



**REPORT ON MEASURES TO COMBAT DISCRIMINATION**  
**Directives 2000/43/EC and 2000/78/EC**

**COUNTRY REPORT 2011**

**MALTA**

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**State of affairs up to 1<sup>st</sup> January 2012**

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## TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	<b>4</b>
0.1 The national legal system .....	4
0.2 Overview/State of implementation .....	4
0.3 Case-law.....	8
<b>1 GENERAL LEGAL FRAMEWORK</b> .....	<b>14</b>
<b>2 THE DEFINITION OF DISCRIMINATION</b> .....	<b>16</b>
2.1 Grounds of unlawful discrimination .....	16
2.1.1 Definition of the grounds of unlawful discrimination within the Directives .....	16
2.1.2 Assumed and associated discrimination .....	19
2.2 Direct discrimination (Article 2(2)(a)) .....	20
2.2.1 Situation Testing .....	24
2.3 Indirect discrimination (Article 2(2)(b)) .....	25
2.3.1 Statistical Evidence .....	27
2.4 Harassment (Article 2(3)).....	29
2.5 Instructions to discriminate (Article 2(4)).....	31
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78).....	33
2.7 Sheltered or semi-sheltered accommodation/employment .....	39
<b>3 PERSONAL AND MATERIAL SCOPE</b> .....	<b>40</b>
3.1 Personal scope .....	40
3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78) .....	40
3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43).....	40
3.1.3 Scope of liability .....	41
3.2 Material Scope.....	41
3.2.1 Employment, self-employment and occupation.....	41
3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?.....	43
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c)) .....	45
3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b)) .....	46
3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d)).....	47

3.2.6	Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43) .....	48
3.2.7	Social advantages (Article 3(1)(f) Directive 2000/43) .....	48
3.2.8	Education (Article 3(1)(g) Directive 2000/43) .....	49
3.2.9	Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43) .....	51
3.2.10	Housing (Article 3(1)(h) Directive 2000/43) .....	52
<b>4</b>	<b>EXCEPTIONS .....</b>	<b>54</b>
4.1	Genuine and determining occupational requirements (Article 4) .....	54
4.2	Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78) .....	55
4.3	Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78) .....	56
4.4	Nationality discrimination (Art. 3(2) .....	56
4.5	Work-related family benefits (Recital 22 Directive 2000/78) .....	57
4.6	Health and safety (Art. 7(2) Directive 2000/78) .....	58
4.7	Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78) .....	59
4.7.1	Direct discrimination .....	59
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities .....	60
4.7.3	Minimum and maximum age requirements .....	60
4.7.4	Retirement .....	61
4.7.5	Redundancy .....	63
4.8	Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78) .....	65
4.9	Any other exceptions .....	65
<b>5.</b>	<b>POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)</b>	<b>66</b>
<b>6</b>	<b>REMEDIES AND ENFORCEMENT .....</b>	<b>69</b>
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78) .....	69
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78) .....	74
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)	77
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78) ...	78
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78) .....	79
<b>7</b>	<b>SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43) .....</b>	<b>82</b>
<b>8</b>	<b>IMPLEMENTATION ISSUES .....</b>	<b>88</b>



8.1	Dissemination of information, dialogue with NGOs and between social partners .....	88
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78) ..	92
<b>9</b>	<b>CO-ORDINATION AT NATIONAL LEVEL .....</b>	<b>94</b>
	<b>ANNEX .....</b>	<b>95</b>
	<b>ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION ..</b>	<b>96</b>
	<b>ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS .....</b>	<b>102</b>



## INTRODUCTION

### 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.*

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

Thus, the Constitution is supreme over the executive and legislative and the constitutional system provides for a system of checks and balances among and between the executive, the legislature and the judiciary. The Constitution of Malta was amended in April 2001, entrenching the system of local government. It is now stipulated that the "territory of Malta shall be divided into such number of localities as may by law be from time to time determined, each locality to be administered by a Local Council elected by the residents of the locality and established and operating in terms of such law as may from time to time be in force."<sup>1</sup>

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

### 0.2 Overview/State of implementation

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*

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<sup>1</sup> Article 115A of the Constitution of Malta.



*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

*This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

*Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.*

*Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.*

Malta has introduced a number of specific legislative enactments to implement Council Directives 2000/78/EC and 2000/43/EC, including the Employment and Industrial Relations Act 2002 as subsequently amended,<sup>2</sup> the Equal Opportunities (Persons with Disability) Act, 2000, and Legal Notice 461 of 2004 which brought into force the Equal Treatment in Employment Regulations, which augmented protection against discrimination on the grounds of religion or religious belief<sup>3</sup>, disability, age, sexual orientation, and racial or ethnic origin in the field of employment and thus implemented provisions of the two Directives. The latter regulations were amended by Legal Notice 53 of 2007 which refer, in particular, to the provision of suitable accommodation to persons with disabilities and the defence of rights in line with the provisions of Directive 2000/78. In terms of the Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations, introduced by Legal Notice 54 of 2007, the provisions of the 2004 Regulations were extended to employment in the public sector.<sup>4</sup> Similarly, the provisions of Legal Notice 86 of 2007<sup>5</sup> further extended the protection to cover persons in self-employment and occupation from discrimination. By virtue of Legal Notice 444 of 2011, the Regulations were amended to provide for a definition of an 'equality body' and the

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<sup>2</sup> Act V of 2009 amended the provisions on discrimination in the Employment and Industrial Relations Act.

<sup>3</sup> It is to be noted that whereas Directive 2000/78 makes reference to discrimination on the grounds of religion or belief, local regulations are more restrictive in that they refer to religion or religious belief, thus excluding discrimination on other forms of belief.

<sup>4</sup> The extension of applicability was made clearer when in terms of Legal Notice 137 of 2008, regulation 1 was amended to read 'These regulations give effect to the relevant provisions of Council Directives 76/207/EEC, 2000/78/EC, 2000/43/EC, 2002/73/EC and 2006/54/EC and apply to all persons as regards both the public and private sectors and including service with the Government in accordance with the Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations, 2007.'

<sup>5</sup> Equal Treatment in Self-Employment and Occupational Order, 2007.



extension of the remit of the Department of Industrial and Employment Relations to act as an equality body in issues relating to ethnic and industrial relations in terms of the equality regulations.

In 2007, Maltese law saw the enactment of the Equal Treatment of Persons Order, 2007,<sup>6</sup> the object of which is to further implement the provisions of Directive 2000/43/EC in all spheres and not just in the field of employment.

It therefore refers to social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing; and access to any other service as may be designated by law for the purposes of the regulation. The Equal Treatment of Persons Order could also be seen to provide protection additional to the basic requirements of the 2000/78/EC Directive in the area of discriminatory advertising, where it states that it is not lawful “for persons to publish or display, or cause to be published or displayed, any advertisements which promotes discrimination or which is discriminatory or which might reasonably be understood as indicating an intention to discriminate.”<sup>7</sup>

Regulation 5 of Legal Notice 461 of 2004 states that difference of treatment on the ground of age shall not constitute discriminatory treatment if: -

- such differences are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy, labour market and vocational training objectives; and
- if the means of achieving that aim are appropriate and necessary.

Non-discriminatory differences of treatment may include: -

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

Therefore, it is submitted that the requirements laid down in Article 6 of the 2000/78/EC Directive have been fulfilled.

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<sup>6</sup> Legal Notice 85 of 2007.

<sup>7</sup> Article 8 of Legal Notice 85 of 2007.





In terms of the Equal Treatment of Persons Order of 2007 which covers discrimination based on ethnic and racial origin:

- (a) direct discrimination shall be taken to occur where a person is treated less favourably than another person is, has been, or would be, treated in a comparable situation;
- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;
- (c) harassment shall be deemed to be discrimination when it is related to racial or ethnic origin and takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- (d) an instruction to discriminate against persons on any ground mentioned in paragraph (c) above shall be deemed to be discrimination.

However, a less favourable treatment which is based on a characteristic related to any of the grounds mentioned in the paragraph (c) above shall not constitute discrimination where by reason of the particular occupational activities concerned, or of the context in which they are carried out, the treatment is legitimate and the characteristic constitutes a genuine occupational requirement which is proportionate in the circumstances.

2007 saw the introduction of measures further implementing the provisions of the two Council Directives. Article 13 of Council Directive 2000/43 states that Member States are to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. In terms of the 2007 Order, the Commission for the Promotion of Equality for Men and Women (set up under the Equality for Men and Women Act, 2003) has been designated to promote equality of treatment for all persons without discrimination of the grounds of race or ethnic origin.

Similarly, in terms of article 4 of the 2007 Order, 'no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to (i) social protection, including social security and healthcare, (ii) social advantages, (iii) education, (iv) access to and supply of goods and services which are available to the public, and (v) housing,' as is stipulated under Article 3(1) (e) to (h) Directive 2000/43.

Furthermore, in terms of Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations and the 2007 Order the relative legal provisions are applicable in relation to employees in both the private and public sector. Similarly, in terms of Legal Notice 86 of 2007, the protection was extended to cover persons in self-employment and occupation.





There are no provisions under Maltese law which are in breach of the Directives, other than for the prohibition of instruction to discriminate under the Equal Treatment of Persons Order which is more restrictive than under the provisions of the Directive. Furthermore, also to note is that the duty to provide reasonable accommodation only arises out of the Equal Opportunities (Persons with Disability) Act 2000 and hence only applies to the field of employment to employees with a disability to the exclusion of job applicants.

As a general comment, this report does not make reference to local practice on the subject areas because there is little case-law or publicly available material and only sparse practice exists. The absence of case-law could, in the past, have been caused by the lack of awareness of one's rights. However, the State, through its departments and agencies as well as the NGO's have in the recent past created various campaigns, both written and visual, to disseminate information and to create awareness among the general public.

### 0.3 Case-law

*Provide a list of any important case law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*

**Name of the court**

**Date of decision**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)

**Brief summary** of the key points of law and of the actual facts (no more than several sentences).

→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives.

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

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

**Date of decision:** 25 February 2005

**Name of the parties:** National Commission Persons with Disability vs. Michele Peresso Limited

**Reference number:** Writ of Summons no. 413/2001/1



**Brief summary:** On 25<sup>th</sup> February 2005, the Maltese Courts through the Civil Court, First Hall decided the case National Commission Persons with Disability vs. Michele Peresso Limited.<sup>8</sup>

Although this case did not refer to the application and interpretation of the Directives, it was the first case decided by the Maltese Courts in this field.

In this case the National Commission Persons with Disability (NCPD) filed a writ of summons against the defendant company, Michele Peresso Limited, claiming that disabled people were being discriminated against by the company since the latter did not provide adequate accessibility for disabled persons to its commercial outlet. This, it was claimed, was in breach of the Equal Opportunities (Persons with a Disability) Act in that wheelchair users were unable to surmount, without third-party assistance, the steep ramp at the front side of the building.

The NCPD argued that disabled persons were to be treated equally, without any form of discrimination and therefore the defendant's claim that there was access to the premises by a lift through the back entrance was not acceptable. The defendant Company argued that (a) the NCPD did not have the legal capacity to initiate legal proceedings under the Equal Opportunities (Persons with Disability) Act 2000, (b) the Act only came into force in October 1, 2000 and was not applicable retrospectively, (c) disabled persons did have adequate access, and (d) the company was itself being discriminated against by the Commission since although many other Maltese public places did not provide adequate access to persons with a disability, the Company was being singled out.

The Civil Court, First Hall, upheld the claims made by the NCPD and rejected the pleas submitted by the defendant company. It decided that the defendant Company was guilty of discrimination in terms of Article 12 (1)(c) of the Equal Opportunities (Persons with Disability) Act 2000 and granted the defendant Company two months from the issue of the relevant planning permits to carry out the necessary works to provide free and adequate access to the premises in question.

The defendant Company appealed on the grounds that (a) it had never discriminated against disabled persons; and (b) Act 1 of 2000, the Equal Opportunities (Persons with Disability) Act, is not retroactive and cannot apply to buildings built before the coming in force of the said Act; and (c) the building did provide for access to disabled persons even though it was constructed before there was the legal obligation to so provide for access; and (d) the building provides adequate access to persons with a disability, since if they cannot use the ramp, they can use the back-entrance; and (e)

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<sup>8</sup> Civil Court, First Hall - 25 February, 2005 - Writ of Summons no. 413/2001/1;  
[http://www2.justice.gov.mt/sentenzi/judgm\\_judgement.asp?FrmJudgementID=29418&FrmNo=&FrmYear=&FrmSeq=&FrmDate=&FrmDate2=&FrmCourt=&FrmJudge=&FrmOkkjo=&FrmOkkjo2=peresso&Frmkeywords=&FrmMatch=All&search=Search&FromThis=1&FrmPageNo=2&FrmProcessyear=ALL&FrmSection=1&lng=ENG&FrmList=10](http://www2.justice.gov.mt/sentenzi/judgm_judgement.asp?FrmJudgementID=29418&FrmNo=&FrmYear=&FrmSeq=&FrmDate=&FrmDate2=&FrmCourt=&FrmJudge=&FrmOkkjo=&FrmOkkjo2=peresso&Frmkeywords=&FrmMatch=All&search=Search&FromThis=1&FrmPageNo=2&FrmProcessyear=ALL&FrmSection=1&lng=ENG&FrmList=10).



it had applied for a Planning Authority permit 3 years before the case and the permit had not yet been issued.

The Court of Appeal held that the grounds of appeal of the defendant Company centred around two main arguments: (i) the retroactivity of the said Act; and (ii) discrimination.

The Court dismissed the defendant's arguments in relation to retroactivity and held that Act 1 of 2000 clearly applied to buildings already built at the time of the coming into force of the Act, since otherwise it would "defeat the whole purpose" of the Act.

