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Country report

Non-discrimination

Malta

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including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Malta

Tonio Ellul

Reporting period 1 January 2019 – 31 December 2019

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EXECUTIVE SUMMARY

1. Introduction

As at December 2018, the population of Malta was estimated to be 493 559, of whom 251 836 were male and 241 723 were female.¹ Of the total population, 84 247 were foreign nationals. According to the Labour Force Survey, the number of people employed at the end of September 2019 was estimated at 255 297, of whom 151 252 were male and 104 045 were female.² An increase in the number of foreign nationals living in Malta in recent years has been accompanied by an increase in the number of incidents of racial intolerance.

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

It is important to note that, in December 2014, a consultation process was launched³ proposing the introduction of an equality act and legislation for a human rights and equality commission. An equality act has been 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 will also introduce provisions on intersectionality.⁴ The ultimate aim of the proposed new 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 Ministry for Social Dialogue, Consumer Affairs and Civil Liberties presented drafts of the two aforementioned bills during a public seminar.⁵ These bills were opened 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 and discussion commenced in November 2019.⁶ They are still in the process of enactment. There is no publicly available information to show that there is any opposition to the introduction of these laws.

The proposed legislative framework for the new national human rights and equality commission (NHREC), which will address human rights issues and violations and will monitor and advise on human rights priorities in Malta,⁷ will focus on potential and current systematic

¹ NSO News Release, 10 July 2019, No. 108/2019.

² Labour Force Survey news release, 23 December 2019, No. 209/2019.

³ 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.

⁴ 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 grounds 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.

⁵ https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/Bill%20-%20Equality%20Act.pdf;
https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/Bill%20-%20Human%20Rights%20and%20Equality%20Commission%20Act.pdf.

⁶ At this point, the aforementioned Minister pointed out that the original version of the bill had been amended to take on board various recommendations made in 2018 by the Venice Commission, which had produced a report on the rule of law in Malta.

⁷ The NHREC will remain independent but will be 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.

violations of human rights and will contribute to preventing such violations (based on the Paris Principles).⁸ 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 force in 2016.⁹ 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 if 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 2017.¹⁰ The purpose of this law was to make the institution of marriage available to all individuals.¹¹ 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 Act coming into force.¹²

In addition, Malta ratified Protocol 12 of the European Convention on Human Rights, which provides for a general prohibition on discrimination. The Protocol removes the current limitation on 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.

2. Main legislation

The principles of equality of treatment and non-discrimination were first introduced into the Maltese Constitution of 1964.¹³ In 1987, the European Convention Act was enacted. Through this Act,¹⁴ 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 2002,¹⁵ the Equal Opportunities (Persons with Disability) Act 2000,¹⁶ the

⁸ The NHREC should be accessible to the public and will provide for accessible complaints procedures. The NHREC is to engage in proper collaboration with various stakeholders in its quest to establish the highest human rights standards in Malta.

⁹ Transposing Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014.

¹⁰ Marriage Act and other Laws (Amendment) Act, 1 August 2017; came into force in September 2017.

¹¹ The Act was passed by an almost unanimous vote, with only one Member of Parliament voting against its adoption.

¹² In view of the introduction of same sex marriages, amendments were required in several laws to render them gender neutral.

¹³ The Maltese Constitution of 1964, in article 32, 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.

¹⁴ European Convention Act, 19 August 1987 (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*.

¹⁵ Employment and Industrial Relations Act, 2 December 2002 (Act XXII of 2002).

¹⁶ Equal Opportunities (Persons with Disability) Act, 10 February 2000 (Act I of 2000).

Equality for Men and Women Act 2003,¹⁷ and Article 82A of the Criminal Code.¹⁸ The Equal Treatment in Employment Regulations 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 people with disabilities and the defence of rights in line with the provisions of Directive 2000/78/EC.¹⁹ 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.

The Equal Treatment of Persons Order²⁰ 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 everyone without discrimination on the grounds of racial or ethnic origin.²¹ Malta is also a party to various international human rights instruments that provide for protection against discrimination.²²

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,²³ however, is that of disability under the Equal Opportunities (Persons with Disability) Act 2000.²⁴

The Equal Treatment in Employment Regulations provide protection from harassment in matters of employment on all the grounds mentioned in the directives.²⁵ Maltese law does not require that the effects of the harassment be cumulative.²⁶ Under 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.²⁷

¹⁷ Equality for Men and Women Act 2003, 9 December 2003 (Act I of 2003).

¹⁸ Chapter 9 of the *Laws of Malta*, which criminalises incitement to racial hatred.

¹⁹ By virtue of Legal Notice 54 of 2007, the Equal Treatment in Employment Regulations were extended to employees in the public sector.

²⁰ Equal Treatment of Persons Order, 3 April 2007 (Legal Notice 85 of 2007).

²¹ 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.

²² Malta signed and ratified Protocol No. 12 on 8 December 2015.

²³ In line with the definition under the CRPD and EU law.

²⁴ 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, the Equal Treatment in Employment Regulations and the Equal Treatment of Persons Order provide for the prohibition of both direct and indirect discrimination.

²⁵ 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 their obligation to suppress any form of harassment at their place of work or within their organisation.

²⁶ The prohibition of harassment is also mentioned under the Public Service Management Code.

²⁷ '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 a person.

Article 3A(6) of the Equal Opportunities (Persons with 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 the Equal Treatment in Employment Regulations 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.²⁸ This provision goes further than that required by Article 11 of the Employment Equality Directive, since it relates not only to breaches of the obligation of equal treatment but to any breach of the provisions of the Act.

Similarly, Article 7 of the Equal Treatment of Persons Order, as regards race and ethnic origin, and Article 5 of the Equal Opportunities (Persons with Disability) Act, as regards disability, both provide for a prohibition of victimisation and are in line with the provisions of the EU law requirements.²⁹ Furthermore, under 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.³⁰

Under 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 an 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 a 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.

The Equal Treatment in Employment Regulations prohibit 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 2003.³¹ One nevertheless notes that the prohibition on instruction to discriminate is more restrictive in the Equal Treatment of Persons Order than in the provisions of the directive.

²⁸ This provides that if any person (a) files a complaint with 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 interests, it is unlawful to victimise such a person for having acted accordingly.

²⁹ 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 behaviour, activities or practices.

³⁰ 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.

³¹ 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.

Article 2(3) of the Equal Treatment of Persons Order provides that 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, in Article 2(3), is more restrictive in that it refers to whether the 'treatment' is legitimate under the genuine occupational requirement test, rather than the 'objective' as specified in the directive.³²

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.³³

In Malta, national law does not make specific reference to the prohibition of discrimination based on association with people who have particular characteristics. Discrimination based on perception or assumption of a person's characteristics is prohibited under national law while multiple discrimination is prohibited only on the ground of disability.³⁴

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 people (discrimination on the basis of sex, race and ethnic origin, sexual orientation, gender identity, gender expression or sex characteristics and discrimination against disabled people). In this case, the protection afforded by these laws extends to matters between private individuals rather than matters between private individuals 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.

Employment in the public sector 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 against employees in the public sector by public authorities, these employees can invoke the provisions of the Constitution and the European Convention Act.

Furthermore, in respect of the engagement of employees by Government and Government-owned or controlled bodies and companies, under the Employment and Training Services Act 2018³⁵ 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 sex, religion or belief, economic means, race or ethnic origin, political opinion, disability, colour, sexual orientation or gender identity.

³² The directive provides that the objective must be legitimate and the requirement proportionate.

³³ Maltese law also provides for the provision of reasonable accommodation under subsidiary legislation issued under the Occupational Health and Safety Authority Act 2000, as well as under the Equal Opportunities (Persons with Disability) Act 2000. In addition, the latter Act provides that employers must provide reasonable accommodation for employees with disabilities.

³⁴ These should be both addressed in the new equality act once it is adopted and implemented.

³⁵ Employment and Training Services Act 2018.

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,³⁶ 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, the European Convention Act and the Ombudsman Act.

As seen above, therefore, implementation applies to both the public and private sectors in all fields covered by the Directives.

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 Constitution of Malta) and the Employment Commission (under the Constitution of Malta).³⁷

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. People 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 the Equal Treatment in Employment Regulations and The Equal Treatment of Persons Order 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.

Under 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. They may also do so on receipt of a complaint in writing by people 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

³⁶ 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.

³⁷ With respect to the Employment Commission, the Constitution limits the remit to discrimination on the basis of political opinion.

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, the Equal Treatment in Employment Regulations provide 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.³⁸

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

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

6. Equality bodies

The National Commission for the Promotion of Equality for Men and Women (NCPE)³⁹ has been designated as the body in Malta to promote equality of treatment for everyone 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.⁴⁰ The remit of the Commission for the Rights of Persons with Disability is disability discrimination and this organisation deals with all areas of disability.⁴¹

Several entities, such as the NCPE and the Commission for the Rights of Persons with Disability, regularly organise publicity campaigns, participate in projects and hold seminars and public meetings to encourage people of a particular religion or religious belief, disability, age, sexual orientation or racial or ethnic origin to participate in training to assist

³⁸ 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.

³⁹ 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* (by 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')'.

⁴⁰ The scope of the National Commission for the Promotion of Equality is intended to be widened so that it becomes a Commission for Human Rights and Equality (NHREC), acting as a national human rights institution as well as an equality body in accordance with the provisions established by the European Directives on equal treatment. Henceforth, 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.

⁴¹ The commission is now made up of a Commissioner and a Council for the Rights of Persons with Disability.

them in entering the labour market. Jobsplus, the public employment agency, is very active in this field, as one of the corporation's main objectives is that of assisting people in finding employment.

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 instructions 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 applies only to the field of employment in respect of employees with a disability and the exclusion of job applicants.

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'.⁴²

The Constitution provides for the setting up of the legislature, and all bills must be 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 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.⁴³ Treaties and conventions do not automatically become part of domestic law. They would need to be 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 1987,⁴⁴ 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. The main legislative enactments include:

- Employment and Industrial Relations Act (EIRA),⁴⁵ adopted on 2 December 2002. The material scope is employment, while the grounds covered are marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership of a trade union or an employers' association. The EIRA is the

⁴² Article 115A of the Constitution of Malta.

⁴³ The United Nations Convention on the Rights of Persons with Disabilities and the Optional Protocol were ratified by Malta in October 2012 and came into effect in November 2012 following a wide-ranging consultation process with all stakeholders. 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.

⁴⁴ European Convention Act, 19 August 1987 (Act XIV of 1987).

⁴⁵ Employment and Industrial Relations Act, 2 December 2002 (Act XXII of 2002).

- main national legislative enactment regulating conditions of employment and industrial relations for all employed people.
- Equal Opportunities (Persons with Disability) Act,⁴⁶ adopted on 10 February 2000. The Act deals with people with disability and the protection in cases of discrimination based on disability in the fields of employment, education, provision of goods and services, access and accommodation. - Equal Treatment in Employment Regulations⁴⁷ adopted on 5 November 2004. These regulations deal specifically with equality in employment relations and in particular afford protection on the grounds of equal treatment vis-à-vis religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave,⁴⁸ and gender reassignment.
 - Equal Treatment of Persons Order⁴⁹ adopted on 3 April 2007. These regulations provide for the equal treatment of everyone and the prohibition of discrimination, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin under Directive 2000/43/EC.
 - Equality for Men and Women Act⁵⁰ adopted on 9 December 2003. This law deals with the prohibition of discrimination on the basis of sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, actual or potential pregnancy or childbirth and its material scope covers employment,⁵¹ self-employment, education and provision of services.

⁴⁶ Equal Opportunities (Persons with Disability) Act, 10 February 2000 (Act I of 2000).

⁴⁷ Equal Treatment in Employment Regulations, 5 November 2004, Legal Notice 461 of 2004.

⁴⁸ Regulated by the Protection of Maternity (Employment) Regulations, 2004.

⁴⁹ Equal Treatment of Persons Order, 3 April 2007, Legal Notice 85 of 2007.

⁵⁰ Equality for Men and Women Act, 9 December 2003 (Act I of 2003).

⁵¹ People who feel they are victims of discrimination in employment may bring forward a claim under the provisions of the EIRA and the Equal Treatment in Employment Regulations.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

Chapter IV, which is entitled 'Protection of Fundamental Rights and Freedoms', includes Article 45, which deals with protection from discrimination on grounds of race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity.

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 individuals (although they can be enforced against the state).

Chapter II of the Maltese Constitution⁵² lays down a number of principles; however, according to Article 21 of the Constitution, these are not 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 Constitution⁵³ provides for those fundamental rights and freedoms of the individual in respect of which an aggrieved person may apply to the court⁵⁴ 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,⁵⁵ 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’.⁵⁶

⁵² Articles 7 to 21 (inclusive).

⁵³ Articles 32 to 47 (inclusive).

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ 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

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.⁵⁷ 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 reference to these grounds cannot be implied from the grounds actually mentioned. However, protection under these grounds is afforded under specific national legislation.

Under 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.⁵⁸ 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.⁵⁹

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. The Act does not provide for a definition of 'sexual orientation'.

⁵⁷ Constitutional Court, *Dr Walter Cuschieri et al v. The Hon. Prime Minister et noe*, 30 November 1977.

⁵⁸ Malta signed and ratified Protocol No. 12 on 8 December 2015.

⁵⁹ As held by the Constitutional Court in the case of *Victoria Cassar v. Malta Maritime Authority et al* (2 November 2001), protection from discriminatory treatment under the Constitution is guaranteed as being specific, autonomous and independent of other rights and freedoms. In this context, the discrimination itself is considered to be the basis for the action and therefore there is no need to make any reference to any other fundamental right or freedom.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation (listed in the introduction) transposing and implementing the two EU anti-discrimination directives:

- 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. Age and disability discrimination are also not covered under the Constitution.
- Employment and Industrial Relations Act 2002 and the legal notices issued thereunder⁶⁰ – 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.
- Equal Opportunities (Persons with Disability) Act 2000 – disability discrimination⁶¹ on the grounds protected under the Constitution. Moreover, the state shall ensure that the exercise of such rights is also guaranteed when, together with the disability, there are other factors: *inter alia*, gender, age, ethnicity, beliefs, skin colour, trade union affiliation or the political belief of the person with disability.
- 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.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

Under 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.⁶²

b) Religion and belief

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 at least 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 and the interpretation given by the European Court of Human Rights.

