

**REPORT ON MEASURES TO COMBAT  
DISCRIMINATION IN THE 13 CANDIDATE  
COUNTRIES (VT/2002/47)**

**COUNTRY REPORT  
MALTA**

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## Chapter 1 The legal framework, definitions and scope

### a. The legal framework

#### *Article 1 (Racial Equality Directive and Employment Equality Directive)*

*Does national law guarantee the principle of equal treatment or non-discrimination with respect to the grounds racial or ethnic origin, religion or belief, disability, age and sexual orientation? If so, what is the nature of the national legal framework (e.g. Are the anti-discrimination laws and provisions general or ground-specific? Is discrimination on all of the grounds listed in Art.13 EC expressly prohibited in law as opposed to a non-exhaustive list that could be interpreted to include all listed grounds)? What is the scope of these laws and provisions? Is the level of protection the same for all grounds? Is there a definition of the grounds racial or ethnic origin, religion or belief, disability, age and sexual orientation, in legislation or case law? Does national law cover other grounds of discrimination (in particular nationality and membership of a national minority)?*

*Where there is no anti-discrimination law, the reports should make note of any relevant public or academic discussion, policy debate or legislative proposals at the national level. In particular, the reports should explain what any proposed legislation entails.*

Maltese law guarantees the principle of equal treatment or non-discrimination. This legislative framework is based on the provisions of the Constitution of Malta as well as on provisions found in other pieces of legislation, in particular:

- (i) the European Convention Act, 1987<sup>1</sup> which incorporates the substantive Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms and is enforceable as part of the Law of Malta;
- (ii) the Equal Opportunities (Persons with Disability) Act, 2000;
- (iii) the Employment and Industrial Relations Act, 2002, which relates to employment in the private sector;<sup>2</sup> and
- (iv) the Equality for Men and Women Act, 2003.<sup>3</sup>

Chapter II of the Maltese Constitution<sup>4</sup> lays down a number of principles that, though not judicially enforceable, are nevertheless “fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws”.<sup>5</sup> These principles cover, *inter alia*, the following issues: 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.

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<sup>1</sup> Chapter 319 of the Laws of Malta which came into force on 19 August 1987. This Act and any other legislation mentioned in this report may be viewed at: [www.justice.gov.mt](http://www.justice.gov.mt)

<sup>2</sup> Employment in the public sector is regulated by the Public Service Management Code (commonly referred to as the Estacode). This Code does not constitute primary or secondary legislation but is merely a collection of circulars and other rulings issued by the Management and Personnel Office at the Office of the Prime Minister. It regulates the conditions of employment in the public service and lays down rules of conduct for public service employees. Breaches of this Code are sanctioned by the Public Service Commission which is an independent body established by Article 109 of the Constitution of Malta. The primary role of this Commission is that of giving advice and making recommendations to the Prime Minister in the making of appointments to public offices, in the removal of persons from such offices and in the exercise of disciplinary control over public officers. It is to be noted, however, that Article 48(1) of the Employment and Industrial Relations Act empowers the Prime Minister to prescribe the applicability of the provisions of the Act to public sector employees. To date no such regulations have been prescribed. Furthermore, in terms of Article 84 of the said Act, the provisions relating to industrial relations found in Title II of the Act, may also be applicable to employees in the public sector.

<sup>3</sup> Act I of 2003. Published in the Maltese Government Gazette on 4 February 2003. On 31 May 2003, the Act was not yet in force.

<sup>4</sup> Articles 7 to 21 (inclusive).

<sup>5</sup> Article 21.

Chapter IV of the Constitution,<sup>6</sup> on the other hand, provides for those Fundamental Rights and Freedoms of the Individual in respect of which an aggrieved person may apply to the Court<sup>7</sup> for redress. 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 or sex” subject to the respect of the rights and freedoms of others.

Article 45 of the Constitution specifically caters for the protection from discrimination on the basis of race, place of origin, political opinions, colour, creed or sex. This list is ground-specific and exhaustive. In fact, the Maltese Courts have held that if there is any other consideration upon which the discrimination is based, besides those mentioned, such discrimination will not be deemed unconstitutional.<sup>8</sup> Therefore, the Maltese Constitution does not afford protection against discrimination based on disability, age or sexual orientation, and neither does it afford protection against discrimination based on apurtenance to a national minority.

This deficiency is however remedied to a certain extent, by the European Convention Act, 1987. Article 3(1) of this Act provides that the substantive provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms have become and are enforceable as part of the law of Malta. Therefore, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms can also be invoked before and enforced by the Maltese Courts in the event that a person is deprived of the enjoyment of the fundamental rights and freedoms provided for in the Convention on grounds of discrimination. Since the grounds for non-discrimination under the said Article 14 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, age or sexual orientation may invoke Article 14 of the Convention. It is to be noted that the right to protection from discrimination under Article 45 of the Constitution of Malta is an independent right and can therefore be invoked even if there is no breach of any other article of Chapter IV of the Constitution.<sup>9</sup>

There have been various cases of alleged discrimination that have been brought before the Maltese Courts on the basis of Article 14 of the Convention,<sup>10</sup> as they deal with grounds which are not provided for in Article 45 of the Constitution. However, there are no reported decisions of cases instituted on the basis of Article 14 of the Convention concerning alleged discrimination based on disability, age or sexual orientation.

In terms of Article 46 of the Constitution of Malta, if a person alleges that any of the provisions of Articles 33 to 45 (inclusive) of the Constitution has been, is being or is likely to be contravened in relation to him, such person, may, without prejudice to any other action which may be available to him at law, , apply to the Civil Court, First Hall, for redress. It is to be noted that the Constitution of Malta only has vertical effect. Furthermore, action for any alleged breach of any of the rights and freedoms found in the Constitution may also be instituted by such other person as the Civil Court, First Hall, may appoint at the instance of the alleged victim. In fact, it is the Civil Court, First Hall, which has original jurisdiction to hear and determine any case, make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of,

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<sup>6</sup> Articles 32 to 47 (inclusive).

<sup>7</sup> An aggrieved individual may seek enforcement of these rights by means of an application before the First Hall of the Civil Court, with final appeal at national level to the Constitutional Court. Procedures are inexpensive and regulations currently in force provide that all human rights cases are to be heard as expeditiously as possible.

<sup>8</sup> *Dr Walter Cuschieri et vs. The Hon. Prime Minister et noe* – Constitutional Court – 30 November 1977.

<sup>9</sup> As held by the Constitutional Court in the case *Victoria Cassar v. Malta Maritime Authority et* (2 November 2001) the protection from discriminatory treatment under the Constitution is guaranteed as being specific, autonomous and independent from other rights and freedoms. In this context, the discrimination itself is considered to be the basis for the action and therefore there is no need to make any reference to any other fundamental right or freedom.

<sup>10</sup> For example: *Maurice Zarb Adami vs. The Hon. Prime Minister* – Civil Court, First Hall – 19 October 1989; *Martin Vella vs. Alfred Grima noe* – Civil Court, First Hall – 6 February 1990.

any of the provisions of the said Articles 33 to 45 (inclusive) of the Constitution. Any party to proceedings brought in the Civil Court, First Hall, in pursuance of Article 46 of the Constitution shall then have a right of appeal to the Constitutional Court.

Having exhausted all local remedies when seeking redress for the alleged violation of his human rights, including the right to protection from discrimination, the aggrieved individual can also exercise his right to petition the Secretary-General of the Council of Europe in accordance with the provisions of Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of all related Articles of the said Convention.

As the protection afforded under the Constitution and the European Convention Act is of a general nature, it can be invoked in any instance wherein a person feels that he has been subjected to discriminatory treatment. However, in the case of those specific laws which provide for protection from discriminatory treatment (as listed on page 1 above), in order to be able to invoke the protection under such laws, the alleged discrimination must specifically fall within the scope of such law. The provisions of these laws are dealt with in more detail in this report.

With regards to the issue as to whether discrimination on all the grounds listed in Article 13 of the Treaty establishing the European Community are expressly prohibited under Maltese law one notes that discrimination on the grounds of sex, race, place of origin, colour, and creed is prohibited by the Constitution of Malta, whereas discrimination on the basis of disability is expressly prohibited under the Equal Opportunities (Persons with Disability) Act, 2000 and the Employment and Industrial Relations Act, 2002. Although there is no provision of law in Malta which expressly prohibits discrimination on the basis of age and sexual orientation as required under Article 13 EC and Directive 2000/78/EC, such prohibition may be inferred from the interpretation of the definition of ‘discriminatory treatment’ under Article 2 of the Employment and Industrial Relations Act, 2002. This is the view taken by the Maltese Government which contends that, as drafted, the definition of ‘discriminatory treatment’ covers also age and sexual orientation. However, not all share such view.<sup>11</sup>

Besides the national legislation which affords protection against discriminatory treatment, Malta is also a party to various international human rights instruments that provide for the protection against discrimination. These include: The European Convention for the Protection of Human Rights and Fundamental Freedoms and various protocols thereof (but not Protocol 12 thereof), The European Social Charter, The Framework Convention for the Protection of National Minorities, The International Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and ILO Convention 111 on Discrimination in Employment and Occupation. It is to be noted that Malta should shortly be ratifying the Revised European Social Charter of the Council of Europe.

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<sup>11</sup> In its report entitled “A Report on the Implementation, in Malta, of the provisions on sexual orientation discrimination contained in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation” the Malta Gay Rights Movement (MGRM) states that its proposal that sexual orientation be expressly included as a ground of discrimination in the Employment and Industrial Relations Act was not taken up. It has been reported in the press that the Minister of Social Policy, Dr Lawrence Gonzi, has met with members of the MGRM on this issue. Furthermore, during a recent press conference held jointly with the head of the European Commission Employment and Social Affairs Directorate General, Ms Odile Quintin, Dr Gonzi was reported to have commented as follows on this issue: “All forms of discrimination, including discrimination based on sexual orientation or on age, ethnic origin or racial grounds are illegal and the interpretation given by the Attorney General of the law that has been passed in Parliament is that the clause as drafted covers all these areas,” Dr Gonzi said. “The issue that has been discussed is whether we need to mention these areas specifically. The opinion of legal experts given to us here in Malta is that we do not need to be specific, the clause mentions some areas as examples but it does not exclude all the other areas. We’ve agreed to go into this issue and get the legal advice more substantiated so that everybody can be sure that the judgements given by our Constitutional Court in previous cases substantiate this interpretation.” (The Malta Independent on Sunday, 11 May 2003).