In relation to the second argument, the Court of Appeal disagreed with the Court of First Instance and held that the defendant Company had not discriminated against the disabled persons since it had provided for adequate access by means of the ramp at the front entrance together with the lift at the back entrance. The Court of Appeal revoked the judgment at first instance and held that the defendant Company had not discriminated against disabled persons and was therefore not bound to carry out any works.

**Name of the court:** Court of Magistrates (Criminal Judicature)

**Date of decision:** 27 March 2008

**Name of the parties:** Police vs. Norman Lowell

**Address of the webpage:**

[http://docs.justice.gov.mt/SENTENZI2000\\_PDF/MALTA/TA'%20L-APPELLI%20KRIMINALI%20\(INFERJURI\)/2008/2008-10-15\\_83-2008\\_51070.PDF](http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA'%20L-APPELLI%20KRIMINALI%20(INFERJURI)/2008/2008-10-15_83-2008_51070.PDF)

**Brief summary:** On 27<sup>th</sup> March 2008, the Maltese Court of Magistrates (Criminal Judicature) decided upon the case Police vs. Norman Lowell<sup>9</sup> and found a person guilty of incitement to racial hatred.

Mr. Norman Lowell<sup>10</sup> was accused of committing the offence of inciting racial hatred (as per Article 82A of the Criminal Code).<sup>11</sup> He used derogatory and insulting terms in referring to illegal immigrants and the Jewish and Muslim populations in two separate political events hosted by his organisation, Imperium Europa. He also used threatening and abusive terms in an article he wrote entitled "Coming Cataclysmic Crises" which he posted on a public access website. Mr. Lowell claimed that he had

<sup>9</sup>[http://docs.justice.gov.mt/SENTENZI2000\\_PDF/MALTA/TA'%20L-APPELLI%20KRIMINALI%20\(INFERJURI\)/2008/2008-10-15\\_83-2008\\_51070.PDF](http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA'%20L-APPELLI%20KRIMINALI%20(INFERJURI)/2008/2008-10-15_83-2008_51070.PDF).

<sup>10</sup> Founder and leader of Imperium Europa, a political party,

<sup>11</sup> Article 82A provides that 'Whosoever 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 whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months. For the purposes of the foregoing subarticle "racial hatred" means hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.'



not violated Article 82A, since his statements were protected by the right to freedom of expression.

The Court of Magistrates held that a balance must be found between the right to freedom of expression on the one hand and the right of others not to be insulted by such the exercise of such right.

It concluded that the words used by the defendant exceeded this balance and were likely to create fear of persons of other races or ethnicities, therefore clearly falling within the scope of the offence contemplated in Article 82A of the Criminal Code.

An appeal to this case decision was lodged on the 8 April 2008 and was decided upon by the Criminal Court of Appeal on 15 October 2008. The court in the latter instance however did not go into the merits of the case as the appeal application failed to meet the formal legal requirements.

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

**Date of decision:** 1 March 2010

**Name of the parties:** The National Commission Persons with Disability vs. Banif Bank (Malta) plc

**Address of the webpage:**

[http://docs.justice.gov.mt/SENTENZI2000\\_PDF/MALTA/CIVILI,%20PRIM%20AWLA/2010/2010-03-01\\_394-2009\\_59707.PDF](http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/CIVILI,%20PRIM%20AWLA/2010/2010-03-01_394-2009_59707.PDF)

**Brief summary:** The National Commission Persons with Disability (NCPD) filed an application in Court against Banif Bank asking the Court to declare that the Bank had failed to provide adequate access to persons with a disability, and to order the Bank to rectify the infringement in particular by providing persons using a wheelchair access at two of its branches.<sup>12</sup> The Court rejected the Bank's claim holding that it was the Bank's duty to ensure that any premises chosen for the purposes of its operations were compliant with the laws in Malta, and if they were not so compliant the Bank should have chosen other premises or obtained the necessary authorisation from the other tenants/landlord to carry out the alterations required for compliance. This decision implies that any operation commenced after the coming into force of Chap. 413 (year 2000) must be in compliance with the relevant legal requirements/guidelines. An operator must make the necessary alterations to the premises to bring it into conformity and where this is not possible, or where the

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<sup>12</sup> As regards the branch in St. Julian's a 'platform lift' had been installed but it did not conform with the guidelines established by the NCPD, the Bank claimed the exception established in Art 12(2) of Chap. 413 arguing that failure to conform was due to the particular circumstances relating to the location of the branch (situated at the top of a steep hill, having no pavement and forming part of an Urban Conservation Area). As regards the branch in Gzira, the NCPD's objection related to accessibility of the main entrance to the block within which the Bank's branch was situated. The Bank claimed that under the lease agreement with the landlord, the Bank was not allowed to affect structural alterations, and furthermore since the objection relates to the common area, all tenants together with the landlord should have been sued in order to rectify the infringement.



operator is not allowed so to do, said operator will have no option but to choose alternative premises.

No cases have been brought by Roma or Travellers before the Maltese courts, the reason being that there are no Roma or Travellers in Malta.

The Ombudsman does not publish full details of all cases brought before this Office but merely publishes summaries of the same. None of the published summaries are relevant to the Directives under consideration.

The National Commission for the Promotion of Equality for Men and Women (NCPE) receives complaints and does not publish them. The reason for the non publication of complaints is based on the protection of confidentiality of the parties involved. Extracts of some complaints are mentioned in its annual reports but these are complaints and therefore cannot be deemed case-law.

In its last published report for 2010, the NCPE tabulated the complaints received in 2010 of which 14 dealt with gender issues and 3 were based on racial/ethnic origin issues. The latter referred to access to bars and restaurants and access to obtaining entry visas. Those complaints which referred to gender issues related to alleged gender discrimination in employment, in access and supply of goods and services and discriminatory procedures by government departments.

The National Commission Persons with Disability (NCPD) also publishes annual reports. In its report published in November 2011<sup>13</sup>, it stated that in 2010/2011 it had investigated 259 complaints, with 96 new complaints. A slight decrease in the number of new complaints was registered. Within the employment sector there was an increase of 5 complaints over the previous year which seems to imply that more people are aware of their rights. Within the education sector the number of complaints decreased by 3. An interesting contrast is the accessibility sector where the NCPD did not receive the highest number of complaints. This is evident in the fact that in 2010, 25 new complaints were received, which amounts to 10 fewer complaints in comparison to the previous year. This implies progress because persons with disability and our society in general no longer perceive disability as being dominated by problems solely related to physical accessibility.

Throughout the year 2010 the provision of goods and services sector ranked first with regard to complaints registered: there were 31 new complaints, an increase of 9 complaints over the previous year. This suggests that persons with disability are becoming aware of the importance of having access to means of information, information technology, communication, purchasing and use of different types of equipment.

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<sup>13</sup> Covering the period October 2010 – October 2011.



During the year, 42% of complaints were closed.<sup>14</sup> No court cases were decided upon during the year. At the end of the year 2010/2011, KNPD had one case that is still being heard in court, that against the Health Division with regard to accessibility to the Gzira Health Centre. KNPD also had three other cases where a judicial protest had been presented. These are all related to physical accessibility and were lodged against the owners of property in the entertainment sector.

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<sup>14</sup> The majority of complaints closed during this period (32 complaints or 29% of complaints) are related to the provision of goods and services. In fact KNPD closed 32 out of the 46 such complaints it had been working on. KNPD closed 20 out of 24 complaints it had been working on in relation to the employment sector, while it closed 23 out of 57 complaints it had been working on within the education sector. With regard to accessibility, KNPD closed 29 out of 124 complaints it had been working on. KNPD also closed 2 out of 4 housing-related complaints.





## 1 GENERAL LEGAL FRAMEWORK

### Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

The principles of equality of treatment and non-discrimination under Article 45 of the Constitution of Malta relate to the protection from discrimination on the basis of race, place of origin, political opinions, colour, creed<sup>15</sup> or sex. This provision also provides that no law shall make any provision that is discriminatory either of itself or in its effect. Article 45(3) states that: "'discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

Chapter II of the Maltese Constitution<sup>16</sup> lays down a number of principles that, according to Article 21 of the Constitution of Malta, are however not judicially enforceable. These principles cover, *inter alia*: the right to, and the protection of, work; the right to free education in State schools; the equal rights of men and women; and the right to social assistance and insurance.

Chapter IV of the Constitution,<sup>17</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>18</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.

<sup>15</sup> One notes the use of the term 'creed' here as opposed to religious belief found in local anti-discriminatory provisions under employment law. 'Creed' is not defined under the Constitution but is commonly defined as a statement of belief, normally a religious belief.

<sup>16</sup> Articles 7 to 21 (inclusive).

<sup>17</sup> Articles 32 to 47 (inclusive).

<sup>18</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.





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>19</sup> The Maltese Constitution does not make specific mention of the words 'ethnic origin' in Article 45. However one may try and argue that this may be implied through the words 'race' and 'place of origin'. Likewise, the Constitution does not make specific reference to age, disability or sexual orientation and the same cannot be implied from the specific grounds mentioned. However, protection under these grounds is afforded under specific local legislation.

To date, the Maltese Courts have not had to attempt to interpret the terms 'race' and 'place of origin' as including ethnic origin as well.

This deficiency is, to a certain extent, remedied by the European Convention Act 1987, in that, a person who alleges breach of the enjoyment of the fundamental rights and freedoms provided for in the Convention on grounds of discrimination may apply to the Maltese Courts for redress. In fact, since the grounds for non-discrimination under Article 14 of the European Convention for Human Rights are merely illustrative, proceedings in respect of alleged discrimination can be instituted on a wider range of grounds than those that could be invoked under Article 45 of the Constitution of Malta. Therefore, alleged victims of discriminatory treatment based on disability, 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>20</sup>

*b) Are constitutional anti-discrimination provisions directly applicable?*

The provisions dealing with the protection of the fundamental rights and freedoms of the individual under Chapter IV of the Maltese Constitution are directly applicable. Article 45, which concerns the protection from discrimination, falls under Chapter IV of the Constitution and is therefore directly applicable.

*c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

It is to be noted that the Constitution of Malta only has vertical effect. Consequently it can only be enforced against the State.

<sup>19</sup> *Dr Walter Cuschieri et vs. The Hon. Prime Minister et noe* – Constitutional Court – 30 November 1977.

<sup>20</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.



## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

Grounds of discrimination or discriminatory treatment are found under the following Maltese legal instruments:

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

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

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*

The only ground which is defined under Maltese law is the ground of disability under the Equal Opportunities (Persons with Disability) Act, 2000.

This Act defines disability as a physical or mental impairment that substantially limits one or more of the major life activities of a person. The Act further defines impairment in the context of disability as meaning any loss, restriction or abnormality of psychological, physiological, or anatomical structure or function.



When seen in the light of the concept adopted by the European Court of Justice in case C-13/05, *Chacón Navas*, Paragraph 43, one notes that the Maltese provision is wider in its scope since it does not only apply to situations which hinder the participation of the person concerned in his/her professional life but applies to such person's major life activities, whether these are professional, personal, private or other.

b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

As stated above, national legislation on discrimination does not provide for definitions of these grounds other than for a definition of the term 'disability'. No such definitions can be found in other national legislation.

With respect to interpretation, Legal Notice 297 of 2003, issued in terms of the Employment and Industrial Relations Act, 2002 clarifies the interpretation of the definition of 'discrimination' in the Act and provides that in determining whether any treatment is treatment that is justified in a democratic society, the Industrial Tribunal shall take into account the provisions of any directive or regulation issued by the institutions of the European Union relating to discrimination and particularly Council Directive 2000/43/EC of 29<sup>th</sup> June 2000 and Council Directive 2000/78/EC of 27<sup>th</sup> November 2000 prohibiting discrimination on the basis of religion or belief, disability, age, sexual orientation, race or ethnic origin. It is to be noted that such interpretation is only restricted to proceedings instituted before the Industrial Tribunal in cases of alleged discrimination in employment under the Employment and Industrial Relations Act, 2002. This legal notice does not apply to alleged discrimination under any other legislation in Malta.

Article 5 of Directive 2000/78/EC is reflected in national legislation against discrimination. In terms of Article 4A of the Equal Treatment in Employment (Amendment) Regulations, 2007 'employers shall provide reasonable accommodation for persons with disabilities. In particular, employers shall take appropriate measures to enable a person with a disability to have access to, participate, or advance in employment, or to undergo training unless such measures would impose a disproportionate burden on the employer.'

The wording of Recital 17 of Directive 2000/78/EC can only be seen to be reflected in the provisions of article 8(2) of Legal Notice 461 of 2002 which provides that 'an employment agency shall not be deemed to effect discriminatory treatment against a person if, taking into account training, qualifications and experience relevant to the work sought, and all other relevant factors that it finds reasonable to take into



account, such person would be unable to carry out the inherent requirements of the work.’

Article 40 of the Constitution of Malta provides that “all persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship”. This article is one which requires not less than two-thirds of all members of the House of Representatives for purposes of amendment.

Maltese law does not provide definitions of the terms “conscience” and “religion”. It is assumed that the interpretation of these words should be according to their meaning in common usage. Furthermore, nothing contained in or done under the authority of any law is to be held to be inconsistent or in contravention of Article 40 where the limitation is imposed in the “interests of public safety, public order, public morality or decency, public health, or the protection of the rights and freedoms of others, and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not be reasonably justifiable in a democratic society”.

Similarly, Article 45 of the Constitution provides protection from discrimination on grounds of race, place of origin, political opinions, colour, creed or sex. The word “creed” is not defined. Through the enactment of the European Convention Act,<sup>21</sup> Malta adopted the European Convention as part of its domestic law. Thus, Article 9 of the European Convention on the right to freedom of thought, conscience and religion, together with the case-law developed by the European Commission and the European Court, became applicable in Malta.

Under Maltese law there is no legislation which regulates the establishment and recognition of religious communities. Thus, there exists no legal requirement for recognition and no system of registration of the same.

c) *Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

No.

d) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination. Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

Maltese law does not contain any specific provisions which deal with the situation of multiple discrimination and there do not appear to be any plans for the adoption of

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<sup>21</sup> Act XIV of 1987



such rules. In spite of this, there are no legal restrictions which prevent a person from claiming discrimination on one or more grounds under one or more laws.

