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# Country report

## Non-discrimination

Malta

2018

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English, French and  
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**EUROPEAN COMMISSION**

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# **Country report**

# **Non-discrimination**

# **Malta**

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Reporting period 1 January 2017 – 31 December 2017

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## EXECUTIVE SUMMARY

### 1. Introduction

As at December 2016, the population of Malta was estimated to be 460 297, of which 231 663 were male and 228 634 were female. Of the total population, 54 321 were foreigners.<sup>1</sup> According to the Labour Force Survey, the number of employed persons in December 2017 was estimated at 200 636, of which 121 823 were male and 78 813 were female.<sup>2</sup>

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.

It is important to note that, in December 2014, a consultation process was launched<sup>3</sup> proposing the introduction of an Equality Act and legislation for 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.<sup>4</sup> 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. On 10 December 2015, International Human Rights Day, the MSDC presented drafts of the two aforementioned bills during a public seminar. These bills were open for the last round of public consultation prior to presentation to Parliament. The consultation process ended on 31 January 2016. The respective bills were presented in Parliament in 2017, but are still in the process of enactment.

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,<sup>5</sup> will focus on potential and current systematic violations of human rights, and will contribute to preventing such violations (based on the Paris Principles).<sup>6</sup> The NHREC 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).

In the area of freedom of movement, workers are afforded protection under the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations, which came into

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<sup>1</sup> NSO News Release, 12.02.2018, No. 022/2018.

<sup>2</sup> Labour Force Survey news release, 22.12.2017, No. 203/2017.

<sup>3</sup> 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 closed on 10 February 2015.

<sup>4</sup> The eventual Act should contain a general provision against discrimination as well as positive equality duties and obligations. In addition, 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 will 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.

<sup>5</sup> The NHREC will remain independent but directly responsible to Parliament. The NHREC 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.

<sup>6</sup> The NHREC should be accessible to the public and will provide for accessible complaints procedures. The NHREC is to have proper collaboration with different stakeholders, in its quest to establish the highest human rights standards in Malta.

force in 2016.<sup>7</sup> Workers and their families moving within the EU have full rights with respect to access to employment in Malta, as in other EU Member States, and are empowered to bring forward a complaint when they feel that obstacles exist to the exercise of their rights. It is pertinent to point out that nationals of non-EU states remain protected in terms of the general anti-discrimination law.

The Marriage Act and other Laws (Amendment) Act was enacted in 2017.<sup>8</sup> The purpose of this law was to make the institution of marriage available for all individuals.<sup>9</sup> The Act not only modified the Marriage Act, but also introduced changes to the Criminal Code, the Civil Code, the Code of Organisation and Civil Procedure, the Civil Unions Act and the Interpretation Act, as well as other subsidiary legislation such as the Public Registry (Inspection and Searches) Regulation. The Act introduced, *inter alia*, several changes to the terminology found in legislation so as to make it gender neutral. It is important to note that the amendments to the Civil Union Act provide that partners who contracted civil unions before the coming into force of the Act may convert their civil union into marriage within five years of the coming into force of the Act.

## 2. Main legislation

The principles of equality of treatment and non-discrimination were first introduced into the Maltese Constitution of 1964.<sup>10</sup> In 1987, the European Convention Act was enacted. Through this Act,<sup>11</sup> 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,<sup>12</sup> the Equal Opportunities (Persons with Disability) Act 2000,<sup>13</sup> the Equality for Men and Women Act 2003,<sup>14</sup> and Article 82A of the Criminal Code.<sup>15</sup> 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/EC.<sup>16</sup> The definition of 'discrimination' under the Equality for Men and Women Act has been extended to include not only discrimination based on sex or family responsibility but also sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, gender expression or sex characteristics in the fields of employment, education, vocational training, financial services and advertising.

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<sup>7</sup> Transposing Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014.

<sup>8</sup> Came into force in September 2017.

<sup>9</sup> The Act was passed by an almost unanimous vote, with only one Member of Parliament voting against its adoption.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> Act XXII of 2002, entitled the Employment and Industrial Relations Act.

<sup>13</sup> Act 1 of 2000.

<sup>14</sup> Act 1 of 2003.

<sup>15</sup> Chapter 9 of the Laws of Malta, which criminalises incitement to racial hatred.

<sup>16</sup> By virtue of Legal Notice 54 of 2007, the Equal Treatment in Employment Regulations were extended to employees in the public sector.



The Equal Treatment of Persons Order<sup>17</sup> 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.<sup>18</sup> 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.

### **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.<sup>19</sup>

Legal Notice 461 of 2004 provides protection from harassment in matters of employment on all the grounds mentioned in the directives.<sup>20</sup> Maltese law does not require that the effects of the harassment be cumulative.<sup>21</sup> In terms of Article 5 of the Equal Opportunities (Persons with Disability) Act, a person shall be deemed to discriminate against another if he or she subjects the latter to harassment.<sup>22</sup>

Article 3A(6) 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.<sup>23</sup> This provision goes further than that required by Article 11

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<sup>17</sup> Legal Notice 85 of 2007.

<sup>18</sup> 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, gender identity, gender expression or sex characteristics 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.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> The prohibition of harassment is also mentioned under the Public Service Management Code.

<sup>22</sup> 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.

<sup>23</sup> 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 or her employer or by persons acting in the employer's name and

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.<sup>24</sup> 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.<sup>25</sup>

In terms of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations 2016, victimisation is defined as less favourable treatment 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 regulatory body regarding alleged illegal or corrupt activities being committed by any person falling within the scope of these regulations or by persons acting in such person's name and interests. Moreover, Regulation 7 provides that victimisation shall constitute prohibited conduct under these regulations and shall be tantamount to discrimination under the Equality for Men and Women Act.

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.<sup>26</sup> 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.<sup>27</sup>

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interests, it is unlawful to victimise such person for having acted accordingly.

<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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

#### 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, gender expression or sex characteristics, 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 the grounds of race, colour, sex or creed or on the grounds of his or her 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,<sup>28</sup> the Equal Treatment of Persons Order 2007 has transposed those provisions of the directive. The alleged victim can also seek to protect his or her 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 may be followed 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 Commission for the Rights of 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

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reasonable accommodation for employees with disabilities.

<sup>28</sup> Namely social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing.

Constitution of Malta), and the Employment Commission (under the Constitution of Malta).<sup>29</sup>

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 Commission for the Rights of 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 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 or her 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.<sup>30</sup>

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.

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<sup>29</sup> With respect to the Employment Commission, the Constitution limits the remit to discrimination on the basis of political opinion.

<sup>30</sup> 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.

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)<sup>31</sup> 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, gender expression or sex characteristics in employment; banks and financial institutions, as well as education; (ii) racial / ethnic origin and gender in the provision of goods and services and their supply, and (iii) freedom of movement for workers in the EU—and these are the grounds which it deals with.<sup>32</sup> The remit of the Commission for the Rights of Persons with Disability is disability discrimination, and this organisation deals with all areas of disability.<sup>33</sup>

## **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.

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, gender identity or gender expression or sex characteristic, is deemed discriminatory, unless the said provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.<sup>34</sup>

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<sup>31</sup> 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")'.

<sup>32</sup> 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 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.

<sup>33</sup> The commission is now made up of a Commissioner and a Council for the Rights of Persons with Disability.

<sup>34</sup> It is relevant to point out here that, despite the extension of the definition of discrimination, the justification test is limited to factors unrelated to sex. A similar exclusion is not found in the directives.

## RÉSUMÉ

### 1. Introduction

En décembre 2016, la population maltaise était estimée à 460 297 habitants, dont 231 663 hommes et 228 634 femmes. Le pays comptait, dans l'ensemble de sa population, 54 321 ressortissants étrangers.<sup>35</sup> Selon l'enquête sur les forces de travail, le nombre de salariés s'établissait en décembre 2017 à 200 636 personnes, dont 121 823 hommes et 78 813 femmes.<sup>36</sup>

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.

Il est important de signaler qu'un processus de consultation a été lancé en décembre 2014<sup>37</sup> concernant une proposition visant à instaurer une loi sur l'égalité et une législation relative à 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 doter Malte d'un cadre juridique moins fragmenté en matière d'égalité, et à introduire des dispositions relatives à l'intersectionnalité.<sup>38</sup> 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 10 décembre 2015, Journée internationale des droits de l'homme, le ministère du Dialogue social, de la protection des consommateurs et des libertés civiles (MSDC) a présenté les deux projets de loi susmentionnés à l'occasion d'un séminaire public. Ils ont été ouverts à une dernière consultation publique avant d'être soumis au Parlement. Le processus de consultation s'est achevé le 31 janvier 2016. Les deux projets de loi ont été présentés au Parlement en 2017 mais sont encore en voie d'adoption.

Le cadre législatif proposé en ce qui concerne la Commission pour les droits de l'homme et l'égalité, 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 domaine,<sup>39</sup> 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).<sup>40</sup> La

<sup>35</sup> Communiqué de presse n° 022/2018 du 12 février 2018 de l'Office nationale statistique (NSO).

<sup>36</sup> Communiqué de presse n° 203/2017 du 22 décembre 2017 de l'Enquête sur les forces de travail.

<sup>37</sup> 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 s'est clôturé le 10 février 2015.

<sup>38</sup> 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 en outre 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.

<sup>39</sup> La Commission nationale pour les droits de l'homme et l'égalité (NHREC) 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.

<sup>40</sup> La Commission nationale pour les droits de l'homme et l'égalité (NHREC) devrait être accessible au public, y compris en ce qui concerne les procédures de recours. 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.

Commission nationale pour les droits de l'homme et l'égalité (NHREC) 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).

En ce qui concerne la liberté de circulation, les travailleurs bénéficient d'une protection au titre de la réglementation relative à l'exercice des droits conférés aux travailleurs (liberté de circulation) entrée en vigueur en 2016.<sup>41</sup> Les travailleurs et leurs familles qui se déplacent à l'intérieur de l'UE jouissent de la totalité des droits en matière d'accès à l'emploi à Malte, comme dans les autres États membres de l'Union, et sont habilités à introduire une plainte lorsqu'ils estiment que l'exercice de ces droits est entravé. Il est utile de préciser que les ressortissants de pays non membres de l'UE demeurent protégés en vertu de la législation générale anti-discrimination.

La loi modifiant la loi sur le mariage et d'autres lois a été votée en 2017<sup>42</sup> afin d'ouvrir l'institution du mariage à tous les couples<sup>43</sup>; elle comprend une série d'amendements qui modifient non seulement la loi sur le mariage mais également le code pénal, le code civil, le code d'organisation et de procédure civile, la loi sur les unions civiles et la loi d'interprétation, ainsi que d'autres actes législatifs subsidiaires tels que la réglementation relative au registre public (consultation et recherches). La loi introduit entre autres plusieurs changements au niveau de la terminologie figurant dans la législation de manière à la rendre neutre du point de vue du genre. Il est important de signaler que les amendements apportés à la loi sur les unions civiles prévoient que les partenaires ayant contracté une union civile avant l'entrée en vigueur de la loi votée en 2017 peuvent transformer cette union en mariage dans un délai de cinq ans à dater de ladite entrée en vigueur.

## 2. Législation principale

Les principes de l'égalité de traitement et de non-discrimination ont été initialement introduits dans la Constitution maltaise de 1964.<sup>44</sup> La loi sur la Convention européenne a été adoptée en 1987. En vertu de cette loi,<sup>45</sup> 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,<sup>46</sup> la loi de 2000 sur l'égalité des chances (personnes handicapées),<sup>47</sup> la loi de 2003 sur l'égalité entre les hommes et les femmes,<sup>48</sup> et l'article 82 bis du code pénal.<sup>49</sup> 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

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<sup>41</sup> Transposant la directive 2014/54/UE du Parlement européen et du Conseil du 16 avril 2014.

<sup>42</sup> Elle est entrée en vigueur en septembre 2017.

<sup>43</sup> La loi a été votée à la quasi-unanimité puisqu'un seul député a voté contre son adoption.

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> Loi XXII de 2002 sur l'emploi et les relations de travail.

<sup>47</sup> Loi 1 de 2000.

<sup>48</sup> Loi 1 de 2003.

<sup>49</sup> Chapitre 9 des lois de Malte, qui pénalise l'incitation à la haine raciale.

la notice juridique n° 53 de 2007 et concernant 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/CE.<sup>50</sup> 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, l'identité de genre, l'expression de genre et les caractéristiques sexuelles 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 individus<sup>51</sup> 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 ou ethnique.<sup>52</sup> 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).<sup>53</sup>

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.<sup>54</sup> Le droit maltais n'exige pas que les effets du harcèlement soient cumulatifs.<sup>55</sup> 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.<sup>56</sup>

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<sup>50</sup> 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.

<sup>51</sup> Notice juridique n° 85 de 2007.

<sup>52</sup> 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, l'identité de genre, l'expression de genre ou les caractéristiques sexuelles 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.

<sup>53</sup> 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.

<sup>54</sup> 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.

<sup>55</sup> L'interdiction de harcèlement est également mentionnée dans le Code régissant les conditions de travail dans la fonction publique.

<sup>56</sup> 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.



En vertu de l'article 3A, paragraphe 6, 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.<sup>57</sup> Cette disposition va au-delà des exigences imposées par l'article 11 de la directive 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.<sup>58</sup> 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.<sup>59</sup>

La réglementation 2016 relative à l'exercice des droits conférés aux travailleurs (liberté de circulation) définit la rétorsion comme un traitement moins favorable pour avoir déposé plainte auprès des autorités compétentes ou pour avoir engagé ou participé à des poursuites en vue d'obtenir réparation en alléguant une violation des dispositions de ladite réglementation, ou pour avoir divulgué des informations, confidentielles ou autres, à un organe régulateur public dûment désigné à cet effet à propos d'activités illégales ou frauduleuses qui seraient commises par une quelconque personne relevant du champ d'application de ladite réglementation ou par des personnes agissant en son nom ou dans son intérêt. La réglementation 7 dispose en outre que la rétorsion constitue un comportement interdit au titre de ladite réglementation et qu'elle est assimilée à une discrimination en vertu de la loi sur l'égalité entre les hommes et les femmes.

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

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<sup>57</sup> 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 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.

<sup>58</sup> 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.

<sup>59</sup> 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.

par la loi de 2003 sur l'égalité entre les hommes et les femmes.<sup>60</sup> 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 ledit article 2, paragraphe 3, lorsqu'elle 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.<sup>61</sup>

#### **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, l'expression de genre ou les caractéristiques sexuelles, 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

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<sup>60</sup> 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.

<sup>61</sup> 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.

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,<sup>62</sup> 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 possibles pour les 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 instances: le Tribunal du travail (en vertu de la loi de 2002 sur l'emploi et les relations de travail), la Commission pour les droits des personnes handicapées (en vertu de la loi sur l'égalité des chances (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).<sup>63</sup>

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 pour les droits des 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

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<sup>62</sup> 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.

<sup>63</sup> En ce qui concerne la Commission de l'emploi, la Constitution en limite la compétence à la discrimination fondée sur les opinions politiques.

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.<sup>64</sup>

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 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)<sup>65</sup> 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. Elle 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, l'identité de genre, l'expression de genre ou les caractéristiques sexuelles dans les domaines de l'emploi, des banques et institutions financières, et de l'enseignement; sur (ii) l'origine raciale/ethnique

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<sup>64</sup> 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.

<sup>65</sup> Bien que la Commission soit généralement désignée en tant que Commission nationale pour la promotion de l'égalité (y compris sur son site Web), l'article 11 du chapitre 456 des lois de Malte (en vertu duquel la Commission est instituée) dispose que «Le Premier ministre désigne, sur avis du ministre, une Commission qui sera appelée «Commission nationale pour la promotion de l'égalité entre hommes et femmes (ci-après «la Commission»)» [...].

et le genre dans le domaine de l'accès et la fourniture de biens et de services, et sur (iii) la liberté de circulation des travailleurs au sein de l'UE – et tels sont les motifs dont elle traite.<sup>66</sup> La Commission pour les droits des 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.<sup>67</sup>

## **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, une expression de genre ou des caractéristiques sexuelles 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.<sup>68</sup>

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<sup>66</sup> Le champ d'action de la Commission nationale pour la promotion de l'égalité devrait être étendu pour qu'elle devienne une Commission nationale pour les droits de l'homme et l'égalité (NHREC) 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.