## **b. The definition of discrimination**

*Article 2 (Racial Equality Directive and Employment Equality Directive)*

Definitions of discrimination or discriminatory treatment under Maltese law:

### The Constitution of Malta

Article 45:

- (1) Subject to the provisions of subparagraph (4), (5) and (7) of this Article, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subparagraph (6), (7) and (8) of this Article, 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.
- (3) In this article, the expression “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 or sex whereby persons of one such description are subjected to disadvantages<sup>12</sup> 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.

### Ombudsman Act, 1995<sup>13</sup>

Should a person feel that he has been subjected to discriminatory treatment (particularly on the basis of racial or ethnic origin) at the hands of the Government of Malta (including any government department or other authority of the Government, any Minister or Parliamentary Secretary, any public officer and any member or servant of an authority as mentioned above), any statutory body or partnership in which the Government or said body has effective control as well as at the hands of any local council and their committees including officers and staff members, such person can also request the Ombudsman to investigate this matter in terms of the Ombudsman Act, 1995. In the event that the Ombudsman is of opinion (a) that the matter should be referred to the appropriate authority for further consideration; or (b) that the omission should be rectified; or (c) that the decision should be cancelled or varied; or (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or (f) that reasons should have been given for the decision; or (g) that any other steps should be taken, he must report his opinion, and his reasons, to the appropriate department, organisation or local council, and may make such recommendations as he thinks fit, and request such department, organisation or local council to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. If, within a reasonable time after the report is made, no action is taken which seems to the Ombudsman to be adequate and appropriate, he may send a copy of his report and recommendations to the Prime Minister, and thereafter he may make such report to the House of Representatives on the matter as he thinks fit. Thus, the Ombudsman is not empowered to impose any sanctions against the defaulting department, organisation or local council.

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<sup>12</sup> This term refers to those situations where a person is prevented from doing or not doing something.

<sup>13</sup> Act XXI of 1995. Chapter 385 of the Laws of Malta. See article 22.

## Criminal Code<sup>14</sup>

Article 139A(d) of the Criminal Code provides that any public officer or servant or any other person acting in an official capacity who intentionally inflicts on a person severe pain or suffering, whether physical or mental for any reason based on discrimination of any kind, shall, on conviction, be liable to imprisonment for a term of five to nine years. The Criminal Code does not provide any definition of the term discrimination or a description of those instances which may constitute discriminatory treatment. Furthermore, to date the Maltese Courts have not yet provided any such definition or description.

In addition, in its efforts to combat racism and xenophobia, the Maltese government has recently introduced a new provision in the Criminal Code by criminalising incitement to racial hatred.<sup>15</sup> It is to be noted that the term "racial hatred" in this context refers to hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. This provision, numbered Article 82A (1) provides that any person who uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or where racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term of six to eighteen months.

## The Equal Opportunities (Persons with Disability) Act, 2000<sup>16</sup>

This Act provides, under Articles 3 to 6, for those instances which are deemed to constitute discrimination against persons with a disability<sup>17</sup> on the basis of physical and/or mental impairment. Unlike other laws such as the Employment and Industrial Relations Act, 2002, there is no definition of the terms 'discrimination', 'discriminatory treatment' or their derivatives.

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

- (1) A person shall discriminate against another person on the grounds of disability in any circumstances relevant for the purposes of any provision of this Act, if:
- (a) in circumstances which are similar or not materially different, he treats or proposes to treat a person who has a disability less favourably than he treats or would treat a person who does not have such a disability; or
  - (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.<sup>18</sup>

Article 4 caters for those instances which would give rise to discrimination because of non-compliance by a disabled person with a requirement or condition with he/she is unable comply due to his/her disability:

A person shall discriminate against another person on the grounds of disability if that other person is required to comply with a requirement or condition with which the majority of persons who do not have the disability comply or are able to comply, and

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<sup>14</sup> Chapter 9 of the Laws of Malta.

<sup>15</sup> The Criminal Code (Amendment) Act which came into force on the 1<sup>st</sup> May 2002.

<sup>16</sup> Chapter 413 of the Laws of Malta.

<sup>17</sup> Article 2 of the Act defines 'disability' to mean a physical or mental impairment that substantially limits one or more of the major life activities of a person;

<sup>18</sup> For the purposes of article 3(a)(1), the fact that different accommodation and/or, services may be required by the person with a disability shall in no case be deemed as constituting circumstances which are materially different.

- (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.

In terms of Article 5, discrimination on the grounds of disability could also arise if the disabled person is treated less favourably than others because he/she possesses or makes use of an auxiliary aid<sup>19</sup>:

A person shall discriminate against another person on the grounds of disability if he treats or proposes to treat such other 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 or possesses an auxiliary aid that is used by him/her or because of any matter related to that fact, whether or not it is the practice to treat any person who is accompanied by or is in possession of such an auxiliary aid in a less favourable manner.

The prohibition against discrimination mentioned under Article 6 refers to that discrimination to which a person may be subjected due to the fact that he/she is accompanied by an assistant due to his/her disability:

A person shall discriminate against another person on the grounds of disability if he treats or proposes to treat another person less favourably than he treats or would treat others who do not have such a disability because of the fact that such other person is accompanied by –

- (a) an interpreter; or
- (b) a reader; or
- (c) an assistant; or
- (d) 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 Employment and Industrial Relations Act, 2002<sup>20</sup>

Article 2:"discriminatory treatment" means 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 in a trade union or in an employers' association.

The fact that this article defines discriminatory treatment as distinctions, exclusions or restrictions which are 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 in a trade union or in an employers' association clearly indicates that other grounds which though not specifically mentioned therein, such as for example age or sexual orientation, can also be deemed to constitute discriminatory treatment if the distinction, exclusion or restriction in question is otherwise not justifiable in a democratic society.

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<sup>19</sup> An auxiliary aid is defined by the Act to mean any palliative or therapeutic device, any prosthetic aid, or any other device or aid that may be required by a person with a disability specifically because of that disability.

<sup>20</sup> Act XXII of 2002.

## ***Direct and indirect discrimination***

*Is there a definition in law of both direct and indirect discrimination? If so, does this conform to the definitions in the Directives?*

*Please make precise reference to the relevant legal provisions and case law.*

### Constitution of Malta

It has been argued that in interpreting Article 45(1) of the Constitution which provides that “no law shall make any provision that is discriminatory either in itself or in its effect”, it can be inferred that the legislator wanted to provide protection in respect of both direct and indirect discrimination. It is interesting to note that in 1977 the Courts<sup>21</sup> based a judgement on the concept of indirect discrimination, without, however, expressly referring to such term.

A reading of the definition of the term “discriminatory” under Article 45(3) may lead one to conclude that the protection is only afforded in instances of direct discrimination.<sup>22</sup> However, when reading this definition in the light of Article 45(1) as explained above, it could be argued that indirect discrimination is also covered thereunder.

### The Equal Opportunities (Persons with Disability) Act, 2000

This Act does not make any express reference to direct and indirect discrimination. In fact, as seen above, 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 against persons with a disability<sup>23</sup> on the basis of physical and/or mental impairment. While direct discrimination is clearly prohibited under Articles 3, 5 and 6, Article 4 appears to prohibit indirect discrimination. However, it is to be noted that as yet there have been no reported cases where the Courts confirmed whether the prohibitions against discrimination under this Act are direct or indirect.

### The Employment and Industrial Relations Act, 2002

Similarly, this Act does not contain any express reference to direct and indirect discrimination. Whereas the prohibition against direct discrimination is clearly provided for, the definition of discriminatory treatment under Article 2 of the Act could be interpreted to cover indirect discrimination as well. In fact Article 2 defines discriminatory treatment as distinctions, exclusions or restrictions which are 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 in a trade union or in an employers’ association.

Furthermore, the fact that Article 26(2)<sup>24</sup> lays down a non-exhaustive list of those situations which would constitute discriminatory treatment (as defined in Article 2 of the Act), could be interpreted to

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<sup>21</sup> Dr Walter Cuschieri et vs. The Hon. Prime Minister et noe – Constitutional Court – 30 November 1977.

<sup>22</sup> Article 45(3) provides that the term "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 or sex whereby persons of one such description are subjected to disadvantages (this term refers to those situations where a person is prevented from doing or not doing something) or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

<sup>23</sup> Article 2 of the Act defines ‘disability’ to mean a physical or mental impairment that substantially limits one or more of the major life activities of a person.

<sup>24</sup> In terms of Article 26 (2) discriminatory treatment shall *include*:

- (a) 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;
- (b) actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment;

offer protection against instances of both direct and indirect discrimination. However, even in this case there are no decisions on such matters since the law has only been in force for a few months.

### The Equality for Men and Women Act, 2003

The Equality for Men and Women Act, 2003, is the first law in Malta which expressly and specifically prohibits both direct as well as indirect discrimination. Such specific prohibition, however, only extends to direct or indirect sexual discrimination in the sphere of employment, under Article 4(1).

Article 4: (1) It shall be unlawful for an employer 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.

(2) Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers -

- (a) manage the work, give promotions, distribute tasks, offer training opportunities or otherwise arrange the working conditions in a manner that one employee is assigned a less favourable status than others on the basis of sex or because of family responsibilities; or
- (b) alter the working conditions, or the terms of employment to the detriment of those employees who have invoked any rights accorded to them under this Act or requested the performance in their favour of any obligation or duty under this Act; or
- (c) neglect their obligations to suppress sexual harassment as provided under Article 9(2) of this Act.

With regards to sexual discrimination in spheres other than employment, whereas the terms ‘direct’ or ‘indirect’ are not expressly used, Article 2(3) provides that discrimination based on sex or because of family responsibilities, as defined in Article 2(1) includes, *inter alia*, less favourable treatment, direct or indirect, to men and women on the basis of their sex or because of family responsibilities. The definition of discrimination in Article 2 provides that: “discrimination” means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than another person has been or would be treated on the grounds of sex or because of family responsibilities and “discriminate” shall be construed accordingly.