There is however a growing awareness on multiple discrimination cases. In its 2010 report, the NCPE referred to the VS/2010/0569: Think Equal project, the objectives of which include the stimulation of debate on equality, diversity and multiple discrimination within sections of society that have a multiplier effect. It is also taking initiatives, and developing strategies, projects, training and other awareness raising events that cover discrimination on more than one ground.

- e) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

There have been no multiple discrimination cases brought before the local courts and there is no publicly available material to evidence that any other adjudicating body in Malta has handled multiple discrimination cases.

### 2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

The Equal Opportunities (Persons with a Disability) Act, 2000 specifically makes reference to a person having a presumed characteristic. Thus, Article 3 (1) (b) of the Act provides that a person is considered to be acting discriminatorily when ‘he treats or proposes to treat a person less favourably on the basis of a characteristic that appertains generally to persons who have such a disability or a presumed characteristic that is generally imputed to persons who have such a disability.’

Article 6 of the said Act prohibits acts of discrimination which are inflicted because a person makes use of assistance. Therefore, a person shall be deemed to be discriminating against another person on the ground 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 (a) an interpreter; (b) a reader; (c) an assistant; or (d) a carer.

Persons with disability require the assistance of these persons to provide interpretative, reading or other services to them because of their disability or because of any matter related to that fact, and discrimination shall arise whether or not it is the practice to treat less favourably any person who is accompanied by an interpreter, a





reader, an assistant or a career, as the case may be. It is argued that this could be deemed to constitute a form of discrimination by association.

Article 11 of the Equal Opportunities (Persons with Disability) Act 2000 deals with access to university, and other higher education or adult life long learning courses.

This provides that it shall be unlawful for an educational authority or institution (defined as a kindergarten, school, college, university or other institution at which education or training is provided) to discriminate against (a) an applicant for admission as a student on the grounds of his disability or a disability of any of his family members by refusing or failing to accept his application for such admission, or in the terms or conditions on which such educational authority or institution is prepared to admit him as a student; and/or (b) a student on the grounds of his disability or disability of any of his family members by denying him access, or limiting his access, to any benefit provided by such educational authority or institution or expelling him from the educational institution he is attending.

Furthermore, since Legal Notice 461 of 2004 and the Equal Treatment of Persons Order, 2007 provide for the prohibition of both direct and indirect discrimination, and such definitions are taken from the Council Directives, then it may be argued that Maltese law prohibits discrimination based on presumed characteristics.

*b) Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

National law does not make specific reference to the prohibition of discrimination based on association with persons with particular characteristics. Nor have there been any local cases which have dealt with the prohibition of discrimination based on association with persons with particular characteristics. However, as stated above, national law contains definitions on discrimination which reflect the definitions found in the Directives and therefore the interpretation given in the Coleman v Attridge Law and Steve Law case would have to be mirrored if a similar case were to be brought before the local courts.

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

*a) How is direct discrimination defined in national law?*

Legal Notice 461 of 2004 issued under the Employment and Industrial Relations Act, 2002, provides for the prohibition against direct discrimination. Regulation 3(2) (a) provides that direct discriminatory treatment shall be taken to occur where one person is treated less favourably than another is, has been, or would be, treated in a comparable situation on any of the grounds referred to in sub-regulation (1) of this



regulation. This provision is taken from Article 3 of the Directives and is therefore compatible therewith.

In terms of the Equal Treatment of Persons Order of 2007 “discrimination” means direct or indirect discrimination based on racial or ethnic origin.

In terms of Article 2(2) of the Order ‘direct discrimination shall be taken to occur where a person is treated less favourably than another person is, has been, or would be, treated in a comparable situation. and indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’

The Equal Opportunities (Persons with Disability) Act, 2000, 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 under the Act. Direct discrimination is clearly prohibited under Articles 3, 5 and 6.

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

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

In terms of Article 5, discrimination on the grounds of disability could also arise if the disabled person is treated less favourably than others because he/she possesses or makes use of an auxiliary aid. The Act gives the following definition of auxiliary aid, 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. Although not specifically stated in the law, the wording of Article 5 would seem to imply that guide or assistance dogs would fall within the meaning of auxiliary aid.

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

“A person shall discriminate against another person on the grounds of disability if he treats or proposes to treat another person less favourably than he treats or





would treat others who do not have such a disability because of the fact that such other person is accompanied by:

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

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

- b) *Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).*

In terms of Article 8 of the Equal Treatment of Persons Order, 2007 it shall not be lawful for persons to publish or display, or cause to be published or displayed, any advertisement which promotes discrimination or which is discriminatory or which might reasonably be understood as indicating an intention to discriminate.

In terms of Article 26 of the Employment and Industrial Relations Act, 2002 it shall not be lawful for any person when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment. This point is further reiterated in the scope of the Equal Treatment in Employment Regulations, 2004 which provide that the regulations shall be applicable to all persons in relation to conditions for access to employment, including the advertising of opportunities for employment, selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions.

- c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

Legal Notice 461 of 2004 provides for differences based on occupational requirements, Thus, any difference of treatment based on a characteristic related to grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin shall not constitute discriminatory treatment where by reason of the nature of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate.



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

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

d) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

Regulation 5 of Legal Notice 461 of 2004 deals with age discrimination and provides for justification of such form of discrimination in providing that:

- (1) Notwithstanding regulation 3(1) and (2),<sup>22</sup> difference of treatment on the ground of age shall not constitute discriminatory treatment if: -
  - such differences are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy, labour market and vocational training objectives; and
  - if the means of achieving that aim are appropriate and necessary.
- (2) Non-discriminatory differences of treatment referred to in sub-regulation (1) of this regulation may include: -
  - the setting of special conditions on access to employment and vocational training, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
  - the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
  - the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

As can be seen from the above, when dealing with age discrimination local regulations provide for those situations where such discrimination may be justified and does not provide for the manner in which a comparison may be made in order to determine whether age discrimination exists or otherwise.

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<sup>22</sup> Which deal with the concept of discriminatory treatment.



### 2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of ‘situation testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.*

Maltese law does not provide for situation testing and in fact Maltese legislation does not address the issue of situation testing.

- b) *Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc).*

There is no evidence that situation-testing has been used in practice in Malta. In the 2009 NCPE report, it is reported that in June of that year it participated in a Situation Testing Questionnaire on Migration Policy launched by the Migration Policy Group.<sup>23</sup>

This questionnaire was part of a wider project on the role of situation testing in the protection of potential victims of discrimination. In virtue of the same project the NCPE provided information on situation testing at the national level. The results of this questionnaire are not yet publicly available. No more recent evidence is found.

- c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There have not been any reported cases where the Court was reluctant to use situational testing as evidence in Court.

Although the Maltese Courts do look at legal developments in other countries, to assist them in reaching their decisions, this in practice is not obligatory. Thus it is not clear whether or not situational testing would be accepted as evidence in judicial, administrative or other procedures.

- d) *Outline important case law within the national legal system on this issue.*

There is no reported case-law on the subject-matter.

<sup>23</sup> The Migration Policy Group has launched an online survey on Situation Testing in anti-discrimination cases as part of a project to raise awareness and gather data on Situation Testing.



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

#### a) *How is indirect discrimination defined in national law?*

It can be argued that Article 4 of The Equal Opportunities (Persons with Disability) Act, 2000 provides a prohibition against indirect discrimination.

In fact, it provides that 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 (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.

Legal Notice 461 of 2004 issued under the Employment and Industrial Relations Act, 2002, also provides for the prohibition against indirect discrimination. Regulation 3(2)(b) provides that “indirect discriminatory treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular race or ethnic origin or having a particular religion or religious belief, disability, age, or sexual orientation at a disadvantage when compared with other persons.”

In terms of the Equal Treatment of Persons Order of 2007, ‘indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’ This definition is in line with the provisions of Council Directive 2000/43/EC.

#### b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

As there have been no judicial pronouncements in Malta on indirect discrimination one cannot detail the legitimate aims which have been or which would be accepted by the local courts. A complaint mentioned in the NCPE annual report for 2009 deals with indirect discrimination due to family responsibilities.

Acting upon a complaint, NCPE investigated the conditions contained in a call for promotion within the public service, where one of the conditions that needed to be satisfied was that the applicant would have been in continuous service for a number of months. The complainant was deemed not to qualify as she was working on a reduced hour schedule due to family responsibilities. The NCPE concluded that this criterion amounted to indirect discrimination.



After discussions with the Public Service Commission, the latter has undertaken to address this by amending the criterion of eligibility to be one whereby the years of service required for one to be eligible shall be aggregate in cases in which the applicants have had a break in their service career.

c) *Is this compatible with the Directives?*

The prohibition against indirect discrimination found under Legal Notice 461 of 2004 issued under The Employment and Industrial Relations Act, 2002, is taken from Article 2(2)(b) of Council Directive 2000/78, and is therefore compatible with the provisions of the said Directive. In fact, the same test which applies to Article 2(2)(b) of Council Directive 2000/78 to determine whether there has been indirect discrimination or otherwise applies to Regulation 3(2)(b) of this Legal Notice.

Likewise, the definition in the Equal Treatment of Persons Order of 2007 is in line with the provisions of Council Directive 2000/43/EC.

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

Regulation 5 of Legal Notice 461 of 2004 states that difference of treatment on the ground of age shall not constitute discriminatory treatment if: -

- such differences are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy, labour market and vocational training objectives; and
- if the means of achieving that aim are appropriate and necessary.

Non-discriminatory differences of treatment may include: -

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

e) *Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?*

There have been no court cases in Malta in which the issue of difference in treatment based on language has been raised.



### 2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*

Maltese law does not specifically prohibit the use of statistical evidence to establish indirect discrimination. Reference is made to the use of statistical evidence under the definition section of the Equality for Men and Women Act which provides that indirect discrimination may be proven by any means of evidence including statistical evidence.

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

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

- c) *Please illustrate the most important case law in this area.*

To date, in Malta there is no case law relating to the admissibility or otherwise of statistical evidence and on the conditions of its eventual admissibility.

- d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

The Data Protection Act, 2001 regulates the collection and processing of personal data.

Data which relates to race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union, health, or sex life is classified as 'sensitive personal data' and the processing of such data is subject to stricter regulation than to the processing of other personal data.<sup>24</sup> In fact, sensitive personal

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<sup>24</sup> Ibid. Article 2.





data may only be processed if the data subject has either given his/her explicit written consent to processing or else has made such data public.<sup>25</sup>

However, this strict requirement is relaxed in connection with necessary processing done by the employer to be able to comply with his duties or exercise his rights under any law regulating the conditions of employment.<sup>26</sup> It is important to note that the employer is still obliged to adopt appropriate safeguards to ensure that such data is processed in accordance with the provisions of the Data Protection Act.

Furthermore, in terms of the Persons with Disability (Employment) Act,<sup>27</sup> which obliges employers to employ a certain quota of persons with disability,<sup>28</sup> employers are required to keep a register containing the number and the names of the disabled persons employed by them, the number and the names of registered persons<sup>29</sup> employed by them and such other matter as shall be necessary to show compliance by the employer with the provisions of this Act.<sup>30</sup>

When collecting relevant data for the purposes of the national census, the Data Protection Act, 2001 is adhered to. Article 16 of the Data Protection Act states that sensitive personal data may be processed for research and statistics purposes, provided that the processing is necessary for the performance of an activity that is carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data is disclosed. Furthermore, in terms of Article 10 (2) of the Census Act 1948 if any person:

- being a person employed in taking a census, without lawful authority publishes or communicates to any person, otherwise than in the ordinary course of such employment, any information acquired by him in the course of his employment; or
- having possession of any information which to his knowledge has been disclosed in contravention of this Act, publishes or communicates that information to any other person; or
- in the pretended performance of duties under this Act, obtains, or seeks to obtain, information which he is not duly authorized to obtain, such person shall, on conviction before the said court, be liable to imprisonment for a term not exceeding one year, or to a fine not exceeding EUR 232 or to both such imprisonment and fine.

<sup>25</sup> Ibid. Article 12(2).

<sup>26</sup> Ibid. Article 13(a).

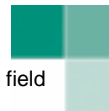
<sup>27</sup> The Laws of Malta, Chapter 210.

<sup>28</sup> According to Legal Notice 157 of 1995, the quota is two percent.

<sup>29</sup> Chapter 210 obliges the Employment and Training Corporation (ETC) to keep a register of persons with disability.

<sup>30</sup> Ibid. Article 20(1).





Census employees must pass security and employment reference checks and they are also required to take an oath to preserve the confidentiality of individual answers. The National Statistics Office also uses diverse security measures to protect data collected by it, including electronic barriers and dedicated telephone lines.

Answers on the census questionnaires are combined with others to produce the statistical summaries or aggregates to be published. No data on ethnicity and race are collected in the census.

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

## 2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Legal Notice 461 of 2004, issued under the Employment and Industrial Relations Act 2002, extended the protection from harassment in matters of employment on all the grounds mentioned in the two Directives. It defines harassment as a form of discriminatory treatment which violates the dignity of the person who is being harassed or where it has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected.

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

The concept of harassment was introduced in the Public Service Commission (Disciplinary Procedure) (Amendment) Regulations, 2006. These amendments, which came into force on the 27 March 2006, provide, in the schedule of offences and penalties to the principal regulations, that sexual harassment is listed as a serious offence under the regulations.

In terms of the Equal Treatment of Persons Order, 2007 “harassment” of a person means to subject the person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material and “to harass” a person shall be construed accordingly.

In terms of article 2(2)(c) of the Order ‘harassment shall be deemed to be discrimination when it is related to racial or ethnic origin and takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’ Furthermore, an instruction



to discriminate against persons on any afore-mentioned grounds shall be deemed to be discrimination.

