability.

¹²³ Article 20(1).

¹²⁴ Article 2(4A).

In terms of the Equal Treatment of Persons Order, 2007, 'harassment' of a person means to subject the person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, and 'to harass' a person shall be construed accordingly. In terms of Article 2(2)(c) of the Order, 'harassment shall be deemed to be discrimination when it is related to racial or ethnic origin and takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'

In terms of Article 4 of the same Order, 'the failure by any person responsible for any establishment and/or entity to fulfill his obligation to suppress harassment shall, for the purposes of Article 4(1) constitute discrimination. Such persons must not permit the harassment of persons present in such establishment or entity, or to avail themselves of any facility, goods or service provided at such establishment or entity.'

In terms of Article 5(2) of the Equal Opportunities (Persons with Disability) Act, a person shall be deemed to discriminate against another if he subjects the latter to harassment. Harassment is defined in this Act as subjecting a person to any unwelcome act, request, conduct, including spoken words, gestures or the production, display or circulation by any means of written words, pictures or other material which could reasonably be regarded as offensive, humiliating, hostile, degrading or intimidating to such person.

In terms of Section 7.1.3.4 of the Public Service Management Code, public officers should not harass or discriminate in work practices on the ground of sex, marital status, pregnancy, age, race, colour, nationality, physical or intellectual impairment, sexual preference, or religious, political or other convictions/allegiances when dealing with their colleagues and members of the public. The concept of harassment was also introduced in the Public Service Commission (Disciplinary Procedure) (Amendment) Regulations, 2006. These Regulations provide, in the schedule of offences and penalties to the principal regulations, that sexual harassment is deemed a serious offence in terms of the regulations.

In Malta, harassment does explicitly constitute a form of discrimination.

This is defined under the Equal Treatment in Employment Regulations, as seen above, and under Article 2(2)(c) of the Equal Treatment of Persons Order. Article 5 of the Equal Opportunities (Persons with Disability) Act also provides for a definition of harassment as a form of discrimination.

b) Scope of liability for harassment

In Malta, where harassment is perpetrated by an employee, the employer may be held liable for the acts of the employee. Therefore, employers are liable unless they can prove that they exercised due diligence to avoid the harassment, in which case the harasser is liable.

In terms of Article 29 of the Employment and Industrial Relations Act, the employer is to do all that is reasonably possible to avoid any kind of discrimination or harassment and may therefore be held criminally liable for a discriminatory act of his employee. With regard to trade unions being held liable for actions of their members, this is not provided for in the law.

Provision is also made where an employer is an entity rather than an individual, in which case liability is assumed by an officer representing such an entity. Thus, Article 46 of the Employment and Industrial Relations Act provides that, where an offence against the provisions of the Act or of any regulations or orders made thereunder is committed by a partnership, company, association or other body of persons, every person who, at the time

of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.

Similarly, Article 14 of the Equal Treatment of Persons Order, 2007, provides that, where an offence against the provisions of the Order is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. Whoever is found guilty of an offence shall be subject to the penalty imposed by the adjudicating authority. A person found guilty shall be liable on conviction to a fine (*multa*) of not more than two thousand, three hundred and twenty-nine euros and thirty-seven cents (EUR 2 329.37) or to imprisonment for not more than six months, or to both such fine and imprisonment.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Malta, instructions to discriminate are prohibited in national law. 'Instructions' are not specifically defined.

Article 45(3) of the Constitution of Malta provides that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

The Equal Treatment in Employment Regulations introduce into Maltese employment legislation a prohibition against instructions to discriminate. Regulation 3(4) provides that a person shall also be deemed to have discriminated against another person if he instructs any person to discriminate against such other person. Protection is afforded on the following grounds: religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, and gender reassignment

In terms of the Equal Treatment of Persons Order, 2007, the prohibition against giving an instruction to discriminate arises out of the definition of harassment. In terms of the definition section, 'harassment' means to subject the person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material. In addition, the law provides that harassment shall be deemed to be discrimination when it is related to racial or ethnic origin and takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment, and any instruction to harass a person in such a manner shall constitute discrimination. In essence, therefore, the Order prohibits instructions to harassment but not (explicitly) instructions to discriminate. There are no provisions prohibiting instructions to discriminate on the grounds of racial/ethnic origin in the fields outside employment covered by Directive 2000/43. This could be interpreted to be a provision which is not deemed to be fully compliant with the provisions of Directive 2000/78, in that its scope is more restrictive than that found under the directive as, in the latter, the instruction is to discriminate and not solely instruction to harass.

Article 1044 of the Civil Code¹²⁵ and Article 42 of the Criminal Code¹²⁶ can provide the basis for judicial action to be taken against a person who allegedly gave instructions to another person to discriminate.

Whereas, with respect to instructions to discriminate given by the public authorities, one can plead Article 45(3) of the Constitution, in the case of the giving of instructions to discriminate in the private sphere, Regulation 3(4) of the Equal Treatment in Employment Regulations appears specifically to conform with the provisions of the directives by prohibiting an instruction to discriminate against another person. As seen above, in terms of the Equal Treatment of Persons Order, 2007, the prohibition of giving an instruction to discriminate arises out of the definition of harassment, and its scope is found to be more restrictive than that found under the directive.

b) Scope of liability for instructions to discriminate

As is detailed hereunder, in Malta the instructor and/or the discriminator is liable.

In terms of Article 46 of the Employment and Industrial Relations Act, 2002, where an offence against the provisions of this Act or of any regulations or orders made thereunder is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.¹²⁷

It is also pertinent to note that, in terms of the 2002 Act, the definition of an 'employer' includes a partnership, company, association or other body of persons, whether vested with legal personality or not.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) Implementation of the duty to provide reasonable accommodation in the field of employment

In Malta the duty to provide reasonable accommodation is included in the law. It is defined. Article 7 of the Equal Opportunities (Persons with Disability) Act, 2000, provides that employers must provide reasonable accommodation for employees with disabilities, to the exclusion of job applicants. Reasonable accommodation is defined as 'alterations not imposing a disproportionate or unjustifiable burden, where needed in a particular case, to ensure to persons with disability the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. One notes that, while the directive makes reference to the exception of 'disproportionate burden', the 2000 Act provides a wider

¹²⁵ Chapter 16 of the Laws of Malta. Article 1044 provides that: 'Where damage has been unjustly caused, any person who has wilfully contributed thereto with advice, threats, or commands, shall also be liable'.

¹²⁶ This deals with the offence of complicity.

¹²⁷ It has been argued that the provisions of Article 28 of the Employment and Industrial Relations Act, 2002, which deals with 'victimisation' and which provides that: 'It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests' mean that a person acting in the employer's name and interests cannot bring forward in his/her defence the claim that he/she was instructed to discriminate by his/her employer. The author does share such an interpretation, since this provision does not appear to prohibit a person from giving instructions to discriminate.

scope in that 'reasonable accommodation' refers to alterations not imposing a disproportionate or unjustifiable burden.

In accordance with Article 7(5), the phrase 'make reasonable accommodation' is defined to include (a) making existing facilities used by employees readily accessible to persons with disabilities; and (b) restructuring jobs, instituting part-time or modified work schedules, reassigning vacant positions, acquiring or modifying equipment or devices, appropriately adjusting or modifying examinations, training materials or policies, providing qualified readers or interpreters, and making any other similar alterations¹²⁸ for a person with a disability.

In terms of Article 4 of the Equal Treatment in Employment Regulations, 2004, issued under the Employment and Industrial Relations Act, 'employers shall provide reasonable accommodation for persons with disabilities. In particular, employers shall take appropriate measures to enable a person with a disability to have access to, participate, or advance in employment, or to undergo training unless such measures would impose a disproportionate burden on the employer: provided that this burden is not disproportionate when it is sufficiently remedied by measures existing within the framework of the national disability policy.'

What must be kept in mind here is that the aforementioned provisions refer to employees and do not cover 'job applicants', and hence are in breach of the directive.

b) Practice

While national law does not provide a definition of 'disproportionate burden', it refers to situations which would 'unduly prejudice the operation of the employer's trade or business.' In terms of Article 7(4) of the Equal Opportunities (Persons with Disability) Act, 2000, the factors to be considered in determining whether providing alterations for an employee with a disability would unduly prejudice the operation of the trade or business run by the employer shall include (a) the nature and cost of the alterations; (b) the overall financial resources of the workplace involved in the making of the alterations; (c) the number of employees at the workplace requiring alterations; (d) the effect on expenses and resources and the impact of the required alterations upon the operation of the workplace; (e) the overall financial resources of the employer; (f) the overall size of the business of the employer including the number of employees, and the number, type and location of its workplaces; (g) the type of operation or operations of the employer, including the composition, structure and functions of the workforce; and (h) the availability of financial assistance from public funds to defray the expense of any alterations. Clearly, these factors are very close to the wording found in the directive and go further in amplifying the scope of its provisions.

To date there have been no judicial pronouncements with regard to what constitutes 'reasonable' accommodation or whether such accommodation imposes a 'disproportionate burden' on the persons who are required to make such accommodation. However, an indication as to what constitutes 'reasonable' accommodation is laid down in Article 20 of the Equal Opportunities (Persons with Disability) Act, 2000, which provides for the test of reasonableness.

Thus, for the purposes of interpreting the provisions of the Act, in determining the reasonableness of any action to be undertaken by any person in fulfilment of the provisions, including any alteration, change and/or provision of services, facilities or assistive means, regard shall be had as to whether such actions could be undertaken without unjustifiable hardship.

¹²⁸ Necessary and appropriate modifications and adjustments.

Article 20(2) contains an illustrative list of those factors which are to be considered in determining whether such actions could be undertaken without unjustifiable hardship:

'The factors to be considered in determining whether such actions could be undertaken without unjustifiable hardship shall include:

- the nature and cost of the actions in question;
- the overall financial resources of the person, body, authority or institution concerned and the effect on expenses and resources or the impact of such actions upon the operations of such person, body, authority or institution; and
- the availability of grants from public funds to defray the expense of the said actions.'

c) Definition of disability and non-discrimination protection

In terms of Article 2 of the Equal Opportunities (Persons with Disability) Act, 'disability' means a long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder one's full and effective participation in society on an equal basis with others. The same definition applies in respect of the obligation to provide reasonable accommodation. Furthermore, the same definition applies under the Equal Treatment in Employment Regulations. Both pieces of legislation co-exist, with similar obligations on employers which they must comply with in relation to employees with disabilities. By having a common definition of the term 'disability', the legislator wanted to ensure uniformity.

d) Duties to provide reasonable accommodation outside the field of employment

In Malta, there is no duty to provide reasonable accommodation for people with disabilities outside the employment field.

While the Equal Opportunities (Persons with Disability) Act, 2000, prohibits discrimination on the ground of disability in the provision of goods, facilities, services, education and accommodation and in the employment sector, the Act only makes reference to the duty to provide reasonable accommodation to persons with disabilities in the field of employment.

In terms of article 11 of the Act, where the admission or continued participation of a person with a disability as a student in an educational institution would necessitate the procurement of services or facilities that are not required by students who do not have a disability, the educational authority or institution concerned may refuse or not accept the admission or continued participation as a student of such a person in that educational institution if the authority or institution proves that the admission or continued participation of such a person in that institution would require services or facilities the provision of which would impose unjustifiable hardship on the educational institution or authority concerned. Therefore, the duty to accommodate could be interpreted to be limited in this instance where unjustifiable hardship is caused to the institution or authority. However, despite this limitation, educational establishments in general do provide accessibility to students with a disability.

Similarly, this is implied under Article 13 of the Equal Opportunities (Persons with Disability) Act, 2000, which prohibits the refusal to provide goods and services to qualified persons with a disability, and states that such prohibition shall not apply where compliance with such provisions in relation to a qualified person with a disability would be impracticable or unsafe and could not be made practicable and safe by reasonable changes to rules, policies or practices, or by the removal of architectural, communication or transport barriers or by the provision of auxiliary aids or services.

e) Failure to meet the duty of reasonable accommodation

In Malta failure to meet the duty of reasonable accommodation does count as discrimination.

An employer shall be considered to discriminate on the grounds of disability in terms of Article 7(2)(d) of the Equal Opportunities (Persons with Disability) Act, 2000, if such employer, without justification, fails to make reasonable accommodation for a disabled person, unless the employer can prove that the required alterations would unduly prejudice the operation of the trade or business run by such employer. Such failure results in direct discrimination. In terms of Article 34, a claim by any person having a legal interest in the matter, made personally or through his or her legal representative, that another person has committed an unlawful act of discrimination against him or her as provided for under the Act shall be made by means of a civil action and may include a claim for damages; and any damages in respect of an unlawful act of discrimination may include compensation for injury to feelings, whether or not they include compensation under any other head, of not more than two thousand, five hundred euros (EUR 2 500) as the court may declare.

In terms of Article 3(2)(b) of the Equal Treatment in Employment Regulations, 2004, indirect discriminatory treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular race or ethnic origin or having a particular religion or religious belief, disability, age, or sexual orientation at a disadvantage when compared with other persons, unless with regard to persons with a particular disability. Therefore, the employer or any person or organisation to whom these regulations apply is obliged, under any law, to take appropriate measures to provide reasonable accommodation so as to eliminate disadvantages entailed by such provision, criterion or practice. Otherwise, this would be considered as indirect discrimination. In terms of Article 14 of the said regulations, any person contravening the provisions of these regulations shall be guilty of an offence and shall, on conviction, be liable to a fine (*multa*) not exceeding two thousand, three hundred and twenty-nine euros and thirty-seven cents (EUR 2 329.37) or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.

Therefore, we note that the failure to provide reasonable accommodation constitutes direct discrimination under one law and indirect discrimination under another. It is felt that the provisions should be deemed complementary.

With respect to the burden of proof, Article 34A of the Equal Opportunities (Persons with Disability) Act, 2000, provides that, in any judicial proceedings, saving criminal proceedings, for redress of acts of discrimination under the Act, it shall be up to the defendant to prove that there has been no breach of the provisions.

f) Duties to provide reasonable accommodation in respect of other grounds

In Malta there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

g) Accessibility of services, buildings and infrastructure

In Malta national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

Article 12 of the Equal Opportunities (Persons with Disability) Act, 2000, provides that it shall be unlawful for any person to discriminate against another person on the grounds of the disability of such other person or a disability of any of his family members by, *inter alia*, failing to, with regard to access to property,¹²⁹ make necessary alterations to such property or facilities so as to make such access possible.

¹²⁹ Property is defined as 'all existing and new buildings and outdoor areas such as streets, pavements, public paths, beaches and gardens.'

However, where such property or facilities are designed or constructed in such a way as to render them inaccessible to a person with a disability and any alteration of such property or facilities would be unreasonable in the circumstances, then this shall not be deemed to constitute discrimination on the ground of disability. Therefore, the law makes reference once again to the reasonableness test provided for under Article 20 of the Act.¹³⁰

In this regard, in February 2005 the Maltese Courts decided the case of the National Commission Persons with Disability v. Michele Peresso Limited,¹³¹ and, in March 2010, the courts decided the case of NCPD v. Banif Bank (Malta) plc.¹³² Both cases dealt with the issue of accessibility to buildings open to the public. As reported in the 2012-13 NCPD report,¹³³ there are five pending court proceedings on accessibility to public buildings. In 2013 proceedings were commenced against the Malta Football Association (MFA) relative to physical access to the Ta' Qali National Stadium, while another court case was instituted against the Health Division¹³⁴ in relation to lack of physical access at the Gzira Health Centre. Three judicial protests were filed against the owners of St Anne Hall in Marsascala, and of Huggins Pub and the Sky Club, both in Paceville. More recently, an appeal was decided upon where the directors of a company were held liable for falsely declaring in a tender bid that a building was accessible when in fact it was not.¹³⁵

In terms of the Equal Opportunities (Persons with Disability) Act, 2000, 'no qualified person with a disability shall, on the grounds of disability, be excluded from participation in or be denied the benefits of the programmes or activities of any person or body in relation to the goods, facilities or services¹³⁶ or be discriminated against by any person or body providing such goods, facilities or services which the qualified person seeks to obtain or use.' However, no discrimination would be deemed to arise where compliance with such provisions in relation to a qualified person with a disability would be impracticable or unsafe and could not be made practicable and safe by reasonable changes to rules, policies or practices, or the removal of architectural, communication or transport barriers or the provision of auxiliary aids or services.

In Malta national law contains a general duty to provide accessibility by anticipation for people with disabilities.

¹³⁰ As part of its enforcement of this Act, the Malta Environmental and Planning Authority (MEPA) is obliged to consult with the National Commission Persons with Disability (NCPD) in relation to applications for the development of buildings that are open to the public and are of major use. This consultation consists of two exercises: (a) MEPA hands the plans to NCPD in order that its technical experts may examine and determine whether these conform to the Guidelines issued by NCPD and published in the *Access for All – Design Guidelines* book; (b) MEPA requests that the developer obtain a certificate from NCPD confirming that the finished building is conformant with these Guidelines before MEPA can issue a Compliance Certificate. In this way, the developer can apply for water and electricity services.

¹³¹ Civil Court, First Hall – 25 February 2005 – Writ of Summons no. 413/2001/1.

¹³² Civil Court, First Hall – 1 March 2010.

¹³³ Thirteen Years of Operation of the Equal Opportunities Act, <http://www.knpd.org/pubs/pdf/EOA%202012-3%20ENG.pdf>.