Assessment: With respect to direct discrimination, the above provisions can be said to conform to the definitions found in the Directives. As regards the issue of indirect discrimination, with the exception of the Equality for Men and Women Act, there is no specific reference to the term ‘indirect discrimination’ but one could infer that it is catered for through an interpretation of the provisions which prohibit discrimination. To dispel any doubts, it would be advisable that the terms ‘direct’ and ‘indirect’ discrimination be specifically included.

### **Harassment**

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- (c) actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.

*Does national law define harassment, as defined in the Directives?  
Please make precise reference to the relevant legal provisions and case law.*

Protection from harassment under Maltese legislation is, to date, restricted to sexual harassment and harassment based on gender. The new labour legislation introduced the concept of harassment into domestic law while the new gender equality law further complimented this protection. Therefore, prior to the enactment of these recent laws protection from harassment was not afforded under Maltese law.

#### The Employment and Industrial Relations Act, 2002

Harassment is regulated under Article 29, which prohibits harassment between employees and between employers and employees. The opening subparagraph deals with harassment based on sexual discrimination, in that it shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to certain behaviour. Such behaviour includes any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of the person against whom they are practiced are based on sexual discrimination (that is, harassment based on gender) and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

Furthermore, subparagraph 2 renders it unlawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by (a) subjecting the victim to an act of physical intimacy; or (b) requesting sexual favours from the victim; or (c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where (i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim; or (ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct.

#### The Equality for Men and Women Act, 2003

This Act defines "sexual harassment" as the unlawful activities listed in subparagraph (1) of Article 9. In turn, Article 9 provides that without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act, it shall be unlawful for any person to sexually harass another person, that is to say:

- (a) to subject another person to an act of physical intimacy; or
- (b) to request sexual favours from another person; or
- (c) to subject another person to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the person to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the person to whom they are directed; or
- (d) the person so subjected or requested is treated less favourably by reason of their rejection of or submission to such subjection or request, it could reasonably be anticipated that such person would be so treated.

Therefore, the provisions in both pieces of legislation are to be deemed complimentary. However, while the former relates to harassment in the employment sector, the latter deals with protection from

sexual harassment in general terms but restricts the basis on which such a claim may be brought forward to the cases listed thereunder. In the 2003 Act, the definition of sexual harassment is exhaustive although one could argue that the wide scope of the wording of the relative provision does not restrict its application.

What is however restrictive is the type of harassment afforded protection under domestic law. As seen above, domestic law only deals with sexual harassment and harassment based on gender. Article 29 of the Employment and Industrial Relations Act draws out the distinction between sexual harassment and harassment based on gender. As set out in Article 29(1), the phrase ‘harassment based on gender’ refers to those instances wherein a person is harassed because of his/her gender. In subparagraph (2) the term ‘sexual harassment’ refers to those instances wherein the alleged victim is subjected to acts of physical intimacy or is requested to grant sexual favours or is subjected to acts or conduct having sexual connotations. Sexual harassment is further amplified under the gender equality law. However, neither law protects persons from harassment based on sexual orientation and harassment based on the other grounds mentioned in the Directives.<sup>25</sup> In view of such, it appears that consideration is being given by the Maltese authorities to extend the existing legal provisions regarding harassment to also cover harassment based on sexual orientation, age, disability, racial or ethnic origin and religion or belief.

The concept of harassment is also mentioned under the Public Service Management Code, which though not being legally enforceable, does provide guidance for the regulation of employment in the public sector. Section 7.1.3.4. thereof provides that:

Public officers should not harass in work practices on grounds of sex, marital status, pregnancy, age, race, colour, nationality, physical or mental impairment, sexual orientation, or religious, political or other convictions/allegiances when dealing with their colleagues and members of the public.

The provisions of this Code are therefore more far-reaching than those of the law and could possibly serve as guidance for widening the scope of the legal provisions outlined above.

Assessment: Maltese legislation only prohibits sexual harassment and harassment based on gender. There is no provision for harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. Therefore, the legislative provisions outlined above do not appear to conform to the Directives.

*Are there any existing or forthcoming Codes of Practice on harassment?*

There are no existing Codes of Practice on harassment in Malta to date.

### **Instruction to discriminate**

*Is it contrary to national law to give instructions to discriminate? Does this conform to the Directives? Please make precise reference to the relevant legal provisions and case law.*

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 Opportunities (Persons with Disability) Act, 2000, the Employment and Industrial Relations Act, 2002 and the Equality for Men and Women Act,

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<sup>25</sup> In its report (see footnote 11 above) the Malta Gay Rights Movement had drawn the Government’s attention to the fact that it is doubted whether the national provisions could be interpreted to offer protection based on sexual orientation discrimination and that therefore the scope of the said provisions should be extended to cover the other grounds dealt with under the Directives.

2003 do not contain specific prohibition against the giving of instructions to discriminate.<sup>26</sup> Article 1044 of the Civil Code<sup>27</sup> and, Article 42 of the Criminal Code (dealing with the offence of complicity)<sup>28</sup> where such conduct gives rise to the commission of a criminal offence, can provide the basis for a judicial action to be taken against a person whom, it is alleged, gave instructions to another person to discriminate.

Assessment: Whereas with respect to instructions to discriminate given by the public authorities, one can plead Article 45(3) of the Constitution, in the case of the giving of instructions to discriminate in the private sphere the legislative provisions outlined above do not appear to conform to the Directives.

### **c. Scope**

#### **Fields of application**

*Article 3.1 (Racial Equality Directive and Employment Equality Directive)*

*Does the prohibition of racial and ethnic discrimination apply to all the fields of application listed in Article 3 of the Racial Equality Directive, including both the private and the public sector? Does the prohibition go beyond the scope foreseen in the Directive?*

*Does the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation apply to all the fields of application listed in Article 3 of the Employment Equality Directive, including both the private and the public sector? Does the prohibition go beyond the scope foreseen in the Directive?*

*Please make precise reference to the relevant legal provisions and case law.*

As stated above, protection against discriminatory treatment under Maltese law is provided for both by general and specific laws. The Constitution and Chapter 319 of the Laws of Malta contain a general prohibition against discrimination that could be taken to include all the fields of application listed in Article 3 of both Directives.

With regards to the protection afforded by the Constitution, this can only be pleaded by any person who feels that he is or has been discriminated against by any law that is discriminatory either of itself or in its effect or that he is or has been 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 and that such discrimination is based on any of the grounds provided for in Article 45,

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<sup>26</sup> The Maltese authorities interpret the provisions of Article 28 of the Employment and Industrial Relations Act, 2002 which deals with “victimisation” and which provides that: “It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer’s name and interests” to mean that a person acting in the employer’s name and interests cannot bring forward in his/her defence the claim that he/she was instructed to discriminate by his/her employer. I do not share such interpretation since this provision does not appear to prohibit a person from giving instructions to discriminate.

<sup>27</sup> Chapter 16 of the Laws of Malta. Article 1044 provides that: “Where damage has been unjustly caused, any person who has wilfully contributed thereto with advice, threats, or commands, shall also be liable”.

<sup>28</sup> Chapter 9 of the Laws of Malta. Article 42 provides that: “A person shall be deemed to be an accomplice in a crime if he –

- (a) commands another to commit the crime; or
- (b) instigates the commission of the crime by means of bribes, promises, threats, machinations, or culpable devices, or by abuse of authority or power, or gives instructions for the commission of the crime; or
- (c) ...
- (d) not being one of the persons mentioned in paragraphs (a), (b) and (c), in any way whatsoever knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed; or
- (e) incites or strengthens the determination of another to commit the crime, or promises to give assistance, aid or reward after the fact.

namely race, place of origin, political opinions, colour, creed or sex. Consequently, such protection does not extend to matters between private persons such as, for example, between employers and employees and between private individuals.

The protection afforded by Chapter 319, on the other hand, though wider in view of the fact that the grounds for discrimination are not exhaustive, are more restrictive in that the right or rights which must have been violated on the grounds of discriminatory treatment are the rights laid down in Articles 2 to 13 of the Convention. Thus, in practice, the protection afforded by Article 45 and by Chapter 319 can be deemed to be complementary to each other.

On the other hand, there are certain pieces of legislation that contain specific anti-discrimination provisions in respect of certain spheres (mainly employment) or persons (discrimination on the basis of sex and discrimination against disabled persons). In this case, the protection afforded by these laws also extends to matters between private persons, as well as to matters between private persons and public entities or authorities.

With respect to employment in the private sector, Article 26 of the Employment and Industrial Relations Act, 2002, provides for the prohibition of discrimination in a general manner by providing that an employer should not subject his employees or prospective employees to any discriminatory treatment.

Article 26 (1): It shall not be lawful for any person –

- (a) 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;
- (b) in regard to employees already in employment, to subject any such employee or class of employees to discriminatory treatment, in regard to conditions of employment.

Article 26 is to be read in conjunction with the definition of discriminatory treatment under Article 2<sup>29</sup> whereby an employer cannot discriminate employees or prospective employees on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.

Furthermore, as can be noted from Article 26(2),<sup>30</sup> the situations that are deemed to constitute discriminatory treatment under the said subparagraph 2 are merely illustrative and therefore not exhaustive. Consequently, the Courts could decide that other situations that may arise may constitute discriminatory treatment.

The Employment and Training Services Act, 1990,<sup>31</sup> deals with the recruitment of employees to the public sector. In terms of Article 15(1), all employees required by the Government of Malta from outside its service or by any body corporate or company in which the Government of Malta has a controlling interest or over which it has effective control, whether these are employed on a contract for a specified time or for an indefinite period, shall be recruited through the employment service provided by the Employment and Training Corporation which is established under this Act. Article 15(6) provides that any person who, *inter alia*, shows favour to, or uses discrimination against, any person for employment with any employer referred to in Article 15(1) on the grounds of race, colour, sex, creed or on the grounds of his party or other political beliefs or associations, shall be guilty of an offence under the Act.

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<sup>29</sup> See page 6 above.