<sup>67</sup> La commission comprend désormais un Commissaire et un Conseil pour les droits des personnes handicapées.

<sup>68</sup> Il convient de faire remarquer ici qu'en dépit de l'élargissement de la définition de la discrimination, le test de justification se limite à des facteurs non liés au sexe. Une telle exclusion ne figure pas dans les directives.

## ZUSAMMENFASSUNG

### 1. Einleitung

Im Dezember 2016 wurde die Einwohnerzahl Maltas auf 460 297 Personen, davon 231 663 Männer und 228 634 Frauen, geschätzt. Die Zahl der Ausländerinnen und Ausländer betrug 54 321.<sup>69</sup> Der Arbeitskräfteerhebung vom Dezember 2017 zufolge betrug die Zahl der Beschäftigten 200 636, davon 121 823 Männer und 78 813 Frauen.<sup>70</sup>

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.

Es sei darauf hingewiesen, dass im Dezember 2014 im Rahmen eines Konsultationsverfahrens<sup>71</sup> die Einführung eines Gleichbehandlungsgesetzes und gesetzlicher Regelungen für eine Kommission für Menschenrechte und Gleichstellung vorgeschlagen wurde. Das Gleichbehandlungsgesetz soll an die Stelle des jetzigen Gesetzes zur Gleichstellung von Männern und Frauen treten, das seinen Zweck nicht mehr erfüllt, weil seine Unterscheidung zwischen einzelnen Gründen eine ungewollte Hierarchie zwischen Diskriminierungsgründen geschaffen hat. Das neue Gleichbehandlungsgesetz soll einen weniger fragmentierten Rechtsrahmen für Gleichstellung in Malta schaffen und führt außerdem den Begriff der Intersektionalität ein.<sup>72</sup> Ziel des neuen Gleichbehandlungsgesetzes ist es, alle einschlägigen Bestimmungen der folgenden EU-Richtlinien in einem einzigen Gesetz zusammenzufassen: Richtlinie 2000/43/EG, Richtlinie 2000/78/EG, Richtlinie 2004/113/EG und Richtlinie 2006/54/EG. Am 10. Dezember 2015, dem Internationalen Tag der Menschenrechte, stellte das Ministerium für sozialen Dialog, Verbraucherfragen und bürgerliche Freiheiten während eines öffentlichen Seminars Entwürfe für die beiden oben genannten Gesetzesvorlagen vor. Die Vorlagen waren Gegenstand einer letzten Runde öffentlicher Konsultationen vor ihrer Einbringung im Parlament. Der Konsultationsprozess endete am 31. Januar 2016. Die entsprechenden Gesetzesvorschläge wurden 2017 im Parlament eingebracht, wurden jedoch noch nicht verabschiedet.

Der vorgeschlagene Rechtsrahmen für die Kommission für Menschenrechte (NHREC) und Gleichstellung, die Probleme bei und Verstöße gegen die Menschenrechte ansprechen und die Menschenrechtspolitik in Malta überwachen und verbessern soll<sup>73</sup>, konzentriert sich auf potenzielle und bestehende systematische Verletzungen der Menschenrechte und wird dazu beitragen, derartige Verletzungen zu verhindern (gemäß den Pariser Grundsätzen).<sup>74</sup> Die NHREC wird im Zuge des vorgeschlagenen Gesetzes über die Kommission für

<sup>69</sup> Nationales Statistikamt, Pressemitteilung Nr. 022/2018, 12.02.2018.

<sup>70</sup> Arbeitskräfteerhebung, Pressemitteilung Nr. 203/2017, 22.12.2017.

<sup>71</sup> Die Ministerin für sozialen Dialog, Verbraucherfragen und bürgerliche Freiheiten Helena Dalli hatte am 10. Dezember 2014 ein Weißbuch vorgelegt und ein öffentliches Konsultationsverfahren eingeleitet, das am 10. Februar 2015 endete.

<sup>72</sup> 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 NROs 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.

<sup>73</sup> Die NHREC bleibt unabhängig und ist direkt dem Parlament gegenüber rechenschaftspflichtig. Sie 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.

<sup>74</sup> Die NHREC 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.

Menschenrechte und Gleichstellung eingerichtet und ist Rechtsnachfolgerin der derzeitigen Nationalen Kommission zur Förderung der Gleichstellung (NCPE).

Was Freizügigkeit betrifft, so genießen Arbeitnehmerinnen und Arbeitnehmer Schutz im Rahmen der Verordnungen über die Ausübung der Rechte der Arbeitnehmer (*Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations*), die 2016 in Kraft getreten sind.<sup>75</sup> Arbeitnehmer und ihre Familienangehörige, die innerhalb der EU zu- oder abwandern, haben in Malta, wie in anderen EU-Mitgliedstaaten auch, uneingeschränkten Anspruch auf Zugang zur Beschäftigung sowie das Recht, Beschwerde einzureichen, wenn sie den Eindruck haben, dass Hindernisse existieren, die der Ausübung ihrer Rechte entgegenstehen. In diesem Zusammenhang sei darauf hingewiesen, dass Staatsangehörige von Nicht-EU-Staaten im Rahmen des allgemeinen Antidiskriminierungsgesetzes weiterhin geschützt sind.

Das Gesetz zur Änderung des Ehegesetzes und anderer Gesetze (*Marriage Act and other Laws (Amendment) Act*) wurde 2017 beschlossen.<sup>76</sup> Zweck dieses Gesetzes war es, die Institution der Ehe für alle Menschen zugänglich zu machen.<sup>77</sup> Mit dem Gesetz wurde nicht nur das Ehegesetz geändert, sondern auch das Strafgesetzbuch, das Zivilgesetzbuch, die Gerichtsverfassungs- und Zivilprozessordnung, das Gesetz über eingetragene Partnerschaften und das Auslegungsgesetz sowie weitere subsidiäre Rechtsvorschriften wie z. B. die Verordnung über das öffentliche Register (Einsicht und Abfragen). Das Gesetz nahm unter anderem diverse Änderungen an der Terminologie der Gesetzesvorschriften vor, um diese geschlechtsneutral zu gestalten. Die Änderungen des Gesetzes über eingetragene Partnerschaften sehen vor, dass Paare, die vor Inkrafttreten des Gesetzes eine eingetragene Lebenspartnerschaft abgeschlossen haben, diese innerhalb von fünf Jahren nach Inkrafttreten des Gesetzes in eine Ehe umwandeln können.

## 2. Wichtigste Rechtsvorschriften

Der Grundsatz der Gleichbehandlung und ein Diskriminierungsverbot wurden erstmals 1964 in die Verfassung Maltas aufgenommen.<sup>78</sup> 1987 wurde das Gesetz über die Europakonvention verabschiedet. Durch dieses Gesetz<sup>79</sup> 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,<sup>80</sup> das Gesetz über Chancengleichheit (Menschen mit Behinderung), 2000,<sup>81</sup> das Gesetz zur Gleichstellung von Männern und Frauen, 2003,<sup>82</sup> und Artikel 82a des Strafgesetzbuchs.<sup>83</sup> 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, „rassischer“ oder ethnischer Zugehörigkeit, Schwangerschaft oder Mutterschaftsurlaub und Geschlechtsumwandlung im Arbeitsleben. Letztere Rechtsvorschrift wurde durch die

<sup>75</sup> Zur Umsetzung der Richtlinie 2014/54/EU des Europäischen Parlaments und des Rats vom 16. April 2014.

<sup>76</sup> Das Gesetz trat im September 2017 in Kraft.

<sup>77</sup> Das Gesetz wurde fast einstimmig angenommen, lediglich ein Mitglied des Parlaments stimmte dagegen.

<sup>78</sup> Die Verfassung Maltas von 1964 schützt vor Diskriminierung aufgrund von rassischer Zugehörigkeit, Herkunftsland, politischer Überzeugung, Hautfarbe, Glaubensbekenntnis, Geschlecht, sexueller Ausrichtung und geschlechtlicher Identität und verbietet außerdem gesetzliche Bestimmungen, die entweder selbst diskriminierend sind oder sich diskriminierend auswirken.

<sup>79</sup> 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.

<sup>80</sup> Gesetz XXII von 2002, mit dem Titel Gesetz über Beschäftigungsverhältnisse.

<sup>81</sup> Gesetz 1 von 2000.

<sup>82</sup> Gesetz 1 von 2003.

<sup>83</sup> Kapitel 9 der Gesetze von Malta, das Anstachelung zum Rassenhass unter Strafe stellt.

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/EG.<sup>84</sup> Die Definition von „Diskriminierung“ im Gesetz zur Gleichstellung von Männern und Frauen wurde erweitert und umfasst neben den bisherigen Diskriminierungsgründen Geschlecht und familiäre Verpflichtungen nun auch die Gründe sexuelle Ausrichtung, Alter, Religion oder Weltanschauung, „rassische“ oder ethnische Zugehörigkeit, geschlechtliche Identität, Geschlechtsausdruck oder Geschlechtsmerkmale in den Bereichen Beschäftigung, allgemeine und berufliche Bildung, Finanzdienstleistungen und Werbung.

Die Gleichbehandlungsverordnung<sup>85</sup> 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 Diskriminierung aufgrund von „rassischer“ oder ethnischer Zugehörigkeit.<sup>86</sup> 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.<sup>87</sup>

Die Rechtsmitteilung 461 von 2004 schützt vor Belästigung im Arbeitsleben wegen allen in den Richtlinien genannten Diskriminierungsgründen.<sup>88</sup> Nach maltesischem Recht müssen die Auswirkungen der Belästigung nicht kumulativ sein.<sup>89</sup> Nach Artikel 5 des Gesetzes über Chancengleichheit (Menschen mit Behinderung) gilt es als Diskriminierung, wenn eine Person Belästigung ausgesetzt wird.<sup>90</sup>

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<sup>84</sup> Mit der rechtlichen Mitteilung 54 von 2007 wurden die Verordnungen über Gleichbehandlung im Beschäftigungsbereich auf Arbeitnehmer im öffentlichen Sektor ausgeweitet.

<sup>85</sup> Rechtsmitteilung 85 von 2007.

<sup>86</sup> Außerdem verbietet die Verordnung Diskriminierung aufgrund von rassischer 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 die 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 Weltanschauung, rassischer oder ethnischer Zugehörigkeit, geschlechtlicher Identität, Geschlechtsausdruck oder Geschlechtsmerkmalen in den Bereichen Beschäftigung, Banken und Finanzinstitute sowie Bildung und (ii) aufgrund von rassischer oder ethnischer Zugehörigkeit und Geschlecht bei der Bereitstellung von Gütern und Dienstleistungen zuständig ist.

<sup>87</sup> 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.

<sup>88</sup> 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.

<sup>89</sup> Ein Verbot von Belästigung ist auch in der Verwaltungsordnung für den öffentlichen Dienst enthalten.

<sup>90</sup> 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.



Nach Artikel 3A(6) 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.<sup>91</sup> Diese Bestimmung geht über die Anforderung von Artikel 11 der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung hinaus, weil sie sich nicht nur auf Verstöße gegen den Gleichbehandlungsgrundsatz, sondern auch auf jeglichen Verstoß gegen die Bestimmungen dieses Gesetz bezieht.

In entsprechender Weise enthalten Artikel 7 der Gleichbehandlungsverordnung in Bezug auf „rassische“ und ethnische Zugehörigkeit sowie Artikel 5 des Gesetzes über Chancengleichheit (Menschen mit Behinderung) in Bezug auf Behinderung ein Verbot von Viktimisierung und erfüllen damit die Anforderungen des EU-Rechts.<sup>92</sup> 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.<sup>93</sup>

Die Verordnungen von 2016 über die Ausübung der Rechte der Arbeitnehmer (Freizügigkeit) definieren Viktimisierung als eine weniger günstige Behandlung als Reaktion auf eine Beschwerde bei den zuständigen Behörden, auf die Einleitung eines Verfahrens bzw. die Beteiligung an einem Verfahren wegen mutmaßlichem Verstoß gegen die Bestimmungen dieser Verordnungen oder auf die Weitergabe an eine zuständige öffentliche Aufsichtsbehörde von vertraulichen oder sonstigen Informationen über mutmaßliche illegale oder korrupte Aktivitäten, die von einer Person begangen wurden, die in den Geltungsbereich dieser Verordnungen fällt, bzw. von Personen, die im Namen und Interesse einer solchen Person handeln. Darüber hinaus sieht die Verordnung 7 vor, dass Viktimisierung einen Verstoß im Sinne dieser Verordnungen darstellt und einer Diskriminierung im Sinne des Gesetzes zur Gleichstellung von Männern und Frauen gleichkommt.

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) aus dem Jahr 2000 und das Gesetz zur Gleichstellung von Männern und Frauen von 2003

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<sup>91</sup> 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.

<sup>92</sup> 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.

<sup>93</sup> 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.

enthalten jedoch kein entsprechendes Verbot.<sup>94</sup> 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 Absatz 3 der Gleichbehandlungsverordnung gilt eine weniger günstige Behandlung aufgrund einer auf „rassische“ 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 Absatz 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 von 2002 als auch das Gesetz zur Gleichstellung von Männern und Frauen von 2003 enthalten Bestimmungen zu wesentlichen beruflichen Anforderungen gemäß der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung.<sup>95</sup>

#### **4. Sachlicher Geltungsbereich**

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.

Die spezielleren Rechtsvorschriften enthalten Verbote von Diskriminierung in bestimmten Lebensbereichen (vor allem im Arbeitsleben) oder für bestimmte Gruppen (Diskriminierung aufgrund von Geschlecht, „rassischer“ oder ethnischer Zugehörigkeit, sexueller Ausrichtung, geschlechtlicher Identität, Geschlechtsausdruck oder Geschlechtsmerkmalen 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 rechtswidrig, Personen aufgrund von „rassischer“ Zugehörigkeit, Hautfarbe, Geschlecht,

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<sup>94</sup> 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.

<sup>95</sup> Das maltesische Recht schreibt außerdem in nachrangigen Rechtsvorschriften wie dem Gesetz über eine Arbeitsschutzbehörde von 2000 bzw. dem 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.

Glaubensbekenntnis oder aufgrund der Parteizugehörigkeit 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 „Rasse“<sup>96</sup> 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, bezieht sich die Umsetzung der Richtlinie also sowohl auf den öffentlichen als auch für den privaten Sektor.

## **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 von 2002), die Kommission für die Rechte von Menschen mit Behinderungen (nach dem Gesetz über Chancengleichheit (Menschen mit Behinderung)), die Nationale Kommission zur 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).<sup>97</sup>

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 Kommission für die Rechte von 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.

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<sup>96</sup> 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 Wohnraum.

<sup>97</sup> Die Beschäftigungskommission ist nach der Verfassung ausschließlich für Diskriminierung aufgrund der politischen Überzeugung zuständig.

Nach Artikel 11 der Gleichbehandlungsverordnung kann der Gleichbehandlungsbeauftragte 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 oder einer Arbeitnehmerin ungerechtfertigt gekündigt oder gegen eine der in Kapitel 1 des Gesetzes genannten Verpflichtungen verstoßen wurde, durch den betroffenen Arbeitnehmer oder die betroffene Arbeitnehmerin selbst oder durch eine in seinem bzw. ihrem 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.<sup>98</sup>

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 fanden Gespräche und/oder Konsultationen mit NROs und den Sozialpartnern statt. Diese werden fortgesetzt.