¹³⁴ Kummissjoni Nazzjonali Persuni b'Dizabilita` v. Direttur Generali tas-Sahha (Application No. 590/2005) – First Hall, Civil Court, Judge Silvio Meli, 12 November 2013.

¹³⁵ The Court of Criminal Appeal declared that the directors of the company knowingly and falsely declared that the premises were accessible to persons with disabilities in order that they may gain an advantage or benefit, and accordingly, were found liable to punishment by imprisonment in terms of Article 188 of the Criminal Code, for a term of 18 months, suspended for two years – *Il-Pulizija (Spt. Angelo Gafa`) v. Rosanne and John David Galea* (Appeal No. 152/2013) – Court of Appeal, Judge Michael Mallia, 6 March 2014 – <http://www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func=all>.

¹³⁶ The provision (whether on payment or not) of goods, facilities and services to the public or any sector of the public. This includes in particular, but without prejudice to the generality of the foregoing (a) access to and use of any place which members of the public or a sector of the public are permitted to enter; (b) the provision of property rights and of housing; (c) accommodation in a hotel, boarding house or similar establishment; (d) facilities by way of banking, insurance or for grants, loans, credit or finance; (e) participation in occupational and other pension schemes; (f) facilities for education; (g) facilities for entertainment, sports or recreation; (h) facilities for transport or travel by land, sea or air; (i) the services of any profession or trade, or of any national or other public authority; (j) membership of associations, clubs or other organisations; (k) enjoyment of civic rights and performance of civic duties; and (l) such other facilities and services as the Minister may prescribe by regulations made under this Act.

As stated above, Article 12 of the Equal Opportunities (Persons with Disability) Act, 2000, deals with access to property. This provides that it shall be unlawful for any person to discriminate against another person on the grounds of the disability of such other person or a disability of any of his family members by not providing adequate access.

Article 12 provides that it shall be unlawful for any person to discriminate against another person on the grounds of the disability of such other person or a disability of any of his family members: (a) by refusing to allow such other person access to, or the use of, any property, or of any facilities within such property that the public or a member of the public is entitled or allowed to enter or use (whether on payment or not); or (b) in the terms or conditions on which such person is prepared to allow such other person access to, or the use of, any such property or facilities; or (c) in relation to the provision of means of access to such property, including any necessary alterations to such property or facilities so as to make such access possible; or (d) by requiring such other person to leave such property or to cease to use such facilities or to unjustifiably restrict in any way such use.

Article 12 therefore obliges people to ensure that access to property is available to all, including those people who have a disability. Where property does not provide for such access, the owners thereof are obliged to ensure that such access is made available. Accessibility is therefore to be provided to all and at all times and is not to be dependent on a request made by a person requiring such access.

However, where such property or facilities are designed or constructed in such a way as to render them inaccessible to a person with a disability and any alteration of such property or facilities would be unreasonable in the circumstances, then this shall not be deemed to constitute discrimination on the ground of disability. While modern buildings constructed over the last decade are accessible to persons with disability, the same cannot be said of old buildings. However, measures are taken to ensure accessibility to those buildings frequented by the general public.

h) Accessibility of public documents

Under Maltese legislation there is no requirement for public services to provide accessibility to public documents. In fact, over recent years, with the introduction and use of computers to assist visually impaired persons, Braille is not popular and is hardly used.

Sign language is used to assist those who have hearing impairments in line with the right of all to have full access to information and education. Courses exist both at the University and at the Malta College of Arts, Science & Technology, where students are taught how to use sign language. Sign language is not recognised on a national level as a legitimate language.¹³⁷ As is the case with the absence of Braille teachers, likewise there is a shortage of sign language interpreters in Malta.

¹³⁷ In 2015 a law is to be enacted to recognise Maltese sign language as an official language.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Under Maltese legislation there are no residence or citizenship/nationality requirements for protection against discrimination, with the exception of Regulation 1(5) (a) of Legal Notice 461 of 2004, which states that the regulations do not apply to any differences of treatment based on nationality and are without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons in Malta or to any treatment which arises from the legal status of the individuals concerned. This reproduces what is stated in Article 3.2 of Council Directive 2000/43.

Similarly, the Equal Treatment of Persons Order, 2007,¹³⁸ provides that the Order shall not apply to any differences of treatment based on nationality, and this without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons in Malta or to any treatment which arises from the legal status of the individuals concerned.

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In Malta the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

In Malta the personal scope of anti-discrimination law covers natural and/or legal persons for the purpose of protection against discrimination.

Article 4(d) of the Interpretation Act, 1975,¹³⁹ provides that, in that Act and in every other Act, whether passed before or after the commencement of the said Act, unless the contrary intention appears, the expression 'person' shall include a body or other association of persons, whether such body or association is corporate or unincorporated.

While, as we have seen in the various sections above, there are various laws which protect citizens against discrimination, such as the Equal Treatment in Employment Regulations, the Equal Opportunities (Persons with Disability) Act, the Equal Treatment of Persons Order and the Employment and Industrial Relations Act, the said laws offer protection to both natural and legal persons. Maltese legislation does not draw a distinction between natural and legal persons for the purpose of protection against discrimination or liability for discrimination, but uses the term 'person'. There is no case law on the matter.

This term is therefore to be interpreted in accordance with the above provision of the Interpretation Act. However, with respect to the protection against discrimination afforded under the Constitution of Malta, Chapter IV thereof, entitled 'Fundamental Rights and Freedoms of the Individual', can clearly only be invoked by natural persons. This is in compliance with the relative provision of the directive.

¹³⁸ Article 2(4).

¹³⁹ Chapter 249 of the Laws of Malta.

b) Private and public sector including public bodies

In Malta the personal scope of national law covers the private and public sectors including public bodies for the purpose of protection against discrimination, subject to certain exceptions.

Generally, national law is applicable to both the private and public sectors, including public bodies. However, there are pieces of national legislation which are specifically applicable to employees in the public sector, such as the Disciplinary Procedure in the Public Service Commission Regulations, while there are others which are specifically applicable to employees in the private sector. In terms of article 84 of the Employment and Industrial Relations Act, all of the provisions of this Act are rendered applicable to persons in both the public and private sectors, except for those provisions which relate to the voluntary settlement of disputes and to the termination of employment. Similarly, the provisions of the Equal Treatment in Employment Regulations apply to all persons working in the public and private sectors. As far as public bodies are concerned, there are bodies, as stipulated in particular in part 5 of this report, which are constituted by virtue of the provisions of particular laws, and hence the said laws would regulate the relative public body.

As stated above, in Malta the personal scope of anti-discrimination law covers both the private and public sector, including public bodies, for the purpose of liability for discrimination, subject to exceptions where certain Regulations apply to only one particular sector.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Malta, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds.

With respect to application to the private sector, the Employment and Industrial Relations Act, 2002, applies to all persons who are in employment. The Act, under Article 2, defines an employee as any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of, another person, including an outworker. Consequently, the prohibition of discrimination applies to employers, who should not subject their employees or prospective employees to any discriminatory treatment.

In terms of Article 4 of the Equality for Men and Women Act, it shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment. Furthermore, employers shall also be deemed to have discriminated against an employee if they alter the working conditions, or the terms of employment of the employee to his/her detriment after he/she has invoked any right accorded to him/her under this Act or claimed the performance in his/her favour of any obligation or duty under the said Act.

With respect to employment in the public sector, this is regulated by the Public Service Management Code. However, article 48(1) of the Employment and Industrial Relations Act empowers the Prime Minister to prescribe the applicability of the provisions of the Act to

public sector employees. To date, certain regulations issued under the 2002 Act have been extended to employees in the public sector.¹⁴⁰

In addition, Article 84 of the Employment and Industrial Relations Act, 2002, provides that, subject to the provisions of Title II of the Act (which deals with industrial relations), and without prejudice to the special provisions therein contained with respect to public officers, the provisions of Title II of the Act, other than the provisions of articles 69 and 72 and the provisions relating to dismissals or termination of employment, shall have effect in relation to Government employment and to workers who are Government employees as they have in relation to other employment and to other workers. The provisions excluded by this sub-article shall not apply to Government employees. In this article, 'Government employment' means employment under or for the purposes of a Government department other than as a member of a disciplined force, and 'Government employee' means a person who, for the time being, is in Government employment. This means that certain provisions of the Employment and Industrial Relations Act, 2002, are not applicable to public service employees.

However, in terms of the Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations, the provisions of the Equal Treatment in Employment Regulations which give effect to the relevant provisions of Council Directive 2000/78/EC and 2000/43/EC were extended to employment with the Government.

Furthermore, in the case of discrimination against employees in the public sector by public authorities, such employees can invoke the anti-discrimination provisions of the Constitution and the European Convention Act. As seen above, the concept of harassment is also mentioned under the Public Service Management Code under Section 7.3. This section defines what is perceived as sexual harassment and stipulates the procedures that shall be adopted in cases of allegations of sexual harassment at work and in the provision of goods and services. The concepts of harassment and victimisation were introduced in the Public Service Commission (Disciplinary Procedure) (Amendment) Regulations, 2006, which amended the Public Service Commission Regulations, 2000. This amendment¹⁴¹ provides that it is a serious offence under these regulations for a person to sexually harass and victimise a witness or an officer/person lodging a report or doing his duty under the regulations.

Recruitment to the public sector is regulated by the Employment and Training Services Act, 1990.¹⁴²

Similarly, in terms of Legal Notice 86 of 2007, the protection afforded under the provisions of the Equal Treatment in Employment Regulations was extended to cover persons in self-employment and in an occupation.

Protection against discrimination is also afforded to self-employed persons in terms of Article 5 of the Equal Treatment of Persons Order, 2007, which provides that no bank, financial institution or insurance company shall discriminate against any person in the grant of any facility in respect of the establishment, equipment or launching or extension of any business or the launching or extension of any form of self-employment or the insurance of that business or the person in self-employment.

¹⁴⁰ Extension of Applicability to Service with Government (Part-Time Employees) Regulations – LN 46 of 2007; Extension of Applicability to Service with Government (Contracts of Service for a Fixed Term) Regulations – LN 52 of 2007.

¹⁴¹ Which came into force on 27 March 2006.

¹⁴² Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Malta, national legislation includes conditions for access to employment, to self-employment or to an occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both private and public sectors, as described in the directives.

Malta does not have specific anti-discrimination legislation which deals with access to employment, self-employment or occupation. Access is covered in employment legislation.

Access to employment in the private sector is regulated by the Employment and Industrial Relations Act, 2002. Article 26 of the Act provides for the prohibition of discrimination in a general manner by providing that an employer should not subject his employees or prospective employees to any discriminatory treatment. The Employment and Industrial Relations Act, 2002, does not apply to persons who are not in employment or who are self-employed.

Article 26(1)(a) of the Act provides: 'It shall not be lawful for any person when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment.' This Article is to be read in conjunction with the definition of discriminatory treatment under Article 2, whereby an employer cannot discriminate against employees or prospective employees on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership of a trade union or of an employers' association.

Furthermore, as can be noted from Article 26(2), the situations that are deemed to constitute discriminatory treatment under the said subparagraph (2) are merely illustrative and therefore not exhaustive. Consequently, the Courts could decide that other situations that may arise may constitute discriminatory treatment. There have been no reported cases on this matter.

Regulation 1(4) of the Equal Treatment in Employment Regulations provides that the regulations shall be applicable to all persons in relation to conditions for access to employment, including the advertising of opportunities for employment, selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions.

By virtue of the provisions of Legal Notice 54 of 2007,¹⁴³ the provisions of the Employment and Industrial Relations Act providing for equality of treatment of persons in employment have been extended to employees in the public sector.

Furthermore, article 15(1) of the Employment and Training Services Act, 1990,¹⁴⁴ which deals with the recruitment of employees to the public sector, provides that all employees required by the Government of Malta from outside its service or by any body corporate or company in which the Government of Malta has a controlling interest or over which it has effective control, whether these are employed on a contract for a specified time or for an indefinite period, shall be recruited through the employment service provided by the Employment and Training Corporation which is established under this Act. Article 15(6) provides that any person who, *inter alia*, shows favour to, or uses discrimination against, any person for employment with any employer referred to in article 15(1) on the grounds

¹⁴³ Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations.

¹⁴⁴ Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

of race, colour, sex or creed or on the grounds of his party or other political beliefs or associations, shall be guilty of an offence under the Act.

In terms of Article 4 of the Equality for Men and Women Act, it shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered. For the purposes of this Act, employment includes self-employment.

In terms of article 4(A) of the Equal Treatment in Self-Employment and Occupation Order, no person in self-employment or occupation shall be discriminated against in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity or occupation. For the purpose of this Order, a person in self-employment or occupation shall also be deemed to have been discriminated against if, in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity or occupation, he is subject to harassment or sexual harassment, or if any person is instructed to discriminate against a self-employed or occupied person.

By virtue of Act X of 2014 amending the Constitution and introducing the grounds of sexual orientation and gender identity, the principle that any law imposing qualifications related to sexual orientation or gender identity shall be held to be discriminatory in relation to calls for services as a public officer or service for a local government authority or body corporate established for a public purpose was also introduced.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In Malta, national legislation covers working conditions including pay and dismissals, for all five grounds and for both private and public employment.

Malta does not have specific anti-discrimination legislation which deals with contractual conditions of employment. This is covered in employment legislation.

Article 26 (1)(b) of the Employment and Industrial Relations Act, 2002, provides that it shall not be lawful for any person, in regard to employees already in employment, to subject any such employee or class of employees to discriminatory treatment regarding conditions of employment or dismissal.

Article 27 of the same Act provides that employees in the same class of employment are entitled to equal pay for equal work. Furthermore, it provides that any distinction between classes of employment based on discriminatory treatment other than in accordance with the provisions of the Act or any other law shall not apply.

Regulation 1(4) of the Equal Treatment in Employment Regulations, 2004, provides that the provisions of these Regulations shall be applicable to all persons in relation to employment and conditions of employment, including remuneration and dismissals.

In terms of Article 4 of the Equality for Men and Women Act, it shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment. Furthermore, employers shall also be deemed to have discriminated against a person if such employers alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to them under this Act or claimed the performance in their favour of any obligation or duty under this Act.

- Occupational pensions constituting part of pay

Occupational pensions are regulated by the Special Funds (Regulation) Act.¹⁴⁵ The Social Security Act and the Special Funds (Regulation) Act do not specifically prohibit discrimination with regard to the pensions they regulate.

Where private pensions form part of employment schemes payable to employees by their employers, the principles of non-discrimination under the Employment and Industrial Relations Act, and in particular under the 2004 Regulations, would apply. While it may be stated that adequate protection is afforded under the provisions of the Constitution and the European Convention Act, it may be worth considering affording specific protection under the Social Security Act and the Special Funds (Regulation) Act.¹⁴⁶

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In Malta, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

As detailed below, various pieces of national legislation which prohibit discrimination also regulate access to guidance and training as defined and formulated in the directives.

Article 26(4) of the Employment and Industrial Relations Act, 2002, provides that, for the purposes of article 26, the term 'offering employment' includes recruitment or training of any person with a view to engagement in employment and in regard to a person already in employment. It also includes promotion or engagement in a different class of employment, thus also providing for prohibition of discrimination on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association, in matters concerning vocational training and guidance.

Furthermore, Regulation 1(4) of the Equal Treatment in Employment Regulations provides that the provisions of this legal notice shall be applicable to all persons in relation to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.

Also, in terms of Regulation 6 of Legal Notice 51 of 2007, entitled 'Contracts of Service for a Fixed Term Regulations, 2007', the employer shall endeavour to facilitate access by employees on a fixed-term contract of service to appropriate training opportunities in order to enhance their skills, career development and occupational mobility.¹⁴⁷

With regard to access to university, other higher education or adult lifelong learning courses, Article 11 of the Equal Opportunities (Persons with Disability) Act, 2000, provides that it shall be unlawful for an educational authority or institution (defined as a kindergarten, school, college, university or other institution at which education or training is provided) to discriminate against (a) an applicant for admission as a student on the grounds of his disability or a disability of any of his family members by refusing or not accepting his application for such admission, or in the terms or conditions on which such

¹⁴⁵ Chapter 450 of the Laws of Malta.

¹⁴⁶ Where pensions are payable by the State, and where a person feels that he/she has been discriminated against on any of the grounds covered by Directive 2000/78, such person may invoke the protection granted under the Constitution and under the European Convention Act; in other cases, horizontal discrimination is not specifically prohibited under Maltese law.

¹⁴⁷ Also note that Section 7.1.3.4. of the Public Service Management Code is more comprehensive than the law in that it prohibits discrimination on all the grounds mentioned in Article 3.1 of the Employment Directive.

educational authority or institution is prepared to admit him as a student; and/or (b) a student on the grounds of his disability or disability of any of his family members by denying him access or limiting his access to any benefit, facility or service provided by such educational authority or institution or expelling him from the educational institution he is attending.

However, where an educational authority or institution has been wholly or primarily established for students who have a particular or a specific disability, the educational authority or institution may restrict admission to persons who have that particular or specific disability and refuse admission to other persons who do not have that particular or specific disability but another disability.

Furthermore, where the admission of a person with a disability as a student into an educational institution would necessitate the procurement of services or facilities that are not required by students who do not have a disability, the educational authority or institution concerned may refuse or not accept the admission or continued participation as a student of such a person in that educational institution if the authority or institution proves that the admission or continued participation of such a person in that institution would require services or facilities the provision of which would impose unjustifiable hardship on the educational institution or authority concerned.