<sup>30</sup> See footnote 24 above.

<sup>31</sup> Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

With respect to the prohibition of discrimination in matters concerning vocational training and guidance, provided for in Article 3(1)(b) of the two 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, includes also promotion or engagement in a different class of employment, thus also providing for prohibition of discrimination in matters concerning vocational training and guidance. Furthermore, Regulation 8 of Legal Notice 427 of 2002 entitled 'Part-Time Employees Regulations, 2002,'<sup>32</sup> provides that:

All part-time employees who are employed for not less than twenty hours a week or 50% of the normal working week, whichever is the lesser, within the same class or category of employees, shall be entitled to participate in vocational training programs provided by or on behalf of the employer in the same manner as whole-time employees at the same place of work

Also, in terms of Regulation 6 of Legal Notice 429 of 2002 entitled 'Contracts of Service for a Fixed Term Regulations, 2002', the employer shall endeavour to facilitate access by employees on a contract of service for a fixed term to appropriate training opportunities to enhance their skills, career development and occupational mobility.<sup>33</sup>

As regards the prohibition of discrimination in respect of the matters mentioned in Article 3(1)(c) of the two Directives, Article 27 of the Employment and Industrial Relations Act, 2002, 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 this Act or any other law shall not apply.

It is also to be noted that Legal Notice 430 entitled "Posting of Workers in Malta Regulations, 2002", issued in terms of Article 34 of the Employment and Industrial Relations Act, 2002, provides that if an undertaking established outside Malta posts a foreign national to work in Malta for a limited time, such employee shall be entitled to conditions of employment which shall be no less than the minimum conditions of work given to Maltese employees in a comparable post by virtue of the Act. Furthermore, such foreign employee shall be entitled to receive equality of treatment as the comparable Maltese employees and in particular such foreign employee shall have equal access to employment rights and health and safety rights under Maltese law. The term "equality of treatment" shall, for the purpose of the regulations, include, *inter alia*: (a) maximum work periods and minimum rest periods as applied to various classes of employees; (b) minimum paid annual holidays as applied to various classes of employees; (c) minimum rates of pay, including overtime rates as applied to various classes of employees; (d) equality of treatment between men and women and other provisions of non-discrimination in accordance with the laws of Malta; (e) protective measures with regards to terms and conditions of employment protecting pregnant women or women who have recently given birth; (f) protective measures in accordance with the laws of Malta with regards to terms and conditions of employment protecting children and young people; (g) measures in accordance with the laws of Malta relating to health, safety and hygiene at work.

Maltese law prohibits discrimination on the grounds mentioned in Articles 3(1)(d) of both Directives. As seen above, such protection is afforded under Article 15(6) of the Employment and Training Services Act, 1990. In addition, Article 42 of the Constitution of Malta, which deals with protection

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<sup>32</sup> Legal Notices 425 to 433 of 2002 published on 31 December 2002 but having retroactive effect to 27 December 2002 brought into effect the provisions of The Employment and Industrial Relations Act, 2002, which regulate a number of working conditions under the said Act.

<sup>33</sup> Also note that Section 7.1.3.4. of the Public Service Management Code (see page 7 above) is more comprehensive than the law in that it prohibits discrimination on all the grounds mentioned in Article 3.1 of the Employment Directive. Furthermore, Article 8 of the Equality for Men and Women Act, 2003, provides that it shall be unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in, *inter alia*, the access to any course, vocational training or guidance.

of freedom of assembly and association provides that no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade or other unions or associations for the protection of his interests. Maltese law, however, does not specifically provide protection against discrimination by professional bodies and associations of workers or employers against their members or against persons who would wish to become members of such bodies or associations.

In cases of alleged discrimination in respect of the matters mentioned in paragraphs (e) to (h) of the Race Equality Directive, as seen above the alleged victim can seek to protect his rights by invoking the right to protection from discrimination under the Constitution, and under the European Convention Act, 1987. Furthermore, redress may also be sought under the Ombudsman Act 1995.<sup>34</sup>

Assessment: Whereas in the case of discrimination by public authorities, the provisions of the Constitution and Chapter 319 can be said to provide adequate means of redress and therefore conform to the Directives, in the case of discrimination by private persons the law only appears to conform to the Directives in part. With regard to the protection afforded by specific anti-discrimination legislation, whereas Maltese law appears to provide adequate means of redress in cases of discrimination in the field of employment thereby conforming with the Employment Equality Directive, it is felt that more specific legislation may be required to conform with the provisions of the Racial Equality Directive.

### **Exceptions and exemptions**

- *Occupational requirements*

*Article 4 (Racial Equality Directive and Employment Equality Directive)*

*Do such exemptions exist on the national level? Does national law define 'genuine and determining occupational requirements' and, if so, how?*

*Please note that the Employment Equality Directive includes particular provisions with regard to organisations the ethos of which is based on religion or belief.*

*Please make precise reference to the relevant legal provisions and case law.*

There are no laws, rules and regulations at the national level providing for exemptions in relation to occupational requirements as laid down in the Racial Equality Directive.

With regards 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. The latter make reference to 'genuine and determining occupational requirements' without, however, providing a definition of such requirements.

### The Employment and Industrial Relations Act, 2002

Article 26 (2) (a) provides that unless an employer can prove that he engaged or selected a person who is less qualified than a person of the opposite sex on the basis of acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience, his actions shall be deemed to be discriminatory for the purposes of the Act.

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

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<sup>34</sup> See page 4 above.

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.

### The Equality for Men and Women Act, 2003

Article 2 (4) provides that nothing in subparagraph (2) of this article<sup>35</sup> shall be deemed to constitute discrimination in so far as such treatment -

- (a) grants special protection to women during childbirth or pregnancy;
- (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women.

Furthermore subparagraph (5) provides that in relation to access to employment, less favourable treatment which is based on a characteristic related to sex shall not constitute discrimination where by reason of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances:

Provided that the burden of proof shall lie on the person who alleges that there is a genuine occupational requirement.

Assessment: Whereas Maltese legislation does not appear to conform to the Racial Equality Directive since there are no specific laws, rules and regulations on the national level which provide for exemptions in relation to occupational requirements in respect of persons who fall within its scope, in the case of the Employment and Industrial Relations Act, Article 26(3) appears to conform with the Employment Equality Directive.

Please note that the Employment Equality Directive includes particular provisions with regard to organisations the ethos of which is based on religion or belief.

The only reference to such in the law is found in Article 3 of the Equality for Men and Women Act, 2003, which states that nothing in the Act shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities.

Assessment: Whereas Article 26(3) appears to conform with the Employment Equality Directive in this regard, this is not specifically mentioned in the said Act.

*Does national law governing disability discrimination make any specific exceptions or provisions in relation to occupational health and safety rules?*

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

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<sup>35</sup> This provides that for the purposes of the Act, and unless the context otherwise requires, the terms “man” and “woman” include males and females irrespective of their age.

## Reasonable accommodation

### *Article 5 (Employment Equality Directive)*

*Are there specific national law provisions regulating the use of pre-employment medical examinations? If so, what are the main provisions/norms? What is the relationship between this body of law and the principle of equal treatment/prohibition of disability discrimination? How does this body of law relate to the duty to provide a 'reasonable accommodation'?*

Subsidiary legislation issued under the Occupational Health and Safety Authority Act<sup>36</sup> affords protection to young persons by requiring that they undergo a pre-employment medical examination to ensure that they are fit for the job to be assigned to them.<sup>37</sup> This requirement is not imposed as a discriminatory measure on the grounds of age but as a precautionary and preventive measure taken to ensure that the young employee is able to carry out the task assigned to him/her thereby trying to prevent physical harm to him/her when carrying on the assigned duties.<sup>38</sup> There is no relationship between such subsidiary legislation and the principle of prohibition of disability discrimination. Neither is there any relationship between this body of law and the duty to provide a 'reasonable accommodation'.

### The Equal Opportunities (Persons with Disability) Act, 2000

This Act makes specific reference to the prohibition of the use of pre-employment medical examinations in respect of persons with disabilities. Article 8 provides that:

- (1) Save as provided in subparagraph(2) ... of this article, an employer shall not conduct or require any medical examination or otherwise make any enquiries of an applicant for employment or of any of his employees as to whether such applicant or employee is a person with a disability or as to the nature or severity of such disability except to ascertain the ability of the applicant to perform job-related functions or to identify the cost involved in any adaptations that may be required as a result of such disability.
- (2) After an offer of employment has been made to an applicant for employment and, prior to the commencement of such employment, an employer may conduct or require a medical examination or make the offer of such employment conditional on the results of such examination if all applicants for this same kind of employment are made subject to such an examination.

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<sup>36</sup> Act XXVIII of 2000. Chapter 424 of the Laws of Malta.

<sup>37</sup> Legal Notice 91 of 2000 (entitled "The Protection of Young Persons at Work Places Regulations, 2000") imposes a duty on an employer, to ensure that before taking any young person into his employment, that the young person has been examined by a medical practitioner, who shall certify that the young person is medically fit to carry out the work intended to be assigned to him/her. The employer shall further ensure that the young person is re-examined medically at least once every twelve months, or at any such interval as directed by the Director of Labour. This regulation also requires the employer to keep a register of young persons at the place of work, containing details of such examinations and of any recommendations made by the examining medical practitioner. Furthermore, the employer must carry out risk assessments at places of work where young persons are to be employed, and take all remedial and preventive measures necessary to protect the health and safety of young persons.

<sup>38</sup> Furthermore, Legal Notice 92 of 2000 (entitled "The Protection of Maternity at Work Places Regulations, 2000"), provides that an employer is obliged to assess the nature and degree of any hazard present at his workplace, together with the anticipated duration of exposure and resulting risks to the health and safety of the employee, and to pregnancy, or, if she is a breastfeeding worker, of her child. Such assessment shall include, but shall not be limited to, an assessment of the hazards, and the resulting risks to the physical and mental health of the worker and to the safety of the pregnancy arising from the industrial processes used, and from the presence of any chemical, physical or biological agent used at the employer's place of work. Furthermore, the assessment shall also include an assessment of the risks which may arise from any particular posture, movement or lifting activity which has to be carried out by any pregnant worker, mother or breastfeeding worker so as to carry out the work or task assigned to her.