Through the enactment of the European Convention Act,⁶³ 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.

⁶⁰ The legal notices include the Equal Treatment in Employment Regulations, under which discrimination on the grounds of sexual orientation is afforded protection.

⁶¹ Based on physical, intellectual, sensory and/or mental impairment.

⁶² In interpreting this definition, the courts will make reference to foreign case law on the matter.

⁶³ Act XIV of 1987.

c) Disability

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'.⁶⁴ 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. Therefore, Maltese definition appears broader in scope than the definition given by the CJEU in *Ring and Skouboe Werge*, in that it extends beyond a situation in which an individual is hindered in participation in 'professional life' to cover 'participation in society'.

d) Age

There is no definition of 'age' in Maltese law. There is no case law which identifies the scope of the protection distinguishing between younger and older people.

e) Sexual orientation

In the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 'sexual orientation' refers to each person's capacity for profound affection for, emotional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than one gender in lieu of a formal definition. There does not appear to have been any interpretation given by the local courts.⁶⁵

Malta ratified Protocol 12 of the European Convention on Human Rights, which provides for a general prohibition on discrimination. The Protocol removes the current limitation on 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.

2.1.2 Multiple discrimination

In Malta, multiple discrimination is prohibited by law only on the ground of disability.

In the white paper for the draft equality bill, mention is made of the introduction of provisions on intersectionality.⁶⁶ 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 Article 3A of the Equal Opportunity (Persons with Disability) Act, there is an explicit prohibition on multiple discrimination against people 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'.

⁶⁴ The definition was amended by virtue of Act II of 2012, a few months prior to Malta's ratification of the UN CRPD.

⁶⁵ 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 an individual'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 everyone has 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.

⁶⁶ Under Article 5 of the draft equality bill, discrimination may occur: (a) on the basis of a single ground, which shall be deemed to occur when a person is discriminated against on the basis of only one of the protected characteristics; or (b) on the basis of multiple grounds, which shall be deemed to occur when a person is discriminated against on the basis of a combination of two or more of the protected characteristics.

In Malta, there is no case law dealing with multiple discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Malta, discrimination based on perception or assumption of a person's characteristics is prohibited under national law. The Equal Opportunities (Persons with Disability) Act 2000 specifically makes reference to a person having a presumed characteristic. 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, discrimination based on association with persons with particular characteristics is prohibited in national law.

By way of interpretation, reference can be seen to be made under Article 6 of the Equal Opportunities (Persons with Disability) Act 2000, 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, 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 or her disability or a disability of any of his or her family members by refusing or not accepting his or 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 or her disability or disability of any of his or her family members by denying him/her access, or limiting his or her access, to any benefit provided by such educational authority or institution or expelling him/her from the educational institution he or she is attending.

There have not been any national cases which have dealt with the prohibition of discrimination based on association with people with particular characteristics.

National law contains definitions of discrimination which reflect the definitions found in the directives and therefore the interpretation given in the *Coleman v. Attridge Law and Steve Law*⁶⁷ case would have to be mirrored if a similar case were to be brought before the national courts. However, it is pertinent to note that the doctrine of precedent is not binding on the local judiciary.⁶⁸

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

a) Prohibition and definition of direct discrimination

In Malta, direct discrimination is prohibited under national law.⁶⁹ It is defined.

⁶⁷ Judgment of the Court (Grand Chamber) of 17 July 2008; *S. Coleman v. Attridge Law and Steve Law*.

⁶⁸ EU law/judgments of the CJEU are not binding on the local judiciary but are a source of reference.

⁶⁹ The draft equality bill defines indirect and direct discrimination. In the latter case, the definition includes situations in which there is less favourable treatment on the basis of a person's association with another person who has one of the protected characteristics under the Bill.

The Equal Treatment in Employment Regulations issued under the Employment and Industrial Relations Act 2002 provide for the prohibition of 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 the Equal Treatment of Persons Order of 2007, 'discrimination' means 'direct or indirect discrimination based on racial or ethnic origin.' Article 2(2) states that '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 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, 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 another⁷⁰ 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 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 CRPD.

(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

⁷⁰ One may note the use in the Act of the wording 'discriminating with another person' and 'discriminating against another person'. It is understood that the term 'with' in the former has the same meaning as 'against' as used in the latter.

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.’

Under Article 5, discrimination on the grounds of disability could also arise if the disabled person is treated less favourably than others because he or 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 as prohibited by the Act, a person is deemed to discriminate against another on the grounds of disability where he or 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 the discrimination to which a person may be subjected due to the fact that he or she is accompanied by an assistant due to his or 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,⁷¹ but under Article 13(2) the Act provides that, ‘the public service⁷² 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’.⁷³

b) Justification for direct discrimination

Other than the exception provided for below, the Equal Treatment of Persons Order provides for no situations in which direct discrimination may be justified.

As noted above, in 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

⁷¹ It is assumed, however, that in interpreting this Act the courts will have regard to provisions in other domestic legislation.

⁷² People engaged by the state.

⁷³ The Public Service Management Code, applicable to the public service, also 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. Furthermore, the Code of Ethics for public employees under the Public Administration Act 2019 provides that employees employed by the state shall not discriminate in any manner or on any basis including race, place of origin, nationality, skin colour, political opinions, creed, sex, sexual orientation, expression or gender identity, civil status, mental or physical wellbeing.

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.⁷⁴

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.

Under 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 does not define indirect discrimination but provides for a prohibition on indirect discrimination, stating 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 a prohibition on 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 people 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 define 'indirect discrimination' and does not make specific reference to the term, other than where reference is made to the use of statistical evidence in proving indirect discrimination. However, under 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.

⁷⁴ Equality for Men and Women Act 2003, Article 2(3)(d).

b) Justification test for indirect discrimination

As noted above, under 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 cover grounds other than gender, the justification test is limited to factors unrelated to sex.⁷⁵ A similar exclusion is not found in the directives.

The same test that applies in Article 2(2)(b) of Council Directive 2000/78/EC to determine whether there has been indirect discrimination or otherwise applies in Regulation 3(2)(b) of the Equal Treatment in Employment Regulations. There is no mention of a justification test for indirect discrimination in any other legislation.

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

2.3.1 Statistical evidence

a) Legal framework

In Malta, there are national rules regulating the collection of personal data.

The Data Protection Act 2018 regulates the collection and processing of personal data.⁷⁶ The provisions of this Act relate to the processing of personal data, as defined under EU Regulation 2016/279, wholly or partly, by automated means and to such processing other than by automated means where such personal data forms part of a filing system or is intended to form part of a filing system. Under Article 6, subject to certain safeguards,⁷⁷ controllers and processors may derogate from the provisions of the Act in the case of processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, such as when collecting data in a national census. Under the Persons with Disability (Employment) Act 1969, employers must maintain a register with the details of all the persons they employ and also of persons registered with a disability. The statistics on such registers shall be used to collect such statistics on a national basis.

Furthermore, in Malta, statistical evidence may be admitted under national law in order to establish indirect discrimination. Maltese law does not specifically prohibit the use of

⁷⁵ In this Act, the terms 'gender' and 'sex' are distinguished and have different meanings.

⁷⁶ The Data Protection Act in Chapter 440 of the *Laws of Malta* distinguished between personal data and sensitive personal data. However, this Act was repealed with the entry into force of the GDPR and was replaced by the Data Protection Act in Chapter 586 of the *Laws of Malta*. The GDPR is directly applicable in Malta as it is a Regulation. Under the GDPR, a distinction is made between personal data (any information relating to an identified or identifiable natural person ('data subject')); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person) and special categories of data (personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation). Therefore, the main distinction between the two sets of data is that, while processing of personal data is permitted as long as it is done in accordance with Article 6, processing of special categories of data is prohibited unless it is done in accordance with Article 9.

⁷⁷ Processing shall be subject to appropriate safeguards for the rights and freedoms of the data subject, including pseudonymisation and other technical and organisational measures to ensure respect for the principle of data minimisation.

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,⁷⁸ which provides that indirect discrimination may be proven by means of any evidence, including statistical evidence. No such reference is made in any other relevant legislation, and therefore there is no provision in statute to confirm that this form of evidence can be used when alleging discrimination under any other legislation.

b) Practice

In Malta, statistical evidence is not regularly used in practice in order to establish indirect discrimination. 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 nor have there been any reported cases in which the court was reluctant to use statistical data as evidence in court. Although the Maltese courts do look at legal developments in other countries to assist them in reaching their decisions, this is not obligatory in practice.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Malta, harassment is prohibited in national law. It is defined. National law is in line with the personal and material scope of the directives applying to all sectors and persons. In Malta, harassment explicitly constitutes a form of discrimination.

The Equal Treatment in Employment Regulations extended the protection from harassment in matters of employment to cover 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 subjected to such treatment.

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

Under 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. Under 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'.

Under 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'.

Under Article 5(2) 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.

Under said Act, harassment means 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

⁷⁸ Equality for Men and Women Act 2003, Article 2(4A).

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 in other regulations.⁷⁹

In Malta, harassment explicitly constitutes a form of discrimination.

This is defined under the Equal Treatment in Employment Regulations, as noted 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.

Under 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 he or she proves that the offence was committed without his or her knowledge and that he or she exercised all due diligence to prevent the commission of the offence.

Similarly, Article 14 of the Equal Treatment of Persons Order 2007 provides that, where an offence against the provisions of the order is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he or she proves that the offence was committed without his or her knowledge and that he or she 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 for a fine (*multa*) of not more than EUR 2 329.37 or for imprisonment for not more than six months, or for both a fine and imprisonment.

⁷⁹ In the Public Service Management Code, under Section 6.6.2, unethical behaviour is taken to include sexual harassment and victimisation, resulting in disciplinary proceedings being taken against a public employee. Disciplinary proceedings in the public service are regulated by the Public Service Commission Disciplinary Regulations 2017, which provide that an officer shall be subject to disciplinary proceedings for misconduct such as unethical or unprofessional behaviour. As specified in the schedule thereto, such misconduct includes sexual harassment and victimisation of a witness or an officer or other person lodging a report or doing his or her duty under these regulations or any other regulations issued under Article 121 of the Constitution. Under the Code of Ethics for the Public Service, public employees are obliged to avoid discrimination or harassment in any form, direct or indirect.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Malta, instructions to discriminate are prohibited in national law. While the term 'instructions' is not defined, the law does define what constitutes instructions to discriminate. In Malta, instructions explicitly constitute a form of discrimination.

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 introduced into Maltese employment legislation a prohibition against instructions to discriminate. Regulation 3(4) provides that a person shall also be deemed to have discriminated against another person if he or she 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, racial or ethnic origin, pregnancy or maternity leave or gender reassignment.

Under the Equal Treatment of Persons Order 2007, the prohibition on giving instructions to discriminate arises out of the definition of harassment. Under the definition, '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 Order, at article 2(c) and (d), 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 constitute 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 the latter refers to instructions to discriminate and not solely instructions to harass.⁸⁰

Article 1044 of the Civil Code⁸¹ and Article 42 of the Criminal Code⁸² can provide the basis for judicial action against a person who allegedly gave instructions to another person to discriminate.

With respect to instructions to discriminate that are given by public authorities, one can plead Article 45(3) of the Constitution. With regard to 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 noted above, under 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.

⁸⁰ The concept of instructions to discriminate is not covered in the Equal Opportunities (Persons with Disability) Act.

⁸¹ 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'.

⁸² This deals with the offence of complicity.

b) Scope of liability for instructions to discriminate

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

Under Article 46 of the Employment and Industrial Relations Act 2002, where an offence against the provisions of this Act or of any regulations or orders made thereunder is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity, shall be deemed to be guilty of that offence unless he or she proves that the offence was committed without his or her knowledge and that he or she exercised all due diligence to prevent the commission of the offence.⁸³

It is also pertinent to note that, under 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 stipulates that employers must provide reasonable accommodation for employees with disabilities, but this provision excludes 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 as including '(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 alterations⁸⁴ for a person with a disability; and (c) quality and vocational career guide, which guide shall be free for the person with disability'.

Under 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

⁸³ 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 or her defence the claim that he or she was instructed to discriminate by his or her employer. The author agrees with such an interpretation, since this provision does not appear to prohibit a person from giving instructions to discriminate.

⁸⁴ Necessary and appropriate modifications and adjustments.

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 and case law

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’. Under 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 those 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 board⁸⁵ 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 everyone. All building applications have to be considered by the board and there is no appeal following a decision taken by the board.⁸⁶

⁸⁵ There shall be a board to determine what is reasonable, appointed by the commissioner (Commissioner for the Rights of Persons with Disability) for a period of three years. The board shall be composed of: (a) five people 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 people with disabilities or family members of people with disabilities who cannot represent themselves. The number of people with disabilities shall be higher than the number of family members of people with disabilities who cannot represent themselves. The board shall be presided over by the Chairperson, who shall be a person with disabilities and who shall preside over every meeting of the board, aided by the Vice Chairperson, who shall be a person with disabilities.

⁸⁶ Throughout 2018, the board reviewed 71 cases, an increase from previous years. Of these, 38 were deemed reasonable, while 28 were not accepted. There were also two cases for which further information was requested. During this year, CRPD technical experts carried out 136 site inspections, of which 105 were found to be compliant and 31 non-compliant. Another project that took place during the year involved auditing the commercial premises, offices and restaurants in two main streets in the capital city Valletta: Merchants Street and Republic Street. The results of this audit showed that the capital city is still a very

Article 20(1) states: 'in determining the reasonableness of any action to be undertaken by any person in the fulfilment of the provisions of this Act, including any alteration, change, and/or provision of services, facilities or assistive means, regard shall be had by the Board as to whether such actions could be undertaken without unjustifiable hardship'. In essence, therefore, the assessment of whether there is unjustifiable hardship is part of the assessment of whether action is reasonable. 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;
- 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.'