## 6. Gleichbehandlungsstellen

Die Nationale Kommission zur Förderung der Gleichstellung von Männern und Frauen (NCPE)<sup>99</sup> ist inzwischen auch die Stelle, die in Malta für die Förderung der Gleichstellung aller Personen ohne Diskriminierung aufgrund von „rassischer“ 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. In die Zuständigkeit der NCPE fällt Diskriminierung aufgrund von (i) Geschlecht und familiären Verpflichtungen, sexueller Ausrichtung, Alter, Religion oder Weltanschauung, „rassischer“ oder ethnischer Zugehörigkeit, geschlechtlicher Identität, Geschlechtsausdruck oder Geschlechtsmerkmalen in den Bereichen Beschäftigung, Banken und Finanzinstitute sowie Bildung, (ii) „rassischer“ bzw. ethnischer Zugehörigkeit und Geschlecht beim Zugang zu und der Versorgung mit Gütern und Dienstleistungen sowie (iii) Freizügigkeit der Arbeitnehmer innerhalb der EU – und das sind die Gründe, mit denen sie sich beschäftigt.<sup>100</sup> Die

<sup>98</sup> 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.

<sup>99</sup> Obwohl die Kommission in der Regel (sogar auf ihrer Webseite) als „Nationale Kommission zur Förderung der Gleichstellung“ bezeichnet wird, heißt es in Kapitel 456 Artikel 11 der *Laws of Malta* (nach denen die Kommission sich konstituiert): „Der Premierminister ernennt auf Anraten des Ministers eine Kommission, die die Bezeichnung ‚Nationale Kommission für die Förderung der Gleichstellung von Männern und Frauen‘ (im Folgenden ‚die Kommission‘) trägt“.

<sup>100</sup> Der Zuständigkeitsbereich der Nationalen Kommission zur Förderung der Gleichstellung (NCPE) soll erweitert und diese zu einer Kommission für Menschenrechte und Gleichstellung im Sinne einer Menschenrechts- und Gleichbehandlungsstelle (NHREC) entsprechend den europäischen Gleichbehandlungsrichtlinien werden. Damit wird die NCPE nicht nur ihre bisherigen Aufgaben weiter ausüben, sondern auch ihre Arbeit und Kompetenzen in den Bereichen Menschenrechte und Gleichstellung ausbauen und vertiefen können.

Kommission für die Rechte von Menschen mit Behinderungen ist für Diskriminierung aufgrund von Behinderung zuständig und befasst sich mit allen Aspekten von Behinderung.<sup>101</sup>

## **7. Zentrale 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 Absatz 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 Weltanschauung, „rassischer“ oder ethnischer Zugehörigkeit, geschlechtlicher Identität, Geschlechtsausdruck oder Geschlechtsmerkmalen 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.<sup>102</sup>

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<sup>101</sup> Die Kommission setzt sich nun aus einem/einer Beauftragten und einem Rat für die Rechte von Menschen mit Behinderungen zusammen.

<sup>102</sup> Hierbei ist zu beachten, dass die Definition von Diskriminierung zwar erweitert wurde, bei den sachlichen Gründen jedoch nur das Geschlecht ausdrücklich ausgeschlossen wird. Die Richtlinien enthalten diese Einschränkung nicht.

## **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'.<sup>103</sup>

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 has ratified various conventions such as the United Nations Convention on the Rights of Persons with Disabilities.<sup>104</sup> 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,<sup>105</sup> giving Maltese citizens the right to individually petition the European Court of Human Rights once domestic remedies have been exhausted.

### **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.

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<sup>103</sup> Malta, Article 115A of the Constitution of Malta.

<sup>104</sup> 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 UN 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.

<sup>105</sup> European Convention Act 1987 (Act XIV of 1987).

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) <sup>106</sup>	02.12.2002	27.12.2002	28.06.2016	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 <sup>107</sup>	10.02.2000	01.10.2000	10.05.2016	Disability	employment, education, provision of goods and services, access, accommodation
Equal Treatment in Employment Regulations <sup>108</sup>	05.11.2004	05.11.2004	12.08.2014	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 <sup>109</sup>	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
Equal Treatment in Self-Employment and	03.04.2007	03.04.2007	07.08.2012	religion or religious belief, disability, age, sex, sexual orientation, and	Self employment

<sup>106</sup> Malta, Act XXII of 2002.

<sup>107</sup> Malta, Act I of 2000.

<sup>108</sup> Malta, Legal Notice 461 of 2004.

<sup>109</sup> Malta, Legal Notice 524 of 2007.

Occupation Order <sup>110</sup>				racial or ethnic origin, pregnancy or maternity leave, gender reassignment	
Equal Treatment of Persons Order <sup>111</sup>	03.04.2007	03.04.2007	01.01.2007	Racial or ethnic origin	Social protection, social advantages, education, access to supply of goods and services
Equality for Men and Women Act <sup>112</sup>	09.12.2003	09.12.2003	14.04.2015	sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, actual or potential pregnancy, or childbirth	Employment, self-employment, education, provision of services

<sup>110</sup> Malta, Legal Notice 86 of 2007.

<sup>111</sup> Malta, Legal Notice 85 of 2007.

<sup>112</sup> Malta, 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 II of the Maltese Constitution<sup>113</sup> 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 Constitution<sup>114</sup> provides for those Fundamental Rights and Freedoms of the Individual in respect of which an aggrieved person may apply to the court<sup>115</sup> 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 and in the public interest.

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,<sup>116</sup> 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.'<sup>117</sup>

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.<sup>118</sup> The Maltese Constitution does not make specific mention of 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.

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<sup>113</sup> Articles 7 to 21 (inclusive).

<sup>114</sup> Articles 32 to 47 (inclusive).

<sup>115</sup> 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.

<sup>116</sup> 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.

<sup>117</sup> 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 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.

<sup>118</sup> Constitutional Court, *Dr Walter Cuschieri et v. The Hon. Prime Minister et noe*, 30 November 1977.

In terms of the European Convention Act 1987, 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.<sup>119</sup>

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

These provisions are directly applicable.

These provisions cannot be enforced against private actors (in addition to being enforced against the state).

## **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 of a trade union or of an employers' association, racial or ethnic origin, age and sexual orientation religion or religious belief, pregnancy or maternity leave or gender reassignment;<sup>120</sup>
- Equal Opportunities (Persons with Disability) Act 2000 - disability on the basis of physical, intellectual, sensory and/or mental impairment;
- Equality for 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;
- Gender Identity, Gender Expression and Sex Characteristics Act 2015 - general anti-discrimination and promotion of equality rules which provides for elimination of discrimination based on gender identity, gender expression and sex characteristics.

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<sup>119</sup> As held by the Constitutional Court in the case of *Victoria Cassar v. Malta Maritime Authority et* (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.

<sup>120</sup> 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'.

### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

The ground of disability is defined under the Equal Opportunities (Persons with Disability) Act 2000. This Act defines disability as 'a long-term 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.'<sup>121</sup> 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.' The latter definition further amplifies the former definition and is not seen to limit the former.

The Gender Identity, Gender Expression and Sex Characteristics Act 2015 provides for a definition of gender identity as each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms. The Act also defines 'gender expression' as each person's manifestation of their gender identity and/or that which is perceived by others. There is, however, no definition of sexual orientation, and neither does there appear to have been an interpretation given by the local courts.<sup>122</sup>

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 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,<sup>123</sup> 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.

In addition, Malta ratified *Protocol 12 of the European Convention on Human Rights* providing for a general prohibition of discrimination. The Protocol removes the current limitation in the application of Article 14 (non-discrimination) of the Convention and guarantees that no one shall be discriminated against on any ground by any public authority.

There is no definition of 'age' in Maltese law.

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<sup>121</sup> The definition was amended by virtue of Act II of 2012, a few months prior to Malta's ratification of the UN CRPD.

<sup>122</sup> December 2016 saw the implementation of the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act. This law is separate from the Gender Identity, Gender Expression and Sex Characteristics Act 2015. The purpose of the 2015 Act was to legislate on the recognition and registration of one's gender, in particular when there have been changes made thereto, as well as to recognise and protect the sex characteristics of a person. The purpose of the 2016 Act was to affirm that all persons have a sexual orientation, a gender identity and a gender expression, and that no particular combination of these three characteristics constitutes a disorder, disease, illness, deficiency, disability and/or shortcoming; and to prohibit conversion practices as a deceptive and harmful act as well as interventions against a person's sexual orientation, gender identity and/or gender expression.

<sup>123</sup> Act XIV of 1987.

In terms of the Equal Treatment of Persons Order of 2007, 'discrimination' is defined as 'direct or indirect discrimination based on racial or ethnic origin', but without a definition of 'racial and ethnic origin' being offered.

### **2.1.2 Multiple discrimination**

In Malta, prohibition of multiple discrimination is only included in the law as regards the ground of disability.

In the White Paper and the Bill on the proposed Equality Act, mention is made of the introduction of provisions on intersectionality.<sup>124</sup> Currently, there are no legal restrictions which prevent a person from claiming discrimination on one or more grounds under one or more laws. However, in terms of Article 3A of the Equal Opportunity (Persons with Disabilities) Act, there is an explicit prohibition of multiple discrimination against persons with disabilities, as the law provides that 'a person discriminates with another person in a multiple manner if apart from the disability there exists discrimination *inter alia* due to gender, age, civil status, sexual orientation, race, ethnicity, beliefs, skin colour, trade union affiliation or political belief.'

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 3A(6)(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. Indirect reference could be seen to be made under Article 6 of the Equal Opportunities (Persons with Disability) Act, which refers to disability discrimination due to being assisted or accompanied by an assistant. Similar indirect reference can be seen in Article 11 of the Equal Opportunities (Persons with Disability) Act 2000, which provides that it shall be unlawful for an educational authority or institution to discriminate against (a) an applicant for admission as a student on the grounds of his/her disability or a disability of any of his/her family members by refusing or not accepting his/her application for such admission, or in the terms or conditions on which such educational authority or institution is prepared to admit him/her as a student; and/or (b) a student on the grounds of his/her disability or disability of any of his/her family members by denying him/her access, or limiting his/her access, to any benefit provided by such educational authority or institution or expelling him/her from the educational institution s/he is attending.

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<sup>124</sup> The Equality Bill allows further protection from discrimination on the basis of two or more characteristics which are defined in the bill, referred to as intersectional discrimination. Thus, one would be able to make a claim for discrimination on the basis on two or more characteristics protected under the bill, thereby reinforcing the protection and sanctions found thereunder.

There have not 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*<sup>125</sup> case would have to be mirrored if a similar case were to be brought before the national courts.

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

### **a) Prohibition and definition of direct discrimination**

In Malta, direct discrimination is prohibited in national law.<sup>126</sup> 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, gender expression or sex characteristics 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, the law further amplifies the definition of discrimination to include 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 or gender expression or sex characteristics.

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 3A, 5 and 6.

Article 3A (3)-(6) deals with disability discrimination in terms of less favourable treatment:

'(3) A person would be discriminating with another person due to disability if such person deprives the other person from the protection and rights provided by law.

(4) There is discrimination when a person: (a) fails to provide full access to a person with disability for all those actions provided by law; or (b) fails to furnish information with regard to the rights of the other person by means of

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<sup>125</sup> Judgment of the Court (Grand Chamber) of 17 July 2008; *S. Coleman v. Attridge Law and Steve Law*.

<sup>126</sup> The Bill of the Equality Act defines indirect and direct discrimination. In the latter case, the definition includes situations of less favourable treatment on the basis of a person's association with another person who has one of the protected characteristics under the bill.

communication which the other person can understand; or (c) fails to offer help to the other person in procedures linked to an investigation, the giving of evidence and other similar procedures; or (d) knowingly limits or by any other act inhibits the enjoyment of any right acquired by the other person both *inter vivos* or *causa mortis*: Provided that the preceding paragraphs include in particular the behaviour listed therein, but without prejudice to the generality of the conduct referred to in this Act and in the Convention.

(5) A person would be discriminating with another person due to that person's disability if such refers to that other person or addresses him or her in a language which is disrespectful. This applies both to a person with disability in an individual or a collective manner, as well as to persons with a disability, both directly as well as by references on all means of communication, such as, but not limited to, broadcasting, publishing and correspondence.

(6) A person shall be discriminating with another person on the grounds of disability in any circumstances relevant for the purposes of any provision of this Act, if: (a) in circumstances which are similar or are 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 (b) 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. In practice this obliges all providers of assistive means, used by persons with a disability, to publicise the said provision. However, the law does not explain specifically the manner in which the goods, services and facilities are to be made public.

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.'

The Gender Identity, Gender Expression and Sex Characteristics Act does not define discrimination but under Article 13(2) provides that 'the public service has the duty to ensure that unlawful sexual orientation, gender identity, gender expression and sex characteristics discrimination and harassment are eliminated, whilst its services must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression and sex characteristics.'

The Public Service Management Code now provides that public officers shall not discriminate 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.

b) Justification of direct discrimination

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, gender expression or sex characteristics. 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

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 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/EC, and is therefore compatible with the provisions of the said directive.

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 with 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, gender expression or sex characteristics 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, gender expression or sex characteristic 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.

The same test which applies to Article 2(2)(b) of Council Directive 2000/78/EC, to determine whether there has been indirect discrimination or otherwise, applies to Regulation 3(2)(b) of the Equal Treatment in Employment Regulations.

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.

#### 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.<sup>127</sup> 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.<sup>128</sup>

However, this strict requirement is subject to the exception whereby employers may need to carry out processing in order to comply with their duties or the exercise of their rights under any law regulating conditions of employment.<sup>129</sup> 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 and in the light of the provisions of the General Data Protection Regulation.<sup>130</sup>

Furthermore, in terms of the Persons with Disability (Employment) Act,<sup>131</sup> which obliges employers to employ a certain quota of persons with a disability,<sup>132</sup> employers are required to keep a register containing the number and the names of the disabled persons employed by them, the number and the names of registered persons<sup>133</sup> employed by them and such other matters as shall be necessary to show compliance by the employer with the provisions of this Act.<sup>134</sup>

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,<sup>135</sup> 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

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<sup>127</sup> Malta, Data Protection Act 2001, Article 2.

<sup>128</sup> Article 12(2).

<sup>129</sup> Article 13(a).

<sup>130</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, entering into force on 25 May 2018.

<sup>131</sup> Malta, Persons with Disability (Employment) Act, *Laws of Malta*, Chapter 210.

<sup>132</sup> According to Legal Notice 157 of 1995, the quota is 2 %.

<sup>133</sup> Chapter 210 obliges Jobsplus to keep a register of persons with disabilities.

<sup>134</sup> Article 20(1).

<sup>135</sup> Article 2(4A).

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. National law is in line with the personal and material scope of the directives applying to all sectors and persons.

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/her obligation to suppress any form of harassment at their place of work or within their organisation.

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 fulfil 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 s/he subjects the latter to harassment.

The definition of harassment has now been amended to mean when a person is exposed to an act, request, or conduct which is not desired, including words, gestures or conduct, or the showing or dissemination by any means of written words, images and any other material which may be reasonably considered offensive, humiliating, hostile, degrading or intimidating with regard to that person.

The concept of harassment is also mentioned under the Public Service Management Code under Section 6.6.2. This section defines what is perceived as unethical behaviour. This is taken to include sexual harassment and victimisation resulting in disciplinary proceedings being taken against the public employee. Disciplinary proceedings in the public service are in turn regulated by the Public Service Commission Disciplinary Regulations 2017,<sup>136</sup> which amended the regulations previously in force. These regulations provide that an officer shall be subject to disciplinary proceedings for misconduct such as unethical or unprofessional behaviour. As specified in the schedule to the said regulations, such

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<sup>136</sup> Entry into force: 1 March 2017.

misconduct includes sexual harassment and victimisation of a witness or an officer or other person lodging a report or doing his duty under these regulations or any other regulations issued in terms of Article 121 of the Constitution.<sup>137</sup>

In Malta, harassment explicitly constitutes 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 prohibits harassment, and the Act 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 perpetrated by an 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 s/he proves that the offence was committed without his/her knowledge and that s/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 s/he proves that the offence was committed without his/her knowledge and that s/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 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.