Thus, in virtue of this provision, a nexus is created between the prohibition of the use of pre-employment medical examinations and the concept of disability discrimination. There is however no link made with the duty to provide reasonable accommodation.

*Does national law permit an employer to inquire about disabilities prior to entering into a contractual relationship with a prospective employee? If so, in which stage of the job application procedure? Are prospective employees required to disclose, prior to employment, disabilities that impact on job performance? If so, how much and what type of information are they obliged to disclose? According to the law, what consequences follow if they fail or refuse to disclose the information?*

As indicated above, the Equal Opportunities (Persons with Disability) Act, 2000, in Article 8, does not permit employers to inquire about disabilities of a prospective employee prior to entering into an employment relationship. This Act does not require prospective employees to disclose disabilities that impact on job performance prior to the commencement of the employment. Consequently, there are no legal consequences if such prospective employee fails to disclose such information.

Furthermore, Article 7 of the same Act prohibits discrimination on grounds of disability against a qualified person with disability in matters relating to procedures relative to applications for employment. Article 7(2) also provides that an employer shall be considered to discriminate on the grounds of disability against a person, if such employer unreasonably uses qualification standards, employment tests, or other selection criteria that screen out or tend to screen out a person or a class of persons with a disability unless the employer can prove that the standards, tests or other selection criteria are an essential qualification or requirement for the position in question.

Is the duty to provide reasonable accommodation defined by law? Is the failure to provide such accommodation considered to constitute direct or indirect discrimination and/or does it infringe other (labour law) standards? Does such a duty exist only with respect to people with disabilities or also with respect to people discriminated against on the other grounds covered by the two Directives?

Article 7 of the Equal Opportunities (Persons with Disability) Act, 2000, provides that employers must provide reasonable accommodation for employees with disabilities. In accordance with Article 7(5) the phrase "make reasonable accommodation" is defined to include (a) making existing facilities used by employees readily accessible to persons with disabilities; and (b) restructuring jobs, instituting part-time or modified work schedules, reassigning vacant positions, acquiring or modifying equipment or devices, appropriately adjusting or modifying examinations, training materials or policies, providing qualified readers or interpreters, and making any other similar accommodation for a person with a disability.

In terms of Article 7(1) of the Act, it is unlawful for an employer to discriminate against a person on grounds of disability if such person possesses the required qualifications for that particular employment. Such discrimination could be alleged in connection with the procedures relative to the applications for employment, the hiring, promotion or dismissal of employees, the payment of compensation to employees, (d) job training, and any other terms, conditions and privileges related to employment.<sup>39</sup> This Article then proceeds to list those instances in which an employer shall be considered to discriminate on the grounds of disability against a person referred to in subparagraph 1. Such instances include, *inter alia*, if the employer unreasonably fails to make reasonable accommodation for the disability of such a person, (unless the employer can prove that the required accommodation would unduly prejudice the operation of his trade or business),<sup>40</sup> or if the employer

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<sup>39</sup> The 2002 Annual Report of the National Commission Persons with Disability (which can be viewed on the Commission's web-site: <http://www.knpd.org>) states that since its inception the Commission has dealt with 22 cases relating to employment. Two of these cases have been solved, one was still being discussed when the report was published, whereas the remaining nineteen cases are reported to have been closed.

<sup>40</sup> In terms of Article 7(4) the factors to be considered in determining whether providing accommodation for an employee with a disability would unduly prejudice the operation of the trade or business run by the employer shall include (a) the

denies employment opportunities to such a person and denial is based on the fact that he would be required to make reasonable accommodation for the disability of such person.

Therefore, in terms of the Act, failure by the employer to provide an employee with a disability, with reasonable accommodation shall constitute direct discrimination.

The failure to provide reasonable accommodation, which as seen above constitutes direct discrimination, is only provided for under the Equal Opportunities (Persons with Disability) Act, 2000. No reference to reasonable accommodation is made in the Employment and Industrial Relations Act, 2002, or in any other law. Therefore, the requirement to provide reasonable accommodation only applies to people with disabilities. There is no requirement under Maltese legislation to provide reasonable accommodation to people discriminated against on the other grounds covered by the two Directives.

Assessment: Maltese legislation appears to go beyond that required by Article 5 of the Employment Equality Directive.

*How do courts determine whether accommodation is 'reasonable' or whether it imposes a 'disproportionate burden'? What type of criteria is used (medical, occupational, educational, grants etc.)?*

To date there have been no judicial pronouncements with regards to what constitutes 'reasonable' accommodation or whether such accommodation imposes a 'disproportionate burden' on the persons who are required to make such accommodation.

However, an indication as to what constitutes 'reasonable' accommodation is laid down in Article 20 of the Equal Opportunities (Persons with Disability) Act, 2000, which provides for the test of reasonableness. Thus for the purposes of interpreting the provisions of the Act, in determining the reasonableness of (a) any modification to rules, policies or practices, or (b) the removal of architectural, communication or transport barriers, or (c) the provision of auxiliary aids or services regard shall be had as to whether such actions could be undertaken without unjustifiable hardship.

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. These 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.

*How does, under national law, a failure to provide a reasonable accommodation relate to the prohibition of (direct or indirect) discrimination?*

As noted above, Article 7(2)(d) of the Equal Opportunities (Persons with Disability) Act, 2000 provides that an employer shall be considered to discriminate on the grounds of disability against a person as is referred to therein, if such employer without justification fails to make reasonable accommodation for the disability of such a person, unless the employer can prove that the required accommodation would unduly prejudice the operation of the trade or business run by such employer. Such failure results in direct discrimination.

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nature and cost of the accommodation; (b) the overall financial resources of the workplace involved in the making of the accommodation; (c) the number of employees at the workplace requiring accommodation; (d) the effect on expenses and resources and the impact of the required accommodation 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 work-force; and (h) the availability of financial assistance from public funds to defray the expense of any accommodation.

## **Minimum requirements and positive action**

### *Minimum requirements*

#### *Article 6 (Employment Equality Directive)*

*When is differentiation on grounds of age 'objectively and reasonably' justified under national law?  
How is this test being applied?*

There are no specific legal provisions allowing “objective and reasonable” differentiation in matters of employment on grounds of age under Maltese law. Under Maltese law, any person who has passed the compulsory school age<sup>41</sup> may seek employment and/or be employed.

Article 48(3) of the Employment and Industrial Relations Act, 2002, however provides that the Minister responsible for Employment and Industrial Relations may make regulations which prescribe the manner and the circumstances in which persons who are above compulsory school age, as defined in the Education Act, 1988,<sup>42</sup> and who have not yet attained the age of 18 years, may be employed, including the power to designate certain categories or class of employment as prohibited employment for such persons. To date no such regulations have been issued.

Furthermore, Article 43(1) of the Education Act, 1988, provides that no person may employ a minor of compulsory school age or otherwise bound to regularly attend school under the provisions of the Act without the written permission of the Minister of Education.

Assessment: There are no provisions in Maltese legislation similar to Article 6 of the Employment Equality Directive.

*Are any specific arrangements made in national law regarding age discrimination and occupational social security schemes? (Consider this question with reference to article 6.2 Employment Directive).*

No occupational social security schemes exist in Malta.

*Is compulsory retirement permitted? Are there any national provisions on retirement? Do they allow the fixing retirement ages by individual or collective labour agreements and, if so, what are the conditions?*

The Social Security Act, 1987,<sup>43</sup> provides that the retirement age in Malta is set at 61 years of age for men and 60 years for women.<sup>44</sup> Retirement is compulsory on attaining the prescribed age. 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 retirement age as defined in the Social Security Act”. However, specific agreement may be reached between the employer and the employee whereby the employee shall continue to render his services after reaching retirement age.

With respect to employees in the public sector, the retirement age for males is 61 unless they choose to retire at 60. On the other hand the retirement age of female public sector employees is 60 unless they opt to retire at 61.

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<sup>41</sup> 16 years of age.

<sup>42</sup> Act XXIV of 1988. Chapter 327 of the Laws of Malta.

<sup>43</sup> Act X of 1987. Chapter 318 of the Laws of Malta.

<sup>44</sup> Article 2.

*Are mandatory retirement ages fixed in national legislation/legally binding collective agreements? At what ages? What (if any) conditions/restrictions are imposed (e.g. not before state pension age/entitlement to (full) state pension)? Are rights to protection from unfair dismissal lost upon reaching this retirement age?*

*Are mandatory retirement ages (widely) imposed by employers (even if apparently in agreement with employees)? At what ages? Are rights to protection from unfair dismissal lost upon reaching these retirement ages?*

As indicated above, 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 retirement age as defined in the Social Security Act”.

Therefore an employer can terminate the employment of an employee on reaching age 61 in the case of males and 60 in the case of females. These ages coincide with the pension age established in terms of the Social Security Act. The rights protecting employees from unfair dismissal are extinguished upon reaching retirement age.

Furthermore, it is to be noted that it would not be lawful for an employer to terminate an employee’s employment on grounds of age if such employee would not have reached the statutory retirement age (unless the employer is able to prove to the tribunal that such termination was based on a good and sufficient cause). Also, it would not be lawful for an employer to impose an earlier retirement age (e.g. 55) in an employee’s contract of employment without the employee’s consent.

*Are early retirement schemes promoted by the State? If so, are they justified (or might they be justified) by any of the examples provided in Article 6 of the Directive (legitimate employment policy, labour market and vocational training objectives etc)?*

There have been instances where the Maltese government promoted early retirement schemes when implementing restructuring processes within certain State-controlled entities. These instances are not common and have only been resorted to in limited cases, such as, for example, in the case of the restructuring of the Malta Dry Docks.

Furthermore, one notes that in terms of Article 32(c) of the Malta Police Ordinance, 1961<sup>45</sup> provides for compulsory retirement of any police officer from the force for the purpose of facilitating improvement in the organisation of the force.