Article 7(4) refers to the factors to be considered in determining whether any alterations would hinder the business of the employer, while Article 20 refers to the factors to be considered in the test of reasonableness; the latter contains fewer factors to be considered than those to be found under Article 7 and they are more varied.

c) Definition of disability and non-discrimination protection

Under Article 2 of the Equal Opportunities (Persons with Disability) Act, 'disability' means 'a long-term physical, mental, intellectual or sensory impairment⁸⁷ 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. Therefore, the definition of 'disability' for the purposes of claiming reasonable accommodation is the same as the one that applies for claiming protection from non-discrimination in general.

d) Failure to meet the duty of reasonable accommodation for people with disabilities

In Malta, failure to meet the duty of reasonable accommodation in employment for people with disabilities counts as discrimination.

An employer shall be considered to have discriminated on the grounds of disability under 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 them. Such failure results in direct discrimination. Under 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. Any damages in respect of an unlawful act of discrimination may include compensation for

inaccessible place, with 344 out of 375 premises not being accessible. Figures for 2019 are not yet available.

⁸⁷ 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.

injury to feelings, whether or not they include compensation under any other provision, of not more than EUR 2 500 such as the court may declare.

Under Article 4A of the Equal Treatment in Employment Regulations 2004, an employer is obliged to provide reasonable accommodation for people 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. Under Article 14 of the Regulations, any person contravening the provisions of these regulations shall be guilty of an offence and shall, on conviction, be liable for a fine (*multa*) not exceeding EUR 2 329.37 or for imprisonment for a period not exceeding six months, or for both a fine and imprisonment.

Therefore, it can be noted that a 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 to be 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 excepting 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.

- e) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Malta, there is a legal duty to provide reasonable accommodation for people with disabilities outside the area of employment.

The duty to provide reasonable accommodation for people with disabilities outside the employment field arises out of the United Nations Convention of the Rights of Persons with Disabilities, which Malta has ratified. No local legislation has been introduced to impose this obligation.⁸⁸

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 makes reference to the duty to provide reasonable accommodation to people with disabilities only in the field of employment.

Implied reference to the provision of accommodation can be found in Articles 11 and 13. Under 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 in Article 13 of the Equal Opportunities (Persons with Disability) Act 2000, which prohibits the refusal to provide goods and services to eligible people with

⁸⁸ Malta signed the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol in March 2007, which were ratified in October 2012 and came into effect on 9 November 2012.

a disability, and states that such prohibition shall not apply where compliance with such provisions in relation to an eligible 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.

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 sector and/or the private sector.

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)

In Malta, the following residence/citizenship/nationality requirements apply for protection under the relevant national laws transposing the directives.

Regulation 1(5)(a) of the Equal Treatment in Employment Regulations, 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 2007⁸⁹ 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. There is no recent case law on the matter.

There are various laws – as can be seen in the sections below – which protect citizens against discrimination, such as the Equal Treatment in Employment Regulations,⁹⁰ the Equal Opportunities (Persons with Disability) Act,⁹¹ the Equal Treatment of Persons Order⁹² and the Employment and Industrial Relations Act;⁹³ the said laws offer protection to both natural and legal persons.

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(e) of the Interpretation Act 1975⁹⁴ provides that in that Act, and in every other act, whether passed before or after the commencement of the 1975 Act, unless the contrary intention appears, the expression 'person' shall include a body or other association of individuals, whether or not they are granted legal personality.

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.

⁸⁹ Equal Treatment of Persons Order 2007, Article 2(4).

⁹⁰ Equal Treatment in Employment Regulations 2004, Article 3.

⁹¹ Equal Opportunities (Persons with Disability) Act 2000, Article 3.

⁹² Equal Treatment of Persons Order 2007, Articles 4-5.

⁹³ Employment and Industrial Relations Act 2002, Articles 26-32.

⁹⁴ Interpretation Act, 4 February 1975, *Laws of Malta*, Chapter 249.

The 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, which is entitled 'Fundamental Rights and Freedoms of the Individual', can clearly only be invoked by natural persons. This is in compliance with the relevant provision in the directive.

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,⁹⁵ while there are others which apply specifically to employees in the private sector. Under Article 84 of the Employment and Industrial Relations Act, all the provisions of that Act are rendered applicable to people 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 in the Equal Treatment in Employment Regulations⁹⁶ apply to anyone working in the public and private sectors. As far as public bodies are concerned, there are bodies, as stipulated in Section 6 of this report, which are constituted by virtue of the provisions of particular laws, and hence the said laws would regulate the public body concerned.

b) Liability for discrimination

As stated above, in Malta the personal scope of anti-discrimination law covers both the private and public sectors, 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 in the private sector, the Employment and Industrial Relations Act 2002 applies to anyone in employment.⁹⁷ Consequently, the prohibition on 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.

⁹⁵ These regulations cover disciplinary proceedings involving public officers and termination of office.

⁹⁶ Equal Treatment in Employment Regulations 2004, Article 1(2).

⁹⁷ 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.

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

In Malta, national legislation prohibits discrimination in relation to 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 and 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 or her employees or prospective employees to any discriminatory treatment. The Employment and Industrial Relations Act 2002 does not apply to people who are not in employment or who are self-employed. By virtue of the provisions of Legal Notice 54 of 2007,⁹⁸ the provisions in the Employment and Industrial Relations Act establishing equality of treatment of people in employment have been extended to employees in the public sector.

Article 26(1)(a) of the Act states: '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, in Article 26(2), the situations that are deemed to constitute discriminatory treatment under subparagraph (2) are merely illustrative and 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 Regulations⁹⁹ provides that the regulations shall be applicable to everyone 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, workers¹⁰⁰ are afforded protection under the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations.¹⁰¹ 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 employment¹⁰² in Malta. As in other EU Member States, workers are empowered to bring forward a complaint if 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 above-mentioned regulations in the same way as workers of Maltese nationality.

⁹⁸ Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations, 5 November 2004.

⁹⁹ These regulations apply to all persons in employment.

¹⁰⁰ Persons in employment.

¹⁰¹ These regulations transpose Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014.

¹⁰² As well as access to social and tax advantages, housing, training, education and conditions of employment.

Furthermore, Article 15(1) of the Employment and Training Services Act 2018,¹⁰³ which deals with the recruitment of employees to the public sector,¹⁰⁴ provides that all employees required by the Government of Malta from outside its service or by any body corporate or company in which the Government of Malta has a controlling interest or over which it has effective control, whether these are employed on a contract for a specified time or for an indefinite period, shall be recruited through the employment service provided by Jobsplus, 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 sex, religion or belief, economic means, race or ethnic origin, political opinion, disability, colour, sexual orientation or gender identity, shall be guilty of an offence under the Act.

Under Article 4 of the Equality of Men and Women Act 2003, it is unlawful for employers¹⁰⁵ to discriminate in matters relating to access to employment. Therefore, the provision prohibits, directly or indirectly, any discrimination against a person in arrangements made to determine or in determining who should be offered employment; in the terms and conditions on which the employment is offered; or in the determination of who should be dismissed from employment.

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

By virtue of Act X of 2014, the grounds of sexual orientation and gender identity were introduced into Article 45 of the Constitution. The principle was also introduced 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.

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 respect of 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.

¹⁰³ Employment and Training Services Act 2018 (Act XXXIX of 2018), *Laws of Malta*, Chapter 594.

¹⁰⁴ It therefore excludes the self-employed and those employed in the private sector.

¹⁰⁵ The prohibition applies to employers and employees.

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

Under 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 if 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 regulations in the same way as workers of Maltese nationality.

3.2.4 Access to all types and 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.

Furthermore, Regulation 1(4) of the Equal Treatment in Employment Regulations provides that the provisions of these regulations shall be applicable to everyone 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.

In addition, under Regulation 6 of Legal Notice 51 of 2007, which is 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 or her disability or a disability of any of his or her family members by refusing or not accepting his or 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 or her disability or disability of any of his or her family members by denying him/her access or limiting his or 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'.

Under 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.

Under 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.

2018 saw the introduction of the Work-Based Learning and Apprenticeship Act 2018¹⁰⁶ which regulates work-based learning and apprenticeships within the context of vocational educational and training programmes. People who have attained school leaving age as defined by the Education Act shall be eligible to enrol for work placements, apprenticeships and internships in accordance with this Act. Sponsors must ensure that the learners' wellbeing is safeguarded and that they are trained in an environment that is free from discrimination, workplace bullying or harassment. They must also ensure that entry requirements and the selection of learners are equitable and free from discrimination on the grounds of age, belief, creed and/or religion, colour, ethnic origin and/or race, disability, family responsibilities¹⁰⁷ and/or pregnancy, family and/or civil status, gender expression and/or gender identity, genetic features, health status, political opinion, sex and/or sex characteristics and sexual orientation.

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 relation to 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.

¹⁰⁶ Work-Based Learning and Apprenticeship Act 2018, 6 March 2018 (Act III of 2018).

¹⁰⁷ Normally refers to family caregiving responsibilities.

Under 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 establishes that the provisions of this legal notice shall be applicable to everyone 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-one shall be hindered in their right peacefully to assemble freely and to associate with other people 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 2016¹⁰⁸ 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 prohibits discrimination in social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

Under 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 if they feel their rights have been restricted. Workers who are not EU citizens are still afforded protection under the general laws detailed above.

a) 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, other than as stipulated above, in relation to social protection.

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

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

¹⁰⁸ Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations, 20 May 2016, LN 173 of 2016.

Under 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;¹⁰⁹ (e) access to any other service as may be designated by law for the purposes of this regulation.

Jobsplus, the public employment agency, provides services to people who are in a disadvantaged situation and have difficulty entering the labour market.

While these benefits may not always be set out in legislation, there is no specific corresponding legislation (except for the provisions in the Equal Treatment of Persons Order) prohibiting discrimination in the granting of 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 people 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 prohibits discrimination in education, as formulated in the Racial Equality Directive.

Under 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 under Article 11,¹¹⁰ as does the Education Act.

Migrants¹¹¹ are not treated differently under anti-discrimination legislation, benefiting equally with nationals from anti-discrimination law enforcement and implementation in the field of education. In Malta, migrants attend various schools of their choice and are entitled

¹⁰⁹ DB San Ġorġ Property Ltd (DB Group) was granted a permit to demolish the former Institute of Tourism Studies (ITS) in Pembroke and erect two high-rise buildings in its stead. The National Commission for the Rights of Persons with Disability (CRPD) was informed that hoarding blocks had been placed on the pavement adjacent to the former ITS building. Subsequently, on 3 July 2019, it filed a judicial protest against DB Group and the Pembroke local council under the Equal Opportunities (Persons with Disability) Act. As a result of such obstruction, persons with reduced mobility who make use of a wheelchair could not access the pavement. The CRPD claimed that such behaviour on the part of the respondents therefore constituted a manifest breach of the provisions of the Act, and that the respondents should take all necessary measures at law to remedy such violations. Furthermore, under the Environmental Management Construction Site Regulations (SL 552.09), the owner should ensure safe passage past the site. In addition, where construction necessitates the obstruction of a pedestrian pavement and this is approved by the local council, a temporary pedestrian pavement should be provided, which should be kept clear of obstructions at all times. Therefore, if the above facts are proven, it seems that DB Group failed not only to obtain the local council's approval, but also to provide access to pedestrians and persons with reduced mobility. The case is still ongoing.

¹¹⁰ 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 or her disability or a disability of any of his or her family members by refusing or not accepting his or 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 or her disability or disability of any of his or her family members by denying him/her access, or limiting his or her access, to any benefit provided by such educational authority or institution or expelling him/her from the educational institution he or she is attending.

¹¹¹ The term 'migrants' here includes asylum seekers and migrants who have been recognised as such in Malta.

to free education in public schools.¹¹² In 2017, the Government launched its migrant integration strategy and action plan.¹¹³ In so doing, the Government aimed to create a basic but sufficient framework to improve the chances of success for all migrants who want to belong, and it will continue to tweak policies and services in order to remove unnecessary bureaucracy and burdens.

Adults and young asylum seekers are eligible to apply to be exempted from fees at state educational institutions, including the University of Malta, vocational training courses, languages lessons and other adult education. Vocational training courses offered by Jobsplus, the state-run job placement service, are also accessible to asylum seekers.

a) Pupils with disabilities

In Malta, the general approach to education for pupils with disabilities does not give rise to any 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 or her disability or a disability of any of his or her family members by refusing or not accepting his or 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 or her disability or disability of any of his or her family members by denying him/her access, or limiting his or her access, to any benefit provided by such educational authority or institution or expelling him/her from the educational institution he or she 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 people who have that particular or specific disability and may refuse admission or continued participation to other people 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,¹¹⁴ educational establishments in general do provide access to students with a disability.

Under the Education Act 1988, the Minister for Education is responsible for ensuring that the national policy on inclusive education is applied in all schools. The Act also provides

¹¹² Likewise, Article 13(2) of the Refugees Act states that asylum seekers shall have access to state-funded education and training. This general statement is complemented by the Reception Regulations, under which asylum-seeking children are entitled to access the education system in the same manner as Maltese nationals. Primary and secondary education is offered to asylum seekers up to the age of 15-16, as this is also the cut-off date for Maltese students. Access to state schools is free of charge. These rules apply for primary and secondary education. The practical difficulties faced by asylum seeking children relate to the absence of a formal assessment process to determine the most appropriate entry level for children; the absence of preparatory classes; limited or no prior educational background; and language difficulties.

¹¹³ Ministry for European Affairs and Equality (2017), *Integration = Belonging: Migration Integration Strategy & Action Plan – Vision 2020*, available at: <https://meae.gov.mt/en/Documents/migrant%20integration-EN.pdf>.