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

*b) Is harassment prohibited as a form of discrimination?*

Legal Notice 461 of 2004, issued under the Employment and Industrial Relations Act 2002, defines harassment as a form of discriminatory treatment which violates the dignity of the person who is being harassed or where it has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected.

As noted above, Article 2(2)(c) of the Equal Treatment of Persons Order, 2007 also provides for a definition of harassment.

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

The concept of harassment is also mentioned under the Public Service Management Code under Section 7.1.3.4 thereof which 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 Public Service Management Code is a code which regulates employment issues within the public service and includes, as seen above, a reference to the prohibition of harassment. 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. However, one cannot really say that it is a code of practice on harassment.

Guidelines have also been issued entitled 'The Public Service: Guidelines on what constitutes Sexual Harassment and on the Procedures to be adopted in Cases of Sexual Harassment'.

This document defines what is perceived as sexual harassment and stipulates the procedures that are to be adopted in cases of allegations of sexual harassment at work.<sup>31</sup>

A Code of Practice on harassment in Malta is that entitled a Code of Practice against Sexual Harassment.<sup>32</sup> This Code of Practice also refers to harassment on the ground of sexual orientation and provides that sexual harassment is prohibited regardless of the sex of the parties and that sexual preference is also irrelevant to a complaint of sexual harassment. If lesbians or gay men are subjected to unwelcome conduct which is sexual in nature, they can lodge a sexual harassment complaint. For example, sexual harassment also arises if a group of workers makes offensive sexual jokes or comments about a homosexual colleague. For such purpose, the fact that the harasser has no sexual interest in the complainant would be irrelevant.

Although not legally obliged to do so, various private companies and institutions in Malta have policies on sexual harassment. One such institution is the University of Malta which has a policy covering all those who work and study at University. Sanctions following arbitration procedures consist in disciplinary measures. These policy documents are not legally binding but are codes of practice binding on those persons which operate within the relative institutions. Another example is the policy document binding on all employees of the National Statistics Office which was issued in October 2010. This document defines what the National Statistics Office perceives as sexual harassment and stipulates the procedures that shall be adopted in cases of allegations of sexual harassment at work.

## 2.5 Instructions to discriminate (Article 2(4))

*Does national law (including case law) prohibit instructions to discriminate?  
If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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.

<sup>31</sup> These Guidelines were drawn up on the basis of the Code published by the National Commission for the Promotion of Equality for Men and Women.

<sup>32</sup> "Sexual Harassment: A Code of Practice", National Commission for the Promotion of Equality, 2005.



The Equal Opportunities (Persons with Disability) Act, 2000, and the Equality for Men and Women Act, 2003 do not contain specific prohibition against the giving of instructions to discriminate.<sup>33</sup>

Legal Notice 461 of 2004 issued under the Employment and Industrial Relations Act, 2002 introduces into employment legislation in Malta the prohibition of the instruction to discriminate.

Regulation 3(4) provides that a person shall also be deemed to have discriminated against another if he instructs any person to discriminate against such another person. It is also pertinent to note that in terms of the 2002 Act, the definition of an 'employer' includes a partnership, company, association or other body of persons, whether vested with legal personality or not.

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

In terms of the Equal Treatment of Persons Order, the prohibition of giving an instruction to discriminate arises out of the definition of harassment. Thus, an instruction to discriminate against persons on any ground mentioned under such definition shall be deemed discrimination.

The grounds mentioned under the definition of harassment are when such are related to racial or ethnic origin and take place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. This could be interpreted to be a provision which is not deemed to be fully compliant with the provisions of Directive 2000/78 in that its scope is more restrictive to that found under the Directive.

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<sup>33</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.



Specific provision is made in this Order to where an offence is committed by a partnership, company, association or other body of persons, in which case 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.

Article 1044 of the Civil Code<sup>34</sup> and Article 42 of the Criminal Code<sup>35</sup> 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.

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 only Regulation 3(4) of Legal Notice 461 of 2004 appears to conform with the Directives.

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

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*  
*Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

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

<sup>34</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>35</sup> This deals with the offence of complicity.





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.

The said legal provision lists those instances in which an employer shall be considered to discriminate on the grounds of disability. 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>36</sup> or if the employer 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, failure by the employer to provide an employee with a disability with reasonable accommodation shall constitute direct discrimination in terms of the 2000 Act.

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

The definition of 'disability' under the 2004 Regulations is the same as that provided for under the Equal Opportunities (Persons with Disability) Act, 2000. Both pieces of legislation co-exist albeit providing for similar obligations on employers which they must comply with in relation to employees with disabilities. By having a common definition of the term 'disability' the legislator wanted to ensure uniformity.

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

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<sup>36</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 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.



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:

“(2) The factors to be considered in determining whether such actions could be undertaken without unjustifiable hardship shall include –

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

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

b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

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





- c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

An employer shall be considered to discriminate on the grounds of disability in terms of the Equal Opportunities (Persons with Disability) Act, 2000, if such employer, without justification, fails to make reasonable accommodation for a disabled person unless the employer can prove that the required accommodation would unduly prejudice the operation of the trade or business run by such employer. Such failure results in direct discrimination.

In terms of the Equal Treatment in Employment Regulations, 2004 indirect discriminatory treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular race or ethnic origin or having a particular religion or religious belief, disability, age, or sexual orientation at a disadvantage when compared with other persons unless with regards to persons with a particular disability. Therefore the employer or any person or organization to whom these regulations apply, is obliged, under any law, to take appropriate measures to provide reasonable accommodation so as to eliminate disadvantages entailed by such provision, criterion or practice otherwise this would be considered as indirect discrimination.

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

As noted above, the duty to provide reasonable accommodation exists in the employment sector arising from the prohibition of indirect discrimination. This is strictly limited to the provision of reasonable accommodation to the employee by the employer, hence to the exclusion of job applicants and in breach of the Directive. Therefore, the law provides for those measures which an employer must take in regard to an employee having a disability to ensure that his/her needs are accommodated within the legal parameters. Consequently, individuals from other groups and factions of society cannot claim reasonable accommodation.

- e) *Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

National law does not clearly provide for the shift of the burden of proof when claiming the right to reasonable accommodation where such a right or duty is provided for.

- f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*



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

However, where such premises or facilities are designed or constructed in such a way as to render them inaccessible to a person with a disability and any alteration of such premises or facilities would impose unjustifiable hardship on whoever is required to provide such access, and then this shall not be deemed to constitute discrimination on the ground of disability.

In this regard, in February 2005 the Maltese Courts decided the case National Commission, Persons with Disability vs. Michele Peresso Limited,<sup>37</sup> mentioned above. Similarly, in March 2010 the courts decided the case NCPD vs. Banif Bank (Malta) plc detailed above.<sup>38</sup>

In terms of the Equal Opportunities (Persons with Disability) Act 2000 'no qualified person with a disability shall, on the grounds of disability, be excluded from participation in or be denied the benefits of the programmes or activities of any person or body in relation to the goods, facilities or services<sup>39</sup> or be discriminated against by any person or body providing such goods, facilities or services which the qualified person seeks to obtain or use.' However, no discrimination would be deemed to arise where compliance with such provisions in relation to a qualified person with a disability would be impracticable or unsafe and could not be made practicable and safe by reasonable modification to rules, policies or practices, or the removal of architectural, communication or transport barriers or the provision of auxiliary aids or services.

*g) Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing,*

<sup>37</sup> Civil Court, First Hall - 25 February, 2005 - Writ of Summons no. 413/2001/1.

<sup>38</sup> Section 0.3 of this Report; Civil Court, First Hall – 1 March 2010.

<sup>39</sup> The provision (whether on payment or not) of goods, facilities and services to the public or any article of the public and includes in particular, but without prejudice to the generality of the foregoing (a) access to and use of any place which members of the public or a section of the public are permitted to enter; (b) the provision of property rights and of housing; (c) accommodation in a hotel, boarding house or similar establishment; (d) facilities by way of banking, insurance or for grants, loans, credit or finance; (e) participation in occupational and other pension schemes; (f) facilities for education; (g) facilities for entertainment, sports or recreation; (h) facilities for transport or travel by land, sea or air; (i) the services of any profession or trade, or of any local or other public authority; (j) membership of associations, clubs or other organisations; (k) enjoyment of civic rights and performance of civic duties; and (l) such other facilities and services as the Minister may prescribe by regulations made under this Act.



*education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

As stated above, Article 12 of the Equal Opportunities (Persons with Disability) Act 2000 deals with access to premises.

This provides that it shall be unlawful for any person to discriminate against another person on the grounds of the disability of such other person or a disability of any of his family members by not providing adequate access.

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

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

However, where such premises or facilities are designed or constructed in such a way as to render them inaccessible to a person with a disability and any alteration of such premises or facilities would impose unjustifiable hardship<sup>40</sup> on whoever is required to provide such access, and then this shall not be deemed to constitute discrimination on the ground of disability.

*h) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

Local legislation provides for various rights taking the form of additional pension rights.

These include a contributory invalidity pension applicable in respect of persons incapable for suitable full-time or regular part-time employment due to a serious

<sup>40</sup> The law does not provide for a definition of 'unjustifiable hardship' in this context.



disease or bodily or mental impairment; disability pensions for persons suffering from a severe disability; and disablement pensions for persons suffering injuries.<sup>41</sup> Special identity cards are issued for disabled persons in order to help them enjoy equal opportunities. Children with disabilities are also encouraged to follow mainstream education while special schools are also available where special educational needs are identified.<sup>42</sup> Unemployed persons with disability are offered assistance in seeking employment.<sup>43</sup>

Adult day services are also provided. These are community-based programmes designed to meet the needs of adults with physical and intellectual impairments.

The principal aim of these day services is to provide a stimulating, educative environment for disabled persons directed towards their individual development and social adaptation.

## 2.7 Sheltered or semi-sheltered accommodation/employment

a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

Maltese law does not specifically provide for sheltered or semi-sheltered accommodation/employment for disabled workers.

b) *Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?*

Whether such activities be considered to constitute employment under Maltese law, would depend on the manner in which the legislation would be drafted. It is to be noted that the Employment and Industrial Relations Act defines "contract of service" and "contract of employment" as an agreement, (other than service as a member of a disciplined force) whether oral or in writing, in any form, whereby a person binds himself to render service to or to do work for an employer, in return for wages, and, in so far as conditions of employment are concerned, includes an agreement of apprenticeship. If the above-mentioned criteria are fulfilled, sheltered/semi-sheltered employment could be deemed to be employment under Maltese law.

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<sup>41</sup> Social Security Act.

<sup>42</sup> Education Act.

<sup>43</sup> The Employment (Disabled Persons) Act amongst other provisions, obliges employers with more than 20 employees, to engage at least 2% of their workforce (minimum 1) from amongst those registered as disabled persons with the Employment and Training Corporation.



### 3 PERSONAL AND MATERIAL SCOPE

#### 3.1 Personal scope

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

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

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

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

##### 3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

*Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

Article 4(d) of the Interpretation Act 1975 (Chapter 249 of the Laws of Malta) provides that in the Act and in every other Act, whether passed before or after the commencement of this Act, unless the contrary intention appears, the expression "person" shall include a body or other association of persons, whether such body or association is corporate or unincorporate.

Maltese legislation does not make a distinction between natural and legal persons for the purpose of protection against discrimination or liability for discrimination but uses the term "person". Such term is therefore to be interpreted in accordance with the above provision of the Interpretation Act. With respect to the protection against discrimination afforded under the Constitution of Malta, Chapter IV thereof, entitled Fundamental Rights and Freedoms of the Individual can clearly only be invoked by natural persons, even in view of the fact that the Constitution was enacted before the Interpretation Act 1975.



### 3.1.3 Scope of liability

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

According to Maltese Law, the employer is to do all that is reasonably possible to avoid any kind of discrimination or harassment and may therefore be held liable for a discriminatory act of his employee (Part IV of the Employment and Industrial Relations Act). With regards to trade unions being held liable for actions of their members, this is not provided for in the law.

Provision is also made where an employer is an entity rather than an individual, in which case liability is assumed by an officer representing such an entity. Thus, Article 46 of the Employment and Industrial Relations Act provides that where an offence against the provisions of the Act or of any regulations or orders made there under is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.

Similarly, Article 14 of the Equal Treatment of Persons Order, 2007 provides that where an offence against the provisions of the Order is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.

## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*





The Employment and Industrial Relations Act, 2002, applies to persons who are in employment.

The Act defines an employee as any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker.

Consequently, the prohibition of discrimination applies to an employer who should not subject his employees or prospective employees to any discriminatory treatment. The Act does not apply to persons who work or perform services in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service and neither does it apply to self-employed and military personnel. With respect to persons who hold a statutory office, the Act will only apply if the person concerned has a contract of employment.

With respect to employment in the public sector, this is regulated by the Public Service Management Code. Article 48(1) of the Employment and Industrial Relations Act empowers the Prime Minister to prescribe the applicability of the provisions of the Act to public sector employees. To date, certain regulations issued under the 2002 Act have been extended to employees in the public sector.<sup>44</sup>

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

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

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<sup>44</sup> Extension of Applicability to Service with Government (Part-Time Employees) Regulations – LN 46 of 2007; Extension of Applicability to Service with Government (Contracts of Service for a Fixed Term) Regulations – LN 52 of 2007.



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

Furthermore, in the case of discrimination of employees in the public sector by public authorities, such employees can invoke the anti-discrimination provisions of the Constitution and the European Convention Act. The concepts of harassment and victimisation have recently been introduced in the Public Service Commission (Disciplinary Procedure) (Amendment) Regulations, 2006 which amend the Public Service Commission Regulations, 1999. This amendment, which came into force on the 27 March, 2006, provides that it is a serious offence under these regulations for a person to sexually harass and victimise a witness or an officer/person lodging a report or doing his duty under the regulations.