In terms of Article 8 of the Equality for Men and Women Act, it shall be unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person (a) in access to any course, vocational training or guidance; or (b) in the award of educational support for students or trainees; or (c) in the selection and implementation of the curricula; or (d) in the assessment of the skills or knowledge of the students or trainees. It shall also be the duty of educational establishments and entities providing vocational training, within the limits of their competence, to ensure that curricula and textbooks do not propagate discrimination. For the purposes of the Act, 'vocational training' is defined as all forms of vocational training and retraining.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In Malta, national legislation includes membership of and involvement in workers' or employers' organisations, as formulated in the directives for all five grounds and for both private and public employment.

Maltese law prohibits discrimination on the grounds mentioned in Articles 3(1)(d) of both directives.

Regulation 1(4) of the Equal Treatment in Employment Regulations, 2004, provides that the provisions of this legal notice shall be applicable to all persons in relation to membership of, and involvement in, any organisation of employees and employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

In addition, Article 42 of the Constitution of Malta, which deals with protection of freedom of assembly and association, provides that no person shall be hindered of his right peacefully to assemble freely and to associate with other persons and in particular to form or belong to trade or other unions or associations for the protection of his interests.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In Malta, national legislation includes social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

In terms of Article 4 of the Equal Treatment of Persons Order, 2007, which implements the provisions of Directive 2000/43/EC, no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to social protection, including social security and healthcare, based on racial and ethnic origin. However, the Maltese enabling legislation makes no specific reference to discrimination on the grounds mentioned in Directive 2000/78 in relation to social protection.

– Article 3.3 exception

Maltese legislation does not mention the exception in Article 3(3) of Directive 2000/78 in relation to religion or belief, age, disability and sexual orientation. As stated above, the Maltese enabling legislation makes no specific reference to discrimination on the grounds mentioned in Directive 2000/78 in relation to social protection.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In Malta, national legislation includes social advantages as formulated in the Racial Equality Directive.

In terms of Article 4 of the Equal Treatment of Persons Order, which prohibits discrimination on the grounds of racial and ethnic origin, no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to: (a) social protection, including social security and healthcare; (b) social advantages; (c) education; (d) access to and supply of goods and services which are available to the public, including housing; (e) access to any other service as may be designated by law for the purposes of this regulation.

The Employment and Training Corporation provides services to persons who are in a disadvantaged situation and have difficulty in entering the labour market.

While these benefits may not always be legislatively provided for, except for the provisions of the Equal Treatment of Persons Order there is no specific corresponding legislation prohibiting discrimination in the granting of the said benefits.

In Malta, the lack of definition of social advantages does not raise problems because, while the law does not expressly provide for those persons who merit social advantages, the schemes providing such benefits, which, in the main, provide for payments, specify who may so qualify and the applicable criteria.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In Malta, national legislation includes education, as formulated in the Racial Equality Directive.

In terms of Article 4 of the Equal Treatment of Persons Order, 2007, which implements the provisions of Directive 2000/43/EC prohibiting discrimination on the basis of racial and ethnic origin, no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to education. Furthermore, the Equal Opportunities (Persons with Disability) Act prohibits discrimination in the field of education, as does the Education Act.

– Pupils with disabilities

In Malta the general approach to education for pupils with disabilities does not raise problems.

With regard to access to education, Article 11 of the Equal Opportunities (Persons with Disability) Act, 2000, provides that it shall be unlawful for an educational authority or institution (defined under article 2 as a kindergarten, school, college, university or other institution at which education or training is provided) to discriminate against (a) an applicant for admission as a student on the grounds of his disability or a disability of any of his family members by refusing or not accepting his application for such admission, or in the terms or conditions on which such educational authority or institution is prepared to admit him as a student; and/or (b) a student on the grounds of his disability or disability of any of his family members by denying him access, or limiting his access, to any benefit provided by such educational authority or institution or expelling him from the educational institution he is attending. However, where an educational authority or institution has been wholly or primarily established for students who have a particular or specific disability, such educational authority or institution may restrict admission or continued participation to such an institution only to persons who have that particular or specific disability and may refuse admission or continued participation to other persons who do not have that particular or specific disability but another disability.

Furthermore, where the admission of a person with a disability as a student into an educational institution would necessitate the procurement of services or facilities that are not required by students who do not have a disability, the educational authority or institution concerned may refuse or not accept the admission as a student of such a person into that educational institution if that authority or institution proves that the admission of such a person into that institution would require services or facilities the provision of which would impose unjustifiable hardship on the educational institution or authority concerned. However, despite this limitation, educational establishments in general do provide accessibility to students with a disability.

In terms of the 1988 Education Act, the Minister for Education is responsible for ensuring that the national policy on inclusive education is applied in all schools. The same Act also provides that the required resources, tools and facilities must be available to implement the policy as effectively as possible. The Minister must ensure that there are specialised resource centres to support schools and colleges in the implementation of the policy of inclusive education through providing a service to students with specific learning difficulties, and that there are other institutions to provide education and training services to students with individual educational needs whose educational entitlement may be better achieved in such centres.

Without prejudice to the above, the law also provides that it shall be the duty of the state to provide special resource centres, whose specialised role will include provision for children with individual educational needs who would benefit more from being in such centres than from being in mainstream schools, for such time as may be appropriate depending on their needs.¹⁴⁸ The Equal Opportunities (Persons with Disability) Act, 2000, enshrined the right of persons with a disability to equal opportunities in all fields, including in education.

Whereas, in the Education Act, one notes that the obligation applies only to children of Maltese citizens, the same obligation under the 2000 Act applies with respect to all persons. The Minister of Education has stated¹⁴⁹ that inclusive education provides the educational environment where disabled and non-disabled children learn together, where possible in

¹⁴⁸ A minor shall be deemed to have special educational needs when that minor has special difficulties of a physical, sensory, intellectual or psychological nature.

¹⁴⁹ This was at the launch of a Working Group entrusted to review inclusive and special education in Malta, which concurred with World Disabled Persons Day 2004.

mainstream school settings. On the other hand, special education is a provision for those students who have a disability that necessitates the provision of special and appropriate educational services.

However, since the mid-1990s, Malta has been implementing the concept of inclusion, and has witnessed a substantial increase in disabled pupils attending mainstream schools and a decrease in the number of students in special schools, thus enabling a more specialised and individualised service for the latter, while at the same time allowing disabled persons who do not need to attend specialised schools to integrate with pupils who do not have disabilities.

As part of Malta's National Curriculum Framework (NCF), issues of diversity and inclusion are integrated into the general principles that include entitlement, diversity and learner-centred learning. Education for diversity is also included as a cross-curricular theme (Ministry of Education and Employment, 2012a). The ongoing work reflects a consideration of a range of needs, including those of learners who are gifted and talented, those who have special educational needs or severe disabilities and those who experience social disadvantage or come from diverse social, cultural and linguistic backgrounds, including children of refugees and asylum seekers.¹⁵⁰

Reference must be made to the EDUCATION FOR ALL Special Needs and Inclusive Education in Malta – External Audit Report, which was drawn up in 2014.¹⁵¹ One of the main recommendations of the Audit was the development of a 10-year plan for education with wide stakeholder consultation and cross-party agreement to ensure that current plans for an inclusive system are implemented and sustained in the longer term.¹⁵²

– Trends and patterns regarding Roma pupils

In Malta, there are no specific patterns existing in education regarding Roma pupils such as segregation as there are no Roma in Malta.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

In Malta, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive. Maltese Law, in line with the provisions of Article 3(1)(h), refers to the supply of goods and services which are available to the public.

In terms of Article 4 of the Equal Treatment of Persons Order, 2007, which prohibits discrimination on the grounds of racial or ethnic origin, no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to access to and supply of goods and services which are available to the public, including housing. Local law does not make specific reference

¹⁵⁰ A new *Framework for the Education Strategy for Malta 2014–2024* (Ministry for Education and Employment, 2014a) was launched in February 2014, aiming to address all cycles of education from early years to adult learning. This Framework aims to unify the different frameworks and strategies, such as the National Curriculum Framework, the National Literacy Strategy for All, A Strategic Plan for the Prevention of Early School Leaving and the Strategy for Lifelong Learning. Measures aim to reach across all socio-economic sectors and different cultural, ethnic, religious, gender and sexual statuses, and the Ministry is seeking to improve learners' learning experiences by encouraging creativity, critical literacy, entrepreneurship and innovation at all levels.

¹⁵¹ This report has been prepared by the European Agency for Special Needs and Inclusive Education on behalf of the Ministry for Education and Employment, Malta.

¹⁵² The Report identified recommendations which included (i) creating clarity around the concept of inclusion; (ii) re-focusing support to colleges and schools; (iii) establishing a national education training body; (iv) undertaking development work to support all colleges and schools to use evidence-based teaching and learning approaches; (v) supporting all schools in teaching for diversity; and (vi) promoting self-review at all levels of the system.

to the supply of goods and services made privately. Protection would be afforded to such supply in terms of the general prohibitions of non-discrimination.

- Distinction between goods and services available publicly or privately

In Malta, national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In Malta, national legislation includes housing as formulated in the Racial Equality Directive.

In cases of alleged discrimination in respect of the matters mentioned in paragraphs 3(1)(e) to (h) of the Race Equality Directive, protection is found under the provisions of the Equal Treatment of Persons Order, which adopted the same wording as the directive. No exceptions in the case of housing are made. Furthermore, the alleged victim can seek to protect his rights against the relevant public body providing housing services by invoking the right to protection from discrimination under the Constitution, and under the European Convention Act, 1987.

The Housing Authority provides financial assistance for adaptation works in houses occupied by people with disabilities. This assistance will enable these individuals to adapt their homes according to their needs so as to be able to lead more of an independent or semi-independent lifestyle. Works may consist of general alterations, for example bathroom or WC facilities; approaches to rooms, such as ramps, steps or their modification and handrails; doors and windows; staircases and lifts; water services and electrical and heating services; and kitchens.

The Housing Authority has a further scheme in place which provides for the installation of a lift where at least one of the applicants or his/her relative who lives in the building has a disability related to mobility or mobility problems. This scheme provides for the installation of lifts in blocks/entrances of apartments built by the Government or the Housing Authority in Malta and Gozo that are occupied by tenants recognised by the Government.

Another scheme promoted by the Housing Authority is that of semi-independent living. The main aim of this concept is to provide a semi-independent environment to develop and sustain a person's ability to live as independently as possible, either in their own home or in accommodation with staff on site. This new type of housing with care allows residents to retain their privacy and independence within their own self-contained apartment, but with access to necessary support to assist them to integrate better in the community. It is open to disabled persons, including persons with a psychosocial disability, homeless people, young people needing care, or adult or child victims of domestic violence.

- Trends and patterns regarding housing segregation for Roma

In Malta there are no patterns of housing segregation and discrimination against the Roma as there are no Roma.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Malta, national legislation provides for an exception for genuine and determining occupational requirements.

Regulation 4(1) of the Equal Treatment in Employment Regulations provides that any difference of treatment based on a characteristic related to religion or religious belief, disability, age, sexual orientation or racial or ethnic origin shall not constitute discriminatory treatment if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. This clearly reflects the relevant provisions of the directives.

Furthermore, subparagraph (3) of Article 26 provides that:

‘The provisions of subparagraph (1) and (2) shall be without prejudice to the rights and obligations prescribed by the Equal Opportunities (Persons with Disability) Act, and shall not apply to any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by any applicable laws or regulations.’

Furthermore, Article 2(3) of the Equal Treatment of Persons Order provides that a less favourable treatment which is based on racial or ethnic origin shall not constitute discrimination where, by reason of the particular occupational activities concerned or of the context in which they are carried out, the treatment is legitimate and the characteristic constitutes a genuine occupational requirement which is proportionate in the circumstances. The burden of proving a genuine occupational requirement shall lie on the person who alleges its existence. We note here that the reference to the requirement of a ‘legitimate objective’ is absent. This provision is not in line with the provisions of the directives, as the requirement here is that the treatment is legitimate, rather than the objective.

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

- Exception for employers with an ethos based on religion or belief

In Malta, national law provides for an exception for employers with an ethos based on religion or belief.

Regulation 4(2) of the Equal Treatment in Employment Regulations states that when an employer has an ethos based on religion or religious belief, the nature of the employment or the context in which it is carried out constitute a sufficiently genuine and legitimate justification for the employer to require that such work be carried out by a person of a particular religion or religious belief, and any difference of treatment based on a person’s religion or religious belief shall not constitute discriminatory treatment, provided that it is proportionate to apply that requirement in that particular case.

In addition, Regulation 4(3) provides that employers whose ethos is based on religion or religious belief shall have the right to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos, provided that the other provisions of the Regulations are complied with.

This appears to conform with Article 4(2) of Council Directive 2000/78, except for the fact that national regulations are more restrictive and provide for an ethos based on religion or religious belief, while the directive provides for an ethos based on religion or other belief. Accordingly, Maltese regulations do not regulate an ethos which is based on a belief which is not religious. Furthermore, it is noted that the national provision does not specifically refer to the qualification included in Article 4(2) of the directive, namely that this difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of EU law, and should not justify discrimination on another ground.

– Religious institutions affecting employment in state-funded entities

In Malta, religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the state.

In terms of Article 47 of the Education Act, it shall be the duty of the Minister to provide for the education and teaching of the Catholic religion in state schools¹⁵³ and to establish the curriculum for the education and teaching of that religion in those schools according to the dispositions in this regard of the Bishops in Ordinary of the Maltese Islands.

In selecting teachers of religion in schools in Malta, candidates are often requested to obtain a certificate of suitability from their local church authority. No information is publicly available on the criteria applied for the issue or otherwise of this certificate.¹⁵⁴ There do not appear to be any other grounds on the basis of which religious institutions restrict staff selection in state-funded entities. Reference should, however, also be made to the educational institutions which are run and managed by the Church in Malta but which receive state funding. The Church has put forward reservations on the selection of persons to hold high or sensitive teaching posts, but shall not discriminate between persons in view of the manner in which they choose to live their private lives.

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In Malta, national legislation provides for an exception for the armed forces in relation to age and disability discrimination (Article 3(4), Directive 2000/78).

Regulation 1(5)(b) of Legal Notice 461 of 2004 provides that the provisions of the said legal notice shall not apply to the armed forces of Malta in so far as discriminatory treatment on the grounds of disability and age is concerned.

¹⁵³ In terms of the Constitution of Malta, the Roman Catholic religion is the religion of Malta and accordingly this is the only religion taught in schools in Malta.

¹⁵⁴ A controversy arose in December 2014 when a controversial plan was announced by the Church to block promotions to higher or sensitive teaching posts to candidates who cannot prove they are 'practising Catholics'. Heads of Catholic schools were asked by the Maltese archdiocese to discuss new terms of employment that will guarantee that schools' head teachers and other staff can be safely considered to be 'practising Catholics' – or face disciplinary action if their 'life choices give scandal or run counter to the ethos of the school'. The document was to lay down requirements that will forbid top school posts to be occupied by people who do not share the Catholic faith or 'do not adhere in their substantive life choices to the teachings of the Catholic Church'. The Malta Union of Teachers strongly objected to these regulations and an agreement was reached with the Church that nobody would be discriminated against in view of the manner in which they lived their private lives.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Malta, national law includes exceptions relating to difference of treatment based on nationality.

Regulation 1(5)(a) of Legal Notice 461 of 2004 provides that the provisions of the said legal notice shall not apply to any differences of treatment based on nationality and are without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons in Malta and to any treatment which arises from the legal status of the individuals concerned.

Similarly, Article 2(4) of the Equal Treatment of Persons Order, 2007, provides that it shall not apply to any differences of treatment based on nationality, and its provisions are without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons in Malta and to any treatment which arises from the legal status of the individuals concerned.

Thus, the wording of the aforementioned provisions is the same as that provided under Article 3(2) of the directives.

In Malta, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

No specific reference is made to nationality discrimination in national legislation. However, this does not mean that in practice nothing is done to counter this form of discrimination. Information dissemination carried out by the NCPE also addresses this form of discrimination.

b) Relationship between nationality and 'race or ethnic origin'

There is no case law on discrimination on grounds of nationality and ethnicity.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

a) Benefits for married employees

In Malta it is possible for employers to provide certain benefits to employees who are married as opposed to those who are not. The Equal Treatment in Employment Regulations do not forbid an employer from providing a benefit to workers who are married as opposed to other workers who are not married. It is to be noted that, on marriage, an employee is entitled to 'marriage leave'. The duration of this leave depends on the sector in which the employee works, but the minimum statutory entitlement is of two working days. There is no standard practice whereby employers provide employees and their partners/spouses with particular benefits. This is done on a discretionary basis in the private sector.

b) Benefits for employees with opposite-sex partners

In Malta it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees with opposite-sex partners.

With the enactment of the Civil Unions Act, 2014, the law recognises same-sex partnerships as having the same effects and consequences as a civil marriage.¹⁵⁵ It is also to be noted that 'discriminatory treatment', as defined in the Employment and Industrial Relations Act, means any distinction, exclusion or restriction which is not justifiable in a democratic society, including discrimination made on the basis of marital status. Furthermore, Regulation 3 (1) of Legal Notice 461 of 2004 provides that it shall be unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds of sexual orientation and gender reassignment.