¹¹⁴ It has been remedied by the provisions of the UNCRPD, to which Malta is a party.

that the required resources, tools¹¹⁵ and facilities must be available to implement the policy as effectively as possible.¹¹⁶ The Minister must ensure that there are specialised resource centres to support schools and colleges in the implementation of the policy of inclusive education through providing a service to students with specific learning difficulties and that there are other institutions to provide education and training services to students with individual educational needs whose educational entitlement may be better achieved in such centres.

Without prejudice to the above, the law also provides that it shall be the duty of the state to provide special resource centres, whose specialised role will include provision for children with individual educational needs who would benefit more from being in such centres than from being in mainstream schools, for such time as may be appropriate depending on their needs.¹¹⁷ The Equal Opportunities (Persons with Disability) Act 2000 enshrined the right of people with disabilities to equal opportunities in all fields, including in education.

In the Education Act, the obligation applies only to children of Maltese citizens, whereas the same obligation under the Equal Opportunities (Persons with Disability) Act applies to everyone. The Minister of Education has stated¹¹⁸ that inclusive education provides an educational environment where disabled and non-disabled children learn together, where possible in mainstream school settings. On the other hand, special education is provided 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 in that area, 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 pupils 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, which 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 work¹¹⁹ reflects a consideration of a range of needs, including the needs of learners who are gifted and talented, those who have special educational needs or severe disabilities and those who

¹¹⁵ Under the Maltese Sign Language Recognition Act 2016, Maltese sign language is recognised as an expression of culture and endorsement of equal opportunities and inclusion for the deaf community.

¹¹⁶ A judicial protest was filed on 4 May 2015 by the National Commission for Persons with Disability (NCPD), when it was informed of a case in which a child with a disability was no longer able to attend school because of an alleged lack of assistance offered by the school. The school in question filed a counter-protest denying all allegations that it had not provided the necessary support to the child. See: 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 NCPD as her daughter was not allowed to attend school unless the learning support assistant or teachers who knew how to manage her challenging behaviour were present. The NCPD 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 would have the necessary tools and could continue her studies.

¹¹⁷ A minor shall be deemed to have special educational needs when that minor has special difficulties of a physical, sensory, intellectual or psychological nature.

¹¹⁸ This was at the launch of a working group entrusted with reviewing inclusive and special education in Malta, which coincided with the International Day of People with Disabilities 2004.

¹¹⁹ The Ministry for Education and Employment has also recently launched the initiative '[My journey – Achieving through different paths inclusive and comprehensive equitable quality learning programmes](#)'. Through this initiative, secondary school students will be able to choose between academic, vocational or applied subjects, or a combination of those three elements, during the senior cycle of secondary education. This will involve moving from a one-size-fits-all system to a more inclusive and equitable programme which can specifically cater to each learner's individual talents.

experience social disadvantage or come from diverse social, cultural and linguistic backgrounds, including children of refugees and asylum seekers.¹²⁰

Reference must be made to the principles enshrined in the national policy on the rights of persons with disability¹²¹ 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 2015.¹²² One of the main recommendations in the report 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.¹²³

A new policy on inclusive education in schools was published in 2019 by the Ministry of Education and Employment. The two national policy documents, entitled *A Policy on Inclusive Education in Schools: Route to Quality Inclusion* and *A National Inclusive Education Framework*,¹²⁴ give a comprehensive, structured and harmonised guide to educators, professionals and parents in the passage towards a more effective and efficient education system. It is believed that inclusion, inclusive education and inclusive practices are fundamental for an operative and effective education system. All citizens should be given equitable prospects and experiences through an inclusive education that is designed to meet the strengths and needs of each individual child and young person. The document *A Policy on Inclusive Education in Schools* presents, through its four benchmarks, key areas in moving towards a valued inclusion that is accessible and equitable for all. This national policy is viewed as a transformational process that is intertwined with 10 themes that are presented in the national inclusive education framework, which develops a holistic and applied approach towards the implementations of inclusive education practices. Both documents support stakeholders working at the Ministry for Education and Employment, colleges and schools in becoming superior advocates of inclusion and inclusive education practices.

b) Trends and patterns regarding Roma pupils

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 that are available to the public (Article 3(1)(h) Directive 2000/43)

In Malta, national legislation prohibits discrimination in access to and the supply of goods and services as formulated in the Racial Equality Directive. Maltese law, in line with the

¹²⁰ In February 2014, the Ministry for Education and Employment launched a new framework, in the document *Framework for the Education Strategy for Malta 2014–2024*, which aims 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; the 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.

¹²¹ This policy was 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 Ġusta.

¹²² This report was prepared by the European Agency for Special Needs and Inclusive Education on behalf of the Ministry for Education and Employment.

¹²³ 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.

¹²⁴ Available at:

https://meae.gov.mt/en/Public_Consultations/MEDE/Documents/A%20Policy%20on%20Inclusive%20Education%20in%20Schools%20-%20Route%20to%20Quality%20Inclusion%E2%80%8B.pdf.

provisions of Article 3(1)(h), refers to the supply of goods and services which are available to the public.

Under 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 under the general prohibitions of non-discrimination.¹²⁵

Under 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 services¹²⁶ or be discriminated against by any person or body providing such goods, facilities¹²⁷ or services which the qualified person seeks to obtain or use'.¹²⁸

In 2016, provisions were introduced in the Equal Opportunities (Persons with Disability) Act 2000 that relate specifically to the provision of health services but not necessarily in the employment field. The Act now provides¹²⁹ 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

¹²⁵ In 2018, the NCPE received a complaint alleging unfair treatment based on race and ethnic origin in accessing the justice system. The complainant made special reference to the Small Claims Tribunal in Malta, and stated that the tribunal is nowadays accessible to the public, who can submit complaints either via the usual channels in the law courts or electronically through the law courts website. The complainant further noted that, while the website is available in the Maltese and English languages, the submission of the complaint can only be done in Maltese. In view of this, the complainant believes that 'access to non-Maltese speakers to e-forms related to access to Justice is prevented because it may be accessed only and solely in the Maltese Language'. The Commissioner opined that the policy relating to the language of the law courts is objectively justified by a legitimate aim; that the means of achieving this aim are appropriate and necessary; and that a court of law has a right to conduct its proceedings in a language of its choice. The Commissioner further noted that the practice of choosing a language of the court is adopted by all national courts and also by transnational courts dealing with issues such as the determination of breaches of human rights. For these reasons, the Commissioner concluded that the facts of the case are not tantamount to unfair treatment or of denied access to social or tax advantages on the basis of race and ethnic origin as alleged by the complainant.

¹²⁶ The provision (whether on payment or not) of goods, facilities and services to the public or any sector of the public.

¹²⁷ In *Kummissjoni Nazzjonali Persuni B'Dizabilita' v. Malta Football Association*, final judgment, Civil Court, First Hall, 16 November 2017, appealed, Ref. 462/2013, the Commission for the Rights of Persons with Disability instituted a case against the Malta Football Association on the basis of lack of accessibility to persons with disability at the National Stadium in Ta' Qali in the principal enclosure known as the West Stand. During the proceedings, the defendant developed sanitary facilities for people with disabilities and a platform from where wheelchair users can watch matches, but access was not available to the cafeteria. Given the circumstances of the case, the Court did not consider that it was reasonable that the defendant was ordered to carry out the alterations suggested in order for wheelchair users to be given access to the bar situated in the enclosure. It also noted that, in an ideal situation, financial and logistical considerations would not be taken into account, but it could not discard the element of proportionality in such circumstances. Consequently, it held that, in the circumstances of the case and given the costs that would be incurred by the defendant as well as the length of time needed to carry out such works, the Court considered that the exception raised by the defendant (under Article 12(2) of the Equal Opportunities (Persons with Disability) Act) was satisfied in light of the lack of reasonableness of what was requested by the claimant.

¹²⁸ *Kummissjoni Nazzjonali Persuni B'Dizabilita' v. Kazin tal-Banda ta' Sant'Antnin*, final judgment, Civil Court, First Hall, 11 January 2017, appealed, Ref. 410/2016. This case started in 2003 when the Band Club was not yet open to the public. Although the building had a lift shaft, the lift was never installed and therefore different floors within the club were not accessible to all. The Commission made several attempts to intervene and sent technical officers, including its architects, on site no fewer than five times to verify the accessibility issue. However, by 2016 the lift had not been installed. Thus, in 2016 the Commission opened a court case against the club. The Court pronounced in favour of the Commission and ordered the club's society to render the premises accessible to people with disabilities within three months. The club appealed against this sentence. Pending appeal, the society is still cooperating with the CRPD to implement the necessary changes.

¹²⁹ Equal Opportunities (Persons with Disability) Act 2000, Article 13A.

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 the Act provides that, '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'.

a) 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 and banks) and those only available privately (e.g. those restricted to members of a private association).

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

In Malta, national legislation prohibits discrimination in 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 Racial Equality Directive, protection is found in the provisions of the Equal Treatment of Persons Order under Article 4, 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 or 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.

Under 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 a more 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 or 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 or entrances of apartments built by the Government or the Housing Authority in Malta and Gozo that are occupied by tenants who have the said mobility issues and are recognised by the Government as having such needs.

Another scheme promoted by the Housing Authority relates to 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 into the community. It

is open to disabled people, including people with a psychosocial disability, homeless people, young people needing care or adult or child victims of domestic violence.

In 2019, the Parliamentary Secretariat for Social Accommodation designed specialised housing programmes (SHPs) as a measure that will specifically create housing and integrated service provision that offers solutions based on the needs primarily of vulnerable groups.¹³⁰ The focus on the relationship between vulnerabilities, housing, wellbeing and socio-economic status builds on the EU2020 strategy, which has as one of its core goals the prevention of social exclusion in order to address people who are significantly more at risk than others.¹³¹ SHPs will therefore provide funding to accommodation projects which seek to ensure environmental wellbeing where the final design will be mindful of the benefits of incorporating social thinking that improves the wellbeing and quality of life of the user group.

In the National Commission for the Promotion of Equality (NCPE) report for 2012, reference is made to the conclusions reached in the 'I'm Not Racist, But...' project, which was co-funded by EU PROGRESS 2007-2013 funds. Research was carried out on immigrant and ethnic minority groups and housing and accommodation, and it was reported that the conclusions of the qualitative research exercise revealed 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 for migrants.

The main form of accommodation provided to migrants consists of access to reception centres.¹³² Some families, single women and unaccompanied children are accommodated in separate open centres, although families also often share accommodation with other groups. 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. In recognition of the difficulties faced by migrants in accessing housing, further impetus has been placed on improving the existing reception centres, given 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.¹³³

The document entitled *Integration = Belonging: Migration Integration Strategy & Action Plan – Vision 2020*¹³⁴ has introduced a framework for understanding successful integration assessed through the level of the migrants' own sense of belonging to Maltese society and the space that Maltese society allows for such integration in its different sectors and strata.

a) Trends and patterns regarding housing segregation for Roma

¹³⁰ See the document *Sustainable Communities – Housing for Tomorrow*, available at:

<https://housingauthority.gov.mt/en/documents/schemes/housing%20booklet%20final%20version.pdf>.

¹³¹ Those who are likely to suffer from social exclusion more than any other sub-group are people who might be experiencing: low income; family conflict; being in care; school problems; being from a sexual and gender minority; being an ex-prisoner; being from an ethnic minority; living in a deprived neighbourhood in urban and rural areas; mental health problems; age-related issues; or disability.

¹³² Four of the centres are run by AWAS and two by NGOs. The total reception capacity of the centres is approximately 1 500 places. At the end of 2018, 1 182 persons were accommodated in open centres. One NGO also offers accommodation in the form of private houses or flats, also falling within the AWAS overall reception system. In exceptional cases, particularly where the existing facilities are overcrowded, alternative venues are utilised as, for example, shelters for homeless persons.

¹³³ Communication between the Commissioner of Human Rights and the Minister for Home Affairs, February 2018.

¹³⁴ Ministry for European Affairs and Equality (2017), *Integration = Belonging: Migration Integration Strategy & Action Plan – Vision 2020*, available at: <https://meae.gov.mt/en/Documents/migrant%20integration-EN.pdf>.

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

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Malta, national legislation provides for exceptions 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 and is therefore in conformity with the relative provisions.

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 to be 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.

Under 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 schools¹³⁵ 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.¹³⁶ 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 people to hold high or sensitive teaching posts, but shall not discriminate between people in view of the manner in which they choose to lead their private lives.¹³⁷

¹³⁵ Under 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.

¹³⁶ In December 2014, a contentious 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 produced to lay down requirements that would forbid top school posts from being 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 led their private lives.

¹³⁷ The draft equality bill as published nonetheless effectively bans a Church educational institution from recruiting only staff who practise the same faith. In comments during the consultation process, it was stated that the Roman Catholic Church is against any form of discrimination and that, for this reason, it supports the EU directives protecting equality. However, the view was expressed that the draft equality bill in its current form goes beyond the EU directives and encroaches upon the religious freedom of the Church, religious organisations and practising Catholics. Archbishop Scicluna also called on a group of experts in law coordinated by the Faculty of Theology at the University of Malta, who said that while the bill borrows a lot from the EU directive, it inexplicably omits the directive's specific and special provisions that justify a difference in treatment by religious organisations, in limited circumstances which constitute a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate <https://knisja.mt/wp-content/uploads/2020/03/THE-EQUALITY-BILL.pdf?qa=2.16441526.1061962386.1592037457-496280051.1592037457>.