*Is selection for redundancy widely decided on age grounds?*

With respect to redundancy in the private sector, this is regulated under Article 36(3) and (4) of the Employment and Industrial Relations Act, 2002. In the event that a person is declared redundant by his employer and the following provisions of law are not observed, legal action for unfair dismissal can be instituted by the employee against the employer. Subparagraph 3 provides that a contract of service for an indefinite time may be terminated by the employer if there exists a good and sufficient cause for such<sup>46</sup> or on grounds of redundancy. It is to be noted, however, that an employee whose employment is terminated on grounds of redundancy shall be entitled to re-employment if the post formerly occupied by him is again available within a period of one year from the date of termination of employment. Furthermore such an employee must be so re-employed at conditions no less favourable than those to which he would have been entitled if the contract of service relating to him

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<sup>45</sup> Chapter 164 of the Laws of Malta.

<sup>46</sup> This deals with termination of employment on grounds of a good and sufficient cause. The law does not define a good and sufficient cause but lists those instances which are not deemed to constitute a good and sufficient cause. Each case is to be determined on its own merits to see whether the termination of the employment was based on a good and sufficient cause.

had not been terminated. Also, an employee who is re-employed shall, for the purposes of the Act, be deemed to have continued in his employment notwithstanding the termination due to redundancy.

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

Thus, it is clear that a person cannot be declared redundant on the basis of his age.

*Is there obvious evidence of age discrimination in access to training opportunities?*

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

*Positive action*

*Article 5 (Racial Equality Directive) and Article 7 (Employment Equality Directive)*

*Do specific measures exist in order to ensure or promote full equality or to compensate disadvantages linked with racial or ethnic origin, religion or belief, age, disability or sexual orientation (e.g. mandatory or voluntary quota systems, positive action programmes, financial incentive schemes, etc.)? Is the government considering adopting such measures?*

*Are there comparable specific measures in relation to gender discrimination?*

*Please make precise reference to the relevant legal provisions and case law. Please avoid describing social policies and policies aimed at the integration of certain groups.*

Statutory measures exist to compensate disadvantages linked with disability and age. However, to date there are no such measures relating to racial or ethnic origin, religion or belief, or sexual orientation.

The Persons with a Disability (Employment) Act, 1969<sup>47</sup> provides for the compulsory engagement, on a quota basis, of disabled persons registering for employment. Article 15 of this Act states, *inter alia*, that:

(1) Any person to whom this section applies shall give employment to such number of registered persons as is his quota in accordance with the provisions of section 16 of this Act:

Provided that any person to whom, on the coming into operation of this Act, this section applies, shall (if needs be) comply with the provisions of this subsection as and when vacancies occur.

(2) A person to whom this section applies shall not at any time take, or offer to take, into his employment any person other than a registered person, if, immediately after the taking in of that person, the number of registered persons in his employment (excluding persons employed by him in an employment of a class at that time designated under section 19 of this Act) would be less than his quota.

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<sup>47</sup> Act II of 1969. Chapter 210 of the Laws of Malta.

In accordance with article 15(8), this provision is applicable to a person employing not less than twenty (20) workers. At present the quota is 2% of the employer's workforce, and these persons are to be chosen from the register of persons with disability kept by the Employment and Training Corporation.<sup>48</sup>

Furthermore, Legal Notice 135 of 2001 entitled 'Business Promotion Regulations 2001' provides incentives to those enterprises that employ registered unemployed persons who are over 40 years of age, as well as incentives for those enterprises that create jobs for registered unemployed persons who are disabled.

The Maltese Government intends to introduce legislation or regulations based on Article 5 of the Racial Equality Directive and Article 7 of the Employment Equality Directive by the time the provisions of such Directives will come into force.

Assessment: Maltese legislation only appears to partially conform to the Employment Equality Directive since statutory measures exist to compensate disadvantages linked with disability and age. There are no statutory measures to compensate disadvantages linked with racial or ethnic origin, religion or belief, or sexual orientation. It appears, however, that legislative amendments are being considered to ensure that Maltese legislation will fully conform to the Directives.

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<sup>48</sup> There were 318 disabled persons who were registering on the unemployment register at the end of April 2003.

## Chapter 2 Remedies and enforcement

*Article 7 (Racial Equality Directive) and Article 9 (Employment Equality Directive)*

### a. Judicial and/or administrative procedures

*What judicial, administrative and conciliation procedures are available on the national level for the enforcement of the principle of equal treatment? Is action needed on the national level to comply with Articles 7.1 and 9.1 respectively?*

*Please make precise reference to the relevant legal provisions and case law.*

Maltese legislation provides various procedures that one may follow should he/she feel that he/she has been subjected to discriminatory treatment. Apart from recourse to action before the Civil Court, First Hall, sitting in its Constitutional jurisdiction and before the Constitutional Court, as explained on pages 2 and 3 above, there exist other specific fora and other procedures that can be followed. These include:

- (a) The Industrial Tribunal, established under Article 73 of the Employment and Industrial Relations Act, 2002.

Article 30 of the Act provides that if a person alleges that his employer is, or that the conditions of employment are, in breach of Articles 26 to 29, he may lodge a complaint to the Industrial Tribunal which shall then hear such complaint and carry out any investigations as it shall deem fit. If the Tribunal is satisfied that the complaint is justified, it 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. Furthermore, such action taken by the complainant shall be without prejudice to any further action that he/she may be entitled to take under any other applicable law and shall also be without prejudice to any other action to which the employer may be subject in accordance with any other applicable law.

- (b) The National Commission Persons with Disability, established under Article 21 of the Equal Opportunities (Persons with a Disability) Act, 2000.

Amongst the various functions of the Commission, one finds the following:

- (i) ensuring that all government programmes concerning the affairs and interests of persons with disabilities, their families and voluntary bodies working in the field of disability issues, are implemented in accordance with national policies for disability issues;
- (ii) ensuring the necessary co-ordination between all government departments and agencies in implementing measures, services or initiatives proposed by government or proposed by the Commission from time to time;
- (iii) monitoring the provision of services offered by the government or its agencies or by any other person or group of persons, where the clients of such services are persons with a disability;
- (iv) working towards the elimination of discrimination against people with disabilities;
- (v) carrying out general investigations with a view to determining whether the provisions of the Act are being complied with;
- (vi) investigating such complaints as may be made to them regarding a failure to comply with any provision of the Act in an individual case and, where it seems appropriate, conciliate in relation to such complaints;
- (vii) providing, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act;

- (viii) keeping under review the working of the Act and, when deemed necessary by the Commission or so required by the Minister, draw up and submit to the Minister proposals for amendments to same;
  - (ix) examining enactments, and (when requested to do so by the Minister) propose enactments, for the purpose of ascertaining whether the enactments or proposed enactments are or would be, inconsistent with or contrary to the objects of the Act, and to report to the Minister the results of any such examination.
- (c) The National Commission for the Promotion of Equality for Men and Women which is provided for under Article 11 of the Equality for Men and Women Act, 2003;
- (d) The Public Service Commission, set up in terms of Article 109 of the Constitution of Malta;<sup>49</sup>
- (e) The Ombudsman, appointed in accordance with Article 3 of the Ombudsman Act, 1995;<sup>50</sup>
- (f) The Broadcasting Authority, established in terms of Article 118 of the Constitution of Malta, which is to ensure that in the provision of broadcasting services impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.
- (g) The Employment Commission, which is established under Article 120 of the Constitution of Malta. The function of this Commission to ensure that, in respect of employment, no distinction, exclusion or preference that is not justifiable in a democratic society is made or given in favour or against any person by reason of his political opinions.

Assessment: The legislative provisions mentioned above appear to conform with the requirements of Articles 7.1 and 9.1 of the Racial Equality Directive and the Employment Equality Directive respectively.

## **b. Associations**

*Are associations and other entities with a legitimate interest in ensuring compliance with anti-discrimination law entitled to engage in judicial and/or administrative procedures on behalf of or in support of the complainant? If so, how often do associations and other entities make use of this possibility and with what results?*

*Please make precise references to the relevant legal provisions and case law.*

In terms of Maltese law, in principle it is not possible for a person to bring an action on behalf of another, unless the former can prove that he has a legitimate interest in the action. To date no judicial action has been brought by an association or other entity on behalf of a person complaining that he has been subjected to discriminatory treatment on the grounds mentioned in the Directives. With regards to administrative procedures, there is nothing at law that prohibits an association or other entity from intervening with the administrative authorities on behalf of a person complaining that he has been subjected to discriminatory treatment.

An entity that is legislatively empowered to assist a complainant of alleged discriminatory treatment is the National Commission Persons with Disability. This Commission is empowered to provide, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act.<sup>51</sup> Furthermore, if it appears to the Commission that a person

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<sup>49</sup> See footnote 2 above.

<sup>50</sup> Act XXI of 1995. Chapter 385 of the Laws of Malta. See page 4 above.

<sup>51</sup> Article 22(k).

wishes to make a complaint under Article 32(2) of the Act and that person requires assistance to formulate the complaint orally and/or in writing, it shall be the duty of the Commission to take reasonable steps to provide appropriate assistance to that person.<sup>52</sup>

Legal Notice 13 of 2001 issued in terms of Article 33 of the Act and entitled “Procedure for the Investigation of Complaints Regulations, 2001”<sup>53</sup> provides for the procedure which is to be followed in cases in which the Commission receives a complaint from an aggrieved person, including instances of alleged discrimination. In terms of this Legal Notice, the Commission shall first try and find an amicable solution to the matter. If, however, this is not forthcoming, the Commission is empowered to refer the case to the Civil Court, First Hall.<sup>54</sup> In fact, as stated in the Commission’s Annual Report for 2002<sup>55</sup> during the twelve months under review, three complaints that were not amicably resolved were referred to the Civil Court, First Hall,<sup>56</sup> whereas another two cases were referred to arbitration for settlement.<sup>57</sup>

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

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

Assessment: The legislative provisions mentioned above appear, mainly, to conform with the requirements of Articles 7.2 and 9.2 of the Racial Equality Directive and the Employment Equality Directive respectively. However, to be fully compliant with the Directives other representative associations and organisations, in particular non-governmental organisations, would also have to be granted such rights through legislation.

### **c. Time limits**

*What is the situation concerning time limits?*

*Please make precise references to the relevant legal provisions and case law.*

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<sup>52</sup> Article 32(3).

