

## NATIONAL LEGAL MEASURES TO COMBAT RACISM AND INTOLERANCE IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

### MALTA, Situation as of 1 September 2006

#### General Overview

*Preliminary Note: this table is accompanied by an explanatory note*

COUNTRY: MALTA	Constitutional provisions	Specific Legislation	Criminal Law	Civil and Administrative Law
<b>Norms concerning discrimination in general</b>	Yes.	Yes. Legal notice 461 of 2004 (Equal Treatment in Employment Regulations); Equal Opportunities (Persons with Disability) Act; Equality for Men and Women Act; Art. 2, 29, 26, 27 Employment and Industrial Relations Act; Art. 15 (6) Employment and Training Services Act; Part-Time Employees Act; Occupational Health and	Yes. Art. 6, 3 Press Act; Art. 10 Equality for Men and Women Act; Regulation 14 Equal Treatment in Employment Regulations	Yes. ,Art. 19 (2), Schedule 3 Broadcasting Act; Ombudsman Act

		Safety Authority Act; art. 14 European Convention Act; art. 22 Ombudsman Act; Malta Council for Economic and Social Development Act		
<b>Norms concerning racism</b>	Yes. Art. 45 Const.	Yes, see legislation cited above	Yes. Art. 82 A Criminal Code.	No regulatory provision found on this subject
<b>Relevant jurisprudence</b>	No case-law found on this subject	No case-law found on this subject	No case-law found on this subject	No case-law found on this subject

## EXPLANATORY NOTE

### MALTA / GENERAL OVERVIEW

On the basis of the information obtained, we have established that the main source of anti-discriminatory legislation is the Constitution, which refers to the matter in Articles 32 and 45.

Previously described as a latent problem in Maltese society, racism has come out in the open since Malta became a member of the European Union in June 2004 and more fugitives reaching Malta from North Africa shores on their way to Italy directly demanded asylum in Malta.<sup>1</sup> As far-right groups became more visible and organised, racist attacks and hate speech increased, with African immigrants and refugees being the victims in most of the cases.

Currently, refugees, asylum seekers and illegal immigrants are taken to detention camps where they are held up to one year. According to the Maltese government this policy is necessary due to the country's small size as setting the detainees free would lead to social chaos, make Malta more attractive for abuse and create problems with respect to accommodation and subsistence money as a consequence. On January 13, 2005 detainees staged a peaceful protest against their detention outside the Hal Safari detention centre. After Members of the Armed Forces had failed to convince them to return to their compound, an order was given to force them back inside and approximately 27 immigrants were injured – some of them severely - when they were hit with batons. According to reports, some of the soldiers encouraged their colleagues to beat the detainees by manifesting racist statements. The incidents were followed by an official inquiry which came to the conclusion that, although the use of

force in general was actually justified, the force applied by several soldiers was exaggerated and out of proportion in the circumstances.

Far-right exponents such as Imperium Europa-leader Norman Lowell tried to capitalise on the events and began campaigning against illegal immigrants. Violent racial attacks were reported in the media.

Finding a solution to the growing immigration problem became a government priority on both the national and international level and a number of steps have been taken in that direction<sup>2</sup>. According to EU asylum policy, the member state first entered by a refugee is responsible for the asylum seeking procedure. Malta claims to be overwhelmed by the current situation and wants to pass on a certain number of refugees to other member states without considering their demand for asylum first; this would involve a change of the EU's "Dublin II"-Regulation.<sup>3</sup>

Equal treatment and non-discrimination were introduced as principles into the Maltese Constitution of 1964. Malta ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1971. The European Convention Act, and which makes the European Convention on Human Rights a part of Maltese law was enacted in 1987. Art. 14 of said Convention provides for equal enjoyment of the fundamental rights and freedoms guaranteed in the convention. In consequence of becoming a member of the EU, Malta has introduced a number of specific legislative acts to implement Council Directives 2000/78/EC and 2000/43/EC, e.g. the Employment and Industrial Relations Act 2002, the Equal Opportunities (Persons with Disability) Act 2000 and the Equality for Men and Women Act 2003. Malta also introduced Art. 82A of the Criminal Code which punishes incitement to racial hatred. Legal Notice 461 of 2004 (known as the "Equal Treatment in Employment Regulations") was introduced to complete the gaps in the Employment and Industrial Relations Act 2002 regarding discrimination based on religion, disability, age, sexual orientation, racial or ethnic origin in the field of employment. In addition, we have been informed by the Ministry for the Family and Social Solidarity that additional legislation entitled the "Equality Act" implementing the non-employment aspects of Council Directive 2000/78/EC as well as Council Directive 2000/43/EC has been prepared and is currently being vetted by the Attorney General's Office prior to publication and entry into force.