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 the Equal Treatment in Employment Regulations provide 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.¹³⁸

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

Regulation 1(5)(a) of the Equal Treatment in Employment Regulations 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 equality bill proposes to prohibit discrimination in various spheres of life such as employment and seeks to promote equality.¹³⁹

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

There is no case law on discrimination on grounds of nationality and ethnicity.¹⁴⁰

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.¹⁴¹

¹³⁸ In *Mario Camilleri v. Kap Kmandant tal-Forzi Armati*, (16/10/2007) the claimant argued that his dismissal from the Armed Forces was discriminatory under the Equal Opportunities (Persons with Disability) Act. The first court noted that the claimant failed to prove that he had suffered some form of discrimination as stipulated by law under Articles 3 to 7 of the Act. In addition, no proof was brought that any individual had ever been granted a similar exemption from shooting as he had requested after losing the sight in one eye. Even people placed on light duties were obliged to perform gun training, according to the regulations of the Armed Forces. The first court further noted that Directive 2000/78/EC, at paragraph 18, does not require the armed forces to recruit or maintain in employment people who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services. See: <https://ecourts.gov.mt/online-services/Judgements/Details?JudgementId=0&CaseJudgementId=45378>.

¹³⁹ The equality bill aims to protect individuals from discrimination based age belief, creed or religion, colour, ethnic or national origin, or race, disability, family responsibilities or pregnancy, family or civil status, gender expression or gender identity, genetic features, health status, language, nationality, political opinion, property, sex or sex characteristics, sexual orientation, and social origin are the protected characteristics.

¹⁴⁰ In 2018, the NCPE Commissioner received a complaint alleging unfair treatment based on race and ethnic origin in accessing the justice system.

¹⁴¹ In relation to persons of African descent, the Fundamental Rights Agency (FRA) carried out an in-depth study entitled 'Being Black in the EU' (28/11/2018) which covered areas including the labour market,

Information dissemination carried out by the NCPE also addresses this form of discrimination.¹⁴² According to the NCPE, as stated in the latest annual report,¹⁴³ people coming from minority race/ethnic and religion/belief backgrounds continue to experience a number of obstacles hindering their full inclusion within Maltese society. Obstacles may take the form of unlawful discrimination, language and cultural barriers, as well as lack of stability due to temporary documentation.

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

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 or 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 or 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:

- '(1) The employer shall ensure that the workplace is so organised and arranged to take account of the health and safety requirements of any workers with disability, if necessary.
- (2) Without prejudice to the generality of sub-regulation (1), this provision applies in particular to the doors, passageways, staircases, showers, washbasins, lavatories, resting and eating facilities and workstations used or occupied directly by persons with a disability.
- (3) The employer shall ensure that the work equipment assigned for use by the person with disability, or the type of work itself is such that the disabled person is not exposed to added risks to health and safety due to the disability.'

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

education, housing, social inclusion and social life in general with regard to migrants living in 12 EU Member States, including Malta, who were born in the countries of sub-Saharan Africa. The study (available at: <https://fra.europa.eu/en/publication/2018/being-black-eu>) found that people of African descent are regularly discriminated against in many areas of life because of their skin colour, ethnic origin or religion. One area in which discrimination is prominent is employment. In Malta, 30 % of men were discriminated against when searching for employment. Discrimination took place based on skin colour, or based on physical appearance, accent, the way respondents spoke, or their first or last names. Discrimination also continued at work, where 23 % of male respondents felt discriminated against. Discriminatory practices included giving people tasks below their qualifications because of ethnicity or background; denying them a promotion; people not being allowed to take time off for important religious practices; being dismissed or laid off because of one's ethnic or immigration background; and not being allowed to join a trade union.

¹⁴² 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.

¹⁴³ Annual report, 2018.

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

4.6.1 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 the Equal Treatment in Employment Regulations reflects the provisions of Article 6 of Directive 2000/78/EC and provides that, notwithstanding Regulation 3(1) and (2),¹⁴⁴ difference of treatment on the ground of age shall not constitute discriminatory treatment if:

- '(a) such differences are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy or labour market and vocational training objectives; and
- (b) 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:

- '(a) 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;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- c) 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.

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

With regard to second pension funds and third pension funds, under the Retirement Pensions Act 2011¹⁴⁵ a retirement scheme is one where the commencement of payment of retirement benefits to a member shall take place on a date that is not earlier than that on which such member has attained the age of 50, or not later than the specification provided in the pension rules,¹⁴⁶ which is set at the age of 75, unless the payment is made by reason of the permanent disability or death of the beneficiary or the termination of employment.

¹⁴⁴ These provisions deal with the concept of discriminatory treatment.

¹⁴⁵ Came into force in 2015.

¹⁴⁶ Pension rules for occupational retirement schemes, issued under the Retirement Pensions Act by the Malta Financial Services Authority.

Similarly, in the case of a long-term contract of insurance issued by a licence holder under the Voluntary Occupational Pension Scheme Rules 2017 where the commencement of payment of benefits to a qualifying individual shall start at an age not earlier than 50 or not later than the date when the individual attains the age of 70 or any other age specified in pension rules applicable to occupational retirement schemes under the Retirement Pensions Act or any other law substituting the said Act, except in those cases where the long-term contract of insurance provides that the payment is made by reason of the permanent disability or death of the beneficiary.

4.6.2 Special conditions for young people and older workers

In Malta, there are special conditions set by law for older workers in order to promote their vocational integration. The Business Promotion Regulations 2000¹⁴⁷ provide fiscal incentives to employers who create jobs for, and employ and train, people aged over 40. If such people are registered as disabled, these incentives are further increased. There is no obligation for employers to take action to benefit from such incentives or otherwise. There are no special conditions for young people but there are incentive to encourage young people to continue studying.

4.6.3 Minimum and maximum age requirements

In Malta, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training. The exception relates to personnel in the army, by which applicants wanting to join the armed forces cannot exceed the age of 30.

Under Maltese law, any person who has passed the compulsory school age¹⁴⁸ 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 people who are above compulsory school age, as defined in the Education Act 1988,¹⁴⁹ 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 people.

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. Jobsplus, which is the public employment agency, provides various training schemes.¹⁵⁰ It also provides training courses specifically directed at registered unemployed people over 40 years of age.

¹⁴⁷ Business Promotion Regulations 2000, 1 November 2000, Regulation 13.

¹⁴⁸ At the age of 16.

¹⁴⁹ Education Act, 16 August 1988 (Act XXIV of 1988). Chapter 327 of the *Laws of Malta*.

¹⁵⁰ 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, as well as people who have recently been declared redundant and other people trying to enter the job market.

4.6.4 Retirement

a) State pension age

In Malta, there is a state pension age at which individuals must begin to collect their state pensions. If an individual wishes to work beyond the state pension age 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 1987¹⁵¹ provides in 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 standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. However, under the Retirement Pensions Act 2011¹⁵² a retirement scheme is one in which the commencement of payment of retirement benefits to a member shall take place on a date that is not earlier than that on which such a member has attained the age of 50, or not later than the specification provided in the pension rules,¹⁵³ which is set at the age of 75, unless the payment is made by reason of the permanent disability or death of the beneficiary or the termination of employment.

c) State-imposed mandatory retirement ages

In Malta, there is a state-imposed mandatory retirement age, but people may choose to retire and stop working at any age. Where people 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.¹⁵⁴

National legislation provides for a pension age at which people are entitled to receive a state pension.¹⁵⁵ Under Article 2 of the Social Security Act 1987, the pension age is 65,

¹⁵¹ Social Security Act, 1 January 1987 (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.

¹⁵² Came into force on 1 January 2015.

¹⁵³ Directorate C - Social Statistics and Information Society. See: https://nso.gov.mt/en/nso/Sources_and_Methods/Unit_C2/Labour_Market_Statistics/Pages/Labour-Force-Survey.aspx. Relates to retirement funds and service providers, as well as the requirement of recognition for persons performing back-office administrative services.

¹⁵⁴ Mandatory retirement age is linked to pension age.

¹⁵⁵ On 26 September 2013, the Government was ordered to pay over EUR 700 000 in compensation to 4 stevedore foremen after a court ruled that their fundamental human right to enjoyment of their property was violated by a law which made them retire on turning 61. In a preliminary judgment delivered in November 2011, the court had ruled that the law was in violation of the men's right to enjoyment of their property, as they were being deprived of their licence to work as foremen in the harbour when they reached the age of 61. The court ruled that the men's licence was their property and that failure to renew their licences was a violation of their property rights. The judgment was confirmed by the Constitutional Court and the 2013 judgment was limited to the quantum of compensation owing to the men. In liquidating the

subject to the exceptions mentioned above with respect to people 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. An individual can therefore work and receive the state pension.¹⁵⁶

A state-imposed retirement age applies in the case of judges of the Superior Courts. Under Article 97 of the Constitution of Malta, a judge of the Superior Courts shall vacate his office when he attains the age of 65 years. The same age limit applies to the Attorney General,¹⁵⁷ the State Advocate¹⁵⁸ and magistrates of the Inferior Courts.¹⁵⁹

d) Retirement ages imposed by employers

In Malta, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

¹⁶⁰ Employers can introduce retirement schemes, but employees must consent to them and cannot be forced to participate in the scheme.

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 law on protection against dismissal and other laws protecting employment rights do not apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age thus possibly giving rise to age discrimination.

Thus if, at 65, a person continues working, he or she would not be afforded protection against dismissal on the grounds of age; however, as the person is still in employment, he or she would retain some employment rights under other laws protecting employment rights during employment.¹⁶¹

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).

¹⁵⁶ To encourage people not to retire early before reaching retirement age, the Government introduced a scheme that allows one to receive a higher pension for every year one remains in employment up to 65 years of age. The pensions percentage increase measure came into effect in 2016, for so-called delayed retirees working in private entities who have made enough contributions to benefit from the early opt-out and retire at 61 but who choose to continue working and retire at their proper pension age as per the new pensions reform. With effect from January 2019, public service employees working in the public sector, who would have made enough contributions, as per the table above, to draw a pension at 61 years of age but who choose to continue working are now eligible for a percentage increase to their pension rate, just like private sector employees.

¹⁵⁷ Article 91 of the Constitution.

¹⁵⁸ Article 91A of the Constitution.

¹⁵⁹ Article 100 of the Constitution.

¹⁶⁰

¹⁶¹ In *Grech Reginald et v. Onor. Ministru Ghat-Trasport u l-Infrastruttura et*, (8 January 2018, Constitutional Court) the claimants had received a notice from the Malta Maritime Authority whereby they were given the possibility of early retirement at the age of 55, which they felt constrained to accept. The foremen alleged that their rights under Articles 37 and 45 of the Constitution, and under Article 14 and the first Protocol of the European Convention on Human Rights, were being infringed. The first court referred to Directives 2000/78/EC and 2000/43/EC and stated that discrimination can occur on the basis of age. However, the court held that in such cases, a comparison must be made between all the foremen working at the port (and not between other self-employed workers) and thus concluded that discrimination had taken place. The first court also held that the licence issued to the foremen should be considered as a 'possession' under the Convention. Consequently, it compelled the Minister for Transport and Infrastructure to pay each of the claimants EUR 186 350, as compensation for loss of their licence and their earnings, and a further EUR 2 000 each as compensation for non-pecuniary damages. However the judgment was reversed by the

f) Compliance of national law with CJEU case law

National legislation in this area may be in line with CJEU case law, but some questions still exist – for example, around pension-linked termination.

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.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Malta, national law permits age or 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 or 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 this¹⁶² or on grounds of redundancy.

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

In such an instance, the employer may, instead of terminating the employment of this individual, 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 compensation for redundancy. Such compensation is not affected by the age of the worker.

Constitutional Court. Discrimination could henceforth take place when distinctions are made on the basis of age. Since the foremen were all below the age of 61, the Constitutional Court noted that the claimants could all be issued with a licence. It was the claimants who had chosen to give up their licence upon accepting the retirement scheme. Therefore, it held that the circumstances of the claimants' case did not constitute a violation of Article 45 of the Constitution and Article 14 of the Convention upon comparison with the other foremen, because in actual fact they had all been treated in the same manner.

¹⁶² This deals with termination of employment on grounds of a good and sufficient cause. The law does not define '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.

Redundancy payments depend not 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, 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. In addition, 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.

4.7 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 the Equal Treatment in Employment Regulations 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.

4.8 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 the Equal Treatment in Employment Regulations 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 the Equal Treatment in Employment Regulations state 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'.

Article 15 of the Equal Opportunities (Persons with Disability) Act provides that the law does not prohibit any form of action that may be taken in the circumstances of the case by any person, authority or institution to ensure that persons who have a disability are granted equal opportunities, special treatment, grants, benefits or programmes to with a view to the integration of such persons with other persons who do not have a disability in matters related to employment, education, accommodation, the provision and use of goods, services and facilities, the administration of laws and their capacity to lead an independent life within the community as a whole.

Several entities, such as the NCPE and the Commission for the Rights of Persons with Disability, regularly organise publicity campaigns, participate in projects and hold seminars and public meetings to encourage people 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. Jobsplus is very active in this field, as one of the corporation's main objectives is that of assisting people 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 people with disabilities, 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.¹⁶³

b) Quotas in employment for people with disabilities

In Malta, national law provides for quotas for the employment of people with disabilities.

Positive measures of a general social nature, applicable to both the private and public sectors, quotas and preferential treatment do exist with regard to people with a disability in the employment field.

¹⁶³ 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 scheme and the job bridge programme.

The Persons with Disability (Employment) Act 1969¹⁶⁴ provides for the compulsory engagement, on a quota basis, of disabled people¹⁶⁵ registering for employment.¹⁶⁶

Section 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 Section 16 of the Act:

‘(2) The Minister, after consultation with the Corporation, shall by order specify a standard percentage¹⁶⁷ and may, in like manner, specify a special percentage, either greater or smaller than the standard percentage.

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

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

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

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

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

¹⁶⁴ Persons with Disability (Employment) Act, 7 February 1969 (Act II of 1969), *Laws of Malta*, Chapter 210.

¹⁶⁵ Under 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 impaired in obtaining or keeping employment or in undertaking work on his or her own account, of a kind which apart from that injury, disease, deformity or incapacity would be suited to his or 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.

¹⁶⁶ The register is maintained by Jobsplus.

¹⁶⁷ This figure is 2 %.