<sup>53</sup> In force as from 1 October 2000.

<sup>54</sup> Regulation 5.

<sup>55</sup> See footnote 39 above.

<sup>56</sup> All three cases are against private companies.

<sup>57</sup> Sixty three complaints were filed with the Commission during the period under review. Of these, 67% of the cases were made against government entities and other government-financed entities, namely parastatal companies and Local Councils. Furthermore, it is interesting to note that 60% of the sixty three complaints concerned access to public places, 16% concerned the provision of goods and services, 14% concerned matters relating to employment, 8% concerned education and 2% concerned housing.

### The Equal Opportunities (Persons with Disability) Act, 2000

Article 33 (1)(a) of the Act provides that in respect of general investigations or investigations of complaints undertaken by the National Commission Persons with Disability, the Minister shall prescribe, by regulations, the procedure whereby the Commission may require a person to furnish any information as is necessary for the investigations aforesaid in this Article, and *the time*,<sup>58</sup> manner, and form in which such information is to be furnished. Legal Notice 13 of 2001 published in virtue of Article 13 of The Equal Opportunities (Persons with Disability) Act, 2000, provides, in Regulation 3 thereof, that when commencing an investigation under Article 32 of the said Act the Commission shall grant to the person who is allegedly responsible for the unlawful act of discrimination a period of seven days within which to state in writing to the Commission whether he considers the complaint justified and which course of action he will be taking to remedy the situation.

### The Employment and Industrial Relations Act, 2002

Article 30 (1) of the Act provides that a person who alleges that the employer is in breach of, or that the conditions of employment are in breach of, Articles 26 to 29, may within three 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.

Furthermore, Article 47 (1) provides that proceedings for an offence under the Act or of any regulations or orders made thereunder may be commenced at any time within one year from the commission of the offence.

### The Equality for Men and Women Act, 2003

Article 18 (3)(a) provides that in respect of general investigations or of investigations upon complaints by the Commissioner, the Minister may prescribe the procedure whereby the Commissioner may require any person to furnish such information as may be necessary for the investigation, as well as *the time*<sup>59</sup> within which and the manner in which such information is to be furnished. As the law has only been recently published, no regulations as yet exist.

#### **d. The burden of proof**

*Article 8 (Racial Equality Directive) and Article 10 (Employment Equality Directive)*

*Does the principle of the shift or easing of the burden of proof in cases of discrimination exist under national law (constitutional, civil, penal, labour and administrative)?*

The general principle under Maltese law is that the burden of proof lies on the person making the allegation. However, the Employment and Industrial Relations Act, 2002, has introduced a shift in the principle of the burden of proof in cases of discrimination, including but not limited to sexual discrimination. This shift has also been introduced in the Equality for Men and Women Act, 2003.

### The Employment and Industrial Relations Act, 2002

Article 26(2)(a) 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.

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<sup>58</sup> Emphasis added.

<sup>59</sup> Emphasis added.

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

#### The Equality for Men and Women Act, 2003

The proviso to article 5(2) states that the burden of proof shall lie on the person who alleges that there is a genuine occupational requirement.

Furthermore, Article 19(2) provides that in respect of any proceedings which may be instituted in connection with the violation of any of the provisions of it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities and it shall be incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of this Act.

Assessment: From an interpretation of Article 46 of the Employment and Industrial Relations Act, it would appear that employment legislation in Malta conforms with Article 10 of the Employment Equality Directive. However, it would be opportune that such provision be amended along the lines of Article 26(2) of the same Act to specifically cover discrimination on the basis of racial or ethnic origin, religion or belief, disability, age and sexual orientation and not restrict it solely to sexual discrimination. Furthermore, the Equal Opportunities (Persons with Disability) Act, 2000 does not provide any rules relating to the shifting of the burden of proof and therefore does not appear to conform to the Employment Equality Directive. Other than for the legislative provisions outlined above, it would appear that other Maltese legislation does not conform to the Directives.

Are there comparable provisions in national law in relation to gender discrimination (NB this is covered by Directive 97/80/EC on the burden of proof in cases of discrimination based on sex).

Please make precise references to the relevant legal provisions and case law.

Article 19 (2) of the Equality for Men and Women Act, 2003, provides that in any proceedings under Article 19(1), it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities and it shall be incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of the Act.

#### **e. Victimisation**

*Article 9 (Racial Equality Directive) and Article 11 (Employment Equality Directive)*

*Does protection against victimisation, as defined in Article 9 and Article 11 respectively, exist in national law?*

*Please make precise references to the relevant legal provisions and case law.*

#### The Employment and Industrial Relations Act, 2002

Article 28 of the Act provides that if any person (a) files a complaint to the lawful authorities or initiates or participates in proceedings for redress on grounds of alleged breach of the provisions of the Act, or (b) discloses information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in

the employer's name and interests, it is unlawful to victimise such person for having acted accordingly.

Assessment: In this case this provision goes further than that required by Article 11 of the Employment Equality Directive since it does not only relate to breaches of the obligation of equal treatment but to any breach of the provisions of the Act. With regards to that which is provided for under Article 9 of the Racial Equality Directive, as yet Maltese law does not specifically provide protection to individuals who may be subjected to adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment, other than for instances relating to employment which would be covered by Article 28 of the Employment and Industrial Relations Act, 2002.

## **f. Sanctions**

*Article 15 (Racial Equality Directive) and Article 17 (Employment Equality Directive)*

*What provisions exist on the application of effective, proportionate and dissuasive sanctions, penalties and remedies in anti-discrimination cases? How do these compare to sanctions in other areas (e.g. labour law)? Do equivalent provisions already exist on the national level in other areas? Is multiple discrimination an aggravating circumstance?*

### The Employment and Industrial Relations Act, 2002

In terms of Article 30 if the Industrial Tribunal upholds a person's allegations that his/her employer is in breach of, or that the conditions of employment are in breach of, Articles 26 (gender discrimination), 27 (work of equal value), 28 (victimisation) or 29 (harassment), the Tribunal may take such measures as it may deem necessary including the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory and may order the payment of reasonable sums of money as compensation to the aggrieved party.<sup>60</sup> This is one 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.

Furthermore, under Article 32, any person contravening the provisions of Articles 28 and 29 shall be guilty of an offence and shall be liable on conviction to pay a fine not exceeding one thousand liri (Lm1000)<sup>61</sup> or to imprisonment for a period not exceeding six months or to both.

Apart from the above, Article 48(4) 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 five thousand liri (Lm5000)<sup>62</sup> in respect of any contravention of, or failure to comply with, the provisions of such regulations. To date no regulations have been issued under Article 48.

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<sup>60</sup> It is to be noted that in terms of Article 1045(1) of the Civil Code (Chapter 16 of the Laws of Malta), damage which is to be made good by the person responsible for causing such damage shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused. Thus, only real damages could be awarded. There have been very few cases concerning violations of human rights, where moral damages have been awarded. In its report mentioned in footnote 11 above, the Malta Gay Rights Movement expressed its reservations as to whether such provision could be an effective deterrent in cases of discrimination on grounds of sexual orientation since it would appear to be more of a case where moral rather than real damages would be suffered.

<sup>61</sup> Equivalent to €2,500.

<sup>62</sup> Equivalent to €12,500.

### Employment and Training Services Act, 1990

In terms of Article 50, any person guilty of an offence against, *inter alia*, Article 15 of the Act shall be liable, on conviction, to pay a fine of not less than five hundred liri (Lm500) but not exceeding five thousand liri (Lm5000).<sup>63</sup>

### The Equal Opportunities (Persons with Disability) Act, 2000

Under Article 24 of this 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 bring a claim for damages as with any other civil action; and any damages in respect of an unlawful act of discrimination may include compensation for moral damages whether or not they include compensation under any other head, up to a maximum of two hundred liri (Lm200)<sup>64</sup> as the court may declare.

It is to be noted that this is the first instance where the law in Malta specifically provides for the award of moral damages to an aggrieved party.

### The Equality for Men and Women Act, 2003

Article 19 (1) provides that without prejudice to 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 Act 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.

### Criminal Code

Article 82A imposes imprisonment for a term from six to eighteen 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 otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up. Furthermore, the Criminal Code provides that any sentence to a punishment established by law shall always be deemed to have been awarded without prejudice to the right of civil action.<sup>65</sup>

Maltese legislation does not mention instances of multiple discrimination as aggravating circumstances.

### **g. Dissemination of information**

*Article 10 (Racial Equality Directive) and Article 12 (Employment Equality Directive)*

*What action is being taken or is planned to ensure that anti-discrimination legislation has been or will be brought to the attention of the public?*

Public awareness in combating anti-discrimination, racism and xenophobia is an ongoing process. The amendments to the Criminal Code that came into force in May 2002<sup>66</sup> were widely publicised in the media, printed and audio-visual. Furthermore, radio and television programmes dealing

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<sup>63</sup> Equivalent to €750 to €12,500.

<sup>64</sup> Equivalent to €500.

<sup>65</sup> Article 26(1).

<sup>66</sup> See page 5 above.

specifically with the subjects of anti-discrimination, racism and xenophobia are broadcast from time to time.

Non-governmental organisations are also particularly active in promoting public awareness on the subjects of anti-discrimination, racism and xenophobia. During the action week held in March 2001 to mark the International Day for the Elimination of Racial Discrimination, the Malta Ecological Foundation (ECO), a non-Governmental organisation, organised a campaign against racism and distributed free of charge educational material on the subject.

The National Curriculum for Schools states specifically that students should be taught to regard ‘xenophobia and racism as undesirable social phenomena’. The subject of racism and xenophobia is included in the syllabus for Personal and Social Education (PSE) and Social Studies.

*What action is being taken or is planned to ensure - by means of information and training and where necessary by effective sanctions - that all officials and other representatives of the public authorities at every level abstain from any discriminatory speech or behaviour in the exercise of their functions? The purpose of the research is not to establish whether measures are appropriate and effective, but whether or not they exist.*

Public officers are duty bound to treat any person in a non-discriminatory and equitable manner irrespective of nationality, religion, ethnic origin or sex and are subject to sanctions provided at law, as already described above, if they breach the provisions relating to discrimination whether in their speech or behaviour.