With regards to recruitment to the public sector, this is regulated by the Employment and Training Services Act, 1990.<sup>45</sup>

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

*In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.*

**3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?**

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

The Employment and Industrial Relations Act 2002 does not apply to persons who are not in employment or who are self-employed.

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<sup>45</sup> Act XXVIII of 1990. Chapter 343 of the Laws of Malta.



Article 26 (1)(a) of the Act provides: “It shall not be lawful for any person when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment.”

This Article is to be read in conjunction with the definition of discriminatory treatment under Article 2<sup>46</sup> whereby an employer cannot discriminate against employees or prospective employees on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership of a trade union or of an employers’ association.

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

Regulation 2(4) of Legal Notice 461 of 2004, the Equal Treatment in Employment Regulations, 2004 provides that the provisions of this legal notice shall be applicable to all persons in relation to conditions for access to employment, including the advertising of opportunities for employment, selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions. In virtue of the provisions of Legal Notice 54 of 2007<sup>47</sup> the provisions providing for equality of treatment of persons in employment have been extended to employees in the public sector.

Article 15(1) of the Employment and Training Services Act, 1990,<sup>48</sup> which deals with the recruitment of employees to the public sector, provides that all employees required by the Government of Malta from outside its service or by any body corporate or 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>46</sup> See page 5 above.

<sup>47</sup> Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations.

<sup>48</sup> Act XXVIII of 1990. Chapter 343 of the Laws of Malta.



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

*In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.*

*Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*

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

Article 27 of the same Act provides that employees in the same class of employment are entitled to equal pay for equal work.

Furthermore, it provides that any distinction between classes of employment based on discriminatory treatment other than in accordance with the provisions of the Act or any other law shall not apply.

Regulation 2(4) of the Equal Treatment in Employment Regulations, 2004 provides that the provisions of this legal notice shall be applicable to all persons in relation to employment and conditions of employment, including remuneration and dismissals.

Until December 2006, the only form of pension recognised by Maltese law was the State pension payable under the Social Security Act, either payable on reaching retirement age or in other circumstances depending on the situation of the person concerned (eg. widow's pension, disability pension). 2007 saw the introduction of the concepts of Second Pension Funds and Third Pension Funds. Second and Third Pension Funds are regulated by the Special Funds (Regulation) Act. The Social Security Act and the Special Funds (Regulation) Act do not specifically prohibit discrimination with regard to the pensions they regulate.

Where pensions are payable by the State, then where a person feels that he/she has been discriminated against on any of the grounds covered by Directive 2000/78, such person may invoke the protection granted under the Constitution and under the European Convention Act (see 1 above); in other cases, horizontal discrimination is not specifically prohibited under Maltese law. Where private pensions form part of employment schemes payable to employees by their employers, the principles of non-discrimination under the Employment and Industrial Relations Act, and in particular under the 2004 Regulations, would apply.



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

*Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?*

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 on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association, in matters concerning vocational training and guidance.

Furthermore, Regulation 2(4) of Legal Notice 461 of 2004 provides that the provisions of this legal notice shall be applicable to all persons in relation to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.

Also, in terms of Regulation 6 of Legal Notice 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>49</sup>

With regards to access to university, other higher education or adult life-long learning courses, Article 11 of the Equal Opportunities (Persons with Disability) Act 2000, provides that it shall be unlawful for an educational authority or institution (defined as a kindergarten, school, college, university or other institution at which education or training is provided) to discriminate against (a) an applicant for admission as a student on the grounds of his disability or a disability of any of his family members by refusing or failing to accept his application for such admission, or in the terms or conditions on which such educational authority or institution is prepared to admit him

<sup>49</sup> Also note that Section 7.1.3.4. of the Public Service Management Code is more comprehensive than the law in that it prohibits discrimination on all the grounds mentioned in Article 3.1 of the Employment Directive. 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.





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

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

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

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

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

Regulation 2(4) of the Equal Treatment in Employment Regulations, 2004 provides that the provisions of this legal notice shall be applicable to all persons in relation to membership of, and involvement in, any organization of employees and employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations.

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

*In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*





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

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

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

However, in terms of Article 4 of the Equal Treatment of Persons Order, 2007 which implements the provisions of Directive 2000/43/EC, no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to social protection, including social security and healthcare.

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

*This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.*

Maltese Legislation does not expressly address the category of 'social advantages'. However, in practice persons who are socially disadvantaged are granted certain benefits such as for example in the case of social housing or in the case of payments of utility bills.

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

Furthermore, when in 2005 the Government introduced a surcharge on electricity bills in view of the steep rise in international fuel prices, those persons who were/are registered as 'social assistance' on the Water Services Corporation's database were exempt from paying the surcharge. To qualify for the exemption, such persons had to be in receipt of unemployment assistance, social assistance, non contributory age pension or NI pension (retirement /widows/invalidity pensions).



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

*This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

*Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education are favoured and supported.*

In terms of Article 4 of the Equal Treatment of Persons Order, 2007 which implements the provisions of Directive 2000/43/EC, no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to education.

With regards to access to university, other higher education or adult life-long learning courses, Article 11 of the Equal Opportunities (Persons with Disability) Act 2000, provides that it shall be unlawful for an educational authority or institution (defined as a kindergarten, school, college, university or other institution at which education or training is provided) to discriminate against (a) an applicant for admission as a student on the grounds of his disability or a disability of any of his family members by refusing or failing to accept his application for such admission, or in the terms or conditions on which such educational authority or institution is prepared to admit him as a student; and/or (b) a student on the grounds of his disability or disability of any of his family members by denying him access, or limiting his access, to any benefit provided by such educational authority or institution or expelling him from the educational institution he is attending.

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

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

In terms of the 1988 Education Act, the Minister for Education is responsible to ensure that the national policy on inclusive education is applied in all schools. The



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

Without prejudice to the above, the law also provides that it shall be the duty of the State to provide special resource centres, whose specialised role will include provision for children with individual educational needs who would benefit more from being in such centres than in mainstream schools, for such time as may be appropriate depending on their needs.<sup>50</sup> The Equal Opportunities (Persons with Disability) Act, 2000 legalised the right of persons with a disability to equal opportunities in all fields, including in education.

While in the Education Act one notes that the obligation applies only to children of Maltese citizens, the same obligation under the 2000 Act applies with respect of all persons.

The Minister of Education has stated<sup>51</sup> that inclusive education provides the educational environment where disabled and non-disabled children learn together, where possible in mainstream school settings. On the other hand, special education is a provision for those students who have a disability that necessitates the provision of special and appropriate educational services.

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

The National Minimum Curriculum emphasises as one of its major principles the issue of Inclusive Education and quality education for all.

It is the government's policy to include pupils with special needs within the mainstream education system rather than in special schools. In March 2007 nearly 88% of pupils with a statement, outlining the child's educational needs, attended mainstream schools. However, parents are left to decide which provision they prefer

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<sup>50</sup> A minor shall be deemed to have special educational needs when that minor has special difficulties of a physical, sensory, intellectual or psychological nature.

<sup>51</sup> During the launching of a Working Group entrusted to review inclusive and special education in Malta, which concurred with World Disabled Persons Day 2004.



for their children, particularly when pupils with severe special needs require specialised services and facilities that are difficult to obtain in mainstream schools.

In Malta there were previously 6 schools catering for approximately 200 students with special needs. Recently 4 of these special schools were converted into resource centres, each catering for a particular age bracket. These centres are a resource to support inclusion of students with individual needs in all mainstream schools in Malta and Gozo.

The Education Division within the Ministry of Education also offers a home service mainly geared towards children with disabilities or who are chronically ill, a peripatetic service for pupils who are hearing or visually impaired, a service of complementary education for children who are demonstrating a developmental lag in academic progress, hospital classes for children who are unwell for long periods of time and a facilitator service that has developed extensively.

In the mainstream educational system, there are approximately 1,500 learning support assistants offering their services to approximately 3,231 students who have special needs in state and Church-run primary and secondary schools in Malta, while approximately 800 students with special needs attend Church and Independent schools.

It is to be noted that there are no Roma in Malta.

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

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

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

In terms of Article 4 of the Equal Treatment of Persons Order, 2007 no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to access to and supply of goods and services which are available to the public, including housing. Local law does not make specific reference to the supply of goods and services made privately. Protection would be afforded to such supply in terms of the general prohibitions of non-discrimination.

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the*



*assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

In addition to Article 4 of the Equal Treatment of Persons Order, detailed above, Article 5 refers to the provision of financial services in providing that no bank or financial institution or insurance company shall discriminate against any person in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self employment or the insurance of that business or the person in self employment. An exception is made insofar as the conditions under which the facility or the insurance cover is offered or withheld reflect genuine considerations based on the financial risk in the grant of such facilities or of such insurance cover. In this case, such acts would not be deemed discriminatory. No criteria are however established as to how such risk is to be assessed. Pertinent to note is that the considerations must be based on financial risk and accordingly issues such as age and disability may not be brought forward as considerations in assessing risk.

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

*To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.*

In cases of alleged discrimination in respect of the matters mentioned in paragraphs 3(1)(e) to (h) of the Race Equality Directive, protection is found under the provisions of the Equal Treatment of Persons Order which adopted the same wording as the Directive. No exceptions in the case of housing are made. Furthermore, the alleged victim can seek to protect his rights 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.

The Housing Authority provides financial assistance for adaptation works in houses occupied by people with disabilities. This assistance will enable these individuals to adapt their homes according to their needs so as to be able to lead more of an independent or semi-independent lifestyle.

Works may consist of general alterations, for example, bathroom or WC facilities; approaches to rooms, such as ramps, steps or their modification and handrails; doors and windows; staircases and lifts; water services and electrical and heating services; and kitchens.

The Housing Authority also has another scheme in place which provides for the installation of a lift where at least one of the applicants or his/her relative that lives in the building has a disability related to mobility or mobility problems. This scheme



provides the installation of lifts in blocks/entrances of apartments built by Government or Housing Authority in Malta and Gozo, which are occupied by tenants recognised by Government.

There are no cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups in Malta.





## 4 EXCEPTIONS

### 4.1 Genuine and determining occupational requirements (Article 4)

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

Regulation 4 of Legal Notice 461 of 2004 provides that any difference of treatment based on a characteristic related to religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin, shall not constitute discriminatory treatment if by reason of the nature of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate. This clearly reflects the relevant provisions of the Directives.

This point further pervades the general provisions of the Employment and Industrial Relations Act. This provides, in Article 26(2)(a), 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:

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

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



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

- a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

Regulation 4 of Legal Notice 461 of 2004 states that when an employer has an ethos based on religion or religious belief, the nature of the employment or the context in which it is carried out constitute a sufficiently genuine and legitimate justification for the employer to require that such work be carried out by a person of a particular religion or religious belief, and any difference of treatment based on a person's religion or religious belief shall not constitute discriminatory treatment, provided that it is proportionate to apply that requirement in that particular case.

In addition, this legal notice provides that employers whose ethos is based on religion or religious belief, shall have the right to require individuals working for them to act in good faith and with loyalty to the organisation's ethos, provided that the other provisions of Legal Notice 461 of 2004 are complied with.

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

- b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).*

No, there are no such provisions or case-law.

- c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*



In terms of Article 20 of the Education Act, it shall be the duty of the Minister to provide for the education and teaching of the catholic religion in State schools<sup>52</sup> and to establish the *curriculum* for the education and teaching of that religion in those schools according to the dispositions in this regard of the Bishops in Ordinary of the Maltese Islands.

In selecting religion teachers in schools in Malta, candidates are often requested to obtain a certificate of suitability from their local ordinary. No information is publicly available on the criteria applied for the issue or otherwise of this certificate.

#### **4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)**

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

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

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

There are no such provisions or exceptions.

#### **4.4 Nationality discrimination (Art. 3(2))**

*Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).*

- a) *How does national law treat nationality discrimination? Does this include stateless status?  
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?  
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well)?*

The provisions on indirect discrimination found under Maltese law do not specifically refer to nationality discrimination.

<sup>52</sup> In terms of the Constitution of Malta, the Roman Catholic religion is the religion of Malta and accordingly this is the only religion taught in schools in Malta.



b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

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

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

Thus, the wording of the afore-mentioned provisions is the same as that provided under Article 3(2) of the Directives.

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

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

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

a) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?*

Legal Notice 461 of 2004 does not forbid an employer from providing a benefit to workers who are married as against other workers who are not married. It is to be noted that on marriage an employee is entitled to 'marriage leave'. The duration of this leave depends on the sector in which the employee works but the minimum statutory entitlement is of two working days.

b) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

With regards to couples consisting of same sex partners, these are not given legal recognition by Maltese law. Likewise opposite sex unmarried couples are not legally recognised locally. While there is no specific prohibition against giving benefits to



same sex couples but the wording of the legal provisions is such as to indicate that benefits are given to opposite sex married couples.

It is also to be noted that "discriminatory treatment" as defined in the Employment and Industrial Relations Act means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status. Furthermore, Regulation 3 (1) of Legal Notice 461 of 2004 provides that it shall be unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds of sexual orientation.

#### **4.6 Health and safety (Art. 7(2) Directive 2000/78)**

- a) *Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

Local law provides for exceptions in relation to people with disability.

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.

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

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

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

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

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



- b) *Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc)?*

No such exceptions exist.

#### **4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

- a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold?*

Regulation 5 of Legal Notice 461 of 2004 reflects the provisions of Article 6 of Directive 2000/78 and provides that notwithstanding regulation 3(1) and (2),<sup>53</sup> difference of treatment on the ground of age shall not constitute discriminatory treatment if: -

- such differences are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy, labour market and vocational training objectives; and
  - if the means of achieving that aim are appropriate and necessary.
- b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

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

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

<sup>53</sup> Which deal with the concept of discriminatory treatment.





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

No public data is available on the manner in which this test is being applied.