In 2015, Section 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 or 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 of 2017, the full amount is payable.¹⁶⁸

On 28 April 2016, a memorandum of understanding was signed between the Malta Employers' Association, the Chamber of Commerce, Enterprise and Industry and Jobsplus on the employment of people with disabilities 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 have 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*,¹⁶⁹ it was stated that there were 1 300 registered disabled people who were employed, and that by December 2016 the number had risen to 2,764.¹⁷⁰ In September 2018, it was stated that there were 398 disabled people registered with Jobsplus as seeking work.¹⁷¹ It is pertinent to point out that not all disabled people register with Jobsplus and hence the figures cannot be deemed to be an accurate reflection of reality.¹⁷² It was recently announced that in October 2018 there were 3 508 people with disabilities gainfully employed.¹⁷³ This is a clear increase on previously published statistics. Nonetheless, further initiatives need to be taken in order to encourage employers to offer employment to disabled people so that the number of employed people will continue to increase and lead to equal opportunities for people with disabilities seeking employment.¹⁷⁴

Special arrangements exist to assist people with disabilities to access employment in the public sector. Registered people with disabilities 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 or position, are allowed to ask for special consideration when applying for posts or positions in the public service.¹⁷⁵

¹⁶⁸ 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 people with disabilities, mental health problems and vulnerable people, all of whom can contribute to the country's economy as well as civil society in general. By September 2018, EUR 2.5 million had been allocated to the Lino Spiteri Foundation to work in conjunction with Jobsplus to provide persons with disability with the appropriate training and the opportunities to actually find the jobs they are seeking and to benefit from job coaching facilities.

¹⁶⁹ Malta Employers' Association (2015), *Position paper on Governments' measures to increase employment of disabled persons*.

¹⁷⁰ National Statistics Office (NSO) Labour Force Survey - Labour Market Statistics Directorate C – Social Statistics and Information Society, see: https://nso.gov.mt/en/nso/Sources_and_Methods/Unit_C2/Labour_Market_Statistics/Pages/Labour-Force-Survey.aspx. These are the latest official figures published by the NSO.

¹⁷¹ 244 were seeking full-time employment while 154 sought part-time employment. These figures have been decreasing since 2013, when the number stood at 526.

¹⁷² 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.

¹⁷³ 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.

¹⁷⁴ One such initiative was the Me2 Project, as a result of which 52 disabled people found employment. Another was the Government scheme launched in September 2012 whereby disabled people were to be employed by local councils. The aim was to have 80 people working for three years under this scheme.

¹⁷⁵ Equality Policy for the Public Service, July 2013.

The Business Promotion Regulations 2000 provide fiscal incentives to employers who create jobs and employ and train people over 40 years of age. If such people are registered as disabled, 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 the Various Laws (Persons with Disability) (Membership in Various Entities) Act.¹⁷⁶ This Act seeks to integrate more people with disabilities into the various entities in the Maltese legal and governmental system by way of a provision in which at least one person with a disability must be part of the major public entities/authorities (as specified below) governed by Maltese law. The Act provides for an increase of one member in 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 people 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 594, *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 Gender-Based Violence and Domestic Violence (set up under the Gender-Based Violence and Domestic Violence Act (Chapter 581, *Laws of Malta*));¹⁷⁷
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.¹⁷⁸

¹⁷⁶ Various Laws (Persons with Disability) (Membership in Various Entities) Act, 10 March 2015 (Act VII of 2015).

¹⁷⁷ 2018 saw the introduction of the Gender-Based Violence and Domestic Violence Act. The purpose of the Act is to make provision for the substantive articles of the Council of Europe Convention on prevention and combating of violence against women and domestic violence to become, and be, enforceable as part of the *Laws of Malta*; to promote and protect the right of everyone, and particularly of persons who are at risk of domestic violence to live free from violence in both the public and private sphere. The implementation of the provisions of this Act, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as age; association with a national minority; belief, creed or religion; colour, ethnic origin and/or race; disability; family responsibilities and/or pregnancy; family and/or civil status; gender expression and/or gender identity; genetic features; health status; language; migrant or refugee status; national or social origin; political or other opinion; property; sex or sex characteristics; sexual orientation or any other status.

¹⁷⁸ The CRPD recommends that the recommendations outlined in the report mentioned above are taken on board when implementing future policies and actions in relation to the employment of people with

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 people 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 may be followed 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:¹⁷⁹

- The Industrial Tribunal.¹⁸⁰ 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.¹⁸¹

disabilities and that more research is carried out. More training and information sessions to employers are also essential, especially on matters related to disability issues and the existing services available. It is also important to ensure the retention of people with disabilities in employment, as some employers employ people with disabilities for a short period of time with no intention of extending their contract for an indefinite period. See submission to the Committee on the Rights of Persons with Disabilities in advance of its consideration of Malta's 1st periodic report, February 2018.

¹⁷⁹ Insofar as the Employment Commission is concerned, the Constitution specifically limits its remit to discrimination based on political opinion.

¹⁸⁰ The establishment and constitution of the tribunal are set out in Article 73 of the Employment and Industrial Relations Act 2002.

¹⁸¹ The remit of the NCPE covers discrimination based on sex, sexual orientation, age, religion or belief, racial or ethnic origin or gender identity and free movement of persons.

- 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.
- The Ombudsman receives and investigates complaints and resolves grievances which individuals allege to have suffered from government departments and public authorities.¹⁸²
- 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, paragraph 2 of Article 968 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 for 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 people 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.

Aside from the costs and delays, other factors which may be seen as barriers to people seeking redress are the lack of information and also that parties try and settle disputes out of court to avoid delays and costs.

c) Number of discrimination cases brought to justice

In Malta, statistics on the number of cases related to discrimination that have been brought to justice are not available.

¹⁸² Ombudsman Act, 21 July 1995 (Act XXI of 1995), *Laws of Malta*, Chapter 385.

- d) Registration of discrimination cases by national courts

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

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

- a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In Malta, associations, organisations and 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.

Under Article 22 of the Equal Opportunities (Persons with Disability) Act, the Commission for the Rights of Persons with Disability is authorised to carry out investigations to determine whether there have been violations of the Act and provide, where and as appropriate, assistance, to persons with disabilities in enforcing their rights under this Act. Under Article 32(2), the Commissioner may also initiate investigations on the receipt of a complaint alleging that a person has committed an act that is unlawful under any of the provisions of the Act. The Commission must also give assistance if the complainant 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.

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.

Under 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 proceedings in support of victims of discrimination (joining existing proceedings)

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

Action may be taken under 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 the worker.

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.

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. This commission is empowered to provide, where appropriate, assistance, including legal and financial assistance, to people with disabilities in enforcing their rights under the Equal Opportunities (Persons with Disability) Act.¹⁸³

Furthermore, if it appears to the Commissioner for the Rights of Persons with Disability 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.¹⁸⁴

Legal Notice 13 of 2001, issued under Article 33 of the Equal Opportunities (Persons with Disability) Act and entitled 'Procedure for the Investigation of Complaints Regulations 2001',¹⁸⁵ 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. Under this legal notice, the commission shall first try and find an amicable solution to the matter. If such a solution is not forthcoming, the commission is

¹⁸³ Equal Opportunities (Persons with Disability) Act, 10 February 2000, Article 22(k).

¹⁸⁴ Equal Opportunities (Persons with Disability) Act, 10 February 2000, Article 32(3).

¹⁸⁵ Procedure for the Investigation of Complaints Regulations, 1 October 2000 (LN 13 of 2001).

empowered to commence legal proceedings and refer the case to the Civil Court, First Hall.¹⁸⁶

In addition, under 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 people 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. Under 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 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 before any tribunal or court. This does not mean that other associations, unions and other bodies are prohibited from taking similar action.

As noted above, investigations may be commenced by the NCPE under Article 11 of the Equal Treatment of Persons Order,¹⁸⁷ 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. As yet, there is no published information on whether the commission has taken any such action.

d) Class action

In Malta, national law allows associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event, but no specific reference is made to class actions.

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 on 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.¹⁸⁸

¹⁸⁶ Under Regulation 5.

¹⁸⁷ As also reiterated under Article 4 of the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations.

¹⁸⁸ The draft equality bill should provide specifically for NGOs bringing forward class actions.

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.¹⁸⁹

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 his or her employment, it shall be sufficient for the claimant to establish facts from which it may be presumed 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.

Under Article 34A of the Equal Opportunities (Persons with Disability) Act 2000, where, in any judicial proceedings (other than criminal proceedings) taken under 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.

Under Article 19(2) of the Equality for Men and Women Act 2003, 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.

¹⁸⁹ *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 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 they did not commit the 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.

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 or her employer or by people acting in the employer's name and interests, it is unlawful to victimise such a 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 Disability) 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, under 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.

Under 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 a 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

Under Article 30 of the Employment and Industrial Relations Act, if the Industrial Tribunal¹⁹⁰ upholds a person's allegations that his or 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.¹⁹¹ Furthermore, Article 48(4) of the Act provides that any regulation made under the Act may provide for any matter relating to liability for the observance of such regulations, and the persons who may be liable, and for any matter relating to the enforcement of the said regulations, including, but not limited to, the imposition of a fine not exceeding EUR 11 647 in respect of any contravention of, or failure to comply with, the provisions of such regulations.

Under 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.

Under Article 50 of the Employment and Training Services Act, any person guilty of an offence against, *inter alia*, Article 15 of the Act¹⁹² shall be liable, on conviction, to pay a fine of not less than EUR 2 500 but not exceeding EUR 15 000.

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 of six 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

¹⁹⁰ In 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.

¹⁹¹ It is to be noted that, under 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.

¹⁹² This provision deals with the engagement of employees by the Government and Government-owned or controlled bodies and companies.

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.¹⁹³ 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.¹⁹⁴

Under 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 the unlawful act and to order the payment of compensation for any damage suffered through the unlawful act.

b) Compensation – maximum and average amounts

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 cap on the damages which may be awarded, they are effective and sufficient.

¹⁹³ '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'.

¹⁹⁴ Criminal Code, Article 26(1).

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

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

By virtue of the provisions of the Equal Treatment of Persons Order 2007, the remit of the Commissioner for the Promotion of Equality for Men and Women covers the promotion of equal treatment irrespective of racial or ethnic origin within the meaning of the provisions of the order and 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) as constituted under Article 11 of the Equality for Men and Women Act.¹⁹⁵

By virtue of Act IX of 2012, which amends 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 extended again in 2015 to include discrimination based on gender expression or sex characteristics, and it was further extended in 2016 to cover the exercise of rights by workers moving within the EU.¹⁹⁶ 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),¹⁹⁷ 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. Henceforth, the NCPE will be able not only to build on work which has already been identified, but to expand and strengthen its work and responsibilities in the field of human rights and equality.

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.

Under Article 21 of the Equal Opportunities (Persons with Disability) Act, there shall be a Commission for the Rights of Persons with Disability (the 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 people with disabilities; by combating stereotypes, prejudices and harmful practices relating to people with disabilities, including those based on gender and age, in all areas of life; by raising awareness about the capabilities and contributions of people 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.

Similarly, on the basis of the Ombudsman Act 1995, should a person feel that he or she 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

¹⁹⁵ 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* (under 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") ...'

¹⁹⁶ By virtue of Legal Notice 173 of 2016 entitled 'The exercise of rights conferred on Workers (Freedom of Movement) Regulations'. People 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.

¹⁹⁷ Legislation is pending parliamentary discussion and approval.

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 or her complaint before the Ombudsman, who will investigate the case and make recommendations to the Government. Such recommendations are not binding, however.

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

The designated body, the NCPE, 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 he or she 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 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 competencies¹⁹⁸ 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 people suffering from discrimination in enforcing their rights under the Act and the order;

¹⁹⁸ Article 12 of the Equality of Men and Women Act and Article 10 of the Equal Treatment of Persons 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.

The NCPE has been vested with the required authority to act in an independent manner. This independence allows it to act effectively. It also has the required competent resources to be able to act effectively.

ii) Independent surveys and reports

In Malta, the designated body has the competence to conduct independent surveys and publish independent reports.¹⁹⁹ 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.

The NCPE has been vested with the required authority to act in an independent manner. This independence allows it to act effectively. It also has the required competent resources to be able to act effectively. In cases where it requires additional expertise and resources, it teams up with other organisations.

iii) 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.²⁰⁰

The NCPE has been instrumental in providing recommendations for reform, where required, through its competent and skilled resources.

iv) Other competencies

The NCPE carries out awareness-raising and promotional campaigns to increase education, training and awareness of the rights of all. These fall within the competencies 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.

g) Legal standing of the designated body/bodies

In Malta, the designated body does have legal standing to bring discrimination complaints (on behalf of identified victim(s)) or to intervene in legal cases concerning discrimination.

If it appears to the Commissioner that people 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 people in making the complaint. Moreover, should the Commission become aware of any alleged discriminatory act or

¹⁹⁹ Equality for Men and Women Act, Article 12.

²⁰⁰ Equality for Men and Women Act, Article 12.

practice hindering equality within society, the Commissioner may deem it necessary to initiate ex officio investigations on any matter falling within NCPE's remit.

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.

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 people 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

The NCPE register(s) the number of complaints of discrimination made and/or decisions (by ground, field, type of discrimination, etc). These data are available to the public and published in their annual reports.²⁰¹

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, whether they concern direct or indirect discrimination and according to the grounds on which the complaints are based.²⁰²

j) Stakeholder engagement

In Malta, the designated body engages with stakeholders as part of implementing their mandate.

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 work continuously on strengthening and making more visible the equality agenda, 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

²⁰¹ https://ncpe.gov.mt/en/Pages/Our_Publications_and_Resources/NCPE_Annual_Reports.aspx.

²⁰² The latest figures available are from 2018, when the NCPE received 37 new complaints, of which 14 were lodged by one individual and did not fall within the remit of the NCPE. Of the new complaints, four dealt with freedom of movement, one dealt with sexual harassment, one dealt with religion/belief, six dealt with race or ethnic origin, two concerned age, eleven were on sex and ten were ex officio.

respective events. It is clear from the various activities that the NCPE organises and participates in that its level of engagement with stakeholders is continuous and effective.

k) 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) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

Measures have been taken to disseminate information about legal protection against discrimination under Article 10, Directive 2000/43/EC and Article 12, Directive 2000/78/EC.