Malta is also a party to various international human rights instruments which provide for protection against discrimination, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms and various protocols thereof (except protocol 12), 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.<sup>4</sup>

### **Constitutional law - Malta**

*Preliminary Note: this table is accompanied by an explanatory note*

<b>Constitutional</b>	<b>Scope</b>	<b>Relevant</b>	<b>Remarks</b>
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provisions	jurisprudence	
Art. 1 Constitution	States that Malta is a democratic Republic founded on the respect for the fundamental rights and freedoms of the individual.	
Art. 32 Constitution Fundamental rights	Provides that every person in Malta, whatever his/her race, colour and creed, is entitled to the fundamental rights and freedoms of the individual.	
Art. 41 Constitution Freedom of expression	Consecrates the principle of freedom of expression and information and establishes the limits to such freedom.	
Art. 45 (1) Constitution Racial discrimination	States that no law shall make discriminatory provisions in itself or in its effect.	
Art. 45 (2) Constitution Discrimination	States 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 authority.	
Art. 45(3) Constitution: discrimination	Defines the expression "discrimination" as affording different treatment to different persons attributable wholly or mainly to their respective characteristics by race, origin, political	

	opinion, colour, creed or sex whereby persons exhibiting certain characteristics are subjected to disablements or restrictions to which persons exhibiting different characteristics are not made subject or are accorded privileges or advantages which are not accorded to persons exhibiting different characteristics.	
Arts 45(4), (5) (6) (7) and (8) Constitution	Establish limitations on the principle of non-discrimination.	
Art. 46 Constitution Procedural means	Establishes legal remedies for violations of rights.	
Art. 117 Constitution	Declares unlawful associations using illegal means for political objectives.	

## EXPLANATORY NOTE

### MALTA / CONSTITUTIONAL LAW

#### Comments on the table

#### Art. 41 of the Constitution

Consecrates freedom of expression and information. This article states that nothing contained or done under the authority of any law shall be held as hindering the freedom of expression to the extent that the law in question makes reasonable provision for the protection of public safety, public order, public morality or decency, protection of reputations, rights and freedoms of other persons or their private lives.

#### Article 45, paragraphs (4), (5) (6) (7) and (8) of the Constitution

Establish limitations upon the principle of non-discrimination. The limitations are that the principle does not apply to:

- persons who are not citizens of Malta,

- the appropriation of public revenues or other public funds,
- matters of adoption, marriage, dissolution of marriage, burial, devolution of property on death or any matters of personal law,
- authorisation, during a period of public emergency, of measures that are reasonably justifiable for the purpose of dealing with the situation,
- provisions establishing qualifications for service as a public officer or member of disciplined forces or for service in local government authorities or any other public law body.

## Procedural means

### Art. 46 Constitution

This Article establishes legal remedies for violations of the rights enshrined in the Constitution. The main protective tool is to apply to the Civil Court, First Hall, for redress. This is the Court of first instance, and it may make orders, issue writs and give directions for enforcing and securing the enforcement of human rights provisions. If in any proceedings in any court other than the Civil Court, First Hall or the Constitutional Court, a question arises as to the contravention of any of the human rights provisions of the Constitution, that court shall refer the matter to the Civil Court, First Hall. Appeals on Civil Court, First Hall, decisions are made to the Constitutional Court.

### Act XIV of 1987

Incorporates the European Convention of Human Rights *in toto* as part of Maltese law, thereby rendering it directly enforceable in Maltese courts.

## Commissions

### Act XXXI of 1976

A commission has been set up under the Constitution and Act XXXI of 1976 to settle cases of discrimination at work on the basis of political opinion<sup>5</sup>.

## Criminal Law - Malta

*Preliminary Note: this table is accompanied by an explanatory note*

Offence	Source	Scope	Sanction	Relevant Jurisprudence	Remarks
Racism and similar offences	Art. 6, 3 Press Act	Covers publication or distribution of printed matter or any other broadcast in Malta regardless of	Imprisonment not exceeding three months and fine.		