- c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2)?*

When a person starts working, he/she is bound by law to pay social security contributions which, *inter alia*, would entitle such person to a pension on retirement, either on reaching retirement age or earlier if circumstances so warrant. Thus, the minimum age for admission to such scheme is 16 and the age to benefit from it is as set out in 3.7.4 below. In cases of Second Pension Funds and Third Pension Funds, there are no regulations as yet which fix ages for admission to the scheme or entitlement to benefits under it.

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

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

No, there are none.

#### **4.7.3 Minimum and maximum age requirements**

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

Under Maltese law, any person who has passed the compulsory school age<sup>54</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>55</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.

<sup>54</sup> 16 years of age.

<sup>55</sup> Act XXIV of 1988. Chapter 327 of the Laws of Malta.



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. No public discussion has taken place as to whether this is regarded as being in compliance with the Directive.

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

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

#### 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals **actually** retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

*For these questions, please indicate whether the ages are different for women and men.*

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

The Social Security Act, 1987<sup>56</sup> provides that the "pension age" applicable to both men and women in Malta is sixty-five; provided that (a) in the case of a person born on or before the 31<sup>st</sup> December 1951, pension age shall be sixty-one years; (b) in the case of a person born during the calendar years 1952 to 1955, pension age shall be sixty-two years; (c) in the case of a person born during the calendar years 1956 to 1958, pension age shall be sixty-three years; and (d) in the case of a person born during the calendar years 1959 to 1961, pension age shall be sixty-four years. Notwithstanding the above in the case of a woman born on or before the 31<sup>st</sup> December 1951, pension age shall be sixty years.

<sup>56</sup> Act X of 1987. Chapter 318 of the Laws of Malta as subsequently amended from time to time with new definition of pensionable age introduced in 2006.



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.

In such a case, employment between the ages of 61 and 65 is possible without prejudicing one's pension rights and without the need to pay contributions, subject to an earning ceiling pegged to the minimum wage. The minimum wage ceiling is subsequently removed at age 65 and one can earn any amount, even above the minimum wage, if one opts to continue working, without any contributions falling due.

The rights protecting employees from unfair dismissal are extinguished upon reaching retirement age and therefore one could possibly argue that protection is not afforded in the event that employment continues after 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.

b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

No, there is no such age stipulated.

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

As stated in (a) above, the state-imposed mandatory retirement age is 65 subject to the exceptions mentioned. This age is generally applicable.

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*



Employers cannot unilaterally set retirement ages in any manner whatsoever.<sup>57</sup>

- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*

If a person reaches the age of 65 he has to retire. Until he/she reached that age, he would have been entitled to protection under the laws on discrimination.

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

#### 4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

With respect to redundancy in the private sector, this is regulated under Article 36(3) and (4) of the Employment and Industrial Relations Act, 2002. In the event that a person is declared redundant by his 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>58</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 on conditions no less favourable than those to which he would have been entitled if the contract of service relating to him had not been terminated. Also, an employee who is re-employed shall, for the

<sup>57</sup> On 3 January 2008, the Civil Court, First Hall, in its Constitutional Jurisdiction dealt with an application wherein the applicant claims age discrimination in relation to the loss of a licence to act as a stevedore upon the attainment of pensionable age for persons who are self employed. The applicant, a self employed, is claiming that the imposition of a new condition in his licence stating that persons who have reached pensionable age as stipulated by law for employees, is discriminatory in his regard on the basis of age. This new condition was imposed in the law in the course of restructuring of the trades and professions related to shipping carried out by the State in liaison with workers' unions. The condition as introduced does not allow for the transfer of a licence upon reaching pension age. The case is still pending a final decision from the court

<sup>58</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.



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. The reason for this exception has always been so as to try and prevent problems within families or through marriage.

Thus, it is clear that a person cannot be declared redundant on the basis of his age, sexual orientation, disability, religious beliefs or racial or ethnic origin but on the objective criterion as to who was last employed in the post, subject to the proviso of relationship by blood or marriage.

Redundancy payments do not depend on age but on the duration of the employment of the employee who is employed on an indefinite basis - if for example you have worked for 3 years then you would be entitled to 4 weeks notice of termination of employment, whereas if you worked for say 10 years then you would be entitled to 11 weeks notice - the maximum notice period is 12 weeks. These notice periods are fixed by law and cannot be shortened.

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

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

*b) If national law provides compensation for redundancy, is this affected by the age of the worker?*

There is no legislation which regulates the payment of compensation to redundant workers on the basis of their age.



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

*Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?*

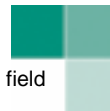
Regulation 1(6)(a) of Legal Notice 461 of 2004 reflects the provisions of Article 2(5) of Directive 2000/78 and provides that the provisions of this legal notice shall be without prejudice to, *inter alia*, any law necessary for public security, for maintaining public order, for the prevention of criminal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

#### **4.9 Any other exceptions**

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

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





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

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.*

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

- affording persons of a particular religion or religious belief, disability, age, sexual orientation or racial or ethnic origin, access to benefits relating to training which would help prepare them for a particular work; or
- encouraging such persons referred to in sub-regulation (1) (a) of this regulation to take advantage of opportunities for doing a particular work,

where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to the grounds of religion or religious belief, disability, age, sexual orientation and racial or ethnic origin. There are no prescribed criteria to determine what constitutes 'disadvantages'.

It is not known that any specific measures have been taken on the basis of this legal notice.

- b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.*

The Persons with a Disability (Employment) Act, 1969<sup>59</sup> provides for the compulsory engagement, on a quota basis, of disabled persons<sup>60</sup> registering for employment. Article 15 of this Act states, *inter alia*, that:

<sup>59</sup> Act II of 1969. Chapter 210 of the Laws of Malta.

<sup>60</sup> In terms of this Act, a "person with disability" means a person, being over compulsory school age, who, by reason of injury, disease, congenital deformity or other physical or mental incapacity, is substantially handicapped in obtaining or keeping employment or in undertaking work on his own account, of a kind which apart from that injury, disease, deformity or incapacity would be suited to his age, experience and qualifications; and the word "disability", in relation to any person, shall be construed accordingly.



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

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

- “(2) The Minister, after consultation with the Corporation, shall by order specify a standard percentage and may, in like manner, specify a special percentage, either greater or smaller than the standard percentage.
- (3) A special percentage specified by the Minister under subsection (2) of this section shall be made with respect to employment in any trade or industry, or in any branch or part of any trade or industry, or to employment with any class of employer, being employment to which, in the opinion of the Minister, a percentage, other than the standard percentage, should be assigned owing to its distinctive characteristics as respects its suitability for persons with disability.
- (4) An order specifying a special percentage shall contain such provisions as may appear to the Minister to be requisite for more particularly defining for the purposes of this section the trade or industry, branch or part of a trade or industry, or class of employer, to employment in which or with whom such percentage is assigned.
- (5) The quota at any time of a person to whom section 15 of this Act applies shall be the number ascertained by applying to the number of all the persons at that time in his employment (excluding persons employed by him in an employment of a class at that time designated under section 19 of this Act and any employee related to him by consanguinity or affinity up to the third degree) -
- (a) so far as they consist of persons employed by him in an employment other than one to which a special percentage is at that time assigned, the standard percentage; and
- (b) so far as they consist of persons employed by him in an employment to which a special percentage is at that time assigned, that percentage:

Provided that, if the number so ascertained includes or consists of a fraction less than one half, such fraction shall be disregarded, and, if the



number so ascertained includes or consists of a fraction being one-half or more, the quota shall be the nearest higher whole number. ”

Publicly available information provides that at the end of 2007, there were 347 disabled persons registered with the Employment and Training Corporation working in the public sector. This amounts to 1.2% of those who work in the sector and is therefore below the 2% quota<sup>61</sup>. No similar data is available as regards employment of disabled persons in the private sector.

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<sup>61</sup> There may be other disabled persons working in the public service who are not so registered.



## 6 REMEDIES AND ENFORCEMENT

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

*In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.*

*In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).*

*Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.*

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

Maltese legislation lays down various courses of action that one may follow should an individual believe that he was subjected to discriminatory treatment. Apart from recourse to action before the Civil Court, First Hall, sitting in its Constitutional jurisdiction or the Constitutional Court, there exist other bodies where an alleged victim can address his or her complaint, depending on the nature of such complaint. These include the Industrial Tribunal (under the Employment and Industrial Relations Act, 2002), the National Commission Persons with Disability (under the Equal Opportunities (Persons with Disability) Act, 2000), the National Commission for the Promotion of Equality for Men and Women (under the Equality for Men and Women Act, 2003), the Public Service Commission (under the Constitution of Malta), the Ombudsman (under the Ombudsman Act, 1995), the Broadcasting Authority (under the Constitution of Malta), and the Employment Commission (under the Constitution of Malta).<sup>62</sup>

The Employment and Industrial Relations Act does not mention mediation. However, the Mediation Act, enacted on 21 December 2004, encourages and facilitates the settlement of disputes in Malta through mediation, establishes a Malta Mediation Centre as a centre for domestic and international mediation, and regulates the conduct of the mediation process.

Article 968 of the Code of Organisation and Civil Procedure, with regards to arbitration, states that, any cause concerning any matter in dispute which has been brought before a court of civil jurisdiction in Malta may be submitted at the request of all the parties for determination by arbitration. However sub-article 2 of this article continues by saying that, any submission to arbitration in regard to any dispute,

<sup>62</sup> Insofar as the Employment Commission is concerned, the Constitution specifically limits its remit to discrimination based on political opinion.



which may not form the subject matter of a contract, whether absolutely or without certain formalities required by law, is null.

With regards to the public sector, the Public Service Commission is an independent body established by Article 109 of the Constitution of Malta. Its primary role is to give advice and to make recommendations to the Prime Minister in the making of appointments to public offices, in the removal of persons from such offices and in the exercise of disciplinary control over public officers. The Commission derives its authority and functions from Articles 86, 92, 109, 110, 111, 112, 114, 115 and 121 of the Constitution of Malta.

In terms of Article 115 of the Constitution, the Public Service Commission is protected from legal proceedings in the sense that the question of whether the Commission has validly performed any functions vested in it by the Constitution cannot be enquired into in any Court of Law.

The Commission interprets its role to mean that it has a duty to ensure that recruitment into and all promotions or appointments within the public service are made in an equitable and impartial manner; are free from patronage and discrimination and are based on the principle of merit. It is also the duty of the Commission to ensure that disciplinary action against public officers is fair, prompt and effective.

Article 30 of the Employment and Industrial Relations Act states that:

“(1) A person who alleges that the employer is in breach of, or that the conditions of employment are in breach of articles 26, 27, 28 or 29, may within four months of the alleged breach, lodge a complaint to the Industrial Tribunal and the Industrial Tribunal shall hear such complaint and carry out any investigations as it shall deem fit.

(2) If the Industrial Tribunal is satisfied that the complaint is justified, it may take such measures as it may deem fit including the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory and may order the payment of compensation for loss and damage sustained by the aggrieved party as a consequence of the breach”.

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

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



Costs in a court case are regulated by Article 1004 of the Code of Organisation and Civil Procedure. It states that costs shall be taxed and levied in accordance with the Tariffs in Schedule A annexed to the Code and with regulations made by the Minister responsible for justice.

Instituting legal proceedings and the costs incurred during such proceedings can at times be quite high, thereby possibly creating a barrier to people who want to lodge a complaint. Also, even though not really a requirement, it is advisable for a person to seek advice from a lawyer. The Maltese legal system provides for the possibility of free legal aid for those persons who do not have the necessary finances to institute/defend legal proceedings.

It should be noted that there are rules that require that buildings etc., are physically accessible. In fact, Article 12 of the Equal Opportunities (Persons with Disability) Act, 2000 provides for these. In addition, the Malta Environmental and Planning Authority has issued various circulars in connection with accessibility to buildings. With regards to whether information be provided in Braille, or whether there must be sign language interpretation provided, there is no law stating that these services should be given if required. However, should sign language or Braille be needed before the Courts, this would be provided.

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, there exist other specific fora and other procedures that can be followed. These include:

- 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 as described in more detail above;
- The National Commission Persons with Disability (NCPD), established under Article 21 of the Equal Opportunities (Persons with Disability) Act, 2000: Amongst the various functions of the NCPD, one finds the following:
  - 1) 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;
  - 2) 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;





- 3) 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;
  - 4) working towards the elimination of discrimination against people with disabilities;
  - 5) carrying out general investigations with a view to determining whether the provisions of the Act are being complied with;
  - 6) 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;
  - 7) providing, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act;
  - 8) 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; and
  - 9) 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.
- 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;
  - The Public Service Commission, set up in terms of Article 109 of the Constitution of Malta;
  - The Ombudsman, appointed in accordance with Article 3 of the Ombudsman Act, 1995;<sup>63</sup>
  - The Broadcasting Authority, established in terms of Article 118 of the Constitution of Malta. The Broadcasting Authority is to ensure that in the provision of broadcasting services impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties; and
  - 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.

There are no available statistics or data on the number of cases related to discrimination brought to justice.

<sup>63</sup> Act XXI of 1995. Chapter 385 of the Laws of Malta.



b) *Are these binding or non-binding?*

Decisions reached by the Industrial Tribunal and by the Public Service Commission are deemed binding.

When investigations carried out by the NCPD lead to an allegation of discrimination, the Commission shall be empowered to refer the matter to the courts. Similarly civil action for damages may be brought forward before the courts by an interested party. In the case of investigations carried out by the NCPE, decisions reached by the Commission shall not be binding unless the person against whom they are addressed so accepts.