In 2018, as reproduced in its most recent published annual report,²⁰³ the NCPE continued to offer and deliver training on equality law, different social identities, harassment and sexual harassment, diversity management and gender mainstreaming to a wide range of participants. The NCPE offers training services to private companies, public agencies, schools, hospitals, trade unions, NGOs and other organisations that want to gain an in-depth and practical understanding of topics within its remit. Training is given free of charge to public sector and not-for-profit organisations, and for a nominal fee to private sector entities. In 2018, the NCPE gave 61 training sessions involving over 940 participants from the public and private sectors, ranging from officers in managerial positions and clerks to students attending Jobsplus, MCAST and university courses.

Training given by the NCPE focuses on the following subjects:

- Equality law: The basic principles of Maltese equality legislation and EU Directives are explained and discussed. NCPE trainers outline the different grounds of discrimination in Maltese law as well as the different spheres it covers.
- Different social identities: The different characteristics protected by law are explained in detail in the context that equality is more than simple non-discrimination.
- Harassment and sexual harassment: Definitions of harassment and sexual harassment are discussed in the context of their being a serious form of discrimination, and sexual harassment a crime. The difference between the two is elucidated and examples provided. The obligations emanating from law related to addressing and preventing sexual harassment are discussed, and the NCPE outlines practical ways to deal with harassment as well as good practices for its prevention.
- Diversity management: The term 'diversity management' is discussed in its wider context. Diversity management is not about having different rules for different groups, but about the valorisation of different identities and the recognition that diversity can lead to better work processes and outcomes. Practical ways of managing diversity are outlined and discussed with the participants.
- Gender mainstreaming: The meaning of the strategy of gender mainstreaming is explained and the participants are guided through the gender mainstreaming process.

Of particular interest are the NCPE's recommendations on rent regulation in Malta, following the publication of the white paper entitled *Renting as a Housing Alternative*. It was noted that the measures proposed in the white paper were positive and would start to address a number of challenges faced by tenants by aiming to bring about longer-term contracts and more protection. Rent-related challenges disproportionately affect persons in vulnerable situations, such as women who experience domestic violence and other persons escaping abusive domestic situations, pensioners, and migrants who have limited social networks and low income.²⁰⁴

²⁰³ The report covers 2018 and was published in 2019.

²⁰⁴ Recommendations by the NCPE included the introduction of minimum-term contracts, effective protection for tenants when reporting irregularities, a clause on the prohibition of discrimination and the use and collection of gender-disaggregated statistics.

In 2018, the NCPE participated in meetings and discussions in line with the equality agenda of the European Union and other international entities.²⁰⁵ In June 2018, the European Commission adopted the Recommendation on Standards for Equality Bodies concerning the mandate, independence and effectiveness, as well as the coordination and cooperation, of equality bodies. The Recommendation seeks to further harmonise the work of equality bodies across the EU and to enhance their standing in society.²⁰⁶

An integral part of the NCPE's mandate is to promote equality and non-discrimination among the general public. The key messages include: the meaning of discrimination and the fact that it is unlawful, highlighting existing inequalities, the promotion of positive action and the empowerment of people to seek redress by lodging a complaint to the NCPE's commissioner or through other available means. The NCPE conveys these messages through various sources. Most notably in 2018, the NCPE carried out an awareness-raising campaign in line with the UN's initiatives for the UN Week of Solidarity with Peoples struggling against Racism and Racial Discrimination,²⁰⁷ through the EU-funded project 'Equality Beyond Gender Roles'. Throughout 2018, the NCPE continued to disseminate information and raise awareness on rights and responsibilities relating to equality through various means of communication, including targeted messages to the general public and stakeholders on specific topics and on its work and remit. 2018 saw a development in the communication work of the NCPE, and a communication plan was drawn up to increase the Commission's presence and visibility in various media outlets. During 2018, the total number of contributions in the traditional media amounted to 347 and the number of posts in social media totalled 284.

In 2018, the NCPE gave its input to several public consultation processes at a national level. Input was provided for consultation documents directly related to the NCPE's work – for example, the ongoing consultation on the draft HREC bill and the equality bill – and other documents dealing with subjects such as sport, education and the budget. Throughout 2018, the NCPE contributed to the following documents at a national level:

- The draft equality bill and the draft human rights and equality commission bill;
- *Reporting Domestic Violence – Guidelines for Journalists and Media Content Producers*;
- *Transgender Healthcare*;
- The proposed care workers act;
- *A Policy on Inclusive Education in Schools: Route to Quality Inclusion – A National Inclusive Education Framework*;
- *A Strategic Framework for Action 2018–2022: Empowering Society through ICT*;
 - The proposed child protection (alternative care) act;
 - The pre-budget document 2019;
 - *The Renting as a Housing Alternative* white paper;
 - *The Local Government Reform* white paper;
- *Malta's Sustainable Development Vision for 2050*;
 - The draft social regulatory standards on residential services for persons with disability.

In 2018, the NCPE contributed to the consultation process for EU and international documents and carried out desk research on various topics. In addition, throughout 2018 the NCPE contributed its input to various bodies operating at an EU level, via questionnaires, surveys, reports, studies, meetings and conferences.

²⁰⁵ No information for 2019 is available as yet.

²⁰⁶ During the preparations for the development of this recommendation, the NCPE Commissioner was part of an Equinet delegation in a high-level meeting with Commissioner Vera Jourová to discuss the structure and content of the recommendation and the political and practical necessity of such standards for equality bodies.

²⁰⁷ A total of 2 639 people were reached through this online campaign.

For its part, the CRPD – following Malta’s ratification of the UNCRPD – 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. At an international level, the CRPD maintains close contact with the European Disability Forum; the Disability Rights Committee of the Equality and Human Rights Commission of the United Kingdom; Disability Wales; and Inclusion Europe. The CRPD²⁰⁸ continues to carry out various campaigns and training and dialogue sessions. The CRPD also contributes to the work against discrimination that is carried out at an international level, including in the European context.

The CRPD offers training on equality in respect of people with disabilities. Throughout 2018, the UNCRPD unit delivered disability equality training to various public and private entities, as well as educational institutions. These included staff members of the Civil Protection Department, the Police, Heritage Malta, students at ITS and primary schools, and various public entities and private companies. This training is provided to different types of audiences and is carried out with the full involvement of people with disabilities and the parents of people with disabilities who cannot represent themselves.²⁰⁹ This training complements that provided at university level by the disability studies unit within the Faculty for Social Wellbeing at the University of Malta. During 2017, the CRPD disability equality training material was reviewed and updated. The disability studies department at the university was consulted during this period. The training now includes video clips relating to treating people with a disability with respect.

- b) Measures 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)

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

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 some of which are not), by other NGOs or independently.

In Malta, various non-governmental organisations are involved in raising awareness of social issues. Consultation by central Government with NGOs does take place, and NGOs are often involved in discussions prior to the adoption of new regulations where their input would broaden the consultation process or where specialised advice is required. The Government often promotes consultation by issuing a white paper preceding the adoption of new laws in order to widen the spectrum of the consultation process, and NGOs often play an important role in this process. NGOs in Malta are regulated by the Voluntary Organisations Act (Act XXII of 2007), which came 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 principal NGO is the Malta Gay Rights Movement (MGRM), which represents the Maltese LGBTIQ 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.²¹⁰ Aditus Foundation is a

²⁰⁸ As noted in its latest report for 2018. The 2019 report has not yet been published.

²⁰⁹ Training to combat violence was also provided to persons with a disability.

²¹⁰ 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

non-governmental organisation established in 2011 with a mission to monitor, report and act on access to human rights in Malta. Its work promotes a society where everyone is able to access and enjoy all their fundamental human rights, and where access to justice and remedies should be provided in instances of violations.

Founded in 2007, the mission of the People for Change Foundation is to undertake research, advocacy and proactive action to promote social cohesion, respect for human rights and empowerment. The Foundation works in the field of migration, asylum and race in Malta and across the EU, and undertakes on-the-ground legal and social research. It is a human rights think tank based in Malta which encourages evidence-based and data-driven policy and action to promote human rights through research and analysis, lobbying, advocacy and capacity building.

In 2017, Spark 15 was set up; it is a Maltese NGO geared towards empowering young refugees and migrants to actively participate in achieving a more inclusive society.²¹¹ Its purpose is to achieve greater diversity among young people through dialogue.

The Platform of Human Rights Organisations in Malta (PHROM) has been designated as Malta's first network of NGOs striving to promote human rights. PHROM provides a national forum for human rights organisations in Malta to develop, promote and advocate for the values of human dignity and equality. PHROM attracts membership from Maltese NGOs working directly and indirectly in the promotion of human rights values, with the understanding that networked advocacy is more effective and sustainable. PHROM wants to attract membership from NGOs working directly or indirectly within the human rights field. This includes areas such as gender, children, prisoners, migrants, domestic violence, LGBTI, the environment and freedom of expression and religion.

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

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/EC and Article 13, Directive 2000/78/EC).

There are various statutory bodies which, although they were not created specifically 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 2018,²¹² which is composed of three independent people, with two other people appearing before the President of Malta to represent the interests of employers and two other people 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.

island from crisis areas in the Mediterranean and Eastern Europe, mainly Iraq and Bosnia. The situation is now very different, with thousands of asylum seekers and forcibly displaced people arriving, mostly by boat, from the African coast every year.

²¹¹ Spark 15 has the support of the President's Foundation for the Wellbeing of Society and the UN High Commissioner for Refugees.

²¹² Employment and Training Services Act (Act XXXIX of 2018), *Laws of Malta*, Chapter 594.

The Malta Council for Economic and Social Development Act 2001²¹³ provides for the setting up of a Civil Society Committee (CSC) within the MCESD.²¹⁴ The CSC is made up of core representation from civil society.²¹⁵

d) Addressing the situation of Roma and Travellers

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

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

Maltese law provides that laws, regulations and administrative provisions which are contrary to the principles of equal treatment are abolished in line with the provisions of the directives. In this regard, Regulation 13 of the Equal Treatment in Employment Regulations provides that any provisions contrary to the principle of equal treatment in any law shall be deemed 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. There do not appear to be any laws in force which go against the principle of equality.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Maltese law provides that contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers' associations or employers' associations that are contrary to the principle of equal treatment are, or may be declared, null and void or should be amended. In this regard, Regulation 13 of the Equal Treatment in Employment Regulations 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 under the Act shall, on the entry into force of these regulations, be considered null and void.

Furthermore, the second proviso to Article 27 of the Employment and Industrial Relations Act 2002, which deals with the principle of work of equal value, 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, whether they result from contracts of employment or collective agreement with a union.

²¹³ Council for Economic and Social Development Act (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'.

²¹⁴ The Chairperson or the Deputy Chairperson of the MCESD chairs the meetings of the CSC.

²¹⁵ 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 recommendation 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 and the Alliance of Pensioners' Organisations, along with a representative of the island of Gozo and a representative of environmental groups.

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

9 COORDINATION AT NATIONAL LEVEL

Responsibility for the Employment and Industrial Relations Act lies with the Minister for Education and Employment. The Ministry for Family, Children's Rights and Social Solidarity is responsible for the Equal Opportunities (People with a Disability) Act; the Minister for Equality is responsible for the Equal Treatment of Persons Order; and the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties is responsible 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 was never endorsed or adopted by the authorities, contained a number of strategic objectives and set out specific initiatives to be achieved and implemented over a three-year period. It sought to build on 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. It sought to combat racism and xenophobia as well as promoting a more inclusive and intercultural society through a proactive framework. While it addressed issues of investigation and redress, the priority was to create 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 (MSDC) launched a consultation process with the aim of strengthening human rights and equality legislation and the institutions that enforce this legislation so that they conform with both the United Nations model of a national human rights institution (NHRI) as laid out in the Paris Principles, and the European Union's equality body requirements as laid out in the EU equality directives, namely the Racial Equality Directive, the Gender Goods and Services Directive and the Gender 'Recast' Directive. 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.

An initial 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 has now closed, and the submissions received were reviewed and a

subsequent report issued.²¹⁶ The draft equality bill was published on 17 July 2019, but this has not yet become law as it is still being discussed in Parliament.

²¹⁶ Government of Malta (2016) *Towards a robust human rights and equality framework. Submissions report*, available at: 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 and 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, the Malta Environment and Planning Authority (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 2018, 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 people with disabilities.²¹⁷

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. As of 2017, 80 organisations have been awarded the certification. In 2018, 10 new companies received certification while 25 companies were re-certified.²¹⁸ More organisations are in the process of being awarded the 'Equality Mark'.²¹⁹

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 that employ 20 people or more to employ people 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 people with disabilities to access employment in the public sector. Registered people with disabilities 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 or position are allowed to ask for special consideration when applying for posts or positions in the Public Service.²²⁰

The Business Promotion Act Regulations 2000, which may be considered an example of positive action that has been taken, provide fiscal incentives to employers who create jobs for, employ and train people over 40 years of age. If such people are registered disabled, these incentives are further increased. There is no obligation on 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 disabilities to various entities which are governed by Maltese Law. This law seeks to integrate more people with disabilities into the various entities present in the Maltese legal and governmental system by way of a provision in which at least one disabled person must be part of the major public entities/authorities (as specified above under Section 5) governed by Maltese law.

²¹⁷ CRPD (2018) *Annual report*, available at: <http://crpd.org.mt/wp-content/uploads/2019/05/CRPD-Annual-Report-EN.pdf>.

²¹⁸ By December 2018, there were 86 certified organisations employing over 20 800 people.

²¹⁹ Awarded to companies that truly foster equal treatment in their work policies and practices irrespective of the employees' gender or family responsibilities.