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<sup>137</sup> Dealing with powers and procedures of commissions constituted under the Constitution.

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 s/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 harass 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/EC. This could be interpreted to be a provision which is not deemed to be fully compliant with the provisions of Directive 2000/78/EC, 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 Code<sup>138</sup> and Article 42 of the Criminal Code<sup>139</sup> 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.

It is pertinent to note that the definitions contained in the Civil Code, Criminal Code, Constitution and Equal Treatment of Persons Order do not exactly reflect the definitions under the directives.

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

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<sup>138</sup> Malta, Civil Code, *Laws of Malta*, Chapter 16. 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'.

<sup>139</sup> This deals with the offence of complicity.

of persons or was purporting to act in any such capacity, shall be deemed to be guilty of that offence unless s/he proves that the offence was committed without his/her knowledge and that s/he exercised all due diligence to prevent the commission of the offence.<sup>140</sup>

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 for people with disabilities in the area 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 'necessary 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'.

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; (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 alterations<sup>141</sup> for a person with a disability; and (c) quality and vocational career guide, which guide shall be free for the person with disability.'

In terms of Article 4A 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

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<sup>140</sup> 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 regulatory 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 shares such an interpretation, since this provision does not appear to prohibit a person from giving instructions to discriminate.

<sup>141</sup> Necessary and appropriate modifications and adjustments.

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 by the board<sup>142</sup> as to whether such actions could be undertaken without unjustifiable hardship. Amendments introduced in 2016 saw the constitution of a board which shall consider all requests for reasonable accommodation which would include all requests under employment laws and generally in rendering all buildings accessible to all. All building applications have to be considered by the board and there is no appeal from a decision taken by the board.<sup>143</sup>

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 in determining compliance with the reasonableness test:

- '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;

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<sup>142</sup> There shall be a board to determine what is reasonable, appointed by the commissioner for a period of three years. The board shall be composed of: (a) five persons to represent organisations, public entities and experts in the sector; (b) a technical consultant of the commissioner; and (c) a member of a committee of a voluntary organisation as defined under Article 2: The representatives of public entities and experts in the sector and the technical consultant of the commissioner may from time to time be appointed according to the nature of the case discussed by the board. At least half of the total number of members of the board shall be persons with disability or family members of persons with disability who cannot represent themselves: The number of persons with disability shall be higher than the number of family members of persons with disability who cannot represent themselves. The board shall be presided over by the Chairperson, who shall be a person with disability and who shall preside over every meeting of the board, aided by the Vice Chairperson, who shall be a person with disability.

<sup>143</sup> Throughout 2015-16, the board reviewed 49 cases, or 5 cases more than the previous year. Of these, 22 were deemed reasonable, while 26 were not accepted. There was also one case about which further information was requested. It is also worth mentioning that the number of cases presented to the board throughout this past year (49) shows a decrease of 18 cases from the yearly average for all 13 years (61). This reduction can be considered a positive one, since it seems that, with the passing of the years, developers and their architects are taking more care to ensure that the plans submitted to the authorities are compliant with the Access for All standards from the very start, thus providing adequate access to persons with disability as required by the Act.

- 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<sup>144</sup> 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 in areas other than employment for people with disabilities

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, health 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.

Implied reference to the provision of accommodation can be found in Articles 11 and 13. 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 for people with disabilities

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<sup>144</sup> 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.

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 provision, of not more than EUR 2 500 as the court may declare.

In terms of Article 4A of the Equal Treatment in Employment Regulations 2004, an employer is obliged to 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. 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 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,<sup>145</sup> make necessary alterations to such property or facilities so as to make such access possible.

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

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<sup>145</sup> Property is defined as 'all existing and new buildings and outdoor areas such as streets, pavements, public paths, beaches and gardens.'



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.<sup>146</sup>

In this regard, in February 2005 the Maltese Courts decided the case of *Commission for the Rights of Persons with Disability (NCPD) v. Michele Peresso Limited*,<sup>147</sup> in March 2010, the courts decided the case of *Commission for the Rights of Persons with Disability (NCPD) v. Banif Bank (Malta) plc*<sup>148</sup> and in November 2013 they decided the case instituted against the Health Department in relation to the Gzira Health Centre.<sup>149</sup> An appeal was, however, lodged in respect of the latter. The three cases dealt with the issue of accessibility to buildings open to the public. As reported in the 2015-16 Commission for the Rights of Persons with Disability (CRPD) report,<sup>150</sup> there are three 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. The other cases relate to access to the Gzira Health Centre and to the St Anthony's Band Club.<sup>151</sup> In 2014, 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.<sup>152</sup>

In terms of Article 13 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 services<sup>153</sup> 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

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<sup>146</sup> As part of its enforcement of this Act, the Malta Environmental and Planning Authority (MEPA) is obliged to consult with the Commission for the Rights of Persons with Disability (CRPD) in relation to applications for the development of buildings that are open to the public and are in major use. This consultation consists of two exercises: (a) MEPA hands the plans to the CRPD in order that its technical experts may examine and determine whether these conform to the Guidelines issued by the CRPD and published in the *Access for All – Design Guidelines* book; (b) MEPA requests that the developer obtain a certificate from the CRPD 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.

<sup>147</sup> Civil Court, First Hall, 25 February 2005, Writ of Summons no. 413/2001/1.

<sup>148</sup> Civil Court, First Hall, 1 March 2010.

<sup>149</sup> Civil Court, First Hall, 12 November 2013. *Kummissjoni Nazzjonali Persuni b'Dizabilita' v. Direttur Generali tas-Sahha* (Application No. 590/2005), First Hall, Civil Court, Judge Silvio Meli.

<sup>150</sup> <http://crpd.org.mt/wp-content/uploads/2017/11/EN-KNPD-annual-A5-EN.pdf>.

<sup>151</sup> This case started in 2003, when the band club was still not open to the public. Although the building had a lift shaft, a lift has never been installed and therefore different floors within the club are not accessible to all. The commission has made several attempts to keep in touch with the club and has sent technical officials including its architects on site no less than five times to verify the accessibility issue. However, the lift had not been installed by 2016. Thus in 2016 the commission opened a court case against the club. The court pronounced judgment in favour of the commission and ordered the band club to make the necessary changes within three months to render the club accessible to persons with disability. The club appealed against this sentence.

<sup>152</sup> 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, available at: [www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func=all](http://www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func=all).

<sup>153</sup> 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.

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.

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/her 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/her 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 specific 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, although there remains a need for easy-to-read documents for some people with disabilities.

Amendments to the Equal Opportunities (Persons with Disability) Act 2000 Act introduced the following definition: “communication” includes languages,<sup>154</sup> the showing of texts, communication by means of touch, Braille, large font, accessible multimedia as well as communication by means of writing, audio, easy readable format, human or multimedia readers or interpreters, accessible means and formats of communication and technological communication’. Under the provisions of disability discrimination, the Act now provides that there shall be discrimination when a person fails to furnish information with regard to the rights of the other person by means of communication which the other

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<sup>154</sup> ‘Language’ is now also defined as any verbal language by means of signs, which includes, but does not exclude, Maltese Sign Language and any other non-verbal languages.

person can understand. Furthermore, in terms of Article 3(13), which provides for the rights of persons<sup>155</sup> with disability, 'the person with disability shall have access to mobility and orientation training, to the Maltese Sign Language, and the use of technological equipment.'

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. In 2016 the Maltese Sign Language Recognition Act<sup>156</sup> was introduced recognising sign language as a national language. In terms of the said Act, Maltese Sign Language is declared to be an official language of Malta and the Government of Malta shall promote through all possible means the widest use of Maltese Sign Language in all government information and services, education, broadcasting, media, at the law courts, and in political, administrative, economic, social and cultural life. The Maltese Sign Language Council was set up to advise the Government on issues related to the enhancement and promotion of Maltese sign language amongst other aims. As is the case with the absence of Braille teachers, likewise there is a shortage of sign language interpreters in Malta.

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<sup>155</sup> These rights were introduced following Malta's adoption of the United Nations Convention on the Rights of Persons with Disabilities adopted by the General Assembly of the United Nations on 13 December 2006, and any Optional Protocol together with the Reservations as affirmed and ratified by Malta on 30 March 2007 and 9 November 2012 respectively.

<sup>156</sup> Act XVII of 2016

### **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 by 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/EC.

Similarly, the Equal Treatment of Persons Order 2007<sup>157</sup> 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 by 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 Natural and legal persons (Recital 16 Directive 2000/43)**

###### **a) Protection against discrimination**

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

###### **b) Liability for discrimination**

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

Article 4(d) of the Interpretation Act 1975<sup>158</sup> 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 or not granted legal personality.

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.

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<sup>157</sup> Article 2(4).

<sup>158</sup> Malta, Interpretation Act, *Laws of Malta*, Chapter 249.

### **3.1.3 Private and public sector including public bodies (Article 3(1))**

#### **a) Protection against discrimination**

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 Public Service Commission Disciplinary Regulations,<sup>159</sup> 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 Section 7 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.

#### **b) Liability for discrimination**

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.<sup>160</sup> Consequently, the prohibition of discrimination applies to employers, who should not subject their employees or prospective employees to any discriminatory treatment. Similar protection is afforded under the Equality for Men and Women Act.

With respect to employment in the public sector, this is also regulated by the Public Service Management Code.

### **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))**

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<sup>159</sup> Which regulate disciplinary proceedings involving public officers and termination from office.

<sup>160</sup> 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, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service.

In Malta, national legislation prohibits discrimination in the following areas: 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, for the five grounds, in both private and public sectors, as described in the directives.

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/her 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.

In the area of freedom of movement, workers are afforded protection under the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations.<sup>161</sup> The purpose of these regulations was the transposition of the relevant EU Directive, which is applicable to all EU citizens and their families. Workers and their families moving within the EU are thereby afforded full rights with respect to access to employment<sup>162</sup> in Malta, as in other EU Member States, and are empowered to bring forward a complaint when they feel that obstacles exist to the exercise of their rights. Third-country nationals working in Malta enjoy the same rights and are subject to the same obligations as workers of Maltese nationality. They therefore enjoy the protection against discrimination guaranteed by the above-mentioned regulations in the same way as workers of Maltese nationality.

By virtue of the provisions of Legal Notice 54 of 2007,<sup>163</sup> 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,<sup>164</sup> 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

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<sup>161</sup> Transposing Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014.

<sup>162</sup> As well as access to social and tax advantages, housing, training, education and conditions of employment.

<sup>163</sup> Malta, Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations.

<sup>164</sup> Malta, Act XXVIII of 1990, *Laws of Malta*, Chapter 343.

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

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, s/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 prohibits discrimination in the following areas: 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.

The conditions of employment for workers and their families who need to move for the purposes of work are protected under the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations. According to these regulations, their conditions of employment and work, in particular as regards remuneration, dismissal and health and safety at work, and for instances where workers become unemployed or are reinstated or reemployed, are protected. Workers and their families moving within the EU are empowered and given the tools to bring forward a complaint when they feel that obstacles exist in the exercise of their rights. Third-country nationals working in Malta enjoy the same rights and are subject to the same obligations as workers of Maltese nationality. They therefore enjoy the protection against discrimination guaranteed by the regulations in the same way as workers of Maltese nationality.

#### 3.2.3.1 Occupational pensions constituting part of pay

Occupational pensions are regulated by the Special Funds (Regulation) Act<sup>165</sup> which does not specifically prohibit discrimination with regard to the pensions it regulates. As of 2015, the Social Security Act,<sup>166</sup> in Article 108(1)(iv), provides that an appeal may be lodged in respect of any claim of discrimination on ground of sex made by any person concerning the determination of that person's eligibility and entitlement for any benefit, pension, allowance and assistance payable under this Act.

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 and now under the Social Security Act, it may be worth also considering affording specific protection under the Special Funds (Regulation) Act.<sup>167</sup>

#### **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 of a trade union or of an employers' association, in matters concerning vocational training and guidance.

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<sup>165</sup> Malta, Special Funds (Regulation) Act, *Laws of Malta*, Chapter 343.

<sup>166</sup> Malta, Social Security Act, *Laws of Malta*, Chapter 318.

<sup>167</sup> 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/EC, such person may invoke the protection granted under the Constitution, the European Convention Act and the Social Security Act; the latter has introduced horizontal protection.



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.

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/her disability or a disability of any of his/her family members by refusing or not accepting his/her application for such admission, or in the terms or conditions on which such educational authority or institution is prepared to admit him/her as a student; and/or (b) a student on the grounds of his/her disability or disability of any of his/her family members by denying him/her access or limiting his/her access to any benefit, facility or service provided by such educational authority or institution or expelling him/her from the educational institution s/he is attending.'

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. In terms of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations issued under the Equality for Men and Women Act, workers moving within the EU for the purposes of work are given full rights regarding access to training and access to education, apprenticeships and vocational training for the children of workers. Third-country nationals working in Malta enjoy the same rights and are subject to the same obligations as workers of Maltese nationality. They therefore enjoy the protection against discrimination guaranteed by the regulations in the same way as workers of Maltese nationality, including the right to training, as applies to all employees in Malta.

### **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 prohibits discrimination in the following areas: 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.

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.

In terms of Article 2 of the Employment and Industrial Relations Act 2002 'discriminatory treatment' is defined as 'any distinction, exclusion or restriction which is not justifiable in

a democratic society including discrimination made 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.'

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 in their 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 their interests.

More recently, with the enactment of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations 2016<sup>168</sup> issued under the Equality for Men and Women Act, the right of workers to freely become members of trade unions and their eligibility to join workers' representative bodies is once again afforded protection in the case of workers moving from one country to another and their families.

### **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/EC in relation to social protection.

The Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations 2016 allow workers who are EU citizens and who move within the EU to freely access the social and tax advantages available and grant them the right to bring forward a complaint when they feel their rights have been restricted. Workers who are not EU citizens are still afforded protection under the general laws detailed above.

#### **3.2.6.1 Article 3.3 exception (Directive 2000/78)**

Maltese legislation does not mention the exception in Article 3(3) of Directive 2000/78/EC 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/EC 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.

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<sup>168</sup> LN 173 of 2016.

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.

Migrants are not treated differently under anti-discrimination legislation, benefiting equally with nationals from anti-discrimination law enforcement and implementation in the field of education. Migrants attend various schools in Malta of their choice and are entitled to free education in public schools. In 2014, the Ministry of Education launched the policy document, 'National Strategy on Literacy for the period 2014-2019'.<sup>169</sup> The document acknowledges the need to support third-country nationals living in Malta and the necessity to review the education system with regard to the participation of migrant children in schools. In this context, the policy encompasses a list of recommendations, including on the provision of information about schooling options for migrant parents, an offer of small language support classes, the implementation of assessment procedures and training courses for teachers, and the active involvement of parents in literacy courses for adult migrants.

This National Strategy is yet to be implemented at national level regarding the integration of migrant children. Nevertheless, in practice, several initiatives to integrate migrant children are in place in Malta. The Migrant Learners Unit within the Ministry for Education is in charge of promoting the inclusion of newly arrived learners into the education system and runs several projects which aim to provide migrant learners in school with further support in basic and functional language learning over and above the teaching provided by the class teacher. Several projects have been implemented at local level in recent years in schools in Malta to help students integrate through the provision of targeted language classes for children.