		<p>point of origin. Result must be the threatening, insulting or exposing to hatred, persecution or contempt. Victim must be a person or a group of persons because of their race, creed, colour, nationality, sex, disability as defined in article 2 of the Equal Opportunities (Persons with Disability) Act, or national or ethnic origin.</p>		
Incitement of racial hatred etc.	Art. 82A Criminal Code	<p>Covers words, behaviour, written and printed material as well as other conduct. Words, behaviour or material must be threatening, abusive or insulting. Use, display or conduct must be intended or likely to stir up racial hatred.</p>	Imprisonment for a term from six to eighteen months.	Only Maltese norm addressing racism specifically and not as part of discrimination in general.
Discriminatory Advertisement	Art. 10 Equality of Men and	Prohibits the advertisement of a vacancy	Liability to the penalties established for	

	Women Act	for employment which discriminates between job seekers or which requests from job seekers information concerning their private life or family plans. Prohibits any advertisements which promotes discrimination or otherwise discriminates.	contraventions.	
Victimisation	Art. 28, 32 Employment and Industrial Relations Act	Prohibition of victimisation of any person for having made a complaint or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of the Act or for having disclosed information regarding alleged illegal or corrupt activities.	Fine not exceeding one thousand liri or imprisonment not exceeding six months, or both.	
Harassment; sexual harassment	Art. 29, 32 Employment and Industrial Relations	Makes it unlawful for any employer or employee to harass another	Fine not exceeding one thousand liri or imprisonment	Prohibition addressed to employers and employees.



	Act	employee or the employer by subjecting them to any unwelcome act, request or conduct which is based on sexual discrimination. Prohibition of sexual harassment.	not exceeding six months, or both.	Protects employer as well as employee.
Discrimination	Art. 16 (6), 50 Employment and Training Services Act	Unlawful to show favour to, or discriminate against, any person applying for employment with Government or Government owned or controlled bodies and companies on the grounds of race, colour, sex. Creed or on the grounds of his party or other political beliefs or associations.	Fine of not less than five hundred liri but not exceeding five thousand liri.	
Discrimination, harassment	Regulation 14 Equal Treatment in Employment Regulations	Makes it an offence to contravene the provisions of aforesaid Regulations.	Fine not exceeding one thousand liri or imprisonment for a period not exceeding six months, or both.	Regulations give effect to the relevant provisions of Council Directive 2000/73/EC and 2000/43/EC.

## EXPLANATORY NOTE

## **MALTA / CRIMINAL LAW**

### **1. Criminal Code (cap. 9)**

Art.82 A of the Maltese Criminal Code criminalises incitement of racial hatred.

#### **1.1 Criminalised Conduct**

The regulation creates three different offences concerning incitement to racial hatred which have certain basic elements in common.

First, the addressed conduct must be “threatening, abusive or insulting”.

Secondly, the conduct must either be intended to stir up racial hatred, or, having regard to all the circumstances, be likely to stir up racial hatred. Art. 82A (2) Criminal Code defines “racial hatred” as hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

With regard to the type of conduct punished, Art. 82A (1) Criminal Code qualifies

- the use of words or behaviour
- the display of written or printed material
- other conduct

with said effects as punishable behaviour.

#### **1.2 Penalties**

Where a defendant has been convicted on incitement of racial hatred, he may be sentenced to imprisonment for a term from six to eighteen months.

### **2. Press Act (cap. 248)**

Art. 6 Press Act deals with racism and similar offences.

#### **2.1 Criminalised Conduct**

Art. 3 Press Act defines the means by which the offences named in the Press Act can be committed. According to the norm the offences are committed by means of publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or by means of any broadcast. It must be pointed out that the article which is publicised, distributed or otherwise broadcasted does not necessarily have to be produced in Malta as long as the punishable result – i.e. the publication etc. - occurs in this country.

A defendant will be convicted to racism and similar offences as mentioned in art. 6 Press Act if he, by any means mentioned in art. 3 Press Act threatens, insults, or exposes to hatred, persecution or contempt, a person or group of persons because of

their race, creed, colour, nationality, sex, disability as defined by art. 2 of the Equal Opportunities (Persons with Disability) Act, or national or ethnic origin.

## **2.2 Penalties**

The conduct described above will be followed by a conviction to imprisonment for a term not exceeding three months and a fine.

## **3. Art. 10 Equality for Men and Women Act**

Art. 10 Equality for Men and Women Act criminalises discriminatory advertisement.

### **3.1 Criminalised Conduct**

According to Art. 10 (1) Equality for Men and Women Act, any person publishing or displaying or causing to be published or displayed any advertisement, or, otherwise advertising a vacancy for employment which discriminates between job seekers or requests from job seekers information concerning their private life is acting against the law except where the employer can prove that the work in question can only be performed by a person of a specific sex. Advertising within the meaning of art. 10 of the Act includes the passing of information about the vacancy by word of mouth from person to person (art. 10 (4)). Furthermore, art. 10 (2) Equality for Men and Women Act criminalises the publication or display of an advertisement which promotes discrimination or which otherwise discriminates as well as the cause of such publication or display.