In fact, Section 7.1.3.4. of the Public Service Management Code specifically states that public officers should not harass or discriminate in work practices on the ground of sex, marital status, pregnancy, age, race, colour, nationality, physical or mental impairment, sexual preference, or religious, political or other convictions/allegiances when dealing with their colleagues and members of the public. Furthermore, Section 7.1.3.5 of the same Code states that public officers have a duty to report to a senior officer any unethical behaviour or wrongdoing by any other public officer during the course of their duties.

Any reports in this regard against public officers are invariably investigated and disciplinary action is taken in terms of the Public Service Commission Regulations of 1999 if it is proven that such public officers acted in a discriminatory manner.

Whereas to date no training sessions on the prohibition of discrimination have been organised for public service employees, and it appears that there are currently no plans to do so in the near future, it is to be noted that training courses at the Police Academy held for Police Cadets include a module covering the subject of human rights and racism.

Assessment: Whereas it appears that measures have been, and are being, taken in conformity with Article 10 of the Racial Equality Directive, more needs to be done to conform with Article 12 of the Employment Equality Directive.

#### **h. Social dialogue and NGOs**

*Article 11 and 12 (Racial Equality Directive) and Article 13 and 14 (Employment Equality Directive)*

*Has the government taken steps to promote dialogue with the social partners at national level? If so, what are the measures adopted and what are the results?*

The Malta Council for Economic and Social Development Act, 2001,<sup>67</sup> sets up the legal framework for the Malta Council for Economic and Social Development (MCESD). The MCESD, which is a body corporate having a distinct legal personality, is composed of 16 members: a chairperson who shall be appointed after consultation with the social partners; a deputy chairperson who shall be appointed by the Prime Minister from amongst members of the public service; nine persons nominated by representative national employers' and workers' organisations constituted bodies;<sup>68</sup> four representatives of the Government, representing the Ministries responsible for Finance, Economic Services, Social Policy and European Union Affairs and the Governor of the Central Bank of Malta, *ex officio*.

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 organizations.” To achieve this mission, the Council in all its actions, whether undertaken on specific request by Government or on its own initiative, seeks to reconcile individual sectoral considerations to achieve the overriding national interest.<sup>69</sup>

The MCESD has held seventeen meetings since the provisions of the law setting it up came into force on 1 August 2001. Items brought up for discussion during these meetings included the criteria for nomination of the members of the Civil Society Committee (see hereunder), the Budget 2002, the Industrial Policy document and the White Paper on Employment Relations Act (ERA) and Industrial Relations Act (IRA) and the subsequent publication of the Bill on Employment and Industrial Relations, a Discussion on Malta's Inflation Rate, a guiding document on the setting up of a National Competitiveness Council, and the 2003 Budget Consultation Document.

Furthermore, preliminary discussions have been initiated to appoint an 'ad hoc' Consultative Standing Committee to interface with the Inter-Ministerial Committee (IMC) for Regional Policy. The MCESD also has a number of sub-committees, which meet on a regular basis.<sup>70</sup>

*Has the government taken steps to promote dialogue with non-governmental organisations at national level? If so, what are the measures adopted and what are the results?*

The Malta Council for Economic and Social Development Act, 2001, provides for the setting up of a Civil Society Committee (CSC) within the MCESD. The Chairperson or the Deputy Chairperson of the MCESD chairs the meetings of the CSC. The CSC is made up of a core representation of civil society which must include the chairpersons of the following organisations: the Local Councils Association, the National Youth Council, the National Council for the Elderly, the Consumers' Association, the National Commission Persons with Disability and the Commission for the Advancement of Women. On the recommendations of the CSC, the MCESD approved the inclusion of the following NGOs to sit on the CSC: The Federation of Professional Bodies, The National Council of Women, Alliance of Pensioners' Organizations, a representative of the island of Gozo, and a representative of the Environmental Groups. Other NGO's may be invited to sit on the CSC.

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

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<sup>67</sup> Act XV of 2001. Chapter 431 of the Laws of Malta.

<sup>68</sup> There are two representatives of the General Workers' Union, and one each of the following: Union Haddiema Maghqudin (a trade union), Confederation of Malta Trade Unions, Malta Employers' Association, Chamber of Commerce, Federation of Industry, Malta Hotels and Restaurants Association and the General Retailers and Traders Union.

<sup>69</sup> [www.mcesd.org.mt/page.jsp?id=21&siteid=1](http://www.mcesd.org.mt/page.jsp?id=21&siteid=1)

<sup>70</sup> One sub-committee deals with Economic and Financial Affairs, one sub-committee deals with Employment Affairs, and the third sub-committee deals with Social Policy issues.

- (a) The National Employment Authority created in terms of the Employment and Training Services Act, 1990,<sup>71</sup> which is composed of three independent persons, two other persons appearing to the President of Malta to represent the interests of employers and two other persons appearing to the President of Malta to represent the interests of employees;
- (b) The Employment Relations Board created in terms of The Employment and Industrial Relations Act, 2002, which is composed of an independent chairperson, the Director responsible for Employment and Industrial Relations who shall act as Deputy Chairperson, four employee representatives nominated by the Malta Council for Economic and Social Development from amongst the national workers' representative organisations sitting on the said Council, four employer representatives nominated by the Malta Council for Economic and Social Development from amongst the national employers' representative organisations sitting on the said Council, and three other persons to be appointed by the Minister;
- (c) The Guarantee Fund Board created in terms of The Employment and Industrial Relations Act, 2002, which is composed of the Director of Employment and Industrial Relations who shall act as Chairperson, the four employee representatives appointed on the Employment Relations Board, the four employer representatives appointed on the Employment Relations Board, a member nominated by the Minister of Finance, the Chairperson of the Employment and Training Corporation and a person appointed by the Minister who shall be a member of the legal profession;
- (d) The Occupational Health and Safety Authority created in terms of the Occupational Health and Safety Authority Act 2002, which is composed of a Chairperson, appointed by the Minister, the Director of Industrial and Employment Relations, a person competent in occupational health and/or safety issues appointed by the Minister, a person appointed by the Minister responsible for health, a person appointed by the Minister responsible for economic affairs, two members appointed by the Minister to represent the interests of workers, following consultation with such body or bodies as the Minister may from time to time consider to be the principal worker representatives, and two members appointed by the Minister to represent the interests of employers, following consultation with such body or bodies as the Minister may from time to time consider to be the principal employer representatives;
- (e) The Board of Assessors created under the Social Security Act 1987, which includes, *inter alia*, an assessor chosen from a panel of people to represent employers and an assessor chosen from a panel of people to represent employees.

In Malta, there are various non-governmental organisations which are involved in the promotion of awareness of social issues. One such organisation is the Malta Gay Rights Movement (MGRM) which represents the Maltese gay, lesbian and bisexual community. The MGRM submitted to the Maltese government its position paper regarding the Bill on Employment and Industrial Relations, in which it proposed certain modifications with the purpose of implementing the provisions of Employment Equality Directive. A delegation from MGRM also held a meeting with the Minister for Social Policy, during which MGRM's position paper and the government's obligations under the above Directive were discussed.

Assessment: Maltese law and practice are fully compliant with the requirements laid down in the Directives in this regard.

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<sup>71</sup> Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

### Chapter 3 Specialised bodies

#### *Article 13 (Racial Equality Directive)*

*Does such a body exist on the national level? Where it does, what are its resources (staff and budget), powers and duties in relation to the requirements of the Racial Equality Directive? Has it also a mandate on other grounds of discrimination?*

*Are existing bodies addressing the issue of multiple discrimination?*

*Where a body does not exist on the national level, are there plans to establish such a body?*

As yet there is no body designated by the government to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin. Neither is there any designated body to address the issue of multiple discrimination. However, it is being considered that the National Commission for the Promotion of Equality for Men and Women, set up in terms of the Equality for Men and Women Act, 2003, will also be designated as the national authority which will be designated to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin as well as to address issues of multiple discrimination. Article 12 (1)(l) of the Act, which states that the Commission shall “perform such other functions as may be assigned by this or any other Act or such other function as may be assigned by the Minister”, provides the legal *vires* in this regard.

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

Assessment: To date, Maltese legislation does not appear to comply with the Directive, though it appears that there are plans to implement Article 13 of the Racial Equality Directive.

## Chapter 4 Compliance and implementation

*Article 14 (Racial Equality Directive) and Article 16 (Employment Equality Directive)*

*Does national law provide a mechanism for the abolition of laws, regulations and administrative provisions that are contrary to the principle of equal treatment?*

No mechanism for the abolition of laws, regulations and administrative provisions that are contrary to the principle of equal treatment exists.

However, it is to be noted that 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. There are currently two schools of thought as to what is to happen in this case. Whereas some believe that if the Courts declare that a law is contrary to the principle of equal treatment, such law will not be abolished *ipso jure* but would have to be repealed by Parliament, others hold that once the Constitutional Court has declared a law unconstitutional, it is inconceivable that a Maltese Court would apply or enforce such a law.

Furthermore, the Referenda Act, 1973<sup>72</sup> provides that a referendum may be called for the Maltese electorate to declare whether they agree that a provision of law should be repealed or abrogated. An abrogative referendum may not be called, however, to abrogate, *inter alia*, any part of the Constitution or the European Convention Act, 1987. Where the majority of voters, voting in an abrogative referendum approve the proposal regarding the repeal of a provision of a law, the said provision shall no longer have effect and the President of Malta shall issue a Proclamation accordingly. No abrogative referendum has been held in Malta to date.

*Is there a mechanism under national law by which provisions in agreements, contracts or rules relating to professional activity, workers and employers that are contrary to the principle of equal treatment can be declared null and void or amended?*

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

Furthermore, in terms of Article 30 of the same Act, a person who alleges that their employer is in breach of, or that the conditions of employment are in breach of articles 26, 27, 28 or 29, he may within three 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 necessary. If the Tribunal is satisfied that the complaint is justified, it may take such measures as it may deem 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. This action taken by a complainant 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.

Assessment: Maltese legislation appears to conform to the Directives.

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<sup>72</sup> Act XXXIII of 1973. Chapter 237 of the Laws of Malta.