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<sup>169</sup> Ministry of Education, Launch of the National Literacy Strategy, available at: <http://bit.ly/2kYx6mE>.

a) 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/her disability or a disability of any of his/her family members by refusing or not accepting his/her application for such admission, or in the terms or conditions on which such educational authority or institution is prepared to admit him/her as a student; and/or (b) a student on the grounds of his/her disability or disability of any of his/her family members by denying him/her access, or limiting his/her access, to any benefit provided by such educational authority or institution or expelling him/her from the educational institution s/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 access 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.<sup>170</sup> 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

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<sup>170</sup> A judicial protest was filed on 4 May 2015 by the National Commission Persons with Disability (NCPD) when it was informed of a case where a child with a disability was no longer able to attend school because of alleged lack of assistance offered by the school. The school in question filed a counter-protest denying all allegations of not providing the necessary support to the child. [www.independent.com.mt/articles/2015-06-02/local-news/KNPD-files-court-protest-against-St-Edward-s-College-over-lack-of-service-for-child-with-disability-6736136603](http://www.independent.com.mt/articles/2015-06-02/local-news/KNPD-files-court-protest-against-St-Edward-s-College-over-lack-of-service-for-child-with-disability-6736136603). Agreement was reached between both parties and the child was provided with the necessary support. In a complaint filed in 2016, the mother of a young person with severe disability contacted the commission as her daughter was not allowed to attend school unless the learning support assistant (LSA) or teachers who knew how to manage her challenging behaviour were present. The commission wrote to the school in question and it was agreed that a meeting with all parties concerned, including the child's parents, should take place. During this meeting a reasonable solution should be found so that the child will have the necessary tools and can continue her studies.

centres than from being in mainstream schools, for such time as may be appropriate depending on their needs.<sup>171</sup> 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 stated<sup>172</sup> that inclusive education provides the educational environment where disabled and non-disabled children learn together, where possible in 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.

Since the mid-1990s, Malta has been implementing the concept of inclusion. Although no specific statistics have been published on the matter, Malta 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, 2012). 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.<sup>173</sup>

Reference must be made to the principles enshrined in the National Policy for Persons with Disability<sup>174</sup> and to the document entitled *Education for all: Special needs and inclusive education in Malta – External audit report*, which was written in 2014 and published in February 2015.<sup>175</sup> 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.<sup>176</sup> Publication of the report was to be followed by a period of public consultation, the findings of which have not yet been made public.

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<sup>171</sup> A minor shall be deemed to have special educational needs when that minor has special difficulties of a physical, sensory, intellectual or psychological nature.

<sup>172</sup> 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.

<sup>173</sup> A new *Framework for the Education Strategy for Malta 2014–2024* (Ministry for Education and Employment, 2014) 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.

<sup>174</sup> Drawn up by the Parliamentary Secretariat for Rights of Persons with Disability and Active Ageing in collaboration with the Commission for the Rights of Persons With Disability and Kumitat Azzjoni Lejn Soċjetà Gusta.

<sup>175</sup> This report was prepared by the European Agency for Special Needs and Inclusive Education on behalf of the Ministry for Education and Employment, Malta.

<sup>176</sup> 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.

b) 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 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.

In terms of Article 13 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 services<sup>177</sup> or be discriminated against by any person or body providing such goods, facilities or services which the qualified person seeks to obtain or use.'

2016 saw the introduction of new provisions in the Equal Opportunities (Persons with Disability) Act 2000 which relate specifically to the provision of health services but not necessarily in the employment field. The law now provides that 'A person would be discriminating with another person due to a disability if that person is refused the giving of a health service of the same standard, conditions, even financial, of a range and quality like that given to other persons, including but not limited to that related to sexual and reproductive health.' Furthermore, 'A person with disability shall also have a right to the health services required by persons with disability specifically due to their disability, including: (a) the early identification and intervention as appropriate; (b) an assessment which reflects the actual needs and health conditions of the person with disability; and (c) rehabilitation and habilitation services designed to minimise and prevent further disabilities: so however that the state shall offer all help as the case may be.'

**3.2.9.1 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

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<sup>177</sup> The provision (whether on payment or not) of goods, facilities and services to the public or any sector of the public.

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/her 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.

In terms of Article 13 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 services or be discriminated against by any person or body providing such goods, facilities or services which the qualified person seeks to obtain or use.' Goods, facilities and services also include the provision of housing.

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.

In the National Commission for the Promotion of Equality (NCPE) report for 2012, reference is made to the conclusions reached in *I'm Not Racist, But...*, a project co-funded by 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 main form of accommodation provided to migrants consists of access to reception centres.<sup>178</sup> Two centres are dedicated to accomodating minors and women, and provide smaller categories of accommodation. Refugees are entitled to apply to the Maltese Housing Authority programme for alternative accommodation known as 'Government Units for Rent', provided they have been residing in Malta for 12 months and have limited income and assets. Refugees are also entitled to all of the schemes that the Housing Authority offers. A recent study carried out among the migrant community in Malta (asylum seekers and beneficiaries of international protection) evidenced that

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<sup>178</sup> Six are run by AWAS and two by NGOs.

housing remains an issue for this population group, as rental prices have increased greatly over the past few years—not for migrants, but generally—because the rental market is so large. Most of the people questioned for the survey cited housing costs as a burden. Moreover, problems such as shortage of space and lack of light are common, as the overall quality of the dwellings rented by the migrant population is usually poor and/or their size is not suited for the number of individuals living in them.<sup>179</sup> Cognisant of the difficulties faced by migrants in accessing housing, further impetus has been placed on improving the existing reception centres, given also that there is a lack of affordable housing even for local nationals on low incomes. Following the intervention of the European Commission, the state is further committed to introducing measures to improve public housing schemes and to eradicating discrimination that migrants may face in accessing housing.<sup>180</sup>

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.

#### 3.2.10.1 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.

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<sup>179</sup> Aduitus foundation and JRS Malta, 'Struggling to Survive: An investigation into the risk of poverty among asylum seekers in Malta', January 2017, available at: <http://bit.ly/2kVtuRz>.]]

<sup>180</sup> Communication between the Commissioner of Human Rights and the Minister for Home Affairs, February 2018



## **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.

Subparagraph (3) of Article 26 of the Employment and Industrial Relations Act 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)**

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/EC, 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. However, as it is a derogation regarding the prohibition of direct discrimination in the directive, the fact of narrowing the scope of the derogation does not seem contrary to the directive. 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 them 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 schools<sup>181</sup> 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.<sup>182</sup> 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/EC).

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.

#### **4.4 Nationality discrimination (Article 3(2))**

a) Discrimination on the ground of nationality

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<sup>181</sup> 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.

<sup>182</sup> 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.

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 by 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. The draft Equality Act proposes to prohibit discrimination in various spheres of life such as employment and seeks to promote equality. The bill aims to protect individuals from discrimination based on age; belief, creed or religion; disability; gender expression and gender identity; HIV status; maternity; pregnancy; family responsibilities; family or marital status; race, colour or ethnic origin;<sup>183</sup> sex or sex characteristics; and sexual orientation.

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.<sup>184</sup>

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

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<sup>183</sup> This includes 'colour, nationality, language, cultural background and ethnic and national origins'.

<sup>184</sup> In 2016-17 the NCPE carried out research on behalf of the People and Standards Division on cultural diversity within the Public Service. The resulting research paper is entitled *Cultural Diversity in the Maltese Public Service: Approaches to Diversity Management*. This research study seeks to understand existing human resource practices related to cultural diversity in the Maltese Public Service, as well as assessing the potential for implementing systematic diversity management. It provides a statistical overview of cultural diversity levels in the Public Service and compares them with those in the general Maltese workforce by using nationality as an indicator of cultural diversity. Through a qualitative research study conducted by the NCPE among managers in the Public Service, it analyses the management's views on cultural diversity and its impact on team dynamics, service delivery and policy development, and it discusses the Public Service's approaches to diversity in recruitment and management. The study also provides recommendations for the systematic implementation of diversity management in the Public Service.

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.<sup>185</sup> By virtue of the Marriage Act and other Laws (Amendment) Act,<sup>186</sup> the institution of marriage and the rights pertaining thereto became available to all couples, regardless of the sexual orientation of the spouses.<sup>187</sup> These changes ensure that every individual is seen as equal before the law vis-à-vis the contracting of marriage.<sup>188</sup> There are no worrying trends to report regarding employers discriminating against same-sex couples.

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/EC).

The Equal Opportunities (Persons with Disability) Act 2000, under Article 8(4), provides that, if a disabled person is employed, nothing shall preclude his/her employer from informing, if s/he deems necessary, first aid and safety personnel regarding any emergency treatment that might be required by such applicant because of his/her 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,

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<sup>185</sup> Malta, 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.

<sup>186</sup> Came into force on 1 September 2017.

<sup>187</sup> It is worth mentioning that a debate ensued when the law came before Parliament by virtue of the fact that it introduced other changes to other laws, in particular nomenclature changes to words such as mother, father, brother and sister. However, the law was still passed with the required majority in Parliament.

<sup>188</sup> It is important to note that the amendments to the Civil Union Act provide that partners who contracted civil unions before the coming into force of the Act may convert their civil union into marriage within five years of the coming into force of the Act. If they do not convert it, the union shall remain a civil union.

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 the ground of age.

##### **a) 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 of Legal Notice 461 of 2004 reflects the provisions of Article 6 of Directive 2000/78/EC and provides that, notwithstanding regulation 3(1) and (2),<sup>189</sup> 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.

##### **b) 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/EC. These are reflected in Regulation 5 of the Equal Treatment in Employment Regulations.

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/EC has been fully implemented.

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<sup>189</sup> These provisions deal with the concept of discriminatory treatment.

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

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. The Business Promotion Act Regulations 2000<sup>190</sup> 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.

There is a section of the female population who require support because they have caring responsibilities which prevent them from actively participating in the labour market. No special conditions or legislative incentives as yet exist for these people. However, it is recognised that the care infrastructure availability, accessibility and quality for children and other dependent persons need to be strengthened.

#### **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 age<sup>191</sup> may seek employment and/or be employed.

However, Article 48(3) of the Employment and Industrial Relations Act 2002 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,<sup>192</sup> 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 when it comes to accessing training opportunities. The Employment and Training Corporation, which is the public employment agency, provides various training schemes.<sup>193</sup> It also provides training courses specifically directed at registered unemployed persons over 40 years of age.

#### **4.7.4 Retirement**

- a) State pension age

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<sup>190</sup> Malta, Business Promotion Act Regulations 2000, Regulation 13.

<sup>191</sup> 16 years of age.

<sup>192</sup> Act XXIV of 1988. Chapter 327 of the Laws of Malta.

<sup>193</sup> By means of the Work Trial Scheme, Jobsplus encourages the employment of young people between the ages of 16 and 24 so that they may gain work experience and on-the-job training, of persons who have recently been declared redundant and of other persons trying to enter the job market.

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 and agreement is reached with the employer, the pension cannot be deferred. The individual can collect a pension and still work.

The Social Security Act 1987<sup>194</sup> provides under Article 2 that the 'pension age' applicable to both men and women in Malta is 65; but:

- in the case of a person born on or before 31 December 1951, the pension age shall be 61 years;
- in the case of a person born during the calendar years 1952 to 1955, the pension age shall be 62 years;
- in the case of a person born during the calendar years 1956 to 1958, the pension age shall be 63 years; and
- in the case of a person born during the calendar years 1959 to 1961, the 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.

b) Occupational pension schemes

In Malta, there is no fixed age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. If an individual wishes to work longer, payments from such occupational pension schemes can presumably be deferred. An individual can collect a pension and still work.

c) State-imposed mandatory retirement ages

In Malta, there is a state-imposed mandatory retirement age, but persons may choose to retire and stop working at any age. Where persons are employed, as opposed to being self-employed, agreement must be reached with the employer should the employee wish to stop working before reaching retirement age or to continue working after reaching retirement age.

National legislation provides for a pension age at which persons are entitled to receive a state pension. The pension age is 65, subject to the exceptions mentioned above (with respect to persons born between 1951 and 1961). Nonetheless agreement may be reached between the employer and employee for employment to continue and for an employee to continue working beyond pension age.

d) Retirement ages imposed by employers

In Malta, national law does not permit employers to set retirement ages which fall earlier than the pension age (or ages at which the termination of an employment contract is possible) unilaterally.<sup>195</sup> Employers can introduce retirement schemes, but employees must consent to them and cannot be forced to participate in the scheme.

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<sup>194</sup> Malta, Act X of 1987, *Laws of Malta*, Chapter 318, as subsequently amended from time to time, with a new definition of pensionable age introduced in 2006.

<sup>195</sup> 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

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. It is to be noted that it is standard practice that employees leave employment on reaching pension age.

e) Employment rights applicable to all workers irrespective of age

The laws on protection against dismissal do not apply to persons who remain in employment on attaining pensionable age, while other laws protecting employment rights do apply to all workers irrespective of age, if they remain in employment on reaching pensionable 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/her 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,<sup>196</sup> or on grounds of 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

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of their property rights. The judgment was confirmed by the Constitutional Court 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).

<sup>196</sup> 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.



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 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 provides for compensation to be granted 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/EC 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 permitted 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'.

### **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<sup>197</sup> provides for the compulsory engagement, on a quota basis, of disabled persons<sup>198</sup> registering for employment.

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 percentage<sup>199</sup> and may, in like manner, specify a special percentage, either greater or smaller than the standard percentage.

<sup>197</sup> Malta, Act II of 1969, *Laws of Malta*, Chapter 210.

<sup>198</sup> 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/her own account, of a kind which apart from that injury, disease, deformity or incapacity would be suited to his/her 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.

<sup>199</sup> 2 %.

(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.'

In 2015, Article 16 was extended to add enforcement provisions. Thus, an employer who fails to respect the quota referred to shall be asked by the corporation to make an annual contribution of EUR 2 400 for every person with disability who should be in his/her employment, up to a maximum of EUR 10 000 for any employer who fails to respect the quota. The contribution payable was staggered until 2017. However, as from 2017, the full amount of the contribution is payable.<sup>200</sup>

On 28 April 2016, a memorandum of understanding was signed between the Malta Employers Association, the Chamber of Commerce, Enterprise and Industry and the Employment and Training Corporation (now Jobsplus) on the employment of persons with disability in the private sector. The memorandum has resolved the difficulties that employers had been facing in implementing the law. One issue tackled in the memorandum is that, in the case of a group of companies, the different companies within the group would be able to share - not necessarily equally - the number of disabled people who had to be employed according to the law. The memo also enabled Jobsplus to inform employers if one of their employees was disabled, should the person concerned give consent.

In a report entitled 'Position Paper on Governments' Measures to Increase Employment of Disabled Persons',<sup>201</sup> it was stated that there were 1 300 registered disabled persons who were employed. In January 2018, it was stated that there were 288 disabled persons registered with Jobsplus as seeking work.<sup>202</sup> It is pertinent to point out that not all disabled persons register with Jobsplus and hence the figures cannot be deemed to be an

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<sup>200</sup> The contributions/fines paid by those employers who fail to satisfy the 2 % quota will be administered by Jobsplus and will be contributed to the Lino Spiteri Foundation. This Foundation, established on 25 May 2015, has been set up in order to improve the integration of vulnerable individuals into gainful employment through the empowerment of the individuals themselves, as well as the employers who recruit them. The Foundation wishes to reach and exceed a suitable and sustainable level of employment for persons with disability, mental health problems and vulnerable people, all of whom can contribute to the country's economy as well as civil society in general.

<sup>201</sup> Published in January 2015 by the Malta Employers Association.

<sup>202</sup> These figures have been decreasing since 2013, when the number stood at 526.

accurate reflection of reality.<sup>203</sup> In 2002 there were over 900 disabled persons working on a full-time basis, and 250 on a part-time basis.<sup>204</sup> Statistics resulting from a census in 2011 published by the NCPD 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.<sup>205</sup>

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.<sup>206</sup>

The Business Promotion Act Regulations 2000 provide fiscal incentives to employers who 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.

Further positive action taken in 2015 was through the enactment of Act No. VII of 2015. This Act seeks to integrate more persons with disability into the various entities present in the Maltese legal and governmental system by way of a provision in which at least one person with disability must be part of the major public entities/authorities (as specified below) governed by Maltese Law. The Various Laws (Persons with Disability) (Membership in Various Entities) Act<sup>207</sup> provides for the increase by one member within each board or entity to include a person with a disability. There is no publicly available information on the enforcement or otherwise of this regulation.