This notwithstanding the NCPE may refer a matter to the competent civil courts or Industrial Tribunal, as the case may require, as may any interested party. Once the Ombudsman has reviewed a complaint, he may issue such recommendations as he deems necessary. If within a reasonable time no remedial action is taken, the Ombudsman may send a copy of the relative report to the Prime Minister and thereafter to the House of Representatives as he may deem fit. The Broadcasting Authority may issue administrative penalties against defaulters which penalties are binding against the persons against whom they are issued. Decisions issued by the Employment Commission are also deemed binding and the Commission may issue 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 the provisions of the Constitution.

c) *What is the time limit within which a procedure must be initiated?*

Proceedings in the Industrial Tribunal are less time consuming and therefore are more favourable to the complainant. Also, the fact that the complainant is still entitled to bring an action under any other law, even after he has lodged a complaint with the Industrial Tribunal, is to the complainant's advantage. As may be seen above, the time limit within which to lodge a complaint is not strict since the person who alleges that there has been discrimination has four months within which to lodge the complaint.

No time limit is prescribed for complaints made to the NCPD, to the NCPE, the Employment Commission or to the Broadcasting Authority. Petitions made to the PSC in relation to appointments and promotions must be made within 10 working days. The time period within which a complaint may be lodged is not long and is so not to unnecessarily lengthen the period within which an appointment or promotion of employment can be confirmed or otherwise. A complaint to the Ombudsman must be submitted within 6 months from the day on which the aggrieved person first had knowledge of the matters complained about.

d) *Can a person bring a case after the employment relationship has ended?*



As noted above, on the basis of the provisions of Article 30 of the Employment and Industrial Relations Act, actions can be instituted even after the employment relationship has been terminated provided that the relative time limits are respected.

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

*Please list the ways in which associations may engage in judicial or other procedures*

- a) *What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).*

Until the publication of Legal Notice 461 of 2004, which deals with equality in employment, in terms of Maltese law, in principle it was not possible for a person to bring a judicial action on behalf of another, unless the former can prove that he has a legitimate interest in the action and consequently no judicial action was 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 no prohibition at law for 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.

However, Regulation 11 of Legal Notice 461 of 2004 provides that nothing shall prevent any association, organization or other legal entity, having a legitimate interest in ensuring that these regulations are complied with, to engage itself either on behalf of or in support of the complainant, with his or her approval, in any judicial or administrative procedure which is provided for the enforcement of obligations under these regulations.

Furthermore, Article 16 of the Order provides that nothing in this Order or in any other law shall prevent any association, organization or other legal entity, having a legitimate interest in ensuring that the Order is complied with, from engaging itself either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative procedure provided for the enforcement of obligations under the Order. No such case has occurred to date.

In terms of these provisions, added protection is afforded to complainants under the relevant legislation, where an entity having a legitimate interest in ensuring the regulations are adhered to, may intervene on their behalf. No limitations are laid down as to the mode of intervention and therefore this may be seen as entities taking action in the general public interest.

An entity that is legislatively empowered to assist a complainant of alleged discriminatory treatment is the National Commission Persons with Disability (NCPD).



This Commission is empowered to provide, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act.<sup>64</sup>

Furthermore, if it appears to the Commission that a person 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>65</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>66</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>67</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 there under, 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 (NCPE), 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.

*b) What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific*

<sup>64</sup> Article 22(k).

<sup>65</sup> Article 32(3).

<sup>66</sup> In force as from 1 October 2000.

<sup>67</sup> Regulation 5.



*chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove “legitimate interest”, what types of proof are needed? Are there legal presumptions of “legitimate interest”?*

As seen above, provided that the association, organization or other legal entity, has a legitimate interest and obtains the complainant’s consent, it can engage itself either on behalf of or in support of the said complainant. While a legal entity is normally registered, associations and organizations need not be registered. No membership or permanency requirements are laid down.

No criteria are laid down for associations, organizations or other legal entities to comply with, evidencing that they have a legitimate interest in intervening in these procedures. Whether such interest exists or not shall be subject to the jurisdiction of the competent authority before which the claim is made.

c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

The complainant’s authorization is required but no specific provisions stipulate the manner in which such authorization is to be obtained.

d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

In terms of Article 11 of the Equal Treatment of Persons Order, 2007 the Commissioner for the Promotion of Equality may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of the Order. As stated above the Order is to implement the provisions of Directive 2000/78/EC. The Commissioner may also initiate investigations on the receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of the Order.

e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations’ standing in different types of proceedings, please specify.*

The proceedings where assistance is provided are administrative and civil in nature.

f) *What type of remedies may associations seek and obtain? If there are any differences in associations’ standing in terms of remedies compared to actual victims, please specify.*



The type of remedy which an association may seek is the remedy which may also be sought by a complainant and which, as seen above, varies depending on the legislation. There are no differences in associations' standing in terms of remedies compared to actual victims.

- g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

There are no special rules on the shifting of the burden of proof where associations are engaged in proceedings.

- h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

As seen above investigations may be commenced by the NCPE but there are no particular rules provided as to the instances where this may be done and the type of proceedings which are to be followed.

- i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

The provisions mentioned above seem to indicate that an action could only be made on behalf of one complainant at a time. However, on the other hand there is no specific prohibition of actions being brought on behalf of more than one complainant or to bring a class action.

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

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

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

However, the Employment and Industrial Relations Act, 2002, has introduced a shift in the principle of the burden of proof in cases of discrimination.





Regulation 10(3) of Legal Notice 461 of 2004 provides that in any proceedings brought by a person claiming discriminatory treatment in respect of his/her employment, it shall be sufficient for the plaintiff to prove that he or she has suffered discriminatory treatment and it shall become incumbent on the defendant to prove that such treatment was justified in accordance with these regulations, in the absence of which, the Tribunal or Court shall uphold the complaint of the plaintiff.

Regulation 10(3) implements what is laid down in both Directives, since the latter state that: "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment". Directive 2000/43 and 2000/78 further provide that it is up to the Member State whether or not to introduce rules of evidence which are more favourable to plaintiffs.

Also, 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.

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 with the Employment Equality Directive.

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

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

*What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).*



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

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.

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

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

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

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

In terms of Article 30 of the Employment and Industrial Relations Act, 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>68</sup>

<sup>68</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



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

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

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

In terms of Article 50 of the Employment and Training Services Act, any person guilty of an offence against, inter alia, Article 15 of the Act shall be liable, on conviction, to pay a fine of not less than one thousand one hundred and sixty four Euros but not exceeding eleven thousand six hundred and forty seven Euros.

Under Article 24 of The Equal Opportunities (Persons with Disability) Act, a claim by a person having a legal interest in the matter, made personally or through his or her legal representative, that another person has committed an unlawful act of discrimination against him or her as provided for under the Act may 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 four hundred and sixty six Euros (Lm200) 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.

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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.



In the 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>69</sup>

b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

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

c) *Is there any information available concerning:*

- *the average amount of compensation available to victims?*
- *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

There have been no cases, whether before the courts or before the Ombudsman, on this matter.

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<sup>69</sup> Article 26(1).



## 7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

*When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

In virtue of the provisions of the Equal Treatment of Persons Order, 2007 the remit of the Commissioner for the Promotion of Equality for Men and Women has been extended to cover the promotion of equal treatment irrespective of racial or ethnic origin within the meaning of the provisions of the Order and to issues of compliance with, and the enforcement of rights under, the provisions of the Order, which functions shall continue to be exercised with the assistance of the NCPE.

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

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

The Commission is answerable to the Minister responsible for equality and is funded from funds allocated to it by the Minister for the promotion of equality out of funds





voted by Parliament for activities under the Ministry or out of funds that may be donated or allocated to it from other sources in Malta or abroad.

Both the NCPE and NCPD are autonomous bodies having a separate legal personality and such is provided for in the respective regulating laws.

- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

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

The current functions of the Commission include the following:

- (i) to liaise between, and ensure the necessary coordination between, government departments and other agencies in the implementation of measures, services or initiatives proposed by Government or the Commission from time to time;
  - (ii) to carry out general investigations with a view to determine whether the provisions of the Act and the Order are being complied with;
  - (iii) to investigate complaints of a more particular or individual character to determine whether the provisions of the Act and the Order are being contravened with respect to the complainant and, where deemed appropriate, to mediate with regard to such complaints;
  - (iv) to inquire into and advise or make determinations on any matter relating to equality between men and women as may be referred to it by the Minister;
  - (v) to provide assistance, where and as appropriate, to persons suffering from discrimination in enforcing their rights under the Act and the Order;
  - (vi) to keep under review the working of the Act and the Order, and where deemed required, at the request of the Minister or otherwise, submit proposals for its amendment or substitution; and
  - (vii) to perform such other function as may be assigned by law or such other functions as may be assigned by the Minister.
- d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*





As noted above, the Commission<sup>70</sup> can provide assistance to victims of discrimination and in the carrying out of its other activities, in an independent capacity, does conduct surveys, issue reports and makes recommendations to Government as to the manner in which further protection may be afforded in Malta.

The NCPE has also published several publications and leaflets regarding different issues, which are also available to the general public as well as the public and private sectors and each year publishes an annual report laying down its activities over the past year.

- e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

The NCPE and the NCPD work independently given that they are bodies set up statutorily as independent entities having their own legal personality. To date, their impartiality has never been questioned in public fora.

- f) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The Commissioner may initiate investigations either on its own behalf or after having received a complaint from an alleged victim. In terms of Article 11 of the Equal Treatment of Persons Order, 2007 the Commissioner for the promotion of equality may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of the Order. The Commissioner may also initiate investigations on the receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of the Order. Furthermore, if it appears to the Commissioner that persons who wish to make a complaint require assistance to formulate the complaint, the Commissioner it to take or order the taking of such reasonable steps as may be necessary to assist such persons in making the complaint. The Commission may intervene in judicial proceedings on behalf of or in support of a complainant.<sup>71</sup>

Statistics of the complaints investigated are not published on a regular basis but they are kept by the NCPE and fed into reports on particular aspects of equality and to the National Statistics Office as and when required. In the NCPE Annual Report for 2007

<sup>70</sup> The remit of the NCPE relates to discrimination issues based on gender in employment or in the provision and/or supply of goods and services, and based on race or ethnic origin in the provision and/or supply of goods and services, principal role is the promotion of equal treatment including equal treatment irrespective of racial or ethnic origin.

<sup>71</sup> In the NCPE Annual Report for 2007 it was stated that the NCPE presented its first case before the Industrial Tribunal on allegations of dismissal due to pregnancy.



it was stated that the NCPE presented its first case before the Industrial Tribunal on allegations of dismissal due to pregnancy. This case was dismissed as the parties reached an amicable solution outside of court.

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

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 the Civil Court, First Hall, and the Constitutional Court, one finds the Ombudsman, the Industrial Tribunal, the National Commission Persons with Disability, the National Commission for the Promotion of Equality for Men and Women and the Public Service Commission.

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

- 1) identify, establish and update all national policies directly or indirectly related to disability issues;
- 2) identify the needs of persons with disabilities, their families and voluntary bodies working in the field of disability issues and to take all necessary steps or propose appropriate measures in order to cater for such needs as much as possible;
- 3) ensure that all government programmes concerning the affairs and interests of persons with disabilities, their families and voluntary bodies working in the field of disability issues, are implemented in accordance with national policies for disability issues;
- 4) ensure the necessary co-ordination between all government departments and agencies in implementing measures, services or initiatives proposed by government or proposed by the Commission from time to time;
- 5) keep direct and continuous contact with local and foreign bodies working in the field of disability issues, and with other groups, agencies or individuals as the need arises;
- 6) monitor the provision of services offered by government or its agencies or by any other person or group of persons, where the clients of such services are persons with disability;
- 7) work towards the elimination of discrimination against people with disabilities;
- 8) carry out general investigations with a view to determining whether the provisions of the Act are being complied with;
- 9) investigate such complaints as may be made to them of failure to comply with any provision of this Act in an individual case and, where it seems appropriate, conciliate in relation to such complaints;



- 10) inquire into, and make determinations on, matters referred to it by the Minister;
- 11) provide, where and as appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act;
- 12) keep under review the working of the Act and, when deemed fit by the Commission or so required by the Minister, draw up and submit to the Minister proposals for amendments to same;
- 13) examine 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;
- 14) provide all such services that may be necessary or required for the Commission to attain its objectives; and
- 15) collate, analyse and publish statistics related to the disability sector which, inter alia, indicates the national level achieved in inclusive policy.

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

In the Ombudsman Act, 1995,<sup>72</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, 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.

Article 13 (1) states:

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

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

In the period 2008 – 2010 the Ombudsman received 247 complaints of discrimination and during the same period 51 cases of discrimination were concluded and found to be justified.

The Ombudsman is not empowered to impose any sanctions against the defaulting department, organisation or local council. After carrying out the necessary investigations and proceedings, the Ombudsman issues his recommendations as to

<sup>72</sup> Act XXI of 1995. Chapter 385 of the Laws of Malta. See article 22.



what action is to be taken to rectify the wrongdoing. Statistics of the complaints received by the Office of the Ombudsman are kept and are publicly available.<sup>73</sup>

*g) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).*

Action taken by an aggrieved individual is taken before the Industrial Tribunal or Public Service Commission, in the case of employment issues. As stated above, decisions here are deemed binding.

Neither the NCPE nor the NCPD are judicial bodies but within their remit may assist persons to bring forward action before the competent judicial authorities.<sup>74</sup>

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

*i) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

In Malta, there are no Roma and Travellers.

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<sup>73</sup> Statistics of number of complaints received till 2005 are publicly available but statistics are not divided according to subject matter of complaints.

<sup>74</sup> As noted above, court cases have been instituted by both the NCPE and the NCPD.



## 8 IMPLEMENTATION ISSUES

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

Describe *briefly* the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

The amendments to the Criminal Code that came into force in May 2002 were widely publicised in the media, printed and audio-visual.

Regulation 12 of Legal Notice 461 of 2004 provides that it shall be the duty of the employer or any person or organisation to whom these regulations apply, to use appropriate means to bring the provisions of these regulations as well as of any measure taken to further the aim of these regulations to the attention of his employees, or of the organisation's members, as the case may be, or to any other persons who may be affected by the actions of the employer or the organisation concerned. Though the law does not specify this, the wording if the law indicated that the means used in this case have to take into consideration any impairment of the employees or members and therefore accessibility to disabled persons to such regulations must be considered and catered for. The manner, in which the duty of the employer to inform employees of rights to non-discrimination is implemented in practice, is left to each employer individually.