4.6 Health and safety (Article 7(2) Directive 2000/78)

a) Exceptions in relation to disability and health/safety

In Malta there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

The Equal Opportunities (Persons with Disability) Act, 2000, under Article 8(4), provides that, if a disabled person is employed, nothing shall preclude his employer from informing, if he deems necessary, first aid and safety personnel regarding any emergency treatment that might be required by such applicant because of his disability or regarding any special precautions that might need to be taken because of the said disability.

Furthermore, Legal Notice 44 of 2002, entitled the Work Place (Minimum Health and Safety Requirements) Regulations, 2002, states under Article 30 that:

'The employer shall ensure that the workplace is so organised and arranged to take account of the health and safety requirements of any workers with disability, if necessary.

(2) Without prejudice to the generality of sub-regulation (1), this provision applies in particular to the doors, passageways staircases, showers, washbasins, lavatories, resting and eating facilities and workstations used or occupied directly by persons with a disability.

(3) The employer shall ensure that the work equipment assigned for use by the person with disability, or the type of work itself is such that the disabled person is not exposed to added risks to health and safety due to the disability.'

Therefore, Article 30(3) allows employers to treat disabled people differently by ensuring that the employer assigns appropriate work in line with the capacities of the disabled person, in order not to endanger their health and safety.

4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.7.1 Direct discrimination

In Malta, national law provides an exception for direct discrimination on age.

¹⁵⁵ Act IX of 2014 - Civil Unions Act, 2014, adopted on 14 April 2014, introduces equality in the rights of registration of partnerships as civil unions for persons of the same sex. The Act provides that it is possible to register, as a Civil Union, a partnership between two persons of the same or opposite sex. The Act also provides for the recognition and registration of unions of equivalent status celebrated outside of Malta. A civil union will, once registered, have the corresponding effects and consequences in law as those of a civil marriage.

Regulation 5 of Legal Notice 461 of 2004 reflects the provisions of Article 6 of Directive 2000/78 and provides that, notwithstanding regulation 3(1) and (2),¹⁵⁶ difference of treatment on the ground of age shall not constitute discriminatory treatment if:

1. such differences are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy or labour market and vocational training objectives; and
 2. if the means of achieving that aim are appropriate and necessary.¹⁵⁷
- Justification of direct discrimination on the ground of age

In Malta it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age.

Regulation 5 goes on to provide that non-discriminatory differences of treatment referred to in sub-regulation (1) of this regulation may include:

- the setting of special conditions on access to employment and vocational training, including dismissal and remuneration conditions for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Therefore, to that extent, Article 6 of Council Directive 2000/78 has been fully implemented.

a) Permitted differences of treatment based on age

In Malta, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78. These are reflected in Regulation 5 of the Equal Treatment in Employment Regulations.

b) Occupational pension schemes' fixed ages for admission or entitlements

In Malta, with respect to second pension funds and third pension funds, there are no regulations as yet which fix ages for admission to the schemes or entitlement to benefits under them.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

In Malta there are special conditions set by law for older workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection. The Business Promotion Act Regulations, 2000,¹⁵⁸ provide fiscal incentives to employers which create jobs and employ and train persons of over 40 years of age. If such persons are registered as disabled persons, these incentives are further increased. There is no obligation for employers to take action to benefit from such incentives or otherwise.

¹⁵⁶ These provisions deal with the concept of discriminatory treatment.

¹⁵⁷ Reference may be made to Irene Desira and Inspire v. the Eden and Razzett Foundation in section 12.2. below.

¹⁵⁸ Regulation 13.

In 2014 the Government launched a strategy for early school leavers to assist youths in not leaving compulsory education without having the necessary requirements to enter the labour market or further their studies.¹⁵⁹ Also launched in 2014 was the Youth Guarantee Scheme, which offers an opportunity to those who are not in employment, education or training to either access the labour market or education. The Youth Guarantee targets young people under 25 years and supports them with training, job exposure and personalised assistance.

4.7.3 Minimum and maximum age requirements

In Malta there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training.

Under Maltese law, any person who has passed the compulsory school age¹⁶⁰ may seek employment and/or be employed.

Article 48(3) of the Employment and Industrial Relations Act, 2002, however, provides that the Minister responsible for Employment and Industrial Relations may make regulations which prescribe the manner and the circumstances in which persons who are above compulsory school age, as defined in the Education Act, 1988,¹⁶¹ but who have not yet attained the age of 18 years, may be employed. This includes the power to designate certain categories or classes of employment as prohibited employment for such persons.

Furthermore, Article 128(1) of the Education Act, 1988, provides that no person may employ a minor of compulsory school age or who is otherwise bound to regularly attend school under the provisions of the Act without the written permission of the Minister of Education. No public discussion has taken place as to whether this is regarded as being in compliance with the directive.

There is no evidence of age discrimination in access to training opportunities. The Employment and Training Corporation, which is the public employment agency, actually provides training courses specifically directed to registered unemployed persons over 40 years of age.

4.7.4 Retirement

a) State pension age

In Malta there is a state pension age, at which individuals must begin to collect their state pensions. If an individual wishes to work longer, he can collect a pension and still work.

The Social Security Act, 1987,¹⁶² provides under Article 2 that the 'pension age' applicable to both men and women in Malta is 65; provided that;

- in the case of a person born on or before the 31 December 1951, pension age shall be 61 years;
- in the case of a person born during the calendar years 1952 to 1955, pension age shall be 62 years;
- in the case of a person born during the calendar years 1956 to 1958, pension age shall be 63 years; and

¹⁵⁹ A Strategic Plan for the Prevention of Early School Leaving in Malta, Ministry for Education and Employment, 2014.

¹⁶⁰ 16 years of age.

¹⁶¹ Act XXIV of 1988. Chapter 327 of the Laws of Malta.

¹⁶² Act X of 1987. Chapter 318 of the Laws of Malta as subsequently amended from time to time, with a new definition of pensionable age introduced in 2006.

- in the case of a person born during the calendar years 1959 to 1961, pension age shall be 64 years. Notwithstanding the above, in the case of a woman born on or before 31 December 1951, the pension age shall be 60 years.

The last proviso to Article 36(14) of the Employment and Industrial Relations Act, 2002, provides that 'the employer can terminate the employment of an employee when the employee reaches pension age as defined in the Social Security Act,' and this will constitute a good and sufficient cause for termination. However, specific agreement may be reached between the employer and the employee whereby the employee shall continue to render his services after reaching pension age.

Furthermore, it is to be noted that it would not be lawful for an employer to terminate an employee's employment on grounds of age if such employee has not reached the statutory pension age (unless the employer is able to prove to the tribunal that such termination was based on a good and sufficient cause). Also, it would not be lawful for an employer to impose an earlier pension age (e.g. 55) in an employee's contract of employment without the employee's consent. Employers cannot unilaterally set pension ages in any manner whatsoever, as the pension age is stipulated at law.¹⁶³

b) Occupational pension schemes

In Malta there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

c) State-imposed mandatory retirement ages

In Malta there is no state-imposed mandatory retirement age, and persons may choose to retire at any age.

As stated in (a) above, however, national legislation provides for a pension age at which persons are entitled to receive a state pension. The state-imposed mandatory pension age is 65, subject to the exceptions mentioned above whereby agreement may be reached between the employer and employee for employment to continue. This age is, however, generally applicable. The most recent changes were those introduced in 2006, with the new retirement ages as detailed above.

d) Retirement ages imposed by employers

In Malta, national law does not permit employers to set retirement ages which fall earlier than pension age (or ages at which the termination of an employment contract is possible) unilaterally. Employers can introduce retirement schemes, but employees must consent to them and cannot be forced to participate in the scheme.

¹⁶³ On 26 September 2013, the Government was ordered to pay over EUR 700 000 in compensation to four stevedore foremen after a court ruled that their fundamental human rights to enjoyment of their property was violated by a law which made them retire on turning 61. Mr Justice Anthony Ellul, in the First Hall of the Civil Court (Rikors Numru. 60/2007), delivered this judgment following a constitutional application filed by Anthony Attard, Armando Chircop, Anthony Spiteri and another Anthony Attard against the Union Haddiema Maghqudin, the Malta Maritime Authority, the Prime Minister, the Minister for Competitiveness and Competition and the Attorney General. The men had filed their application in 2007, claiming that a legal notice had been promulgated in that year which had established that they, like other port workers, had to retire upon reaching the age of 61. In a preliminary judgment delivered in November 2011, the court had ruled that this legal notice was in violation of the men's right to enjoyment of their property, as they were being deprived of their licence to work as foremen in the harbour when they reached the age of 61. The court ruled that the men's licence was their property and that failure to renew their licences was a violation of their property rights. The judgment was confirmed by the Constitutional Court last year and the 2013 judgment was limited to the quantum of compensation owing to the men. In liquidating the damages suffered by the men, the court took into consideration their earnings prior to the age of 61 and projected these earnings until they reached the age of 71. In an appeal decided on 10 March 2014 by the Constitutional Court, the amount of damages payable by Government was reduced (Appell Civili Numru. 60/2007/3).

- e) Employment rights applicable to all workers irrespective of age

If, at 65, a person continues working, he/she would not be afforded protection against dismissal on the grounds of age; however, as the person is still in employment, he/she would retain some employment rights under other laws protecting employment rights during employment.

- f) Compliance of national law with CJEU case law

In Malta, national legislation is in line with the CJEU case law on age regarding compulsory retirement.

As stated above, the Employment and Industrial Relations Act provides that employment can be terminated by the employer when the employee reaches pension age. Therefore, the law provides for a compulsory pension age, but also provides for agreement to be reached between the employee and employer whereby the employee can work beyond pension age.

4.7.5 Redundancy

- a) Age and seniority taken into account for redundancy selection

In Malta, national law permits seniority to be taken into account in selecting workers for redundancy.

With respect to redundancy in the private sector, this is regulated under Article 36(3) and (4) of the Employment and Industrial Relations Act, 2002. In the event that a person is declared redundant by his employer and the following provisions of law are not observed, legal action for unfair dismissal can be instituted by the employee against the employer.

Subparagraph (3) provides that a contract of service for an indefinite time may be terminated by the employer if there exists a good and sufficient cause for such,¹⁶⁴ or on grounds of redundancy. It is to be noted, however, that an employee whose employment is terminated on grounds of redundancy shall be entitled to re-employment if the post formerly occupied by them is again available within a period of one year from the date of termination of employment. Furthermore, such an employee must be so re-employed on conditions no less favourable than those to which they would have been entitled if their previous contract of service had not been terminated. Also, an employee who is re-employed shall, for the purposes of the Act, be deemed to have continued in their employment notwithstanding the termination due to redundancy.

Furthermore, in terms of Article 36(4), if an employer intends to terminate the employment of an employee on grounds of redundancy, they shall terminate the employment of that person who was engaged last in the class of employment affected by such redundancy, unless such person is related to the employer (not being a limited liability company or a statutory body) by blood or marriage.

In such instance, the employer may, instead of terminating the employment of such person, terminate that of the person next in turn. The reason for this exception has always been so as to try and prevent problems within families or through marriage.

Thus, it is clear that a person may be declared redundant not on the basis of their age, sexual orientation, disability, religious beliefs or racial or ethnic origin but on the objective

¹⁶⁴ This deals with termination of employment on grounds of a good and sufficient cause. The law does not define a good and sufficient cause but lists those instances which are not deemed to constitute a good and sufficient cause. Each case is to be determined on its own merits to see whether the termination of the employment was based on a good and sufficient cause.

criterion as to who was last employed in the post, subject to the proviso of relationship by blood or marriage.

b) Age taken into account for redundancy compensation

In Malta, national law does provide compensation for redundancy. Redundancy payments do not depend on age but on the duration of the employment of the employee who is employed on an indefinite basis – for example, an employee who has worked for three years would be entitled to four weeks' notice of termination of employment, whereas if they had worked for 10 years, for instance, they would be entitled to 11 weeks' notice - the maximum notice period is 12 weeks. These notice periods are fixed by law and cannot be shortened.

On receiving notice of termination on the ground of redundancy from the employer, the employee may either continue to perform work until the period of notice expires or, at any time during the period of notice, may require the employer to pay them a sum equal to the wages that would be payable in respect of the unexpired period of notice and therefore, in the latter case, not work during the notice period. Usually, employees in this situation opt for the latter arrangement since, during such notice period, they may start seeking new employment. Also, if the employer fails to give notice, they shall be liable to pay to the employee a sum equal to the wages that would be payable in respect of the period of notice.

Furthermore, the employer may pay the employee additional amounts, but these would be paid at the employer's sole discretion.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Malta, national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

Regulation 1(6)(a) of Legal Notice 461 of 2004 reflects the provisions of Article 2(5) of Directive 2000/78 and provides that the provisions of this legal notice shall be without prejudice to, *inter alia*, any law necessary for public security, for maintaining public order, for the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

4.9 Any other exceptions

In Malta, other exceptions to the prohibition of discrimination (on any ground) provided in national law are as follows:

Regulation 1(6) of Legal Notice 461 of 2004 provides that the provisions of the Regulations shall be read and construed without prejudice to the introduction and implementation of provisions in collective agreements or any other agreements entered into between employers and employees that lay down anti-discrimination rules in the areas referred to in sub-regulation (3) of Regulation 1 which respect the minimum requirements in these regulations.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In Malta, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law.

Regulation 6 (1) of Legal Notice 461 of 2004 states that nothing shall render unlawful any act carried out in or in connection with:

- affording persons of a particular religion or religious belief, disability, age, sexual orientation or racial or ethnic origin access to benefits relating to training which would help prepare them for a particular job; or
- encouraging such persons referred to in sub-regulation (1)(a) of this regulation to take advantage of opportunities for doing a particular job; or
- instances where it reasonably appears to the person carrying out the act that it prevents or compensates for disadvantages linked to the grounds of religion or religious belief, disability, age, sexual orientation and racial or ethnic origin. There are no prescribed criteria to determine what constitutes 'disadvantages'.

While it is not known if any specific measures have been taken on the basis of this legal notice, it is clear that several NGOs, such as the NCPE and NCPD, regularly organise publicity campaigns, participate in projects and hold seminars and public meetings to encourage persons of a particular religion or religious belief, disability, age, sexual orientation or racial or ethnic origin to participate in training to assist them in entering the labour market. The Employment and Training Corporation is very active in this field, as one of the Corporation's main objectives is that of assisting persons in finding employment. The ETC offers specific services to people who are in disadvantaged situations and who therefore find it more difficult to enter the labour market. These services are offered through the Inclusive Employment Services. People in disadvantaged situations include persons with disability, former substance abusers, former prison inmates, workers who have been out of the labour market for more than five years, and other people with different social problems. The employment advisors give assistance and job search guidance to these people. It is up to the individual to seek this particular service.¹⁶⁵

The ETC has also provided information sessions on work permits and legal employment in detention centres for migrants and asylum seekers.¹⁶⁶ The Agency for the Welfare of Asylum Seekers has also organised language training sessions.

b) Main positive action measures in place on national level

Positive measures of a general social nature, quotas and preferential treatment do exist with regard to persons with a disability in the employment field.

The Persons with a Disability (Employment) Act, 1969,¹⁶⁷ provides for the compulsory engagement, on a quota basis, of disabled persons¹⁶⁸ registering for employment.

¹⁶⁵ Training and vocational training services are also offered by Richmond Foundation, Agenzija Support and Inspire. The schemes include The Bridging the Gap Scheme, The Community Inclusive Employment Scheme, The Community Work Scheme, The Sheltered Employment Training and the Job Bridge Programme.

¹⁶⁶ The main projects being COPE (Coordination and Provision of Welfare Services in Closed Centres) and EQUAL, the latter project focusing on improving accessibility to employment and improving employability by providing support and guidance.

¹⁶⁷ Act II of 1969. Chapter 210 of the Laws of Malta.

¹⁶⁸ In terms of this Act, a 'person with disability' means a person, being over compulsory school age, who, by reason of injury, disease, congenital deformity or other physical or mental incapacity, is substantially handicapped in obtaining or keeping employment or in undertaking work on his own account, of a kind

Article 15 of this Act states, *inter alia*, that:

1. 'Any person to whom this section applies shall give employment to such number of registered persons as is his quota in accordance with the provisions of section 16 of this Act:
Provided that any person to whom, on the coming into operation of this Act, this section applies, shall (if needs be) comply with the provisions of this subsection as and when vacancies occur.
2. A person to whom this section applies shall not at any time take, or offer to take, into his employment any person other than a registered person, if, immediately after the taking in of that person, the number of registered persons in his employment (excluding persons employed by him in an employment of a class at that time designated under section 19 of this Act) would be less than his quota.'

The quota shall be a number ascertained in accordance with the following provisions of Article 16 of the said Act:

'(2) The Minister, after consultation with the Corporation, shall by order specify a standard percentage¹⁶⁹ and may, in like manner, specify a special percentage, either greater or smaller than the standard percentage.

(3) A special percentage specified by the Minister under subsection (2) of this section shall be made with respect to employment in any trade or industry, or in any branch or part of any trade or industry, or to employment with any class of employer, being employment to which, in the opinion of the Minister, a percentage, other than the standard percentage, should be assigned owing to its distinctive characteristics as respects its suitability for persons with disability.

(4) An order specifying a special percentage shall contain such provisions as may appear to the Minister to be requisite for more particularly defining for the purposes of this section the trade or industry, branch or part of a trade or industry, or class of employer, to employment in which or with whom such percentage is assigned.