The Act affects the composition of the following entities, increasing their number by one and imposing that at least one member be a person with a disability or a person representing such persons as the case may be:

1. The Housing Authority (set up under the Housing Authority Act (Chapter 261, *Laws of Malta*));
2. The National Commission for Further and Higher Education (set up under the Education Act (Chapter 327, *Laws of Malta*));
3. Jobsplus (set up under the Employment and Training Services Act (Chapter 343, *Laws of Malta*));
4. The Broadcasting Authority (set up under the Broadcasting Act (Chapter 350, *Laws of Malta*));
5. The Refugee Appeals Board (set up under the Refugees Act (Chapter 420, *Laws of Malta*));
6. The Malta Statistics Authority (set up under the Malta Statistics Authority Act (Chapter 422, *Laws of Malta*));
7. The National Commission for the Promotion of Equality for Men and Women (set up under the Equality for Men and Women Act (Chapter 456, *Laws of Malta*));
8. The Commission on Domestic Violence (set up under the Domestic Violence Act (Chapter 481, *Laws of Malta*));

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<sup>203</sup> 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.

<sup>204</sup> The findings of a research report for the project 'Research on the Situation of Disabled Persons in Malta', concluded by the CRPD in 2014, showed that, of the 600 persons interviewed, 2 % were in part-time employment and 7.8 % in full-time employment.

<sup>205</sup> 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 local councils. The aim was to have 80 persons working for three years under this scheme.

<sup>206</sup> Equality Policy for the Public Service, July 2013.

<sup>207</sup> 10 March 2015.

9. The Council for the Voluntary Sector (set up under the Voluntary Organisations Act (Chapter 492, *Laws of Malta*));
10. The Authority for Transport in Malta (set up under the Authority for Transport in Malta Act (Chapter 499, *Laws of Malta*)).

The above entities are all public entities and therefore the Prime Minister of Malta, or the relevant Minister whose Ministry governs the specific entity, as applicable, is responsible for the implementation of these provisions. The entities must be constituted according to these provisions, including the above new requirements. Otherwise, such public entities will not be considered as legally constituted in accordance with Maltese law.

Several NGOs, such as the NCPE<sup>208</sup> and the CRPD, 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. Jobsplus 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.<sup>209</sup>

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<sup>208</sup> As mentioned in the NCPE annual report for 2016, one document reviewed by the NCPE was the proposal by Jobsplus to create *Job Brokerage Offices* for migrants who went through the asylum process with the aim of regularising short-term employment with working conditions that are in accordance with the law. The NCPE stated that the needs and realities of people who went through the asylum process should be acknowledged and addressed. However, this should happen through an extension and strengthening of the current services offered by the Government, and not through the creation of parallel systems. The NCPE insisted that the principles of fairness, transparency and accountability in recruitment should be ensured. In the financial budget for 2017, the Government declared its commitment to set up this scheme, and in January 2017 it was announced that a public tender would be issued, with the offices be set up by March 2017. It appears, however, that this scheme has not yet been launched.

<sup>209</sup> 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.

## **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 Commission for the Rights of 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:<sup>210</sup>

- The Industrial Tribunal,<sup>211</sup> Article 30 of the Employment and Industrial Relations Act states: '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.' 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 Commission for the Rights of Persons with Disability (CRPD) can initiate investigations on any matter involving an act which is allegedly in violation of the provisions of the law and may also do so on receipt of a complaint similar in nature.
- The National Commission for the Promotion of Equality investigates complaints received in respect of alleged acts of discrimination and assists any complainants in safeguarding their rights.<sup>212</sup>
- The Public Service Commission deals with and resolves complaints relating to disciplinary issues within the public service as well as those which relate to appointments and termination of employment within the same sector.

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<sup>210</sup> Insofar as the Employment Commission is concerned, the Constitution specifically limits its remit to discrimination based on political opinion.

<sup>211</sup> The establishment and constitution of which are set out under Article 73 of the Employment and Industrial Relations Act 2002.

<sup>212</sup> The remit of the NCPE is discrimination based on sex, sexual orientation, age, religion or belief, racial or ethnic origin or gender identity and free movement of persons.

- The Ombudsman receives and investigates complaints and resolves grievances which individuals allege to have suffered from government departments and public authorities.<sup>213</sup>
- The Broadcasting Authority receives and resolves complaints regarding impartiality in the provision of broadcasting services, in respect of matters of political or industrial controversy or relating to current public policy.
- The Employment Commission is there 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.

Mediation does exist under national legislation. 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 concerns questions of personal status including those relating to separation, divorce or annulment of a marriage between spouses, or in regard to things or rights 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 will commence but not when they will end. Furthermore, in certain 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.

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<sup>213</sup> Malta, Act XXI of 1995, *Laws of Malta*, Chapter 385.



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

### **a) Engaging 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.

These 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.

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.

### **b) Engaging in support of victims of discrimination**

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

Action may be taken in terms of Regulation 11 of the Equal Treatment in Employment Regulations and Article 16 of the Equal Treatment of Persons Order. These 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.

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.

One entity that is legislatively empowered to assist a complainant of alleged discriminatory treatment, both in and outside court, is the Commission for the Rights of Persons with Disability (CRPD). This commission is empowered to provide, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Equal Opportunities (Persons with Disability) Act.<sup>214</sup>

Furthermore, if it appears to the commissioner that a person wishes to lodge a complaint before the competent authorities 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 commissioner to take reasonable steps to provide appropriate assistance to that person.<sup>215</sup>

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,<sup>216</sup> 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 commence legal proceedings and refer the case to the Civil Court, First Hall.<sup>217</sup>

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. Assistance shall be provided as and when required by the victim. 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. In terms of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations 2016, nothing in the regulations shall prevent any associations or organisations, including social partners or other legal entities with a legitimate interest in

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<sup>214</sup> Article 22(k).

<sup>215</sup> Article 32(3).

<sup>216</sup> Entry into force: 1 October 2000.

<sup>217</sup> Regulation 5.

ensuring that the provisions of these regulations are complied with, from engaging, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure as is provided for the enforcement of the rights under these regulations within 24 months of the alleged breach—provided that the provisions of the regulations shall apply without prejudice to any other competences and collective rights of social partners and employees’ and employers’ representatives, where applicable, including the right to take action on behalf of a collective interest.

c) *Actio popularis*

In Malta, national law allows the equality body, the NCPE, to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*) on any matter involving any act or omission that is allegedly unlawful in terms of law before any tribunal or court.

As seen above, in terms of Article 11 of the Equal Treatment of Persons Order, investigations may be commenced by the NCPE,<sup>218</sup> 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*

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.<sup>219</sup>

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

In Malta, national law permits a partial shift of the burden of proof from the complainant to the respondent.<sup>220</sup>

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 introduced a shift in the principle of the burden of proof in cases of discrimination. Article 26(2)(a) of the Act 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.

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

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<sup>218</sup> As also reiterated under Article 4 of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations.

<sup>219</sup> The proposed Equality Act should provide specifically for NGOs bringing forward class actions.

<sup>220</sup> *Frederick Attard v. Malta International Airport plc.* (see Section 12.2. below). In its decision, the Industrial Tribunal had stated that the principle of ‘who alleges must prove’ subsists and therefore it is for the claimant to prove the discrimination. The claimant argued that this was not the case as Directive 2000/78/EC states clearly that the opposite is, in fact, the case and it is for the accused to prove that it did not commit such alleged discrimination. The Court of Appeal agreed with this interpretation but added that this subsists only once the person alleging the discrimination has established the facts which presume the discrimination in some way.

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/EC and 2000/78/EC further provide that it is up to the Member State whether or not to introduce rules of evidence which are more favourable to claimants.

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 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 regulatory body, regarding alleged illegal or corrupt activities being committed by his/her 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 Racial Equality 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 regulatory 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 regulatory 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.

In terms of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations 2016, victimisation is defined as less favourable treatment 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 regulatory body regarding alleged illegal or corrupt activities being committed by any person falling within the scope of these regulations or by persons acting in such person's name and interests. Moreover, Regulation 7 provides that victimisation shall constitute prohibited conduct under these regulations and shall be tantamount to discrimination under the Equality for Men and Women 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 Tribunal<sup>221</sup> 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.<sup>222</sup> Furthermore, Article 48(4) of the Act

<sup>221</sup> 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.

<sup>222</sup> It is to be noted that, in terms of Article 1045(1) of the Civil Code (*Laws of Malta*, Chapter 16), damage which is to be made good by the person responsible for causing such damage shall consist of the actual loss which the act will have directly caused to the injured party, the expenses which the latter may have been compelled to incur in consequence of the damage, the loss of actual wages or other earnings, and 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.

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 EUR 11 647 in respect of any contravention of, or failure to comply with, the provisions of such regulations.

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 terms of Article 50 of the Employment and Training Services Act, any person guilty of an offence against, *inter alia*, Article 15 of the Act<sup>223</sup> shall be liable, on conviction, to pay a fine of not less than EUR 1 164 but not exceeding 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 provision, up to a maximum of 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. 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 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.<sup>224</sup> 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.<sup>225</sup>

In terms of Regulation 5 of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations, a person who alleges that any other person has committed in his or her regard any unlawful act under these regulations shall, within 24 months of the alleged breach, have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful act and to order the payment of compensation for such damage suffered through such unlawful act.

#### b) Ceiling and amount of compensation

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<sup>223</sup> This provision deals with the engagement of employees by the Government and Government-owned or controlled bodies and companies.

<sup>224</sup> '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.'

<sup>225</sup> Article 26(1).

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 provision, up to a maximum of 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.

## **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 covers 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 National Commission for the Promotion of Equality (NCPE), constituted under Article 11 of the Equality for Men and Women Act.<sup>226</sup>

By virtue of Act IX of 2012 amending the Equality for Men and Women Act, the remit of the commission was extended to cover discrimination based on sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity. It was again extended in 2015 to include discrimination based on gender expression or sex characteristics. This was further extended in 2016 to the exercising of the rights of workers moving within the EU.<sup>227</sup> The scope of the National Commission for the Promotion of Equality is intended to be widened further so that it will become a National Human Rights and Equality Commission (NHREC),<sup>228</sup> acting as a national human rights institution as well as an equality body, in accordance with the provisions established by European directives on equal treatment. Hence, the NCPE will 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.

In addition, there are two other relevant bodies dealing with discriminations issues: the CRPD (for disability-related issues) and the Ombudsman (for action taken by public authorities). These bodies complement the work of the NCPE on non-discrimination and equality.

In terms of Article 21 of the Equal Opportunities (Persons with Disability) Act, there shall be a Commission for the Rights of Persons with Disability (CRPD, formerly the NCPD), which shall be composed of the Commissioner for the Rights of Persons with Disability and the Council for the Rights of Persons with Disability. The competencies of the commission are wide, and they clearly serve to combat any form of disability discrimination, in particular by raising awareness and fostering respect for the rights and dignity of persons with disabilities; by combating stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on gender and age, in all areas of life; by raising awareness about the capabilities and contributions of persons with disabilities; and by providing an independent mechanism to promote, protect and monitor the implementation of the United Nations Convention on the Rights of Persons with Disabilities and any of its Optional Protocols as ratified by Malta.

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<sup>226</sup> 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") ...'

<sup>227</sup> By virtue of Legal Notice 173 of 2016 entitled 'The exercise of rights conferred on Workers (Freedom of Movement) Regulations'. Persons who feel that they have encountered or are encountering obstacles to exercising their rights, or who have had or are having their right to free movement restricted without justification, shall have a right to file a complaint with the commissioner, even after the relationship in which the obstacle or restriction is alleged to have occurred has ended, and the commissioner shall initiate the proceedings prescribed in the Act or in any other applicable law or regulation.

<sup>228</sup> Legislation is pending parliamentary discussion and approval.



Similarly, on the basis of the Ombudsman Act 1995, should a person feel that s/he has been subjected to discriminatory treatment (particularly on the basis of racial or ethnic origin) at the hands of the Government of Malta or any statutory body or partnership in which the Government or said body has effective control, or at the hands of any local council or its committees, including officers and staff members, this person can ask the Ombudsman to investigate the matter in accordance with the Ombudsman Act 1995. The complainant shall file his/her complaint before the Ombudsman, who will then investigate the case and make recommendations to the Government. Such recommendations are not binding, however.

b) Political, economic and social context for the designated body

The designated body is supported by the Government and by other national institutions. There has not been any political hostility towards or interference in the governance of the designated body.

There is nothing to show that the Government has substantially varied the budget allocated to the designated body. This has remained stable in recent years.

Popular debate has always been supportive of equality and diversity and of the work of the designated body.

c) Institutional architecture

The National Commission for the Promotion of Equality is not, and does not form part of, a body with multiple mandates.

The National Commission for the Promotion of Equality works to ensure that Maltese society is a society free from any form of discrimination based on: (i) sex/gender and family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity, gender expression or sex characteristics in employment; banks and financial institutions, as well as education; (ii) racial / ethnic origin and gender in the provision of goods and services and their supply; and (iii) freedom of movement for workers in the EU. The commission therefore is mandated, and dedicates its resources to the equality/anti-discrimination mandate.

Given its mandate in the field of equality and non-discrimination, the commission has widespread visibility in the field. ]]

d) Status of the designated body/bodies – general independence

i) Status of the body

The National Commission for the Promotion of Equality (NCPE) is currently an autonomous body. It was officially set up and started operating in January 2004. The commission has a legal personality, separate from that of the Government, and its judicial representation rests 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 and one of the members must be a person with disability. 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 or her 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 s/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.

ii) Independence of the body

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.

Despite being dependant on Government funding, the NCPE is deemed to be independent and autonomous. To date, nothing has ever been published to infer that such independence is hampered or not recognised, or that the said entity lacks sufficient and adequate resources to effectively address all complaints which are brought before it. Likewise, it is evident from the reports detailing the work that the commission carries out each year that its work covers all areas of its remit. The NCPE not only deals with complaints which are brought before it, but carries out research, provides consultancy services and carries out investigations within its remit.

e) Grounds covered by the designated body/bodies

The remit of the NCPE relates to discrimination issues based on sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, gender expression or sex characteristics, actual or potential pregnancy or childbirth, and the freedom of movement of workers within the EU. The commission deals with migrant issues linked with discrimination based on racial or ethnic origin and deals with such issues on a par with any form of discrimination suffered or alleged by any persons in Malta. There is no publicly available information on how the employees within the commission manage their work internally, but it does not seem that there are different departments or service desks dealing with the different areas. Likewise, there is no evidence to show that the commission dedicates particular or greater attention to one or more areas.

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

i) Independent assistance to victims

In Malta, the designated body has the competence to provide independent assistance to victims in bringing forward and defending their claims.

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 competencies<sup>229</sup> of the commission include the following:

- 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.

The NCPE has published several publications and leaflets promoting equality and non-discrimination, 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 previous year.

- Independence  
It is felt that the competencies of the independent body are exercised in an independent manner.
- Effective  
It is felt that the competencies of the independent body are exercised in an effective manner.
- Required Resources  
It is felt that the competencies of the independent body are exercised with the required resources.

## ii) Independent surveys and reports

In Malta, the designated body has the competence to conduct independent surveys and publish independent reports. The designated body publishes regular reports with detailed information on its work, in particular in its annual reports, which set out in detail, amongst other things, the number of claims received, investigated and closed, including the relative statistics.

- Independence  
The information provided and the manner in which it is presented clearly demonstrate that the independent body acts in an independent manner.
- Effective  
It is felt that the independent body acts in an effective manner.
- Required Resources

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<sup>229</sup> Article 12 of the Equality of Men and Women Act and Article 10 of the Equal Treatment of Persons Order.