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.

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.

Public awareness in combating anti-discrimination, racism and xenophobia is an ongoing process locally. Newspaper articles, radio and television programmes dealing 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.

In November 2007, as a follow up to the *European Year of Equal Opportunities for All 2007*, the European Commission Representation in Malta in collaboration with the NCPE organised a media campaign entitled *A National Campaign Promoting Equal Opportunities for All*. This campaign was aimed at highlighting the six grounds of discrimination as recognised by the EU - Gender, Religion or Belief, Race or Ethnicity, Age, Sexual Orientation, and Disability.

In 2008, intercultural dialogue was promoted through the 'European Film Festival' that was aimed at educating children and the general public about different cultures as well as activities such as round-table discussions which were held between school children of different origins; music, dance, art, cookery, drama, poetry and singing lessons were given to students by immigrants living in Malta.

Moreover, in 2008 NCPE carried out a project, 'Voice for All', with the aim of empowering participants to endorse diversity and to challenge the learning and thinking processes that give rise to discrimination. This project included forum theatre, a good practice competition, an art competition, a play on discrimination, and an awareness raising campaign.

The NCPE took a proactive stance in this sphere by first training and preparing its staff and then by preparing documents that would help different sectors of the population. The Commission drew up and published a manual is meant to serve as a tool for employers and service providers so that they will be able to understand what is expected of them and what their responsibilities are in line with the Directive 2000/43/EC as enforced locally through Legal Notice 85 of 2007. In 2007 NCPE brought to Malta a Diversity Expert from The Netherlands who trained NCPE staff and the training was also offered to the Chairs and Members of the Equality Committees set up in the Ministries in Malta and Gozo.

Training courses are held regularly at the Police Academy are specifically held for Police Cadets which include a module covering the subject of human rights and racism.





A publicity campaign to raise awareness on all grounds of discrimination and to raise awareness on the good practices identified through the pan-European research was carried out by the NCPE.<sup>75</sup>

In 2010, NCPE contributed to the compilation of the combined 'fifteenth to twentieth periodic reports' by Malta submitted to the Committee on the Elimination of Racial Discrimination. Since 2000, the European Union Agency for Fundamental Rights (FRA) collects data on issues regarding racism, xenophobia and related intolerances through various National Focal Points covering all EU Member States. NCPE gives its contribution on the developments and initiatives undertaken to enhance equality on the grounds of race and ethnic origin on a regular basis.

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

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

NGOs in Malta are regulated by Act XXII of 2007 entitled the Voluntary Organisations Act. This Act was brought into force on 11 December 2007. The principal NGOs in Malta are ground-specific and in fact work towards combating discrimination in specific areas only.

NGOs act very subjectively and independently of each other and it is therefore rather difficult to obtain objective information from the NGOs. There is no NGO which could be said to be cover all grounds of discrimination.

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. To date there

<sup>75</sup> This project is supported by the European Community Programme for Employment and Social Solidarity - PROGRESS (2007-2013).



are no organisations working for the rights of gay, lesbian or bisexual persons 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:

- The National Employment Authority created in terms of the Employment and Training Services Act, 1990,<sup>76</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; and
- The Employment Relations Board created in terms of the Employment and Industrial Relations Act, 2002.

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 continues to create awareness of its rights. Another NGO involved in helping and promoting awareness, in this case on the grounds of race and ethnic origin, is the Jesuit Refugee Service. The mandate of the Jesuit Refugee Service is to accompany, serve and defend the cause of forcibly displaced people. The JRS was set up in Malta in 1993 to support the first influx of asylum seekers to the island from crisis areas in the Mediterranean and Eastern Europe, mainly from Iraq and Bosnia. The situation is now very different, with asylum seekers and forcibly displaced people arriving mostly by boat from the African coast.

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

The Malta Council for Economic and Social Development Act, 2001,<sup>77</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: the Chairman appointed by the Prime Minister following consultation with the employers' and unions' represented on Council, a Deputy Chairman in the person of the Principal Permanent Secretary of the Civil Service, the Permanent Secretaries of the Ministries of Finance, the economy and Investment (MFEI), Foreign Affairs (MFA) and Social Policy (MSOC), the Director General of the Economic Policy Division, the Governor of the Central Bank of Malta, the Presidents

<sup>76</sup> Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

<sup>77</sup> Act XV of 2001. Chapter 431 of the Laws of Malta.

of the five main employers organisations<sup>78</sup> and the Secretaries General of the two largest Unions<sup>79</sup> and the President of the Confederation of Malta Trade Unions.

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>80</sup> The MCESD also has a number of sub-committees, which meet on a regular basis.<sup>81</sup>

d) *to specifically address the situation of Roma and Travellers.*

There are no Roma and Travellers in Malta.

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

a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

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

b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

No. Furthermore, it is to be noted that Regulation 12 of Legal Notice 461 of 2004 provides that any provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings, or rules

<sup>78</sup> the Malta Employers Association, the Malta Chamber of Commerce, Enterprise and Industry, the Malta Hotels and Restaurants Association and the General Retailers and Traders Union.

<sup>79</sup> General Workers Union and Union Haddiema Maghqudin.

<sup>80</sup> [www.mcesd.org.mt/page.jsp?id=21&siteid=1](http://www.mcesd.org.mt/page.jsp?id=21&siteid=1)

<sup>81</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.



governing any registered organisation in terms of the Act, shall, on entry into force of these regulations, be considered null and void.

Furthermore, Article 6 of the Constitution of Malta provides that the Constitution is the supreme law of Malta and that therefore if any other law is inconsistent with this Constitution, it shall prevail and the other law shall, to the extent of the inconsistency, be void. Legal practitioners do not share the same opinion on this matter. Whereas some believe that if the Courts declare that a law is contrary to the principle of equal treatment, such 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.



## 9 CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

*Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.*

With regards to the Employment and Industrial Relations Act, the Equal Opportunities (People with a Disability) Act and the Equality for Men and Women Act, the responsibility lies in the hands of the Minister for Social Policy.

The National Commission for the Promotion of Equality (NCPE) has contracted the Equality Research Consortium to develop, through research and consultation, a framework leading to a national action plan against racism and xenophobia (NAPARX) in Malta. The NAPARX has a number of strategic objectives, as well as specific initiatives to be achieved and implemented over a three-year period. It seeks to build upon the existing policy, legal and institutional framework as well as the various initiatives that have been undertaken by a wide spectrum of stakeholders and ensure that these are used to their full potential. The Action Plan is strategic in nature, providing a roadmap towards the achievement of its aims and objectives. It should be seen as fluid and as such be able to adapt to emerging trends and realities. It adopts a human rights based approach - a strategic mainstreaming process intended to permeate all levels of national structures. The plan seeks to take into account the different forms of racism experienced by the various minorities, as well as the different levels of racism at both an individual and institutional/systemic level.

This action plan addresses various minority groups including ethnic minorities, linguistic minorities as well as religious minorities. This action plan seeks to combat racism and xenophobia as well as promote a more inclusive and intercultural society through a proactive framework. Whilst it addresses issues of investigation and redress, the priority is on creating an environment that does not accept the presence of racism and where discriminatory treatment is neither accepted nor tolerated. As such, the plan seeks to address the 4 Ps namely: prevention, protection, prosecution and partnership.



## ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**





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

Name of Country: Malta

Date: 01 January 2012

Title of Legislation (including amending legislation)	Date of adoption: Day/month h/year	Date of entry in force from: Day/month/ year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.					e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/month/year</b>	<b>Date of entry in force from: Day/month/year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
Employment and Industrial Relations Act <sup>82</sup>	2 <sup>nd</sup> December 2002	27 <sup>th</sup> December 2002	Marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political	Civil Law/Administrative Law	Private Employment	Regulates employment in the private/public sector and, inter alia, prohibits discrimination
Legal Notice 461 of 2004 as amended by Legal Notices 53 of 2007 and 137 of 2008 and 444 of 2011 issued under the Employment and Industrial Relations Act	5 <sup>th</sup> November 2004	5 <sup>th</sup> November 2004	Religion or religious belief, disability, age, sexual orientation, and racial or ethnic	Civil Law/Administrative Law	Private Employment	Prohibition of discrimination on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic

<sup>82</sup> All Maltese legislation (primary and secondary) may be viewed on: <http://www.justiceservices.gov.mt/LegalServices.aspx?pageid=72>

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/month/year</b>	<b>Date of entry in force from: Day/month/year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
			origin.			origin
Legal Notice 524 of 2007	13 <sup>th</sup> March 2007	13 <sup>th</sup> March 2007	Religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin.	Civil Law/Administrative Law	Public Employment	Prohibition of discrimination on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin
Equal Opportunities (Persons with Disability) Act	10 <sup>th</sup> February 2000	1 <sup>st</sup> October 2000	Disability	Civil Law/Administrative Law	Employment; Education; Access, Provision of goods, services and facilities; Accommodation	Prohibition of discrimination on ground of disability; creation of a specialised body

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/mont h/year</b>	<b>Date of entry in force from: Day/month/ year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
Equality for Men and Women Act	9 <sup>th</sup> December 2003	9 <sup>th</sup> December 2003	Gender	Civil Law/Administrative Law	Employment; Education; Provision of goods, services and facilities; Harassment	Prohibition of discrimination on the ground of gender; creation of a specialised body
European Convention Act	19 <sup>th</sup> August 1987	19 <sup>th</sup> August 1987	All grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,	Constitutional Law		Renders the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe enforceable as, part of the Law of Malta

Title of Legislation (including amending legislation)	Date of adoption: Day/mont h/year	Date of entry in force from: Day/month/ year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
			property, birth or other status.			
Constitution of Malta	21 <sup>st</sup> September 1964	21 <sup>st</sup> September 1964	Protection from discriminati on on the grounds listed in Article 45, that is, race, place of origin, political opinions, colour, creed or sex	Constitutional Law		
Equal Treatment in Self-Employment and Occupation Order	3 <sup>rd</sup> April 2007	3 <sup>rd</sup> April 2007	Protection from discriminati on on the	Civil Law/Administrative Law	Persons in self- employment and	Extension of prohibition of discrimination on the grounds of

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/mont h/year</b>	<b>Date of entry in force from: Day/month/ year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
			grounds of race and ethnic origin		occupation	racial and ethnic origin in employment
Equal Treatment of Persons Order	3 <sup>rd</sup> April 2007	3 <sup>rd</sup> April 2007	Protection from discriminati on on the grounds of race and ethnic origin	Civil Law/Administrative Law	Social protection, social advantages, education, access to and supply of goods and services	Prohibition of discrimination on the grounds of racial and ethnic origin



**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of Country: Malta

Date: 01 January 2012

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	12 <sup>th</sup> December 1966	23 <sup>rd</sup> January 1967	No reservation related to the right of education	Yes	Yes
Protocol 12, ECHR	Not Signed	Not Ratified			
Revised European Social Charter	27 <sup>th</sup> July 2005	27 <sup>th</sup> July 2005		Collective complaints protocol not yet ratified.	
International Covenant on Civil and Political Rights	13 <sup>th</sup> September 1990	13 <sup>th</sup> September 1990	The Government of Malta reserves the right not to apply Article 22 to the extent that existing legislative measures may not be		

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
			fully compatible with this article.		
Framework Convention for the Protection of National Minorities	11 <sup>th</sup> May 1995	10 <sup>th</sup> February 1998	No reservations		
International Convention on Economic, Social and Cultural Rights	22 <sup>nd</sup> October 1968	13 <sup>th</sup> September 1990	Article 13 - The Government of Malta declares that it is in favour of upholding the principle affirmed in the words " and to ensure the religious and moral education of their children in conformity with their own convictions". However, having regard to the fact that the population of Malta is overwhelmingly Roman		

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, which cases are very exceptional in Malta.		
Convention on the Elimination of All Forms of Racial Discrimination	5 <sup>th</sup> September 1968	27 <sup>th</sup> May 1971	No reservations	Yes – provided that the Committee shall not consider complaints without ascertaining whether the matter is not being	

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
				considered or has not already been considered by another international body of investigation or settlement.	
Convention on the Elimination of Discrimination Against Women	8 <sup>th</sup> March 1991	8 <sup>th</sup> March 1991	Article 11 The Government of Malta interprets paragraph 1 of article II, in the light of provisions of paragraph 2 of article 4, as not precluding prohibitions, restrictions, or conditions on the employment of women in certain areas, or the work done by them,		

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			<p>where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of Malta.</p> <p>Article 13 The Government of Malta reserves the right, notwithstanding anything in the Convention, to continue to apply its tax legislation which deems, in certain circumstances, the</p>		

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			<p>income of a married woman to be the income of her husband and taxable as such.</p> <p>(ii) The Government of Malta reserves the right to continue to apply its social security legislation which in certain circumstances makes certain benefits payable to the head of the household which is, by such legislation, presumed to be the husband.</p> <p>Articles 13, 15, 16</p> <p>While the Government of Malta is committed to remove, in as far as possible, all aspects of</p>		



Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			<p>family and property law which may be considered as discriminatory to females, it reserves the right to continue to apply present legislation in that regard until such time as the law is reformed and during such transitory period until those laws are completely superseded.</p> <p>Article 16 The Government of Malta does not consider itself bound by sub-paragraph (e) of paragraph (1) of article 16 in so far as the same may be</p>		

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
			interpreted as imposing an obligation on Malta to legalize abortion."		
ILO Convention No. 111 on Discrimination	Not signed	1 July 1968	No		
Convention on the Rights of the Child	26 <sup>th</sup> January 1990	30 <sup>th</sup> September 1990	No		
Convention on the Rights of Persons with Disabilities	30 <sup>th</sup> March 2007	Not ratified			