(5) The quota at any time of a person to whom section 15 of this Act applies shall be the number ascertained by applying to the number of all the persons at that time in his employment (excluding persons employed by him in an employment of a class at that time designated under section 19 of this Act and any employee related to him by consanguinity or affinity up to the third degree)

- so far as they consist of persons employed by him in an employment other than one to which a special percentage is at that time assigned, the standard percentage; and
- so far as they consist of persons employed by him in an employment to which a special percentage is at that time assigned, that percentage:

Provided that, if the number so ascertained includes or consists of a fraction less than one half, such fraction shall be disregarded, and, if the number so ascertained includes or consists of a fraction being one-half or more, the quota shall be the nearest higher whole number.'

Publicly available information states that, in 2014, there were 442 disabled persons registered with the Employment and Training Corporation as seeking work.¹⁷⁰ It is pertinent

which apart from that injury, disease, deformity or incapacity would be suited to his age, experience and qualifications; and the word 'disability', in relation to any person, shall be construed accordingly. It is to be noted that this definition differs from the definition found under the Equal Opportunities (Persons with Disability) Act.

¹⁶⁹ 2 %.

¹⁷⁰ A total of 130 people have registered for clerical jobs and another 125 for elementary occupations. Some 100 would like to work in shops or as market sales workers, while 38 are more suited for plant or factory work as they are able to work as machinery operators and assemblers. A total of 41 people, or 8 %, of the disabled job seekers, are technicians and associate professionals, 32 individuals (6 %) are professionals and

to point out that not all disabled persons register with the ETC and hence the quota cannot be deemed to be an accurate reflection of reality.¹⁷¹ In 2002 there were over 900 disabled persons working on a full-time basis, and 250 on a part-time basis.¹⁷² Statistics resulting from a census in 2011 published by the KNPD indicate that 16.5 % of disabled persons are employed, while 85.9 % wish to work. Clearly, further initiatives need to be taken in order to encourage employers to offer employment to disabled persons so that the number of employed persons will continue to increase and lead to equal opportunities for persons with disability to find employment.¹⁷³

One budgetary measure announced in November 2014 is a scheme to enforce the employment quota. Through this scheme, the Government seeks to ensure the implementation and enforcement of the 1967 law requiring companies employing 20 or more persons to employ persons with disabilities. The Minister announced that employers who refuse to abide by the law will be asked to pay a yearly compensation fee of between EUR 2 400 and EUR 10 000. Income from this fee will go towards a fund for persons with disability. The Government, according to the Finance Ministry, would rather see people working and contributing than have employers pay into the fund.

Special arrangements exist to assist persons with a disability to access employment in the public sector. Registered persons with a disability who do not satisfy all the eligibility requirements in calls for applications but who are capable of carrying out, in essence, the duties attached to a particular post/position, are allowed to ask for special consideration when applying for posts/positions in the public service.¹⁷⁴

The Business Promotion Act Regulations, 2000, provide fiscal incentives to employers which create jobs, employ and train persons over 40 years of age. If such persons are registered as disabled persons, these incentives are further increased. There is no obligation for employers to take action to benefit from such incentives or otherwise.

eight (2 %) can work as legislators, senior officials and managers. Another 13 are skilled agriculture and fishery workers and 27 can work on crafts or related jobs.

¹⁷¹ In December 2013, the Government announced that it was drawing up a comprehensive register of disabled persons to better analyse and provide for their needs.

¹⁷² The findings of a research report for the project 'Research on the Situation of Disabled Persons in Malta', concluded by KNPD in 2014, showed that, of the 600 persons interviewed, 2 % were in part-time employment and 7.8 % in full-time employment.

¹⁷³ One such initiative was the Me2 Project, as a result of which 52 disabled persons found employment, and the Government scheme launched in September 2012 whereby disabled persons are to be employed by the local councils. The aim was to have 80 persons working for three years under this scheme.

¹⁷⁴ Equality Policy for the Public Service – July 2013.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) Available procedures for enforcing the principle of equal treatment

In Malta the following procedures exist for enforcing the principle of equal treatment: judicial/ administrative/ alternative dispute resolution such as mediation. As can be seen below, recourse can be had by persons alleging discrimination to the courts, commissions and other authorities set up under law, to the Ombudsman and even to mediation.

Maltese legislation lays down various courses of action that one may follow should an individual believe that he or she was subjected to discriminatory treatment. Apart from recourse to action before the Civil Court, First Hall, sitting in its Constitutional jurisdiction, or before the Constitutional Court, there exist other bodies where an alleged victim can address his or her complaint, depending on the nature of such complaint.

These include the Industrial Tribunal (under the Employment and Industrial Relations Act, 2002), the National Commission Persons with Disability (under the Equal Opportunities (Persons with Disability) Act, 2000), the National Commission for the Promotion of Equality (under the Equality for Men and Women Act, 2003), the Public Service Commission (under the Constitution of Malta), the Ombudsman (under the Ombudsman Act, 1995), the Broadcasting Authority (under the Constitution of Malta), and the Employment Commission (under the Constitution of Malta), as detailed hereunder:¹⁷⁵

- The Industrial Tribunal, the establishment and constitution of which are set out under Article 73 of the Employment and Industrial Relations Act, 2002. Article 30 of the Employment and Industrial Relations Act states that:
 1. 'A person who alleges that the employer is in breach of, or that the conditions of employment are in breach of articles 26, 27, 28 or 29, may within four months of the alleged breach, lodge a complaint to the Industrial Tribunal and the Industrial Tribunal shall hear such complaint and carry out any investigations as it shall deem fit.
 2. If the Industrial Tribunal is satisfied that the complaint is justified, it may take such measures as it may deem fit including the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory and may order the payment of compensation for loss and damage sustained by the aggrieved party as a consequence of the breach'.

On the basis of the provisions of Article 30, actions can be instituted even after the employment relationship has been terminated provided that the relative time limits are respected.

Furthermore, Article 30(4) states that any action taken by a complainant in accordance with the provisions of this article shall be without prejudice to any further action that such complainant may be entitled to take under any other applicable law and shall also be without prejudice to any other action to which the respondent may be subject in accordance with any other applicable law;

- The National Commission Persons with Disability (NCPD), established under Article 21 of the Equal Opportunities (Persons with Disability) Act, 2000. The NCPD works in order to eliminate any form of direct or indirect social discrimination against persons

¹⁷⁵ Insofar as the Employment Commission is concerned, the Constitution specifically limits its remit to discrimination based on political opinion.

with disability and their families while providing them with the necessary assistance and support.

- The National Commission for the Promotion of Equality, which is provided for under Article 11 of the Equality for Men and Women Act, 2003. Its primary role is to monitor the implementation of the Act to Promote Equality for Men and Women, to promote equal treatment irrespective of racial or ethnic origin, to promote equality in spheres where it may be lacking and to ensure compliance with the provisions of the Equal Treatment of Persons Order.¹⁷⁶
- The Public Service Commission, set up in terms of Article 109 of the Constitution of Malta. Its primary role is to give advice and to make recommendations to the Prime Minister in the making of appointments, removal of persons and disciplinary control over public offices. In terms of Article 115 of the Constitution, the commission is protected from legal proceedings, and whether the commission has validly performed any functions vested in it by the Constitution cannot be enquired into in any Court of Law.
- The Ombudsman, appointed in accordance with Article 3 of the Ombudsman Act, 1995.¹⁷⁷
- The Broadcasting Authority, established in terms of Article 118 of the Constitution of Malta. The Broadcasting Authority is to ensure that, in the provision of broadcasting services, impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy, and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.
- The Employment Commission, which is established under Article 120 of the Constitution of Malta. The function of this commission to ensure that, in respect of employment, no distinction, exclusion or preference that is not justifiable in a democratic society is made or given in favour of or against any person by reason of his or her political opinions.
- The Employment and Industrial Relations Act does not mention mediation. However, the Mediation Act, enacted on 21 December 2004, encourages and facilitates the settlement of disputes in Malta through mediation, establishes a Malta Mediation Centre as a centre for domestic and international mediation, and regulates the conduct of the mediation process.
- Article 968 of the Code of Organisation and Civil Procedure, with regard to arbitration, states that any cause concerning any matter in dispute which has been brought before a court of civil jurisdiction in Malta may be submitted at the request of all the parties for determination by arbitration. However, sub-article 2 of this article goes on to say that any submission to arbitration in regard to any dispute which may not form the subject matter of a contract, whether absolutely or without certain formalities required by law, is null.

b) Barriers and other deterrents faced by litigants seeking redress

Costs in a court case are regulated by Article 1004 of the Code of Organisation and Civil Procedure, which states that costs shall be taxed and levied in accordance with the Tariffs in Schedule A annexed to the Code and with regulations made by the Minister responsible for justice. The costs incurred to institute legal proceedings can at times be quite high, thereby possibly creating a barrier to people who want to lodge a complaint. Also, even though this is not really a requirement, it is advisable for a person to seek advice from a lawyer to assist in the proceedings. The Maltese legal system provides for the possibility of free legal aid for those persons who do not have the necessary finances to institute/defend legal proceedings.

Delays in judicial proceedings can be seen as a further deterrent, in that one is aware when proceedings shall commence but not when they shall end. Furthermore, in certain

¹⁷⁶ The remit of the NCPE is discrimination based on sex, sexual orientation, age, religion or belief, racial or ethnic origin or gender identity.

¹⁷⁷ Act XXI of 1995. Chapter 385 of the Laws of Malta.

instances, time limits for lodging a claim or complaint must be respected, and failure to do so will nullify the lodgement of claim or complaint. Thus, in the case of proceedings under the EIRA, complaints must be lodged within four months of the alleged breach.

c) Number of discrimination cases brought to justice

In Malta there are no available statistics on the number of cases related to discrimination that have been brought to justice.

d) Registration of discrimination cases by national courts

In Malta, discrimination cases are not registered as such by national courts.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Standing to act on behalf of victims of discrimination (representing them)

In Malta associations/organisations/trade unions are entitled to act on behalf of victims of discrimination.

Regulation 11 of the Equal Treatment in Employment Regulations provides that nothing shall prevent any association, organisation or other legal entity from having a legitimate interest in ensuring that these regulations are complied with, or from engaging itself either on behalf of or in support of the complainant, with his or her approval, in any judicial or administrative procedure which is provided for the enforcement of obligations under these regulations.

Furthermore, Article 16 of the Equal Treatment of Persons Order provides that nothing in this Order or in any other law shall prevent any association, organisation or other legal entity, having a legitimate interest in ensuring that the Order is complied with, from engaging itself either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative procedure provided for the enforcement of obligations under the Order. Therefore, the provisions are general in nature and no limitations exist as to the conditions under which or the terms upon which representation can take place. The complainant's authorisation is required, but no specific provisions stipulate the manner in which such authorisation is to be obtained. The type of remedy which an association may seek is the remedy which may also be sought by a complainant and which, as seen above, varies depending on the legislation. There are no differences in associations' standing in terms of remedies compared to actual victims. There are no special rules on the shifting of the burden of proof where associations are engaged in proceedings. There is no known case where any association, organisation or other legal entity has brought forward proceedings.

Article 75(2) of the Employment and Industrial Relations Act, 2002, also permits action to be taken on behalf of a person who is the subject of alleged discriminatory treatment. This provides that, where it is alleged that a worker has been unfairly dismissed by an employer, or where there is an alleged breach of any obligation under Title I of the Act (thus including discriminatory treatment) or any regulations prescribed thereunder, the matter shall be referred to the Industrial Tribunal for a decision by it by means of a referral in writing made by the worker alleging the breach, or by some other person acting in the name and on behalf of such worker.

b) Standing to act in support of victims of discrimination

In Malta, associations/organisations/trade unions are entitled to act in support of victims of discrimination.

In terms of the aforementioned provisions, added protection is afforded to complainants under the relevant legislation, where an entity having a legitimate interest in ensuring the regulations are adhered to may intervene on their behalf. The type of remedy which an association may seek is the remedy which may also be sought by a complainant and which, as seen above, varies depending on the legislation. There are no differences in associations' standing in terms of remedies compared to actual victims. There are no special rules on the shifting of the burden of proof where associations are engaged in proceedings.

One entity that is legislatively empowered to assist a complainant of alleged discriminatory treatment is the National Commission Persons with Disability (NCPD). This commission is empowered to provide, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act.¹⁷⁸ Furthermore, as of 2012, Article 33A of the Equal Opportunities (Persons with Disability) Act provides that any association, organisation or any legal entity which has a legitimate interest in ensuring that the provisions of the Act are complied with, may institute, on behalf or in support of the person against whom an unlawful act of discrimination has been committed under the Act, with his or her approval, proceedings for redress before the competent court.

Furthermore, if it appears to the commission that a person wishes to make a complaint under Article 32(2) of the Equal Opportunities (Persons with Disability) Act and that that person requires assistance to formulate the complaint orally and/or in writing, it shall be the duty of the commission to take reasonable steps to provide appropriate assistance to that person.¹⁷⁹

Legal Notice 13 of 2001, issued in terms of Article 33 of the Equal Opportunities (Persons with Disability) Act and entitled 'Procedure for the Investigation of Complaints Regulations, 2001',¹⁸⁰ provides for the procedure which is to be followed in cases in which the commission receives a complaint from an aggrieved person, including in instances of alleged discrimination. In terms of this Legal Notice, the commission shall first try and find an amicable solution to the matter. If, however, this is not forthcoming, the commission is empowered to refer the case to the Civil Court, First Hall.¹⁸¹

Also, in terms of Article 12(1) (j) of the Equality for Men and Women Act, 2003, the Commissioner for the Promotion of Equality, with the assistance of the National Commission for the Promotion of Equality (NCPE), is empowered to provide assistance, where and as appropriate, to persons suffering from discrimination by enforcing their rights under the Act. Furthermore, Article 17(1) of the said Act provides that the commissioner may initiate investigations (a) on any matter involving an act or omission that is allegedly unlawful under the provisions of the Act and (b) on receipt of a written complaint by a person who claims to be the victim of an act or omission contrary to the provisions of the Act.

c) Actio popularis

In Malta, national law allows the equality body, NCPE, to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis).

As seen above, in terms of Article 11 of the Equal Treatment of Persons Order, investigations may be commenced by the NCPE, but no particular rules are provided as to the instances where this may be done and the type of proceedings which are to be followed.

d) Class action

¹⁷⁸ Article 22(k).

¹⁷⁹ Article 32(3).

¹⁸⁰ In force as from 1 October 2000.

¹⁸¹ Regulation 5.

In Malta, national law allows associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

Article 11 of the Equal Treatment of Persons Order seems to indicate that an action could only be made on behalf of one complainant at a time. On the other hand, there is no specific prohibition of actions being brought on behalf of more than one complainant or of class actions. This cannot be verified due to the absence of case law.¹⁸²

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Malta, national law permits a shift of the burden of proof from the complainant to the respondent.

The general principle under Maltese law is that the burden of proof lies on the person making the allegation.

However, the Employment and Industrial Relations Act, 2002, has introduced a shift in the principle of the burden of proof in cases of discrimination. Regulation 10(3) of the Equal Treatment in Employment Regulations provides that, in any proceedings brought by a person claiming discriminatory treatment in respect of his/her employment, it shall be sufficient for the claimant to prove that he or she has suffered discriminatory treatment and it shall become incumbent on the defendant to prove that such treatment was justified in accordance with these regulations, in the absence of which the Tribunal or Court shall uphold the complaint of the claimant.

Regulation 10(3) correctly implements what is laid down in both directives. Directives 2000/43 and 2000/78 further provide that it is up to the Member State whether or not to introduce rules of evidence which are more favourable to claimants.

Also, Article 26(2)(a) of the Employment and Industrial Relations Act, 2002, provides that discriminatory treatment shall include the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience.

In terms of Article 34A of The Equal Opportunities (Persons with Disability) Act, 2000, where, in any judicial proceedings, other than criminal proceedings, taken in terms of the Act for redress following an unlawful act of discrimination, the person commencing the proceedings establishes facts before the courts from which it may be presumed that there was discrimination, it shall be for the defendant to prove that there was no breach of the Act.

Similarly, Article 13 of the Equal Treatment of Persons Order, 2007, provides for the shifting of the burden of proof in that, if a person who considers that he or she has been discriminated against establishes, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination against him or her, the burden of proving that there has been no discrimination shall lie on the person, establishment or entity against whom the allegation of discrimination is directed. This rule shall also apply where the NCPE itself takes action to refer an allegation of discrimination to the competent court on behalf of the person discriminated against or where it intervenes in support of a person alleging discrimination and taking action for redress.

In terms of Article 19(2) of the Equality for Men and Women Act, 2003, which was amended in 2014, the burden of proof has been shifted. The claimant or the person instituting the

¹⁸² The proposed Equality Act should provide specifically for NGOs bringing forward class actions.

said proceedings is to establish, before the Court or before such other competent authority, facts from which it may be presumed that he or she has been treated less favourably, directly or indirectly, on the basis of sex or because of family responsibilities, and the defendant or the person against whom such proceedings are brought must 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.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Malta, there are legal measures of protection against victimisation.

Article 28 of the Employment and Industrial Relations Act provides that if any person (a) files a complaint to the lawful authorities or initiates or participates in proceedings for redress on grounds of alleged breach of the provisions of the Act, or (b) discloses information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests, it is unlawful to victimise such person for having acted accordingly.

This provision goes further than is required by Article 11 of the Employment Equality Directive, since it relates not only to breaches of the obligation of equal treatment, but to any breach of the provisions of the Act.

The wording of Article 28, particularly in the case mentioned in (b) above, appears to extend protection against victimisation to persons other than the complainant.