It is felt that the independent body has the required resources when carrying out surveys and drawing up reports. In cases where it requires additional expertise and resources, it teams up with other organisations.

iii) Independent recommendations

In Malta, the designated body has the competence to issue independent recommendations on discrimination issues. The body is seen as a watchdog and does express itself, even publicly through the media, on matters which fall within its remit.

- Independence  
It is felt that in so doing, the independent body acts in an independent manner.
- Effective  
It is felt that the independent body issues recommendations in an effective manner.
- Required Resources  
It is felt that the independent body has the required resources in order to issue recommendations as and when required.

iv) Other competences

The NCPE carries out awareness-raising and promotion campaigns to increase education, training and awareness of the rights of all. These fall within the competences of the body and, judging from the amount of work done each day, as highlighted in the NCPE's annual reports, this is done in an effective and independent manner.

v) Positive duties

The NCPE promotes its competencies in the various activities which it organises and participates in, and in the various publications which it issues. Currently there is no general provision in non-discrimination law which imposes positive duties on the authorities. It is to be noted, however, that such duties are provided for under the provisions of the Equality Act (which has not yet come into force), in particular under Articles 19 and 20, which deal with the public administration and its equality duty.

vi) Further competences/activities

The designated body publishes annual reports which detail its activities in relation to the exercise of its mandate. The competencies exercised fall within its designated mandate.

g) Legal standing of the designated body/bodies

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

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.

Following collection of all possible evidence upon receipt of a complaint, the NCPE Commissioner issues an opinion outlining whether it is of the opinion that there was a breach of the Equality for Men and Women Act. The opinion is then sent to the complainant and to the respondent. The commissioner will submit opinions to the Commissioner of Police in cases of criminal offence. It may also refer the case to the Industrial Tribunal or a civil court, as well as offering mediation between the parties. The commission may furthermore intervene in judicial proceedings on behalf of or in support of a complainant. Therefore the commission receives complaints and also commences ex officio investigations on a regular basis, as detailed in its annual reports and other publications.<sup>230</sup>

#### h) Quasi-judicial competences

In Malta, the relevant body is not a quasi-judicial institution.

The NCPE is not a judicial body but, within its remit, it may assist persons in bringing forward actions before the competent judicial authorities, including by assisting with investigations and making recommendations. Actions brought before the national courts are concluded with binding decisions from which appeals may be lodged within the parameters stipulated at law.

#### i) 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.

#### j) Planning

The designated body plans its work and publishes an annual report in which it describes in detail the work carried out in the previous year and sets out its future plan. The annual report is not debated in Parliament, although it is discussed within the Ministry for Social Dialogue, Consumer Rights and Civil Liberties. There is no publicly available evaluation of the NCPE's strategy. The NCPE operates in full transparency in publishing information about its work—past, present and future.

#### h) Roma and Travellers

There are no Roma or Travellers in Malta.

#### k) Stakeholder engagement

The NCPE organises a number of conferences to raise awareness among its target audiences on equality-related issues, as well as to discuss its ongoing work. It holds an annual conference to outline its work in the preceding year and to share this information with the various stakeholders. The NCPE's Commissioner and staff members have participated in various local and EU/international meetings and conferences. These meetings and conferences are organised by various stakeholders, NGOs, government institutions and private sector bodies. The role of the NCPE at such meetings is to continuously work on strengthening and making more visible the equality agenda,

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<sup>230</sup> In 2016, the NCPE received 38 new complaints, of which 29 were lodged by one individual and did not fall within the remit of the NCPE. Of the new complaints, four dealt with gender/sexual harassment, two dealt with race/ethnic origin, one was on gender identity/gender expression/sex characteristics, one concerned age and one was on religion/belief.

highlighting recent and available data, policies and laws relevant to the subject under discussion. The NCPE is also a member of various committees and boards, and participates in their respective events. From the various activities the NCPE organises and participates in, it is clear that the level of engagement with stakeholders is continuous and effective.

l) Accessibility

The designated body has accessible and publicly visible offices in Malta. The designated body conducts outreach actions to local areas and communities. The designated body has procedures in place to identify and respond to the access needs of specific complainants (e.g. people with disabilities, people with caring responsibilities, people speaking different languages, people with literacy issues etc).

The designated body responds to and accommodates these access needs, in that it receives and acts upon all claims on the possible lack of access to buildings, whether proposed or existing, and it has procedures in place to deal with such requests. The commission's building is accessible to all those who seek to contact the NCPE for assistance.

m) Roma and Travellers

There are no Roma or Travellers in Malta.

## **8 IMPLEMENTATION ISSUES**

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

- a) Measures have been taken to disseminate information about legal protection against discrimination in terms of Article 10 Directive 2000/43 and Article 12 Directive 2000/78
- In 2016,<sup>231</sup> the NCPE continued to offer and deliver training on diversity, equality and non-discrimination to a wide range of participants, including students, employers, employees in the private sector, public officers and asylum seekers. In 2016, the NCPE gave 48 training sessions involving over 1 100 participants. The topics covered by the NCPE in its training sessions were:  
An overview of Maltese equality legislation, detailing the scope and substance of the Equality for Men and Women Act and its subsidiary legislation. The different spheres of life and grounds of discrimination covered by Maltese law were outlined, and the procedure for lodging complaints with the NCPE was explained.
  - Understanding the different social identities within the NCPE's remit, including a discussion on the social climate regarding the different groups and the specific needs and barriers that certain social groups might experience.
  - Preventing and addressing sexual harassment at the workplace and in the provision of goods/ services. A definition of sexual harassment was given and the importance of having workplaces that strive to prevent and address sexual harassment was highlighted. Participants were also informed of possible ways to deal with cases of sexual harassment.
  - The concept of stereotypes and how they are to be avoided. A definition of the word 'stereotype' was presented, and examples of stereotypes encountered in everyday life were discussed.
  - Adopting a diversity management approach that promotes the recruitment, retention and active participation of a diverse workforce with the goal of achieving equality, while at the same time improving organisational efficiency, effectiveness and performance in the workplace.

A number of training sessions were delivered to children in primary and secondary schools in 2016. These covered themes such as stereotypes, sexual harassment and the value of diversity. Students following childcare courses and studying health and social care, as well as newly recruited nurses and midwives at the Mater Dei Hospital, were also trained on equality and non-discrimination. Training sessions for these groups focused on the dimensions that are of most relevance to their work, such as being sensitive to equality and diversity when delivering a service to members of the public.

In 2016, the NCPE was invited by the Agency for the Welfare of Asylum Seekers (AWAS) to provide equality training to all asylum seekers residing in state-run open centres. Eight two-hour sessions were delivered in April and May, in which approximately 150 asylum seekers from different nationalities participated. The rights and obligations emanating from equality legislation in Malta were explained and discussed with the participants, highlighting examples of discrimination at the workplace and in the provision of goods and services. Participants were given the opportunity to share and discuss personal experiences. Information was given on how to lodge a complaint with the NCPE, and information material on equality legislation and the NCPE was distributed following each session. Later in the year, the NCPE provided four training sessions to employees working in open centres for asylum seekers, as well as to Detention Service staff.

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<sup>231</sup> Published in 2017 covering 2016.

In 2016, the NCPE contributed to the consultation process for EU and international documents and carried out desk research on different topics. In the Council Conclusions in relation to equality, the council adopted conclusions on gender equality in response to the commission's strategic engagement for gender equality, as well as on LGBTI equality in response to the commission's list of actions to advance LGBTI equality. In March, the European Commission launched a public consultation on the *European Pillar of Social Rights*. The first preliminary outline delineated a number of essential principles which should become common to participating Member States for the conduct of their employment and social policy, with a specific focus on the needs and challenges confronting the euro area. Two of these principles are 'gender equality and work-life balance' and 'equal opportunities'. In light of this, the NCPE gave its input in reply to various requests for feedback, since discussions on this topic took place in different fora throughout 2016.

At the national level, the NCPE was involved in reviewing the *Malta National Disability Strategy*.<sup>232</sup> It stated that the strategy should adopt an intersectional approach and suggested, *inter alia*, training for disability officers, who should take into account the needs arising from the intersection of disability with other grounds; that the standing committee should be gender balanced and should include persons from different groups in society; and that the data produced from research on disability should always be gender-disaggregated in order to effectively address the concerns of both women and men. Another policy the NCPE gave their input on was the draft *National Transport Strategy* and the *Transport Masterplan*. The NCPE stated that transportation needs, travel behaviour and levels of access to transport vary between women and men from different social groups. The NCPE also highlighted that certain groups, such as women, trans persons and people of minority race/ethnic origin and those who practise minority religions may face safety and accessibility issues due to discrimination and sexual harassment. Thus, it is important that the *Strategy* and *Masterplan* ensure protection from discrimination and sexual harassment.

For its part, following Malta's ratification of the United Nations Convention on the Rights of Persons with Disability, the CRPD assumed the new role of providing an independent mechanism to protect, promote and monitor the implementation of the Convention. In order to be able to do this in the best possible manner, the CRPD ensures that it stays abreast of the latest updates in the disability sector in both local and international contexts. On an international level, the CRPD maintains close contact with the European Disability Forum, the Disability Rights Committee within the Equality and Human Rights Commission of the United Kingdom, Disability Wales and Inclusion Europe. The CRPD<sup>233</sup> continues to carry out various campaigns and training and dialogue sessions. The CRPD also contributes to the work carried out against discrimination at an international level, including in the European context.

The CRPD offers training on the equality of persons with disability. This training is provided to different types of audiences and is carried out with the full involvement of persons with disability and the parents of persons with disability who cannot represent themselves.<sup>234</sup> This training complements that provided at university level by the disability studies unit within the Faculty for Social Wellbeing at the University of Malta.

- b) Measures have been taken to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

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<sup>232</sup> <https://activeageing.gov.mt/en/Documents/SOCIAL%20POLICY%20WEB.pdf>.

<sup>233</sup> As noted in its latest report for 2016.

<sup>234</sup> In 2016 training was given to 653 persons from different sectors.



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), by other NGOs or independently.

In Malta, there are various non-governmental organisations involved in raising awareness of social issues. NGOs in Malta are regulated by Act XXII of 2007, 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. The 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.<sup>235</sup>

In 2017, Spark 15, a Maltese NGO geared to empower young refugees and migrants to actively participate in achieving a more inclusive society, was set up.<sup>236</sup> Its purpose is to achieve greater diversity among young people through dialogue.

- c) Measures have also been taken to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

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,<sup>237</sup> 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 under the Employment and Industrial Relations Act 2002.

To date, however, neither body has been active.

The Malta Council for Economic and Social Development Act 2001<sup>238</sup> provides for the setting up of a Civil Society Committee (CSC) within the MCESD.<sup>239</sup> The CSC is made up of a core representation of civil society.<sup>240</sup>

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<sup>235</sup> 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 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.

<sup>236</sup> Spark 15 has the support of the President's Foundation for the Wellbeing of Society and the UN High Commissioner for Refugees.

<sup>237</sup> Malta, Act XXVIII of 1990, *Laws of Malta*, Chapter 343.

<sup>238</sup> Malta, Act XV of 2001, *Laws of Malta*, Chapter 431. 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.'

d) To date, no action has been taken to address the situation of Roma and Travellers

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

## **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**

There do not appear to be any laws in force which go against the principle of equality.

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<sup>239</sup> The Chairperson or the Deputy Chairperson of the MCESD chairs the meetings of the CSC.

<sup>240</sup> 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 Commission for the Rights of 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.

## **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 but never endorsed or adopted by the authorities, had a number of strategic objectives, as well as specific initiatives to be achieved and implemented over a three-year period. It sought 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 was strategic in nature, providing a roadmap towards the achievement of its aims and objectives. It was to be seen as fluid and, as such, should have been able to adapt to emerging trends and realities. It adopted a human rights-based approach - a strategic mainstreaming process intended to permeate all levels of national structures. The plan sought 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 addressed various minority groups including ethnic minorities and linguistic minorities as well as religious minorities. The action plan sought to combat racism and xenophobia as well as promote a more inclusive and intercultural society through a proactive framework. Whilst it addressed issues of investigation and redress, the priority was 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 sought to address the four Ps, namely: prevention, protection, prosecution and partnership. It may be noted, however, that the action plan was not formally adopted by the national authorities, although it still serves as a set of 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.

In November 2015 a Human Rights and Integration Directorate was set up within the framework of the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties (MSDC).

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 the 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 the consultation is now closed, and the submissions received were

reviewed with a report issued thereon.<sup>241</sup> The Bill on the Equality Act has been published, but this has not yet become law.

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<sup>241</sup> Towards a Robust Human Rights and Equality Framework, Submissions Report  
[https://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Documents/2015%20HREC%20Final/TOWARDS%20A%20ROBUST%20HUMAN%20RIGHTS%20AND%20EQUALITY%20FRAMEWORK-%20final%20report%20on%20Public%20Consultations.pdf](https://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/TOWARDS%20A%20ROBUST%20HUMAN%20RIGHTS%20AND%20EQUALITY%20FRAMEWORK-%20final%20report%20on%20Public%20Consultations.pdf).

## 10 CURRENT BEST PRACTICES

The CRPD 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 the CRPD in relation to applications for the development of buildings that are open to the public and are in major use. Furthermore, a collaborative operation group comprising the CRPD, 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 the CRPD on plans submitted to MEPA.

Throughout 2016, a number of meetings were held by officials from the CRPD on various issues including education, accessibility, employment and road safety for the benefit of persons with disability.<sup>242</sup>

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. In 2016, 12 new companies received certification while 7 companies were re-certified.<sup>243</sup> More organisations are in the process of being awarded the Equality Mark.<sup>244</sup>

As mentioned in the section on Positive Action, the Government has introduced 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 law now provides that failure to abide by the quota renders companies liable to pay a yearly compensation fee.

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.<sup>245</sup>

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.

Further positive action was taken with the introduction of the law to regulate the compulsory addition of one member with disability to various entities which are governed by Maltese Law. This law seeks to integrate more persons with disability into the various entities present in the Maltese legal and governmental system by way of a provision in which at least one person with disability must be part of the major public entities/authorities (as specified below) governed by Maltese Law.

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<sup>242</sup> <http://crpd.org.mt/wp-content/uploads/2017/06/CRPD-Annual-EN-2016.pdf>.

<sup>243</sup> By December 2016, there were 71 certified organisations employing over 18 600 persons.

<sup>244</sup> Awarded to companies that truly foster equal treatment in their work policies and practices irrespective of the employees' gender or family responsibilities.

<sup>245</sup> 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/EC.<sup>246</sup>

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.<sup>247</sup>

The Equal Treatment in Employment Regulations appear to conform with Article 4(2) of Council Directive 2000/78/EC, except for the fact that national regulations 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.<sup>248</sup>

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, under the 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.<sup>249</sup>

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, gender identity, gender expression or sex characteristics 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. It is not clear whether the omission was accidental or deliberate. A similar exclusion is not found in the directives.<sup>250</sup>

### **11.2 Other issues of concern**

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<sup>246</sup> Section 2.5.

<sup>247</sup> Section 4.1.

<sup>248</sup> Section 4.2.

<sup>249</sup> Section 2.6.

<sup>250</sup> Section 2.3.

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 people's lack of awareness of their rights. However, the state, through its departments and agencies as well as the various NGOs, has in the recent past developed and run 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. In practice, however, this has not led to an increase in the number of complaints being brought forward.

## 12 LATEST DEVELOPMENTS IN 2017

The Bill on the Equality Act, published in December 2015, was presented to Parliament in December 2016. The new Equality Act will 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.<sup>251</sup> The new Equality Act will present a less fragmented legal framework for equality in Malta. The Act contains 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 ultimate aim of the 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.<sup>252</sup>

The bill setting up the new national human rights institution, also published in 2015, is modelled on both the United Nations' *Paris Principles*, as well as the European Union's equality body model as laid out in EU equality directives. 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 NHREC should be made accessible by 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 rights standards in Malta.<sup>253</sup> 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, will constitute landmark developments.