### **3.2 Penalties**

On conviction, a person in breach of said provisions will be liable to the penalties established for contraventions.

## **4. Employment and Industrial Relations Act**

Part IV Employment and Industrial Relations Act which was introduced into the laws of Malta in 2002 contains regulations with regard to the protection against discrimination related to employment.

### **4.1 Criminalised Conduct**

According to Art. 28 Employment and Industrial Regulations Act it shall be unlawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of the Act. Likewise, it shall be unlawful to victimise a person for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employers or by persons acting in the employer's name and interest.

Art. 29 (1) of the Act makes it unlawful for either an employer or an employee to harass another employee or the employer by subjecting them to 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 that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person. Under art. 29 (2) it is furthermore prohibited to sexually harass an employee or the employer by subjecting this person to an act of physical intimacy, requesting sexual favours from him / her or 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 materials where

- the act, request or conduct is unwelcome to that person and could reasonably be regarded as offensive, humiliating or intimidating to that person;

- the aggrieved person is treated differently, or it could reasonably be anticipated that the person could be so treated, by reason of his / her rejection of or submission to the act, request or conduct.

## **4.2 Penalties**

Any person committing one of the above described offences will be liable on conviction to a fine not exceeding one thousand liri or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment (art. 32 Employment and Industrial Relations Act).

## **5. Employment and Training Services Act (cap. 343)**

### **5.1 Criminalised Conduct**

According to art. 15 (6) (b) Employment and Training Services Act, it is an offence to show favour to, or use discrimination against, any person applying for employment with either the Government or Government owned or controlled bodies and companies on the grounds of race, colour, sex, creed or on the grounds of his party or other political beliefs or associations.

### **5.2 Penalties**

Art. 50 of the Act imposes as penalty for an offence under art. 15 a fine of not less than five hundred liri but not exceeding five thousand liri.

## **6. Equal Treatment in Employment Regulations (Legal Notice 461 of 2004)**

The Regulations give effect to the relevant provisions of Council Directive 2000/78/EC and 2000/43/EC in order to put into effect the principle of equal treatment in relation to employment by combating discriminatory treatment based on the grounds of religion or religious belief, disability, age, sexual orientation, and racial, or ethnic origin.

### **6.1 Criminalised Conduct**

According to Regulation 14, it is an offence to contravene the provisions of the regulations (to the content of the Regulations, see below “Civil and Administrative Law”).

## 6.2 Penalties

On conviction, a person having committed said offence will be liable to a fine not exceeding one thousand liri or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.

### Civil and Administrative Law - Malta

*Preliminary Note: this table is accompanied by an explanatory note*

Provision	Scope	Consequences of breach	Relevant jurisprudence	Remarks
Art. 19 (2), Schedule 3, no. 1 a) – c) Broadcasting Act;	Advertisement in radio or television programmes	Advertisement shall not be allowed. Affected third parties may apply to Broadcasting Authority seeking effective compliance.		Legislations obliges Broadcasting Authority to secure that advertising and teleshopping do not prejudice respect for human dignity; include any discrimination on grounds of race, sex or nationality or be offensive to religious or political beliefs.
Equal Opportunities (Persons with Disability) Act	Prohibits discrimination on grounds of disability with regard to employment, education, access to premises, provision of goods, facilities or services and accommodation.	Investigations by the National Commission Persons with Disability. Claim for damages in civil proceedings.	<i>The National Commission for the Disabled v. Michele Peresso Limited</i> <sup>6</sup>	National Commission Persons with Disability as specialized enforcement body.
Equality for Men and	Discrimination based on sex or	Investigation by the		National Commission for

Women Act	because of family responsibilities.	Commissioner possibly followed by an report to the police. Potential victim has right of action before civil court requesting the court to order the defendant to desist such unlawful acts and order the payment of compensation.	the Promotion of Equality for Men and Women as specialised enforcement body. Upon request of either a person discriminated against or the Commissioner employer must provide requestor with a report on the allegation made or the procedures used by the employer in the matter alleged to constitute such discrimination.
Art. 2 (1), Part IV (Art. 26-32) Employment and Industrial Relations Act		Complaint to Industrial Tribunal which may cancel any contract of service or any clause in such contract which is discriminatory and order a payment as compensation. Action is without prejudice to any further action under any other law.	
Legal Notice 461 of 2004 (Equal Treatment in Employment Regulations)	Minimum requirements to combat discriminatory treatment on the grounds of religion or religious belief, disability, age, sexual		Regulations do not cover employment in the public sector.