In line with the provisions of the Race Directive, Article 7 of the Equal Treatment of Persons Order provides that it shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of these regulations, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged acts of discrimination or discriminatory treatment.

Similarly, Article 5(3) of the Equal Opportunities (Persons with Disabilities) Act provides that it shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of the Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged discriminatory behaviour, activities or practices.

Furthermore, in terms of Article 4 of the Equality for Men and Women Act, it shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment. Furthermore, employers shall also be deemed to have discriminated against a person if such employers alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to them under this Act or claimed the performance in their favour of any obligation or duty under this Act.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) Applicable sanctions in cases of discrimination – in law and in practice

In terms of Article 30 of the Employment and Industrial Relations Act, if the Industrial Tribunal¹⁸³ upholds a person's allegations that his/her employer is in breach of, or that the conditions of employment are in breach of, specific provisions, namely: Articles 26 (discrimination and gender equality), 27 (work of equal value), 28 (victimisation) or 29 (harassment), the Tribunal may take such measures as it deems necessary, including the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory, and may order the payment of reasonable sums of money as compensation to the aggrieved party.¹⁸⁴

In terms of Article 15 of the Equal Treatment of Persons Order, without prejudice to the provisions of article 30 of the Employment and Industrial Relations Act, a person who alleges that any other person has committed in his or her regard any act which, under any of the provisions of the Order is unlawful, shall have a right of action before the competent court of civil jurisdiction, requesting the court to order the defendant to desist from such unlawful acts and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act.

In any such proceedings it shall be sufficient for the claimant to prove that he or she has been treated less favourably in terms of the provisions of the Order, and it shall be incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of the Order. Furthermore, in any such action the claimant shall, over and above and in addition to such damages and costs as may have been actually suffered and be due according to law, be entitled to recover by way of compensation such sum of money as the court in its discretion may consider reasonable, taking into account all the circumstances of the case and as the court on the trial of the cause shall award and assess.

Apart from the above, Article 48(4) of the Employment and Industrial Relations Act provides that any regulation made under the Act may provide for any matter relating to liability for the observance of such regulations, and the persons who may be liable, and for any matter relating to the enforcement of the said regulations, including, but not limited to, the imposition of a fine not exceeding eleven thousand, six hundred and forty-seven euros (EUR 11 647) in respect of any contravention of, or failure to comply with, the provisions of such regulations.

In terms of Article 50 of the Employment and Training Services Act, any person guilty of an offence against, *inter alia*, Article 15 of the Act¹⁸⁵ shall be liable, on conviction, to pay a fine of not less than one thousand, one hundred and sixty-four euros (EUR 1 164) but not exceeding eleven thousand, six hundred and forty-seven euros (EUR 11 647).

Under Article 34 of The Equal Opportunities (Persons with Disability) Act, a claim by a person having a legal interest in the matter, made personally or through his or her legal representative, that another person has committed an unlawful act of discrimination against him or her, as provided for under the Act, may be brought for damages, as with any other civil action; and any damages in respect of an unlawful act of discrimination may include compensation for moral damages, whether or not they include compensation under any other head, up to a maximum of two thousand, five hundred euros (EUR 2 500), as

¹⁸³ In the case of hearing and deciding cases of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment, the Industrial Tribunal shall be composed of a chairperson alone.

¹⁸⁴ It is to be noted that, in terms of Article 1045(1) of the Civil Code (Chapter 16 of the Laws of Malta), damage which is to be made good by the person responsible for causing such damage shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused. Thus, only real damages could be awarded. There have been very few cases concerning violations of human rights where moral damages have been awarded.

¹⁸⁵ This provision deals with the engagement of employees by the Government and Government-owned or controlled bodies and companies.

the court may declare. It is to be noted that this is the first instance where the law in Malta has specifically provided for the award of moral damages to an aggrieved party. Furthermore, any association, organisation or any legal entity which has a legitimate interest in ensuring that the provisions of the Act are complied with may institute, on behalf or in support of the person against whom an unlawful act of discrimination has been committed under the Act, with his or her approval, proceedings for redress before the competent court.

In the Criminal Code, Article 82A imposes imprisonment for a term from 6 to 18 months for a person who has been convicted for using threatening, abusive or insulting words or behaviour, or displaying any written or printed material which is threatening, abusive or insulting, or has otherwise conducted himself in such a manner, with intent thereby to stir up violence or racial hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion, or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up. Such a person shall, on conviction, be liable to imprisonment for a term from 6 to 18 months.¹⁸⁶ Furthermore, the Criminal Code provides that any sentence for a punishment established by law shall always be deemed to have been awarded without prejudice to the right of civil action.¹⁸⁷

b) Ceiling and amount of compensation

No maximum amount of compensation is laid down under Article 30 of the Employment and Industrial Relations Act or under Article 15 of the Equal Treatment of Persons Order, and there have not been any reported decisions in this respect. These are two of the few instances where the victim can be awarded compensation since, in the majority of cases, the perpetrator of the discriminatory treatment can be ordered to pay a fine. This fine is paid to the state.

Under Article 34 of the Equal Opportunities (Persons with Disability) Act, a claim may be made by a person having a legal interest in the matter, either personally or through his or her legal representative, that another person has committed an unlawful act of discrimination against him or her, as provided for under the Act. He or she may bring a claim for damages as with any other civil action, and any damages in respect of an unlawful act of discrimination may include compensation for moral damages, whether or not they include compensation under any other head, up to a maximum of two thousand, five hundred euros (EUR 2 500), as the court may declare. It is to be noted that this is the first instance where the law in Malta has specifically provided for the award of moral damages to an aggrieved party.

c) Assessment of the sanctions

There have been no cases, whether before the courts or before the Ombudsman, on the amount of compensation to be awarded. Therefore, there is no publicly available evidence to show how effective, proportionate or dissuasive the available sanctions are. It is felt, though, especially with regard to the sanctions under Article 30 of the Employment and Industrial Relations Act and under Article 15 of the Equal Treatment of Persons Order, that, since they do not provide for a capping on the damages which may be awarded, they are effective and sufficient.

¹⁸⁶ 'Violence or racial hatred' means violence or racial hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion.

¹⁸⁷ Article 26(1).

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive.

By virtue of the provisions of the Equal Treatment of Persons Order, 2007, the remit of the Commissioner for the Promotion of Equality for Men and Women has been extended to cover the promotion of equal treatment irrespective of racial or ethnic origin within the meaning of the provisions of the Order and to issues of compliance with, and the enforcement of rights under, the provisions of the Order, which functions shall continue to be exercised with the assistance of the NCPE.¹⁸⁸ By virtue of Act IX of 2012, the remit was again extended to cover discrimination based on sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity. The scope of the National Commission for the Promotion of Equality is intended to be widened further so that it will become a Commission for Human Rights and Equality, acting as a National Human Rights Institution as well as an equality body (NHREC), in accordance with the provisions established by European directives on equal treatment. Hence, the NCPE will thus be able to not only build on work which has already been identified, but also to expand and strengthen its work and responsibilities in the field of human rights and equality.

- b) Status of the designated body/bodies – general independence

The National Commission for the Promotion of Equality (NCPE) is currently an autonomous body. It was set up in January 2004. The commission has a legal personality, separate from that of the Government, and its judicial representation vests in the commissioner. It is composed of a chairperson, who is the commissioner, and six other members, at least three of whom must be women. No quotas are prescribed for members coming from a particular ethnic minority background. All the members of the commission are appointed by the Prime Minister from among such persons appearing to him to be best suited to dealing with issues of equality for men and women and/or administrative issues connected therewith. Every member of the commission shall hold office for a term of two years and may be re-appointed at the end of their term of office. The Prime Minister may terminate the appointment of members of the commission if he is satisfied that: (a) without the consent of the commission, its members failed to attend the meetings of the commission during a continuous period of six months; (b) its members are undischarged bankrupt persons, or have made an arrangement with their creditors, or are insolvent or have been found guilty of any voluntary crime against the person; or (c) its members are incapable of carrying out their duties.

The commission is answerable to the Minister responsible for equality, and it is funded from funds allocated to it by the Minister for the promotion of equality out of funds voted by Parliament for activities under the Ministry or out of funds that may be donated or allocated to it from other sources in Malta or abroad.

The NCPE is an autonomous body, having a separate legal personality, as is provided for in the respective regulating laws. Despite both entities being dependant on Government funding, they are deemed independent and autonomous. To date, nothing has ever been published to infer that such independence is hampered or not recognised or that the said entities lack sufficient and adequate resources to function effectively.

- c) Grounds covered by the designated body/bodies

¹⁸⁸ Although the commission is generally referred to as the National Commission for the Promotion of Equality (even on its website), Article 11 of Chapter 456 of the Laws of Malta (in terms of which the commission is constituted) states that 'The Prime Minister shall upon the advice of the Minister appoint a Commission to be called the National Commission for the Promotion of Equality for Men and Women (hereinafter referred to as "the Commission") ...'

The remit of the NCPE relates to discrimination issues based on (i) sex/gender and family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity in employment; banks and financial institutions, as well as education; and (ii) racial / ethnic origin and gender in the provision of goods and services and their supply, and these are the grounds which it deals with.

d) Competences of the designated body/bodies – and their independent exercise

The current primary task of the NCPE is to monitor the implementation of the Act to Promote Equality for Men and Women, to promote equal treatment irrespective of racial or ethnic origin, to promote equality in spheres where it may be lacking and to ensure compliance with the provisions of the Equal Treatment of Persons Order. The commission seeks to ensure that Maltese society is a society free from any form of discrimination in all sectors and at all levels with respect to training and employment and to the provision of services and benefits. It has the competence to provide assistance to victims, to conduct surveys and publish reports and to issue recommendations on discrimination issues.

The current functions of the commission include the following:

- to liaise between, and ensure the necessary coordination between, Government departments and other agencies in the implementation of measures, services or initiatives proposed by Government or the commission from time to time;
- to carry out general investigations with a view to determining whether the provisions of the Act and the Order are being complied with;
- to investigate complaints of a more particular or individual character to determine whether the provisions of the Act and the Order are being contravened with respect to the complainant and, where deemed appropriate, to mediate with regard to such complaints;
- to inquire into and advise or make determinations on any matter relating to equality between men and women as may be referred to it by the Minister;
- to provide assistance, where and as appropriate, to persons suffering from discrimination in enforcing their rights under the Act and the Order;
- to keep under review the working of the Act and the Order and, where deemed necessary, at the request of the Minister or otherwise, to submit proposals for the amendment or substitution of their provisions; and
- to perform such other function as may be assigned by law or such other functions as may be assigned by the Minister.

As noted above, the commission can provide assistance to victims of discrimination. In the carrying out of its other activities, in an independent capacity, it conducts surveys, issues reports and makes recommendations to Government as to the manner in which further protection may be afforded in Malta.

The NCPE has published several publications and leaflets regarding different issues, which are available to the general public as well as to public and private sector organisations. Each year, it publishes an annual report setting out its activities over the past year.

Furthermore, there are various entities that are entrusted with the defence of human rights or the safeguard of individual rights. Apart from the Civil Court, First Hall, and the Constitutional Court, there are the Ombudsman, the Industrial Tribunal, the National Commission Persons with Disability, the National Commission for the Promotion of Equality and the Public Service Commission.

In terms of the Equal Opportunities (Persons with Disability) Act, the National Commission Persons with Disability is entrusted to pay particular attention to the different needs of children, women and men with disability, and shall:

1. identify, establish and update all national policies directly or indirectly related to disability issues;
2. identify the needs of persons with disabilities, their families and voluntary bodies working in the field of disability issues and take all necessary steps or propose appropriate measures in order to cater for those needs as much as possible;
3. ensure that all Government programmes concerning the affairs and interests of persons with disabilities, their families and voluntary bodies working in the field of disability issues are implemented in accordance with national policies for disability issues;
4. ensure the necessary co-ordination between all Government departments and agencies in implementing measures, services or initiatives proposed by Government or proposed by the commission from time to time;
5. keep direct and continuous contact with national and foreign bodies working in the field of disability issues, and with other groups, agencies or individuals as the need arises;
6. monitor the provision of services offered by Government or its agencies or by any other person or group of persons, where the clients of such services are persons with disability;
7. work towards the elimination of discrimination against people with disabilities;
8. carry out general investigations with a view to determining whether the provisions of the Act are being complied with;
9. investigate such complaints as may be made to it of failure to comply with any provision of this Act in an individual case and, where it seems appropriate, conciliate in relation to such complaints;
10. inquire into, and make determinations on, matters referred to it by the Minister;
11. provide, where and as appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act;
12. keep under review the functioning of the Act and, when deemed fit by the commission or so required by the Minister, draw up and submit to the Minister proposals for amendments to same;
13. examine and (when requested to do so by the Minister) propose enactments for the purpose of ascertaining whether these enactments or proposed enactments are or would be inconsistent with or contrary to the objectives of the Act, and to report to the Minister the results of any such examination;
14. provide all such services that may be necessary or required for the commission to attain its objectives;
15. collate, analyse and publish statistics related to the disability sector which, *inter alia*, indicate the national level achieved in inclusive policy;
16. have the power to take any appropriate action, including proportionate administrative measures and judicial action, to eliminate discrimination on the basis of disability as defined in this Act; and, for the purpose of pursuing any judicial action as described above, the commission shall in all cases be deemed to have the necessary judicial interest to pursue such action in its own name;
17. raise awareness and foster respect for the rights and dignity of persons with disabilities, and combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on gender and age, in all areas of life;
18. raise awareness about the capabilities and contributions of persons with disabilities;
19. provide an independent mechanism to promote, protect and monitor the implementation of the United Nations Convention on the Rights of Persons with Disability and any of its Optional Protocols as ratified by Malta; and
20. monitor guardianship orders.

On the basis of the Ombudsman Act, 1995,¹⁸⁹ should a person feel that he has been subjected to discriminatory treatment (particularly on the basis of racial or ethnic origin) at the hands of the Government of Malta, any statutory body or partnership in which the

¹⁸⁹ Act XXI of 1995. Chapter 385 of the Laws of Malta. See article 22.

Government or said body has effective control as well as at the hands of any local council and its committees, including officers and staff members, such person can also request the Ombudsman to investigate this matter in terms of the Ombudsman Act, 1995.¹⁹⁰

Article 13 (1) states:

‘It shall be the function of the Ombudsman to investigate any action taken by or on behalf of the Government, or other authority, body or person to whom this Act applies, being action taken in the exercise of their administrative functions.’

The complainant shall file his/her complaint before the Ombudsman who will then investigate the case and make his recommendations to the Government. Such recommendations are not binding.

Every year the Ombudsman’s Office publishes a book containing summaries of various cases brought before it and the decisions of the Ombudsman. The last book of Case Notes was issued contextually with the Annual Report for 2013. In the latter it was reported that, in 2013, the Ombudsman dealt with a total of 493 cases, of which 29 complaints dealt with ‘improper discrimination’. During the same period, 11 complaints regarding ‘improper discrimination’ were concluded and found to be justified.

e) Legal standing of the designated body/bodies

In Malta the designated body (or bodies) have legal standing to bring discrimination complaints (on behalf, or not, of identified victim(s)) or to intervene in legal cases concerning discrimination.

The commissioner may initiate investigations either on its own behalf or after having received a complaint from an alleged victim. In terms of Article 11 of the Equal Treatment of Persons Order, 2007, the commissioner for the promotion of equality may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of the Order. The commissioner may also initiate investigations on receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of the Order. Furthermore, if it appears to the commissioner that persons who wish to make a complaint require assistance to formulate that complaint, the commissioner is to take or order the taking of such reasonable steps as may be necessary to assist such persons in making the complaint. The commission may intervene in judicial proceedings on behalf of or in support of a complainant.

Article 16 of the Order provides that nothing in this Order or in any other law shall prevent any association, organisation or other legal entity with a legitimate interest in ensuring that the Order is complied with from engaging either on behalf of or in support of the complainant, with his or her approval, in any judicial or administrative procedure provided for the enforcement of obligations under the Order.

As with the NCPE, the NCPD has its own legal personality.

f) Quasi-judicial competences

In Malta the relevant bodies are not quasi-judicial institutions.

The NCPE is not a judicial body but, within its remit, it may assist persons in bringing forward actions before the competent judicial authorities.¹⁹¹

¹⁹⁰ 2012 saw statutory provision for and the appointment of three additional ombudsmen, all working within the Office of the Ombudsman, namely the Ombudsman for Health, the Ombudsman for Environment and Planning and the University Ombudsman.

¹⁹¹ As noted above, court cases have been instituted by both the NCPE and the NCPD.

Actions brought before the national courts are concluded with binding decisions from which appeals may be lodged within the parameters stipulated at law.

g) Registration by the body/bodies of complaints and decisions

Statistics for the complaints investigated are not published on a regular basis, but they are kept by the NCPE and fed into reports on particular aspects of equality and conveyed to the National Statistics Office as and when required. In its annual reports, the NCPE merely makes reference to the number of complaints received and splits them up by gender of the complainant and according to the grounds on which the complaints are based.¹⁹²

h) Roma and Travellers

In Malta, there are no Roma and Travellers.

¹⁹² In 2013 the NCPE received 53 new complaints, of which 31 fell outside the remit of the NCPE. The majority of complaints dealt with gender and sexual harassment. It is pertinent to note that the Complaints Standard Operating Procedure adopted by the NCPE was modified in November 2013 in order to allow the commissioner to consider requests for the lodging of complaints after the prescriptive one-year time frame, in cases where the complainant alleges that it was not possible to file the complaint within the prescribed period.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Publicity, awareness campaigns, social dialogue and training are carried out locally by NGOs in conjunction with Government departments or other organisations and entities, (some of which are statutorily regulated and others not) other NGOs or independently.