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<sup>251</sup> In 2015 the Equality for Men and Women Act was further amended by virtue of Act XI of 2015 to include 'gender expression or sex characteristics' under the definition of 'discrimination'.

<sup>252</sup> The introduction to the bill provides: 'An Act to prohibit discrimination in various spheres of life, to promote equality and prevent discrimination, inter alia, by giving effect to the relevant provisions of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2002/73/EC of 23 September 2002 amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to goods and services and their supply, Council Directive 2006/54/EC of 5 July 2006 implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), and the Communication from the European Commission (22.12.2011 C(2011) 9497) containing Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats).'

<sup>253</sup> The HREC will, nevertheless, remain independent and thus will 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.



The purpose of the Marriage Act and other Laws (Amendment) Act 2017 was to make the institution of marriage available for all individuals.<sup>254</sup> The amendments to the Civil Union Act provide that partners who have contracted civil unions before the coming into force of the Act may convert their civil union into marriage within five years of the coming into force of the Act. The institution of marriage, regardless of the sexual orientation of the spouses, ensures that every individual is seen as equal before the law vis-à-vis the contracting of marriage. In addition to this, the gender-neutral terminology introduced in various pieces of legislation allows for equal access to parenthood for all, ensuring the inclusion of all forms of families, including the recognition of same-sex couples as parents. The Act therefore provides for more equality between individuals contracting marriage. This is an important step in ensuring that all couples are seen as equal when contracting marriage and that all the rights conducive to marriage are applicable to all.

### 12.1 Legislative amendments

The Marriage Act and other Laws (Amendment) Act was enacted in 2017.<sup>255</sup> The purpose of this law was to make the institution of marriage available for all individuals. It was passed by an almost unanimous vote, with only one Member of Parliament voting against the adoption of the Act.

The Act not only modified the Marriage Act, but also introduced changes to the Criminal Code, the Civil Code, the Code of Organisation and Civil Procedure, the Civil Unions Act and the Interpretation Act, as well as other subsidiary legislation such as the Public Registry (Inspection and Searches) Regulation. The Act introduced, *inter alia*, the following changes:

- All terminology referring to 'husband' and 'wife' has been changed to 'spouse' in order to cater for all types of marriage. For example, Article 5(1)(d) of the Marriage Act has been changed from '(d) the adopter and the adopted person or a descendant, or the husband or wife, of the adopted person,' to 'the adopted and the adopted person or a descendant or spouse, of the adopted person.'
- The words 'mother' and 'father' have been replaced with 'parents'. This covers all types of family structures. For example, Article 392(1)(a) of the Criminal Code has been changed from 'the court shall ask him his name and surname, his age, his place of birth and abode, his trade, profession or calling, the name and surname of his father and whether his father is alive or dead' to 'the court shall ask him his name and surname, his age, his place of birth and abode, his trade, profession or calling, the name and surname of his parents and whether his parents are alive or dead.' In some case this is substituted by 'natural parent'.
- In addition to this, the Act changes the choice of words to be used during the wedding ceremony, from 'husband' and 'wife' to 'spouses'. However, it is also possible for the parties to indicate the choice of words to be used.
- Another important addition is the protection afforded to officials of a religious body. The new Article 32A of the Marriage Act provides that a religious official is not obliged to solemnise a marriage which is not recognised by that religion.
- The Act not only makes changes in relation to homosexual couples, but also provides for amendments for heterosexual couples. This is evident in the changes made relating to surnames. Spouses may opt to adopt the surname of either of the parties to the marriage or to each keep their own name or adopt the surname of both parties to the marriage as long as the surname does not exceed four names.
- The words 'mother of the child' shall be substituted with the words 'the person who gave birth to the child.'

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<sup>254</sup> The Act was passed on 12 July 2017 after its third reading by an almost unanimous vote, with only one Member of Parliament voting against its adoption.

<sup>255</sup> Came into force in September 2017.

- The words 'brother' and 'sister' will be substituted with 'sibling' and the terms 'mother-in-law', 'son-in-law' and 'daughter-in-law' shall be substituted with 'any one of the parents of his spouse, any one of the spouses' children, spouse.'

It is important to note that the amendments to the Civil Union Act provide that partners who contracted civil unions before the coming into force of the Act may convert their civil union into marriage within five years of the coming into force of the Act.

## 12.2 Case law

**Name of the Court:** Court of Appeal (Civil, Inferior)

**Date of Decision:** 16 June 2017

**Name of the parties:** *Anna Punga v. iGame Malta Limited and Shaun O'Neill*

**Reference Number:** 3/2016

**Link:**

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

**Brief summary:** The claimant alleged that she had suffered sexual harassment and molestation at her place of work by another employee (Shaun O'Neill). When she reported the alleged harassment and molestation to her employer, the latter changed the employee's job designation within the company from Affiliate Manager to VIP Coordinator. The claimant instituted proceedings against the employer and the employee. The employee (O'Neill) held that he was not the appropriate defendant in this case as, according to Article 30(1) of the EIRA, the tribunal only had jurisdiction to determine cases brought against the employer. This was rejected by the tribunal, as it interpreted Article 30(1) in a wide sense and held that, since Article 29 of the Act deals with sexual harassment of an employee by an employer or an employee, a sexual harassment case may be brought against the employee. An appeal was lodged against this decision by the tribunal. The Court of Appeal rejected the tribunal's reasoning and held that Article 30 provides that the tribunal only has jurisdiction in cases of sexual harassment exercised by the employer.<sup>256</sup> The claimant's plea could therefore not be deemed to be 'discriminatory treatment' as defined in the Equal Treatment in Employment Regulations. The court therefore decided that the tribunal did not have any jurisdiction to decide cases of sexual harassment of an employee by a fellow employee.

**Name of the Court:** First Hall, Civil Court

**Date of Decision:** 16 November 2017

**Name of the parties:** *Kummissjoni Nazzjonali Persuni B'Dizabilita' v. Malta Football Association*

**Reference Number:**

**Link:**

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8879&l=1>

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10637&l=1>

**Brief summary:** The National Commission for the Rights of Persons with Disability ('the commission') had received various complaints in respect of the Malta Football Association ('the association') due to the fact that the National Stadium did not provide access to persons with disability in the principal enclosure in the West Stand. The association manages and administers the National Stadium as per an agreement entered into with the Maltese Government in 1983.<sup>257</sup> Following the rules under the Procedure for the Investigation of Complaints Regulations (S.L. 413.01 of the Laws of Malta), the commission communicated this matter to the association by means of a registered letter, asking the association to remedy the situation<sup>258</sup> by carrying out the necessary works to

<sup>256</sup> This does not mean that there is no remedy, as the claimant may still bring criminal actions against the employee.

<sup>257</sup> <https://www.mfa.com.mt/en/the-mfa/themfa/7/history.htm>.

<sup>258</sup> Article 5(1) of the Procedure for the Investigation of Complaints Regulations (S.L. 413.01).

allow access to the West Stand by persons with disability. However, the works were not carried out, and therefore the commission filed an application with the First Hall Civil Court.

The commission asked the court to declare that the association was discriminating against persons with disability and to order the association to carry out the necessary works to ensure that access is provided to persons with disability. It also asked the court to order the association to pay daily fines for each day the association did not carry out the works.

The association argued that, when proceedings were pending, it had carried out works to allow for access to the West Stand with all the relative facilities and amenities that may be required, including the provision of parking spaces and various platforms to allow for easy access. Although the Millennium Stand was not previously open for all games, the situation has changed, and the stand is now fully equipped to provide access for persons with disability. Following an on-site inspection, the court concluded that the association had in fact carried out works to ensure that the stadium is more accessible. It was noted that, according to an architect's report, the estimated cost of the works to be carried out on the West Stand entrance of the stadium would be EUR 250 000, not to mention the fact that such works would only be completed within a year.

The court noted that the request by the commission to oblige the association to carry out works on the West Stand entrance was unreasonable. In fact, under Article 20 of the Equal Opportunities (Persons with Disability) Act, in order to determine the reasonableness of any action to be undertaken by a person to fulfil their obligations under the Act, the board responsible for determining what is reasonable must consider whether the action can be undertaken 'without unjustifiable hardship'.<sup>259</sup> The court concluded that, even though the National Stadium was not fully accessible to persons with disability before the commencement of the proceedings, the association had since carried out modifications to the stadium which allowed for such accessibility. Furthermore, it held that the only part which is still not accessible to persons with disability is the bar area and, even though the technical expert held that access to the West Stand was less favourable to such persons, this is not discriminatory. This, it continued, does not mean that such persons do not have a right to watch the match from the enclosure but, in view of all the circumstances in the case, it is not reasonable to carry out all the work requested by the commission.

The appeal was filed on 29 November 2017.

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<sup>259</sup> Article 20 of the Equal Opportunities (Persons with Disability) Act (Chapter 413 of the Laws of Malta)

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Malta  
**Date:** 1 January 2018

<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Employment and Industrial Relations Act  Abbreviation: EIRA  Date of adoption: 02.12.2002  Latest amendments: Act XXXIII of 2016  Entry into force: 27.12.2002  Web link:  <a href="http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8918&amp;l=1">http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8918&amp;l=1</a>  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.</p> <p>Civil/administrative Law</p> <p>Material scope: Private employment (with reference to disciplined forces)</p> <p>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)</p>
<b>Title of legislation (including amending legislation)</b>	<p>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:  <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11800&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11800&amp;l=1</a>  Grounds covered: Racial or Ethnic Origin</p> <p>Civil/administrative Law</p> <p>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</p> <p>Principal content: prohibition of direct and indirect discrimination, and harassment</p>
<b>Title of legislation (including amending legislation)</b>	<p>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 2016  Entry into force: 01.10.2000  Web link:  <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8879&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8879&amp;l=1</a>  Grounds covered: Disability</p> <p>Civil/administrative Law</p> <p>Material scope: right to family life, social protection, social advantages, employment, education, access to property, provision of goods, facilities or services, health and accommodation</p> <p>Principal content: prohibition of discrimination based on disability in several spheres, positive discrimination provisions, creation of a specialised body (The Commission for the Rights of Persons with Disability) and a Board to determine what is reasonable.</p>

<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Equality for Men and Women Act</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 09.12.2003</p> <p>Latest amendments: Act No. XI of 2015</p> <p>Entry into force: 09.12.2003</p> <p>Web link:  <a href="http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8922&amp;l=1">http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8922&amp;l=1</a> </p> <p>Grounds covered: sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, gender expression, sex characteristics, actual or potential pregnancy, or childbirth</p>
	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)
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Equal Treatment in Employment Regulations</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 05.11.2004</p> <p>Latest amendments: Legal Notice 274 of 2014</p> <p>Entry into force: 05.11.2004</p> <p>Web link:  <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11229&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11229&amp;l=1</a> </p> <p>Grounds covered: religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin</p>
	Civil/administrative Law
	Material scope: Private and Public Employment
	Principal content: Prohibition of direct and indirect discrimination
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Equal Treatment in Self-Employment and Occupation Order</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 03.04.2007</p> <p>Latest amendments: Legal Notice 260 of 2012</p> <p>Entry into force: 03.04.2007</p> <p>Web link:  <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11801&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11801&amp;l=1</a> </p> <p>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)</p>
	Civil/administrative Law
	Material scope: Self-employment or occupation, and harassment
	Principal content: Prohibition of direct and indirect discrimination
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Gender Identity, Gender Expression and Sex Characteristics Act</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 14.04.2015</p> <p>Latest amendments: Act No. LVI of 2016</p> <p>Entry into force: 14.04.2015</p> <p>Web link:  <a href="http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=26979&amp;l=1">http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=26979&amp;l=1</a> </p> <p>Grounds protected: sex, sexual orientation, sex characteristics, gender identity, gender expression, gender reassignment (underwent or</p>

	undergoing or intends to undergo)
	Civil/administrative Law
	Material scope: Public service and authorities, private entities, law – norms and procedures
	Principal content: Prohibition of direct and indirect discrimination, and promotion of equality
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Various Laws (Persons with Disability) (Membership in Various Entities) Act</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 10.03.2015</p> <p>Latest amendments: Act No. XII of 2015</p> <p>Entry into force: 10.03.2015</p> <p>Web link:  <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=26717&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=26717&amp;l=1</a></p> <p>Grounds covered: Positive Discrimination – Disability</p>
	Civil/administrative Law
	Material scope: Public service and authorities
	Principal content: Representation of persons with disability on public boards
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 09.12.2016</p> <p>Latest amendments: N/A</p> <p>Entry into force: 09.12.2016</p> <p>Web link:  <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=12610&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=12610&amp;l=1</a></p> <p>Grounds covered: sexual orientation, gender identity and gender expression, vulnerable person, health</p>
	Civil/administrative Law
	Material scope: Private and Public service and authorities, health care services
	Principal content: Prohibition and Criminalisation of Conversion Therapy
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Marriage Act and other Laws (Amendment) Act</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 01.09.2017</p> <p>Latest amendments: N/A</p> <p>Entry into force: 01.09.2017</p> <p>Web link:  <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=28609&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=28609&amp;l=1</a></p> <p>Grounds covered: sexual orientation and gender equality</p>
	Civil/administrative Law
	Material scope: Private and Public service and authorities,
	Principal content: Right to enter into marriage notwithstanding any person's gender, gender neutral terminology in the law,
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations</p> <p>Abbreviation: Full Legal Name Applies</p> <p>Date of adoption: 20.05.2016</p> <p>Latest amendments: Legal Notice 173 of 2016</p> <p>Entry into force: 20.05.2006</p> <p>Web link:  <a href="http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=2">http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&amp;itemid=2</a></p>

	<a href="#">7701&amp;l=1</a>
	Grounds covered: no grounds specified
	Civil/administrative Law
	Material scope: Private and Public Employment
	Principal content: Prohibition of direct and indirect discrimination

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Malta  
**Date:** 1 January 2018

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b> all the answers in this field are subject to the underneath footnote <sup>260</sup>
European Convention on Human Rights (ECHR)	12.12.1966	23.01.1967	No	Yes	Yes
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

<sup>260</sup> 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 of the Convention is deemed to</p>	No provision for individual petition	Yes

			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 or non-discrimination.	Yes. However: Malta declares that it recognizes the competence of the Committee to receive and consider	Yes

				<p>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 that the same matter is not being considered or has not already been</p>	
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				considered by another international body of investigation or settlement.	
Convention on the Elimination of All Forms 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 Malta reserves the right, notwithstanding anything in the Convention, to continue to</p>	No. Malta is not a signatory of the Optional Protocol to the Convention on the Elimination of Discrimination against Women	Yes

			<p>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 -</p> <p>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 to females, it reserves the right to continue to apply present legislation in that regard until such time</p>		
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			<p>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	30.09.1990 (entered into force)	No	No. The Committee on the Rights of the Child may consider individual communications alleging violation of the Convention on the Rights of the Child or its two first Optional Protocols on the sale of children, child prostitution and child pornography as well as the involvement of children in armed conflict by	Yes

				State Parties to the Third Optional Protocol.	
Convention on the Rights of Persons with Disabilities	30.03.2007	10.10.2012	<p>Yes.</p> <p>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 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</p>	Yes	Yes

			current electoral legislation in so far as assistance in voting procedures is concerned.		
Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms	08.12.2015	08.12.2015	No	No	No
European Convention on the Repatriation of Minors	27.04.2015	27.04.2015	No	No	Yes
European Convention on the Adoption of Children (Revised)	27.04.2015	27.04.2015	No	No	Yes
European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes	27.04.2015	27.04.2015	No	No	Yes
Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems	29.01.2003	Not ratified entry into force 01.03.2006	No	No	No



Council of Europe Convention on preventing and combating violence against women and domestic violence	21.05.2012	29.07.2014	Yes Malta reserves the right not to apply Article 30(2) of the Convention and to continue to apply its current legislation in so far as State compensation is concerned.	Yes	Yes
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