	orientation, and racial or ethnic origin.			
Art. 14 European Convention Act	Rights and freedoms included in Convention to be secured without discrimination.		<i>Maurice Zarb Adami vs. The Hon. Prime Minister (Civil Court First Hall, octobr 19<sup>th</sup> 1989); Martin Vella vs. Alfred Grima noe (Civil Court, First Hall, February 6<sup>th</sup> 1990)</i> <sup>7</sup>	Act incorporates the European Convention of Human Rights and Fundamental Freedoms into Maltese law.
Art. 13, 22 Ombudsman Act	Person claiming to have been aggrieved by action taken on behalf of Government or other authority, body or person within the scope of the Act by means of improperly discrimination etc., may file written complaint and thereby ask Ombudsman to investigate.	Report and recommendations issued by Ombudsman.		Ombudsman may report his opinion and make recommendations. If no action is taken thereafter, Ombudsman my report to Prime Minister and House of Representatives but has no further power to enforce his recommendations.

## EXPLANATORY NOTE

### MALTA / CIVIL AND ADMINISTRATIVE LAW

#### 1. Broadcasting Act (cap. 350)

The Broadcasting Act regulates the broadcast in Malta of radio and television programmes as defined in art. 2 of the Act.

##### 1.1 Prohibition of Discrimination

Pursuant to art. 19 (1) of the Broadcasting Act, advertisements may only be inserted in the programmes broadcast to the extent that the provisions of the Act are complied with in relation thereto. Under art. 19 (2) a) of the Broadcasting Act, it is the Broadcasting Authority's duty to secure that the provisions of the Advertising and Sponsorship Code in the Third Schedule to the Act are complied with. Regarding discrimination, said Third Schedule states, among other things, that advertising and teleshopping shall not:

- prejudice respect for human dignity;
- include any type of discrimination on grounds of race, sex or nationality;
- be offensive to religious or political beliefs.

## **1.2 Consequences of Discrimination**

The Broadcasting Authority will not allow any advertisement containing discrimination to be inserted in the programmes. Additionally, art. 21A of the Act allows affected third parties to apply to the Broadcasting Authority to seek effective compliance by broadcasters with the provisions of the Act.

## **2. Equal Opportunities (Persons with Disability) Act (cap. 413)**

The Equal Opportunities (Persons with Disability) Act which was introduced into Maltese law in the year 2000 prohibits discrimination on the grounds of disability.

### **2.1 Prohibition of Disability Discrimination**

Part II of the Act defines three different kinds of disability discrimination, namely:

- disability discrimination because of less favourable treatment (art. 3);
- disability discrimination because of non-compliance with requirement conditions (art. 4);
- disability discrimination because of assistance (art. 6).

Part III names employment (art. 7-10), education (art. 11), access to premises (art. 12), provision of goods, facilities or services (art. 13) and accommodation (art. 14) as the relevant areas in which disability discrimination is prohibited under the Act. With regard to the prohibition of disability discrimination in the field of employment, it must be noted that this includes a prohibition of the use of pre-employment medical examinations as well as a prohibition to a prospective employer to inquire about disabilities of a potential employee prior to entering into an employment relationship. Furthermore, an employer will be deemed 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. Employers are obliged to provide reasonable accommodation for persons with disabilities.

The Act provides exemptions for positive discrimination (art. 15), insurance coverage (art. 16), acts done under authorities such as court or tribunal orders (art. 17), disabilities which constitute infectious diseases (art. 18) and charities (art. 19).



Part. V of the Act establishes the National Commission Persons with Disability as a specialized enforcement body. The functions of the Commission, according to art. 22 of the Act, include, among others, the identification of all national politics related to disability issues, the identification of the needs of disabled persons and their families, the coordination between different government departments and agencies, general investigations as well as investigations preceded by a complaint, legal and financial assistance to people enforcing their rights under the Act and the review of the working of the Act.

## **2.2 Consequences of Disability Discrimination**

Non-compliance with the Act may be followed by an investigation by the National Commission Persons with Disability either initiated by the Commission itself or upon receipt of a complaint.

A person who has been discriminated against by another person in violation of the Act can claim for damages in civil proceedings. This includes compensation for injury to feelings regardless of whether any other damages are available.