To further enhance the inclusion and participation of older persons in society at large, the Government launched the National Strategic Policy for Active Ageing in November 2013. This policy supports active ageing through the active participation of older persons in the labour market, their participation in society and independent living. This policy also puts forward policy recommendations to combat ageism and age discrimination, especially in employment. In effect, safeguarding equal opportunities irrespective of one's age empowers older workers to participate in paid employment. In 2013, a gradual increase in the participation of older workers in employment was evident, increasing to 36.8 % (in the 3rd quarter of 2013) from 35.4 % (in same quarter of 2012) for workers aged 55-64.

There are no Roma issues in Malta as there are no Roma.

In Malta, there are various non-governmental organisations which are involved in the promotion of awareness of social issues. NGOs in Malta are regulated by Act XXII of 2007, which is entitled the Voluntary Organisations Act. This Act was brought into force on 11 December 2007. The principal NGOs in Malta are ground-specific, and they work towards combating discrimination in specific areas only. NGOs act very subjectively and independently of each other, and it is therefore rather difficult to obtain objective information from them. There is no NGO which could be said to cover all grounds of discrimination.

One such organisation is the Malta Gay Rights Movement (MGRM), which represents the Maltese gay, lesbian, transgender and bisexual community. The MGRM continues to create awareness of its community's rights. Another NGO involved in helping and promoting awareness, in this case on the grounds of race and ethnic origin, is the Jesuit Refugee Service.¹⁹³

The NCPE should also be mentioned. As reported in the last published report¹⁹⁴ by the NCPE, various campaigns, media releases and training sessions have been held. Through educational campaigns, in particular from children's earliest years, there has been an increase in education about diversity and against prejudice and racism, while at the same time fighting bullying and hate crimes, including those related to sexual orientation, race and ethnicity. An Anti-Racism Theme Day was held, together with the Have Your Say campaign, which targeted the general public and was aimed at celebrating and promoting diversity and spreading the message on equality and non-discrimination, particularly with regard to race and ethnic origin.¹⁹⁵

Moreover, in 2013, the NCPE drafted specific actions to safeguard and promote equality on the grounds of race or ethnic origin and religion or belief in all spheres within society.

¹⁹³ The mandate of the Jesuit Refugee Service is to accompany, serve and defend the cause of forcibly displaced people. The JRS was set up in Malta in 1993 to support the first influx of asylum seekers to the island from crisis areas in the Mediterranean and Eastern Europe, mainly from Iraq and Bosnia. The situation is now very different, with asylum seekers and forcibly displaced people arriving mostly by boat from the African coast in thousands every year.

¹⁹⁴ Covering 2013 and published in 2014.

¹⁹⁵ This was provided through a roving booth, where citizens had the opportunity to expose discrimination and to share their views on the effects of discrimination and/or the benefits of equality.

According to the ENAR Shadow Report 2012-2013,¹⁹⁶ certain categories of migrants in Malta, especially those coming from sub-Saharan countries, continue to experience discrimination because of their race and ethnic origin. The same report also notes that there has been an increase in awareness of racial discrimination and that the legal framework that is in place to combat it has been strengthened in recent years.

For its part, the NCPD¹⁹⁷ carried out various campaigns and training and dialogue sessions in 2013. It is pertinent to note the roles of the Consultative Committee of Persons with Intellectual Disability and the Disabled Persons Advisory Committee,¹⁹⁸ and the several meetings that were held with other NGOs and social partners. Two major projects carried out by the NCPD were the Promoting Social Inclusion of Persons with Disability with Severely Challenging Behaviour¹⁹⁹ and Fuq Tlieta Toqgħod il-Borma: Participation, Inclusion, Accessibility. The first project mainly consists of training, and has been targeted at employees working with persons with disability with severely challenging behaviour.²⁰⁰ The second is a research project, which has focused on education, employment, discrimination, participation in political life and multiple discrimination (such as that against a person of a different colour, race, gender and religion with a disability).

The Malta Council for Economic and Social Development Act, 2001,²⁰¹ provides for the setting up of a Civil Society Committee (CSC) within the MCESD.²⁰² The CSC is made up of a core representation of civil society.²⁰³

Furthermore, one can mention the fact that there are various statutory bodies which, although they were not specifically created to promote social dialogue, contribute towards social dialogue by virtue of their composition. These bodies are composed of, *inter alia*, representatives of Government, employers and employees. They include:

- The National Employment Authority, created under the terms of the Employment and Training Services Act, 1990,²⁰⁴ which is composed of three independent persons, with two other persons appearing before the President of Malta to represent the interests of employers and two other persons appearing before the President of Malta to represent the interests of employees; and
- The Employment Relations Board, created in terms of the Employment and Industrial Relations Act, 2002.

¹⁹⁶ European Network Against Racism, 2014, ENAR Shadow Report 2012-2013. Based on data gathered by institutions, academics and NGOs in past years, as well as on a number of interviews conducted with migrants residing in Malta, the report focuses on the difficulties that African migrants face when trying to access the labour market and the inferior conditions and payment that they are often offered. To address some of these challenges, the NCPE drafted projects that will provide training on diversity management to employers to empower them to recognise and nurture diversity at the workplace.

¹⁹⁷ As reported in its latest report for 2012/2013

¹⁹⁸ This committee was founded after KNPD assumed the role of Independent Mechanism for the Convention of the Rights of Persons with Disability, particularly under Article 33.3 of this Convention. This article requires the Independent Mechanism to involve persons with disability and their representative entities (that is, disabled persons' groups) in employment in order to promote, protect and monitor the implementation of the Convention.

¹⁹⁹ A project co-financed by the European Social Fund, which KNPD is implementing together with *Agenzija Support* and the Ministry for Gozo.

²⁰⁰ This training was open to those in a managerial or supervisory position with at least three years' experience with persons with disability with severely challenging behaviour.

²⁰¹ Act XV of 2001. Chapter 431 of the Laws of Malta. The mission statement of the MCESD is that it is 'a Consultative and Advisory Body to the Government on issues relating to the sustainable economic and social development of Malta, whilst providing a forum for consultation and social dialogue between social partners and, where necessary, with Civil Society organisations.'

²⁰² The Chairperson or the Deputy Chairperson of the MCESD chairs the meetings of the CSC.

²⁰³ The CSC must include the chairpersons of the following organisations: the Local Councils Association, the National Youth Council, the National Council for the Elderly, the Consumers' Association, the National Commission Persons with Disability and the Commission for the Advancement of Women. On the recommendations of the CSC, the MCESD approved the inclusion of the following NGOs to sit on the CSC: the Federation of Professional Bodies, the National Council of Women, the Alliance of Pensioners' Organisations, a representative of the island of Gozo, and a representative of the Environmental Groups.

²⁰⁴ Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

It should be noted that Regulation 13 of Legal Notice 461 of 2004 provides that any provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings, or rules governing any registered organisation in terms of the Act, shall, on the entry into force of these regulations, be considered null and void.

Furthermore, Article 6 of the Constitution of Malta provides that the Constitution is the supreme law of Malta and that therefore if any other law is inconsistent with this Constitution, it shall prevail and the other law shall, to the extent of the inconsistency, be void. Legal practitioners do not share the same opinion on this matter. Whereas some believe that if the Courts declare that a law is contrary to the principle of equal treatment, such a law will not be abolished *ipso jure* but would have to be repealed by Parliament, others hold that, once the Constitutional Court has declared a law unconstitutional, it is inconceivable that a Maltese Court would apply or enforce such a law.

Furthermore, the second proviso to Article 27 of the Employment and Industrial Relations Act, 2002, provides that any distinction between classes of employment based on discriminatory treatment, other than in accordance with the provisions of the Act or any other law, shall not have effect. Refer also to section 6.5 of this report in this regard.

b) Rules contrary to the principle of equality

No, there do not appear to be any laws in force which go against the principle of equality.

9 COORDINATION AT NATIONAL LEVEL

With regard to the Employment and Industrial Relations Act, responsibility lies with the Minister for Education and Employment, with the Ministry for Family and Social Solidarity for the Equal Opportunities (People with a Disability) Act and with the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties for the Equality for Men and Women Act.

The National Commission for the Promotion of Equality (NCPE) contracted the Equality Research Consortium to develop, through research and consultation, a framework leading to a national action plan against racism and xenophobia (NAPARX) in Malta. The NAPARX, which was published in December 2010, has a number of strategic objectives, as well as specific initiatives to be achieved and implemented over a three-year period. It seeks to build upon the existing policy, legal and institutional framework, as well as the various initiatives that have been undertaken by a wide spectrum of stakeholders, ensuring that these are used to their full potential.

The Action Plan is strategic in nature, providing a roadmap towards the achievement of its aims and objectives. It should be seen as fluid and, as such, should be able to adapt to emerging trends and realities. It adopts a human rights-based approach - a strategic mainstreaming process intended to permeate all levels of national structures. The plan seeks to take into account the different forms of racism experienced by the various minorities, as well as the different levels of racism at both an individual and institutional/systemic level. This action plan addresses various minority groups including ethnic minorities and linguistic minorities as well as religious minorities. This action plan seeks to combat racism and xenophobia as well as promoting a more inclusive and intercultural society through a proactive framework. Whilst it addresses issues of investigation and redress, the priority is on creating an environment that does not accept the presence of racism and where discriminatory treatment is neither accepted nor tolerated. As such, the plan seeks to address the four Ps, namely: prevention, protection, prosecution and partnership. It may be noted, however, that the action plan does not seem to have been formally adopted by the national authorities, and serves as guidelines for the NCPE in carrying out its work.

On 24 February 2014, the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties in Malta launched a consultation process with the aim of strengthening human rights and equality legislation in Malta. The Government expressed its belief that both the current legislative and infrastructural frameworks required reinforcement so as to provide Malta with an adequate human rights and equality mechanism.

The intention is to gather feedback with a view to strengthening human rights and equality legislation, as well as strengthening the institutions that enforce this legislation so that these institutions are in conformity with both the United Nations' model of a national human rights institution (NHRI) laid out in the Paris Principles and the European Union's equality body requirements laid out in EU equality directives, namely the Racial Equality Directive, the Gender Goods and Services Directive and the Gender 'Recast' Directive. This initial scoping consultation was launched to collect input from the general public, civil society organisations, trade unions, business organisations, political parties, governmental institutions and other stakeholders able to offer a contribution. This phase of this consultation is now closed and the submissions received are currently being reviewed.

10 CURRENT BEST PRACTICES

As mentioned in the section above on accessibility of services, buildings and infrastructure,²⁰⁵ the NCPD continues to cooperate with the Malta Competition and Consumer Affairs Authority with the aim that the Access for All Guidelines relating to accessibility shall begin to be considered as national standards. As part of its enforcement procedures, the Malta Environment & Planning Authority is obliged to consult with NCPD in relation to applications for the development of buildings that are open to the public and are of major use. Furthermore, a collaborative operation group comprising NCPD, MEPA and the Parliamentary Secretariat for the Rights of People with a Disability and Active Ageing was set up to strengthen coordination with regard to vetting procedures carried out by NCPD on plans submitted to MEPA. Throughout 2013 a number of discussion meetings were held in this regard. Meetings between NCPD and the Malta Developers Association were also organised to ensure that the two entities work together closely for the benefit of persons with disability.

The Equality Mark Certification awarded by the NCPE continues to gain popularity among organisations that strive to strengthen gender equality in employment. More companies have been recognised for their commitment to secure a safe place of work. The success of the Equality Mark meant that there were 15 757 employees in 54 private companies and Government entities working under equality-certified conditions in 2013. More organisations are in the process of being awarded the Equality Mark.²⁰⁶

As mentioned in the section on Positive Action above, the Government intends to introduce measures to enforce the employment quota. Through this scheme, the Government seeks to ensure the implementation and enforcement of the 1967 law requiring companies employing 20 or more persons to employ persons with disabilities. The Minister announced that employers who refuse to abide by the law will be asked to pay a yearly compensation fee of EUR 2 400 up to EUR 10 000.

Similarly, special arrangements exist to assist persons with a disability to access employment in the public sector. Registered persons with a disability who do not satisfy all the eligibility requirements in calls for applications but who are essentially capable of carrying out the duties attached to a particular post/position are allowed to ask for special consideration when applying for posts/positions in the Public Service.²⁰⁷

The Business Promotion Act Regulations, 2000, which may also be considered as positive action taken, provide fiscal incentives to employers which create jobs, employ and train persons over 40 years of age. If such persons are registered as disabled persons, these incentives are further increased. There is no obligation for employers to take action to benefit from such incentives or otherwise.

²⁰⁵ Section 2 above.

²⁰⁶ Awarded to companies that truly foster equal treatment in their work policies and practices irrespective of the employees' gender or family responsibilities.

²⁰⁷ Equality Policy for the Public Service – July 2013.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

There are some instances under Maltese law where national provisions are more restrictive in scope than the provisions of the directives. Hence, in these instances, national legislation does not conform to the provisions of the directives.

The prohibition of instruction to discriminate under the Equal Treatment of Persons Order is more restrictive than under the provisions of the directive. In essence, the Order prohibits instructions to harassment but not (explicitly) instructions to discriminate. There are no provisions prohibiting instructions to discriminate on the grounds of racial/ethnic origin in the fields outside employment covered by Directive 2000/43.²⁰⁸

Likewise, the same Order provides a more restrictive reference under Article 2(3) when referring to the treatment being legitimate and the objective as a test for a genuine occupational requirement.²⁰⁹

The Equal Treatment in Employment Regulations appear to conform with Article 4(2) of Council Directive 2000/78, except for the fact that national regulations are more restrictive and provide for an ethos based on religion or religious belief, while the directive provides for an ethos based on religion or other belief. Accordingly, Maltese regulations do not regulate an ethos which is based on a belief which is not religious. Furthermore, it is noted that the national provision does not specifically refer to the qualification included in Article 4(2) of the directive, namely that this difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of EU law, and should not justify discrimination on another ground.²¹⁰

Furthermore, it is worth noting that the duty to provide reasonable accommodation only applies in the field of employment. The provisions of the Equal Opportunities (Persons with Disability) Act, 2000, apply to the employment of employees with a disability to the exclusion of job applicants. Similarly, in terms of the Equal Treatment in Employment Regulations, 2004, issued under the Employment and Industrial Relations Act, 'employers shall provide reasonable accommodation for persons with disabilities. In particular, employers shall take appropriate measures to enable a person with a disability to have access to, participate, or advance in employment, or to undergo training unless such measures would impose a disproportionate burden on the employer: provided that this burden is not disproportionate when it is sufficiently remedied by measures existing within the framework of the national disability policy.' What must be kept in mind here is that these measures refer to employees and do not cover 'job applicants', and hence are in breach of the directive.²¹¹

In addition, in terms of the Equality for Men and Women Act, any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex or another sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, is deemed discriminatory, unless the said provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex. It is relevant to point out here that, despite the extension of the definition of discrimination in 2012 to grounds other than gender, the justification test is limited to factors unrelated to sex. A similar exclusion is not found in the directives.²¹²

²⁰⁸ Section 2.5.

²⁰⁹ Section 4.1.

²¹⁰ Section 4.2.

²¹¹ Section 2.6.

²¹² Section 2.3.

11.2 Other issues of concern

There do not seem to be any main key issues of concern with regard to the implementation and practical application of the anti-discrimination directives at the national level, other than perhaps a low number of cases being brought forward. The absence of case law could, in the past, have been caused by a lack of awareness of one's rights. However, the state, through its departments and agencies as well as the various NGOs, has in the recent past created and held various campaigns, written, audio and visual, to disseminate information and to create more awareness among the general public, thus indirectly encouraging people to come forward with any complaints they may have.

12 LATEST DEVELOPMENTS

In December 2014 a consultation process was launched,²¹³ proposing the introduction of the Equality Act and a Human Rights and Equality Commission.

The Equality Act is proposed to supersede the current Maltese Equality for Men and Women Act, which no longer serves its purpose, as its distinctions in providing for different grounds have created an unwanted hierarchy of grounds. The new Equality Act is being proposed so as to present a less fragmented equality legal framework in Malta. The Act should contain a general provision against discrimination as well as positive equality duties and obligations. Additionally, a revised list of grounds of discrimination is to be included to ensure that all bases of discrimination are adequately included within one Act. Intersectional discrimination is also to be tackled with specific provisions within this proposed legislation. The provisions of this Act should cover all spheres of life, and shall include provisions that allow for NGOs to submit cases on behalf of victims and for the possibility of class action suits and the processing of cases of discrimination without the need to identify an individual victim. Finally, provisions allowing for dissuasive sanctions in cases of proven discrimination are also proposed. The ultimate aim of this proposed Equality Act is to have all the relevant provisions of the following EU directives included within one, comprehensive act of legislation: Directive 2000/43/EC, Directive 2000/78/EC, Directive 2004/113/EC and Directive 2006/54/EC.