²²⁰ Equality policy for the public service, July 2013.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

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 instructions 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 harassment²²¹ but not (explicitly) instructions to discriminate. There are no provisions prohibiting instructions to discriminate on the grounds of racial/ethnic origin in fields outside employment covered by Directive 2000/43/EC.²²²

Likewise, the same Order provides a more restrictive reference under Article 2(3) when referring to the treatment being legitimate and objective as the criteria for determining a genuine occupational requirement.²²³

The Equal Treatment in Employment Regulations²²⁴ appear to conform with Article 4(2) of Council Directive 2000/78/EC, except for the fact that the 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 that is not religious.²²⁵

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 disabilities and exclude job applicants. Therefore, all required accommodations needs to be in place when employment starts. 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 local law would have been in breach of the directive were it not for the protection afforded under the UNCRPD.²²⁶

In addition, under the Equality for Men and Women Act, any treatment based on a provision, criterion or practice which would put people at a particular disadvantage compared with people 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.²²⁷

²²¹ Equal Treatment of Persons Order, Article 2(2)(d).

²²² Section 2.5.

²²³ Section 4.1.

²²⁴ Equal Treatment in Employment Regulations 2004, Article 4(2).

²²⁵ Section 4.2.

²²⁶ Section 2.6.

²²⁷ Section 2.3.

11.2 Other issues of concern

There do not seem to be any 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. 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. The Government has introduced the draft equality bill to provide all-encompassing legislation on equality and more clarity in anti-discrimination cases.

12 LATEST DEVELOPMENTS IN 2019

12.1 Legislative amendments

In July 2019, the draft equality bill was published, and in November 2019 Parliament started to discuss the proposed new law. The law has however not yet been adopted by Parliament and the most recent discussions were held in March 2020.

In 2019, there were no important legislative amendments adopted in Malta in anti-discrimination law. Reference shall be made to a new law which made reference to the prohibition of discrimination.

2019 saw the introduction of the Public Administration Act, which replaced the previous act. Its purpose is to affirm the values of public administration as an instrument for the common good; to provide for the application of those values throughout the public sector; to provide for the organisation and management thereof; and to provide for other matters which are consequential or ancillary. Non-discrimination is listed as one of the main public administration values and the avoidance of harassment and discrimination can be found under several provisions of the Code of Ethics applicable to public employees and to members of public boards and commissions.

12.2 Case law

There were no cases brought before the Maltese courts during 2019 on matters covered by the directives.

12.3 Cases brought by Roma and Travellers

No cases have been brought forward by Roma or Travellers.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Malta
Date: 31 December 2019

Title of the law: Employment and Industrial Relations Act

Abbreviation: EIRA

Date of adoption: 02.12.2002

Latest relevant amendment: Act VI of 2019

Entry into force: 27.12.2002

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8918&l=1>

Grounds covered: Marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.

Civil/administrative law

Material scope: Private employment (with reference to disciplined forces)

Principal content: Protection against discrimination related to employment, prohibitions on victimisation and harassment, and protections of gender equality and work for equal value, creation of a specialised body/court (the Industrial Tribunal)

Title of the law: Equal Treatment in Employment Regulations

Abbreviation: Full legal name applies

Date of adoption: 05.11.2004

Latest relevant amendment: Legal Notice 461 of 2004

Entry into force: 05.11.2004

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11229&l=1>

Grounds covered: Religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin

Civil/administrative law

Material scope: Private and public employment

Principal content: Prohibition of direct and indirect discrimination

Title of the law: Protection of Maternity (Employment) Regulations

Abbreviation: Full legal name applies

Date of adoption: 05.01.2004

Latest relevant amendment: Legal Notice 415 of 2014

Entry into force: 05.01.2004

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11225&l=1>

Grounds covered: Pregnancy, maternity leave

Civil/administrative law

Material scope: Private and public employment

Principal content: Safeguarding the employment rights of pregnant employees, employees who have recently given birth and breastfeeding employees

Title of the law: Equal Treatment of Persons Order

Abbreviation: Full legal name applies

Date of adoption: 03.04.2007

Latest relevant amendment: Legal Notice 427 of 2007

Entry into force: 03.04.2007

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11800&l=1>

Grounds covered: Racial or ethnic origin

Civil/administrative law

Material scope: Social protection, social advantages, education, access to and supply of goods and services which are available to the public, including housing, access to any other services such as banking
Principal content: Prohibition of direct and indirect discrimination, and harassment

Title of the law: Equal Treatment in Self-Employment and Occupation Order

Abbreviation: Full legal name applies

Date of adoption: 03.04.2007

Latest relevant amendment: Legal Notice 260 of 2012

Entry into force: 03.04.2007

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11801&l=1>

Grounds covered: Religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, pregnancy or maternity leave, gender reassignment (underwent or undergoing or intends to undergo)

Civil/administrative law

Material scope: Self-employment or occupation and harassment

Principal content: Prohibition of direct or indirect discrimination

Title of the law: Persons with Disability (Employment) Act

Abbreviation: Full legal name applies

Date of adoption: 07.02.1969

Latest relevant amendment: Act XXII of 2015

Entry into force: 07.02.1969

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8718&l=1>

Grounds covered: Disability

Civil/ administrative law

Material scope: Employment

Principal content: Maintaining of a Register of Persons with Disability; determination of quota for entities with over 20 employees

Title of the law: Equal Opportunities (Persons with Disability) Act

Abbreviation: Full legal name applies

Date of adoption: 10.02.2000

Latest relevant amendment: Act XXIV of 2016

Entry into force: 10.02.2000; 01.10.2000

Web link:

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

Grounds covered: Disability

Civil/administrative law

Material scope: Right to family life, social protection, social advantages, employment, education, access to property, provision of goods, facilities or services, health and accommodation

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

Title of the law: Equality for Men and Women Act

Abbreviation: Full legal name applies

Date of adoption: 09.12.2003

Latest relevant amendment: Act XI of 2015

Entry into force: 09.12.2003

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1>

<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> <p>Civil/administrative law</p> <p>Material scope: Employment, banks and financial institutions, education and vocational guidance, sexual harassment</p> <p>Principal content: Prohibition of direct and indirect discrimination, creation of a specialised body (National Commission for the Promotion of Equality for Men and Women)</p>
<p>Title of the law: Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations</p> <p>Date of adoption: 20.05.2016</p> <p>Latest amendments: N/A</p> <p>Entry into force: 20.05.2016</p> <p>Web link: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12506&l=1</p> <p>Grounds covered: No grounds specified</p> <p>Civil/Administrative law</p> <p>Material scope: Private and public employment</p> <p>Principal content: Prohibition of direct or indirect discrimination</p>
<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 relevant amendment: Act XIII of 2018</p> <p>Entry into force: 14.04.2015</p> <p>Web link: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1</p> <p>Grounds covered: Sex, sexual orientation, sex characteristics, gender identity, gender expression, gender reassignment (underwent or undergoing or intends to undergo)</p> <p>Civil/administrative law</p> <p>Material scope: Public service and authorities, private entities, law – norms and procedures</p> <p>Principal content: Prohibition of direct and indirect discrimination and promotion of equality</p>
<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 relevant amendment: N/A</p> <p>Entry into force: 09.12.2016</p> <p>Web link: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12610&l=1</p> <p>Grounds covered: Sexual orientation, gender identity and gender expression, vulnerable people, health</p> <p>Civil/administrative law</p> <p>Material scope: Private and public service and authorities, healthcare services</p> <p>Principal content: Prohibition and criminalisation of conversion therapy</p>
<p>Title of the law: Education Act²²⁸</p> <p>Abbreviation: Full legal name applies</p>

²²⁸ A new Education Act (Act XXIX of 2019) was published on 26.11.2019. However it is not yet in force. Therefore, the Education Act (*Laws of Malta*, Chapter 327) still currently applies.

<p>Date of adoption: 16.08.1988 Latest relevant amendment: Legal Notice 306 of 2019 Entry into force: 16.08.1988; 05.09.1988; 16.04.1991 Web link: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8801&l=1 Grounds covered: Age, sex, disability, belief, economic means Civil/administrative law Material scope: Education Principal content: Right to receive education and instruction</p>
<p>Title of the law: Various Laws (Persons with Disability) (Membership in Various Entities) Act Abbreviation: Full Legal Name Applies Date of adoption: 10.03.2015 Latest amendments: N/A Entry into force: 10.03.2015 Web Link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26717&l=1 Grounds covered: Positive Discrimination – Disability Civil/administrative law Material scope: Public service and authorities Principal content: Representation of persons with disability on public boards</p>
<p>Title of the law: Marriage Act and other Laws (Amendment) Act Abbreviation: Full Legal Name Applies Date of adoption: 01.08.2017 Latest amendments: N/A Entry into force: 01.08.2017 Web link: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=28609&l=3 Grounds covered: sexual orientation and gender equality 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</p>
<p>Title of the law: Maltese Sign Language Recognition Act Abbreviation: Full legal name applies Date of adoption: 24.03.2016 Latest relevant amendment: N/A Entry into force: 24.03.2016 Web link: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8801&l=1 Grounds covered: Disability Civil/administrative law Material scope: Consolidation of human rights, equal opportunities and linguistic rights Principal content: Promotion and use of Maltese Sign Language; Maltese Sign Language declared as an official language of Malta; establishment of a specialised body (the Maltese Sign Language Council)</p>
<p>Title of the law: Gender-Based Violence and Domestic Violence Act Abbreviation: Full legal name applies Date of adoption: 14.05.2018 Latest relevant amendment: Act XXIV of 2019 Entry into force: 14.05.2018</p>

Web link:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12830&l=1>

Grounds covered: Age; association with a national minority; belief, creed or religion; colour, ethnic origin and/or race; disability; family responsibilities and/or pregnancy; family and/or civil status; gender expression and/or gender identity; genetic features; health status; language; migrant or refugee status; national or social origin; political or other opinion; property; sex or sex characteristics; sexual orientation or any other status

Civil/administrative law

Material scope: Public administration

Principal content: Protection of the rights of victims of domestic violence and gender-based violence; State obligations including the creation and adoption of an Action Plan which includes effective, measurable, comprehensive and co-ordinated policies to prevent all forms of gender-based violence and domestic violence; establishment of a specialised body (the Commission on Gender-Based Violence and Domestic Violence) and a designated agency for the provision of preventive, therapeutic and/or treatment programmes for victims and perpetrators of gender-based violence and domestic violence

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Malta

Date: 31 December 2019

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals? All the answers in this field are subject to the underneath footnote ²²⁹
European Convention on Human Rights (ECHR)	12.12.1966	23.01.1967	No	Yes	Yes
Protocol 12, ECHR	08.12.2015	08.12.2015	No	No	No
Revised European Social Charter	27.07.2005	27.07.2005	No ²³⁰	Ratified collective complaints protocol? No	Yes
International Covenant on Civil and Political Rights	Not signed	13.09.1990 (accession)	The Government of Malta interprets ²³¹ and reserves ²³²	Yes	Yes

²²⁹ 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. In general, 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, 1 August 2014) into the Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Ratification) Act (Chapter 532 of the *Laws of Malta*) in 2014. [The latter and the Domestic Violence Act (Chapter 481 of the *Laws of Malta*) were eventually repealed by Act XIII of 2018, which made provisions for the substantive articles of the Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence enforceable as part of the *Laws of Malta*, mainly through the Gender-Based Violence and Domestic Violence Act 2018 (Chapter 581 of the *Laws of Malta*).]

As a matter of policy, Maltese law is 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, Maltese law is broadly 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.

²³⁰ Malta has not accepted all the provisions of the Revised Charter.

²³¹ Article 20 consistently with the rights conferred by Articles 19 and 21 of the Covenant but reserves the right not to introduce any legislation for the purposes of Article 20.

²³² The right not to apply Article 22 to the extent that existing legislative measures may not be fully compatible with this article.

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals? All the answers in this field are subject to the underneath footnote ²²⁹
Framework Convention for the Protection of National Minorities	11.05.1995	10.02.1998	The Government of Malta ²³³	No provision for individual petition	Yes
International Covenant on Economic, Social and Cultural Rights	22.10.1968	13.09.1990	Article 13 ²³⁴	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	05.09.1968	27.05.1971	There are no reservations ²³⁵	Yes ²³⁶	Yes
Convention on the Elimination of Discrimination		08.03.1991 (accession)	Article 11 ²³⁷	No ²⁴⁰	Yes

²³³ 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. Furthermore, the Government of Malta declared that with regard to Articles 24 and 25, Malta does not include national minorities in the sense of the Framework Convention. Its ratification of the Convention is deemed to be an act of solidarity in the view of the Convention.

²³⁴ 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.

²³⁵ However, there is a declaration that is not about equality or non-discrimination.

²³⁶ However, Malta declares that it recognises the competence of the Committee to receive and consider communications from individuals subject to the jurisdiction of Malta who claim to be victims of a violation by Malta of any of the rights set forth in the Convention which results from situations or events occurring after the date of adoption of the present declaration, or from a decision relating to situations or events occurring after that date. The Government of Malta recognises 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 considered by another international body of investigation or settlement.

²³⁷ The Government of Malta interprets paragraph 1 of Article 11, 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.

²⁴⁰ Malta is not a signatory to the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals? All the answers in this field are subject to the underneath footnote ²²⁹
Against Women			Article 13 ²³⁸ Articles 13, 15, 16 ²³⁹		
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 ²⁴¹	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	10.10.2012	Yes ²⁴²	Yes	Yes

²³⁸ (i) The Government of Malta reserves the right, notwithstanding anything in the Convention, to continue to apply its tax legislation which deems, in certain circumstances, the income of a married woman to be the income of her husband and taxable as such.

(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.

²³⁹ 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 as the law is reformed and during such transition period until those laws are completely superseded.

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 legalise abortion.

²⁴¹ 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 State Parties to the Third Optional Protocol.

²⁴² 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 people 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: 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. With regard to (a) (iii): Malta reserves the right to continue to apply its current electoral legislation in so far as assistance in voting procedures is concerned.

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