## **2.3 Relevant Jurisprudence**

In *The National Commission for the Disabled v. Michele Peresso Limited*, the plaintiff filed a writ of summons against the defendant, claiming that the lack of accessibility for disabled persons to the defendant's commercial outlet constituted discrimination under the Act as the ramp at the front side of the premises in question was too steep for wheelchair bound persons to go up on their own. The First Hall Civil Court held on February 25<sup>th</sup> 2005 that the defendant was guilty of the alleged discrimination and granted the defendant a period of two months from the issue of the permits by the Planning Authority to carry out the necessary work to provide free and adequate access to persons with disability. The defendant registered an appeal on 16 March 2005.

## **3. Equality for Men and Women Act (cap. 456)**

The Equality for Men and Women Act was introduced into Maltese law on 9<sup>th</sup> December, 2003 and promotes the equality of men and women in the field of employment.

### **3.1 Prohibition of discrimination**

According to art. 2 (1) Equality for Men and Women Act, "discrimination" in this Act means discrimination based on sex or because of family responsibilities. Art. 2 (3) of the Act provides more specifically as follows:

- the giving of less favourable treatment, directly or indirectly, to men and women;
- treating a woman less favourably for reasons of actual or potential pregnancy or childbirth;
- treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex;

- any treatment based on a provision, criterion or practice which disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Positive discrimination is not covered by the provision (art. 2 (4)). Furthermore, if a characteristic related to sex constitutes a genuine occupational requirement and the resulting inevitably less favourable treatment remains within the limits of what is appropriate and necessary, this treatment will not constitute discrimination. It should, however, be noted that the burden of proof lies with the person who alleges that there is a genuine occupational requirement (art. 2 (5)). Religious communities are not within the scope of the Act (art. 3).

Art. 11 of the Act establishes the National Commission for the Promotion of Equality for Men and Women as a specialised enforcement body with the functions named by art. 12 of the Act, e.g. identification of all policies directly or indirectly related to issues of equality for men and women, identification of the needs of disadvantaged persons, monitoring of the implementation of national policies, investigations in general as well as preceded by a complaint, assistance to persons suffering from discrimination in enforcing their rights under the Act.

### **3.2 Consequences of Discrimination**

Any person feeling discriminated against under the Act may complain to the Commissioner who may initiate an investigation. Where the alleged discrimination constitutes an offence, the Commissioner may make a report to the police for action on such person's behalf. Where the action does not constitute an offence, the Commissioner may call upon the person against whom the complaint is directed to redress the situation, and mediate between the complainant and such person to settle the matter.

Additionally, the complainant has 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. With regard to the burden of proof during such civil proceedings it has to be pointed out that it is 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 whereas the defendant must prove that such less favourable treatment was justified under the Act (art. 19).

## **4. Employment and Industrial Relations Act (cap. 452)**

Part IV of the Employment and Industrial Relations Act is dedicated to the protection against discrimination related to employment. It does not cover employment in the public sector.

### **4.1 Prohibition of Discrimination**

Under the Act, "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 (art. 2 (1)).

Art. 26 (1) of the Employment and Industrial Relations Act prohibits any advertisement of employment vacancies which subjects any applicants for employment or any class of applicants for employment to discriminatory treatment. Likewise, regarding employees already in the employment of the employer, it is unlawful to subject any such employees to discriminatory treatment, in regard to conditions of employment. "Offering employment", according to art. 26 (4) includes recruitment or training of any person with a view to engagement in employment and with regard to a person already employed, includes also promotion to a higher grade or engagement in a different class of employment.

Art. 26 (2) provides that discriminatory treatment shall include the engagement 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. Equally included in the definition of discriminatory treatment are actions which, on the basis of discriminatory treatment, 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 and 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. Art. 26 (3) constitutes an exemption for preferences or exclusions which are 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.

Art. 27 of the Act stipulates that employees in the same class of employment are entitled to the same remuneration for work of equal value.

#### **4.2 Consequences of Discrimination**

A person who alleges that either the employer is acting contrary to any of the aforesaid provisions (including the above treated offences of victimisation and sexual harassment), or that the conditions of employment are so, may lodge a complaint to the Industrial Tribunal under art. 30 of the Act. Accordingly, the Industrial Tribunal will carry out an investigation and, upon being satisfied that the claim is justified, may take the measures it deems fit. Those include the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory and the order of a payment of reasonable sums of money as compensation to the aggrieved party (art. 30 (2)).

Actions taken in accordance with the provisions of the Act do not prejudice actions under any other law applicable.