The proposed legislative framework for the Human Rights and Equality Commission will address human rights issues and violations, monitor and advise on human rights priorities in Malta, focus on potential and occurring systematic violations of human rights and contribute to preventing such violations (based on the Paris Principles). The HREC should be made accessible through raising public awareness of its role and the services it provides, thus providing for accessible complaints procedures. The HREC is to undertake proper collaborations with different stakeholders in its quest to establish the highest human standards in Malta.²¹⁴ The HREC will be established by the proposed Human Rights and Equality Commission Act, and will be a legal successor to the present National Commission for the Promotion of Equality (NCPE). Furthermore, it will be vested with the ability to perform human rights and equality investigations when it deems these necessary. Finally, the complaints mechanism will be widened and will not rely fully on individual victims coming forward, as is presently the case within the NCPE. Therefore, the HREC will have the competence to research and analyse human rights issues, promote equal treatment, advise victims of discrimination, draw up annual reports on human rights progress and challenges, and collaborate with other existing institutions that safeguard specific rights, such as the National Commission Persons with Disability and the Commissioner for Children.

These two legislative proposals, once implemented, shall constitute landmark developments.

²¹³ The White Paper presented on 10 December 2014 by the Minister for Social Dialogue, Consumer Affairs and Civil Liberties, Helena Dalli, launched a consultation process, which will close on 10 February 2015.

²¹⁴ The HREC will, nevertheless, remain independent and thus shall manage its own budget, which is to be allocated independently from Government finances. The HREC will be directly responsible to Parliament, which will also be responsible for the approval of the members of the commission. The HREC should be vested with the ability to issue opinions, make legislative and policy proposals and also criticise the Government or any of its entities on human rights and equality matters.

12.1 Legislative amendments

An amendment to the Equality for Men and Women Act²¹⁵ changed the burden of proof requirement whereby it is not incumbent on the defendant to prove that there was no breach of equality.

Act No. X of 2014, adopted on 17 April 2014, introduced amendments to the Constitution of Malta so as to extend protection of the Fundamental Rights and Freedoms of individuals on the basis of sexual orientation and gender identity.²¹⁶

12.2 Case law

Name of the Court: Industrial Tribunal

Date of Decision: 13 November 2014

Name of the parties: Irene Desira and Inspire – the Eden and Razzett Foundation

Reference Number: 3033/CCG

Link:

<http://dier.gov.mt/en/Industrial%20Relations/Industrial%20Tribunal/Decisions/Pages/2014-Decisions.aspx>

Brief Summary: This case was initiated by an application to the Industrial Tribunal with allegations of unfair dismissal and discriminatory treatment. The claimant worked as a full-time receptionist with the defendant and her employment was terminated allegedly on redundancy. The claimant, however, alleges that this termination was unjust and illegal, as it was based on age discrimination.

The Chief Executive Officer of the defendant Foundation stated, on affidavit, that the claimant was let go because of the dire financial situation of the Foundation, and thus she was chosen to leave her employment because she had reached pensionable age. However, due to an alleged clerical error, the claimant was informed that the termination of her employment was based on redundancy, although this was not the intention of the defendant. Redundancy was also the reason mentioned for her termination in official governmental documents.

The representative of the defendant stated, in defence, that his client acted according to Maltese Law, particularly Article 36(14) of Chap 452 of the Laws of Malta, which specifies that the employer has the right to terminate an employee's contract once pensionable age is reached. This is an exception to the general provision that states that an employer cannot terminate employees' contracts without a valid reason. The claimant's representative, on the other hand, specified that his client's contract was officially terminated based on redundancy. Furthermore, the claimant was already within pensionable age when she started her employment with the Foundation, and therefore, in the claimant's opinion, this could not be a real reason for the termination of her work. The representative of the Employment Agency in Malta gave evidence that, officially, the claimant's contract was terminated on the basis of redundancy. Considering that the other employees with the same job description of the claimant were engaged after the claimant, officially, this situation would imply a breach of the legal employment principle of 'last in, first out'.

²¹⁵ Introduced by Act XVIII of 2014.

²¹⁶ The Act introduced 'sexual orientation' and 'gender identity' as grounds on the basis of which discrimination is prohibited in the public sphere. More particularly, this therefore means that acts of discrimination on these grounds are forbidden in any law or in the conduct of a public entity. Prior to this extension, protection against discrimination was limited to the 'race', 'place of origin', 'political opinions', 'colour', 'creed' or 'sex' of an individual. Moreover, the Act introduced the principle that any law imposing qualifications related to sexual orientation or gender identity shall be held to be discriminatory in relation to calls for services as a public officer or service for a local government authority or body corporate established for a public purpose.

In view of all of the above, the Tribunal decided that the claimant's employment termination was based on redundancy. Therefore, this was deemed to be an unfair dismissal, albeit not discriminatory. The Tribunal decided that the claimant was to receive compensation of EUR 1 000. The Tribunal explained that the official documents surrounding the termination gave the reason for it as being that of redundancy. This was also reflected in the initial termination notice that the claimant received. Following this, the defendant realised that redundancy could not legally be used as a basis for this termination, and they changed their reasoning and started using the claimant's pensionable age as a reason for the termination. The Tribunal pointed out that a dismissal based on the employee reaching pensionable age was not an illegal one, as determined in a prior Tribunal decision.²¹⁷ This is also reflected in various European Court cases where this type of dismissal is justified 'on the basis of legitimate aims'.²¹⁸

Name of the Court: Industrial Tribunal

Date of Decision: 3 March 2014

Name of the parties: Dr Anika Psaila Savona v. CHI Ltd (C 26080)

Reference Number: 2757/MF

Link:

<http://dier.gov.mt/en/Industrial%20Relations/Industrial%20Tribunal/Decisions/Pages/2014-Decisions.aspx>

Brief Summary: This case was initiated by way of an application referred to the Industrial Tribunal wherein the claimant alleged unfair dismissal and discriminatory treatment based on her pregnancy.

The claimant, in her testimony, accepted that she was engaged as a legal counsel on a consultancy contract that was, in her opinion, an employment contract in practice. She also declared that her contract was terminated primarily based on her pregnancy. The chief executive officer of the defendant company stated that the intention of the company was that of engaging the claimant on a consultancy agreement. He also specified that he never implied that the consultancy agreement would change into an employment contract at any time. Another representative of the company explained that they required a full-time legal counsel but that the claimant requested to work on reduced hours because of personal reasons. Therefore, since she had refused a full-time employment contract, the company decided to conclude a consultancy agreement with the claimant. The claimant later on declared that she had resigned.

The Tribunal explained that, during the hearing of the case, it became clear that the agreement between the two parties was that of a consultancy agreement. This signed contract included a clear provision which stated that nothing in the contract could be misconstrued as meaning that the contract was one of employment, even if some provisions were similar to that of an employment contract. Therefore, since the contractual relationship between the parties was not one of employment, the Tribunal did not have the competence to hear the case and the application was refused.

In the hearings of the case, the discriminatory element was not alluded to in detail and, therefore, it was not referred to in the decision of the Tribunal.

Name of the Court: Criminal Appeal

Date of Decision: 6 March 2014

Name of the parties: Police v. Rosanne and John David Galea

Reference Number: 152/2013

Link: <http://www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func=all>

²¹⁷ Christinus Harvey v. British High Commission Malta (16 July 2013) - Industrial Tribunal presided by Dr. Leslie Cuschieri.

²¹⁸ The Queen, on the application of the Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform (2009) C-388/07.

Brief Summary: A call for tenders was issued by the Department of Contracts requesting private operators in the field of information technology to submit a tender to provide tuition in this subject to around 60 students. The selection criteria established by the tender document specified that the premises had to be accessible to persons with disabilities.

The defendants, as directors of the company Future Focus Ltd, submitted their tender application, which included a declaration that the premises made available by the directors for tuition to students were accessible to persons with disabilities. However, on an inspection at the premises in question, it transpired that the facility was in fact not compliant with the declaration provided, as it was not accessible to persons with disabilities. Therefore, the police instituted criminal proceedings against the company, on the basis of Article 188 of the Maltese Criminal Code (Cap. 9 of the Laws of Malta), which provides that:

‘Whosoever, in order to gain any advantage or benefit for himself or others, shall, in any document intended for any public authority, knowingly make a false declaration or statement, or give false information, shall, on conviction, be liable to the punishment of imprisonment for a term not exceeding two years or to a fine (*multa*).’

The defendants argued that the premises were accessible to most people with disabilities, excluding wheelchair-bound people, and that the tender application failed to specify what standards and disabilities it referred to. Although they were found not guilty on first instance, the Criminal Appeal Court found them guilty of providing a false declaration and they were sentenced to a suspended sentence of two years.

Even if this case does not directly refer to discrimination, this judgment demonstrates that accessibility rights for disabled persons are protected and reinforced in Malta, ensuring that disabled people are included - especially in the realm of education - and protected against discrimination.

No trends or patterns are available relative to cases brought by Roma and Travellers as none was instituted, given that there are no Roma or Travellers in Malta.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Malta

Date: 1 January 2014 – 31 December 2014

Title of legislation (including amending legislation)	Title of the law: Employment and Industrial Relations Act Abbreviation: EIRA Date of adoption: 02.12.2002 Latest amendments: Legal Notice 426 of 2012 Entry into force: 27.12.2002 Web link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8918&l=1 Grounds covered: Marital Status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.
	Civil/administrative Law
	Material scope: Private employment (with reference to disciplined forces)
	Principal content: Protection against discrimination related to employment, prohibitions on victimisation and harassment, and protections of gender equality and work for equal value, creation of a specialised body/court (the Industrial Tribunal)
Title of legislation (including amending legislation)	Title of the law: Equal Treatment of Persons Order Abbreviation: Full Legal Name Applies Date of adoption: 03.04.2007 Latest amendments: Legal Notice 427 of 2007 Entry into force: 03.04.2007 Web link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11800&l=1 Grounds covered: Racial or Ethnic Origin
	Civil/administrative Law
	Material scope: social protection, social advantages, education, access to and supply of goods and services which are available to the public, including housing, access to any other services such as banking
	Principal content: prohibition of direct and indirect discrimination, and harassment
Title of legislation (including amending legislation)	Title of the law: Equal Opportunities (Persons with Disability) Act Abbreviation: Full Legal Name Applies Date of adoption: 10.02.2000 Latest amendments: Act XXIV of 2012 Entry into force: 01.10.2000 Web link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8879&l=1 Grounds covered: Disability
	Civil/administrative Law
	Material scope: employment, education, access to property, provision of goods, facilities or services, and accommodation
	Principal content: prohibition of discrimination based on disability in several spheres, positive discrimination provisions, creation of a specialised body (The National Commission Persons with Disability)
	Title of the law: Equality for Men and Women Act

Title of legislation (including amending legislation)	Abbreviation: Full Legal Name Applies Date of adoption: 09.12.2003 Latest amendments: Act No. XVIII of 2014 Entry into force: 09.12.2003 Web link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1 Grounds covered: sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, actual or potential pregnancy, or childbirth
	Civil/administrative Law
	Material scope: employment, banks and financial institutions, education and vocational guidance, sexual harassment
	Principal content: prohibition of direct and indirect discrimination, creation of a specialised body (National Commission for the Promotion of Equality for Men and Women)
Title of legislation (including amending legislation)	Title of the law: Equal Treatment in Employment Regulations Abbreviation: Full Legal Name Applies Date of adoption: 05.11.2004 Latest amendments: Legal Notice 274 of 2014 Entry into force: 05.11.2004 Web link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11229&l=1 Grounds covered: religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, gender reassignment (underwent or undergoing or intends to undergo)
	Civil/administrative Law
	Material scope: Private and Public Employment
	Principal content: Prohibition of direct and indirect discrimination
Title of legislation (including amending legislation)	Title of the law: Equal Treatment in Self-Employment and Occupation Order Abbreviation: Full Legal Name Applies Date of adoption: 03.04.2007 Latest amendments: Legal Notice 260 of 2012 Entry into force: 03.04.2007 Web link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11801&l=1 Grounds covered: religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, gender reassignment (underwent or undergoing or intends to undergo)
	Civil/administrative Law
	Material scope: Self-employment or occupation, and harassment
	Principal content: Prohibition of direct and indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Malta

Date: 1 January 2014 – 31 December 2014

Instrument	Date of signature (if not signed please indicate) Dd.mm. yyyy	Date of ratification (if not ratified please indicate) Dd.mm. yyyy	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals ? all the answers in this field are subject to the underneath footnote²¹⁹
European Convention on Human Rights (ECHR)	12.12.1966	23.01.1967	No	Yes	Yes
Protocol 12, ECHR	Not signed	Not ratified	No	No	No
Revised European Social Charter	27.07.2005	27.07.2005	No [Malta has not accepted all the provisions of the Revised Charter]	Ratified collective complaints protocol? No	Yes
International Covenant on Civil and Political Rights	Not signed	13.09.1990 (accession)	The Government of Malta interprets Article 20 consistently with the rights conferred by Article 19 and 21 of the Covenant but	Yes	Yes

²¹⁹ Dr. Andrew Azzopardi from the Maltese Ministry of Foreign Affairs, Legal Department confirms that, as a general rule, treaties, Conventions or international instruments signed and/or ratified by Malta may not be directly relied upon in domestic courts by individuals, unless they are transposed and/or adopted into Maltese Law. Generally, this transposition is very rarely done. An example is the transposition of the Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Istanbul Convention dated 1 August 2014) into the Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Ratification) Act (Chap 532 of the Laws of Malta) in 2014. However, as a matter of policy, Maltese law is also generally amended so as to reflect the provisions of any Convention or international instrument that Malta is intending to sign or ratify. Therefore, as a matter of policy, broadly, Maltese law is in line with all the Conventions or other international instruments that it chooses to sign or ratify. This means that individuals may rely, persuasively, on the international instrument in domestic courts and mention the relevant international instrument in domestic courts. However, the corresponding Maltese law relating to the provisions of that international instrument should also be directly relied on in domestic courts by individuals, primarily.

			<p>reserves the right not to introduce any legislation for the purposes of article 20.</p> <p>The Government of Malta reserves the right not to apply Article 22 to the extent that existing legislative measures may not be fully compatible with this article.</p>		
Framework Convention for the Protection of National Minorities	11.05.1995	10.02.1998	<p>The Government of Malta reserves the right not to be bound by the provisions of Article 15 insofar as these entail the right to vote or to stand for election either for the House of Representatives or for Local Councils.</p> <p>Furthermore, the Government of Malta declared that with regard to Article 24 and 25, Malta does not include national minorities in the sense of the Framework Convention. Its ratification</p>	No provision for individual petition	Yes

			of the Convention is deemed to be an act of solidarity in the view of the Convention.		
International Covenant on Economic, Social and Cultural Rights	22.10.1968	13.09.1990	Article 13 - The Government of Malta declares that it is in favour of upholding the principle affirmed in the words" and to ensure the religious and moral education of their children in conformity with their own convictions". However, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, which cases are very exceptional in Malta.	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	05.09.1968	27.05.1971	There are no reservations. However, there is a declaration that is not about equality	Yes. However: Malta declares that it recognizes the competence	Yes

			or non-discrimination.	<p>of the Committee to receive and consider communications from individuals subject to the jurisdiction of Malta who claim to be victims of a violation by Malta of any of the rights set forth in the Convention which results from situations or events occurring after the date of adoption of the present declaration, or from a decision relating to situations or events occurring after that date.</p> <p>The Government of Malta recognizes this competence on the understanding that the Committee on the Elimination of All Forms of Racial Discrimination shall not consider any communication without ascertaining</p>	
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				that the same matter is not being considered or has not already been considered by another international body of investigation or settlement.	
Convention on the Elimination of Discrimination Against Women		08.03.1991 (accession)	<p>Article 11 - The Government of Malta interprets paragraph 1 of article II, in the light of provisions of paragraph 2 of article 4, as not precluding prohibitions, restrictions, or conditions on the employment of women in certain areas, or the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of Malta.</p> <p>Article 13 - (i) The Government of</p>	No. Malta is not a signatory of the Optional Protocol to the Convention on the Elimination of Discrimination against Women	Yes

			<p>Malta reserves the right, notwithstanding anything in the Convention, to continue to apply its tax legislation which deems, in certain circumstances, the income of a married woman to be the income of her husband and taxable as such.</p> <p>(ii) The Government of Malta reserves the right to continue to apply its social security legislation which in certain circumstances makes certain benefits payable to the head of the household which is, by such legislation, presumed to be the husband.</p> <p>Articles 13, 15, 16 - While the Government of Malta is committed to remove, in as far as possible, all aspects of family and property law which may be considered as discriminatory</p>		
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			<p>to females, it reserves the right to continue to apply present legislation in that regard until such time as the law is reformed and during such transitory period until those laws are completely superseded.</p> <p>Article 16 - The Government of Malta does not consider itself bound by sub-paragraph (e) of paragraph (1) of article 16 in so far as the same may be interpreted as imposing an obligation on Malta to legalize abortion.</p>		
ILO Convention No. 111 on Discrimination		01.07.1968	No	No	Yes
Convention on the Rights of the Child	26.01.1990	2.09.1990 (entered into force)		No. Mechanisms not yet in force.	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	10.10.2012	Pursuant to Article 29 (a) (i) and (iii) of the Convention, while the Government of Malta is fully committed to ensure the effective and full participation of persons with	Yes	Yes

			<p>disabilities in political and public life, including the exercise of their right to vote by secret ballot in elections and referenda, and to stand for elections, Malta makes the following reservations:</p> <p>With regard to (a) (i): Malta reserves the right to continue to apply its current electoral legislation in so far as voting procedures, facilities and materials are concerned.</p> <p>With regard to (a) (iii): Malta reserves the right to continue to apply its current electoral legislation in so far as assistance in voting procedures is concerned.</p>		
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