#### **5. Equal Treatment in Employment Regulations (Legal Notice 461 of 2004)**

The Regulations give effect to the relevant provisions of Council Directive 2000/78/EC and 2000/43/EC. Their purpose is to put into effect the principle of equal treatment in relation to employment by laying down minimum requirements to combat discriminatory treatment on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin (Regulation 1 (2), (3)). The term “employment” as used in the Regulations does not only cover the contract of service itself but also the process of recruitment or training of any person with a view to engagement in employment, and in regard to a person already in employment, includes also a promotion to a higher grade or engagement in a different class of employment or appointment to an office or post. Besides, the Regulations apply to employers as well as employees’ and employers’ organisations (Regulation 7) and employment agencies (Regulation 8).

The above-mentioned “principle of equal treatment” means the absence of direct or indirect discriminatory treatment (Regulation 2 (1)).

The regulations do not apply to employment in the public sector.

### **5.1 Prohibition of Discrimination**

The Regulations contain a definition of “discriminatory treatment” which is wider than the definition used in the Employment and Industrial Relations Act as it also includes all forms of indirect discrimination. “Discriminatory treatment” according to Regulation 2 (1), 1 (3) means any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on the above-mentioned grounds which is not justifiable in a democratic society, and includes harassment. The term “indirect discrimination” refers to an apparently neutral provision, criterion or practice which puts persons of a particular race or ethnic origin or persons having a particular religion or religious belief, disability, age, or sexual orientation at a disadvantage when compared with other persons (Regulation 3 (2) (b)).

A treatment is not discriminatory if it is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or where, by reason of the nature of the particular activities concerned, a distinction on above-mentioned grounds constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (Regulations 3 (2) (b), 4 (1)). Additionally, there exist exemptions for employers having an ethos based on religion or religious beliefs, as well as different treatment depending on age under certain circumstances (Regulations 4 (2), (3), 5). The Regulations allow positive discrimination (Regulation 6).

### **5.2 Consequences of Discrimination**

Any act in contravention of the above-stated principles constitutes an offence under Regulation 14 (see above).

A person making an allegation of discriminatory treatment may send a written notification to the employer of the alleged discriminatory treatment in question. On receipt of such notification, the respondent must submit a written reply within ten working days giving his version of the events and any grounds for disputing the

allegations. Said correspondence is admissible in proceedings before the tribunals and the courts. In the case of non-response by the respondent, the tribunals or courts can draw from that fact any inference they consider just and equitable to draw, including an inference that the respondent committed an unlawful act (Regulation 9).

A person claiming to have been the victim of discriminatory treatment under the Regulations may lodge a complaint to the Industrial Tribunal under art. 30 of the Employment and Industrial Relations Act (Regulation 10 (1)). With regard to the burden of proof, it should be noted that it is sufficient for the plaintiff to prove that he or she has suffered discriminatory treatment, whereas the defendant must prove that such treatment was justified in accordance with the Regulations (Regulation 10 (3)). Associations, organisations and other legal entities having a legitimate interest in ensuring that the Regulations are complied with, have a right to engage themselves with the approval of the complainant either on behalf or in support of the complainant in any judicial or administrative procedure (Regulation 11).

Provisions in contracts, agreements or rules contrary to the principle of equal treatment are null and void by virtue of Regulation 13.

## **6. European Convention Act (cap. 319)**

Since 1987, the European Convention Act incorporates the substantive Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms into Maltese law and is enforceable as part of the law of Malta (art. 3 (1)).

### **6.1. Prohibition of Discrimination**

Art. 14 of the European Convention Act clarifies that the enjoyment of the rights and freedoms guaranteed by the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### **6.2 Consequences of Discrimination**

Any ordinary law inconsistent with the rights and freedoms guaranteed is void due to the prevalence inherent in said rights and freedoms (art. 3 (2) of the Act).

Persons alleging a violation of their guaranteed rights and freedoms can apply to the Civil Court, First Hall, for redress (art. 4 (1) of the Act). In addition, there exists a right of individual petition to the Secretary-General of the Council of Europe in accordance with the provisions of Art. 25 of the Convention (art. 5 of the Act).

## **7. Ombudsman Act (cap. 385)**

The Ombudsman Act provides for the appointment of an Ombudsman with power to investigate the administrative actions taken by or on behalf of the Government and other authorities.

### **7.1 Prohibition of Discrimination**

The Ombudsman Act itself contains no prohibition of discrimination. However, according to art. 13 (1) Ombudsman Act, it is the function of the Ombudsman to investigate any action taken by, or on behalf of, the Government, or other authority, body or person to whom the Act applies, in the exercise of their administrative functions. The Ombudsman is entitled to take the measures referred to in art. 22 *et seq.* Ombudsman Act if he is of the opinion that the decision, recommendation, act or omission which was the subject matter of the investigation

- appears to have been contrary to law; or
- was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a law or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
- was based wholly or partly on a mistake of law or fact; or
- was wrong.

## **7.2 Consequences of Discrimination**

The Ombudsman may conduct an investigation on his initiative or on the written complaint of any person having claiming to have been aggrieved by an action of the aforesaid (art. 14 of the Act). If he is of the opinion that there is substantial evidence of any significant breach of duty or misconduct he refers the matter to the appropriate authority, including the police (art. 18 (5) of the Act).

After the investigation has taken place, he will report his opinion and may make such recommendations as he thinks fit. Additionally, he may request the affected authority to notify him of the steps that it proposes to take to give effect to his recommendations (art. 22 (3) of the Act). If within a reasonable time after the report was made no action in order to improve the situation was taken, the Ombudsman may send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to the House of Representatives on the matter as he thinks fit (art. 22 (4) of the Act). However, the Ombudsman is not empowered to impose any sanctions against the defaulting public authority.

## **8. The Refugees Act and Policy on Irregular Immigrants, Refugees and Integration**

These two documents provide for specific types of aid to irregular immigrants, asylum seekers and refugees.

### **8.1 The Policy on Irregular Immigrants, Refugees and Integration**

Malta's Policy Document Irregular Immigrants, Refugees and Integration provides for the reception of irregular immigrants as well as for their social welfare and support. The policy concerning the Social Welfare of Unaccompanied Minor Irregular Immigrants addresses the needs of these particularly vulnerable immigrants by specifically focussing on:

- Referrals and age verification
- Issuing and termination of Care Orders
- Placements

- Guardianship
- Assessment and monitoring
- Health
- Education, training and employment
- Social development and integration
- Attaining adulthood

## 8.2 The Refugees Act

Under Article 11(1) and 11(2) of the Refugees Act (Chap. 420) refugees, accepted as such by the Commissioner for Refugees appointed under this same Act, and members of their families have access to state education and training in Malta and access to state medical care and social services. Furthermore, under Article 10 of the aforementioned Act, all asylum seekers are entitled to free medical care and free state-provided education.

In addition, the Refugee Service Area of the Government agency Appogg (which provides social welfare service), the Employment and Training Corporation (ETC), the open accommodation centres alone or in collaboration with several NGO's, all provide English language classes to refugees, asylum seekers, and irregular immigrants. Most of these programmes run in collaboration with the Ministry for the Family and Social Solidarity (MFSS)

## 9. Upcoming Legislation: the Equality Act

We are informed that new legislation entitled the “Equality Act” implementing the non-employment aspects of Council Directive 2000/78/EC as well as Council Directive 2000/43/EC has been prepared and is currently being vetted by the Attorney General’s Office prior to publication and entry into force.

The mandate of the National Commission for the Promotion of Equality, formed to monitor questions of discrimination on the basis of sex will, once the new legislation referred to above becomes effective, be extended to include monitoring of issues of discrimination based on race as well.

### Note

<sup>1</sup> Unless indicated differently, the following information is taken from Christian Attard, *ENAR Shadow Report 2005 – Racism in Malta*.

### Note

<sup>2</sup> See the Council of Europe’s *ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES*, *Second Opinion*, available at:

### Note

[www.coe.int/t/e/human\\_rights/minorities/2.\\_FRAMEWORK\\_CONVENTION\\_\(MONITORING\)/2.\\_Monit](http://www.coe.int/t/e/human_rights/minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monit)

### Note

<sup>3</sup> See “*Flüchtlinge auf Malta: Von Zuständigkeiten und Haftzentren*”, 17. April 2006, [www.no-racism.net](http://www.no-racism.net).

### Note

<sup>4</sup> See Tonio Ellul, *Report on Measures to combat discrimination*,

*Directives 2000/43/EC and 2007/78/EC – Country Report Malta.*

**Note**

<sup>5</sup> Equality in employment and occupation, Publication of ILO, 1988, p. 213.

**Note**

<sup>6</sup> *Information taken from European Anti-Discrimination Law Review, Issue II, Oct. 2005, p. 68 et seqq.*

**Note**

<sup>7</sup> *Information taken from « Report on measures to combat discrimination in the 13 candidate countries (VT/2002/47), Country Report Malta by Tonio Ellul, May 2003.*