

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

COUNTRY REPORT COUNTRY REPORT

Malta

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State of affairs up to 8 January 2007

This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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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 between 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 providing 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."

0.2 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.

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

Malta has introduced a number of specific legislative acts to implement Council Directives 2000/78/EC and 2000/43/EC, in particular the Employment and Industrial Relations Act 2002, the Equal Opportunities (Persons with Disability) Act, 2000, and Legal Notice 461 of 2004 which augmented protection against discrimination on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin in the field of employment.

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

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

Non-discriminatory differences of treatment may include: -

- (a) the setting of special conditions on access to employment and vocational training, including dismissal and remuneration conditions, for young people, older workers and

persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

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

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement. Therefore, it is submitted that the requirements laid down in Article 6 of the Directive have been fulfilled.

Malta has not exercised the option to defer the implementation of the provisions on age discrimination as set out in Article 18 of Directive 2000/78/EC.

It is to be noted that the following provisions of the two Council Directives have still not been implemented:

(a) 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. This part of the legislation is still lacking in Maltese Law even though it is envisaged that this shortcoming will be remedied in the near future as the Commission for the Promotion of Equality for Men and Women (set up under the Equality for Men and Women Act, 2003) will be designated to promote equality of treatment for all persons without discrimination on the grounds of race or ethnic origin. In spite of the fact that such amendment to the law has long been envisaged, it is not yet known when the necessary amendments will be passed.

(b) With regards to the provisions relating 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, under Article 3(1) (e) to (h) Directive 2000/43, there is no specific legislation in Malta which prohibits discrimination in these matters. However, the Maltese Government is planning to enact legislation in the near future to address these shortcomings. In spite of the fact that the enactment of the new law has long been envisaged, it is not yet known when this will take place.

Furthermore, it is to be noted that the only provisions of the Employment and Industrial Relations Act 2002 applicable to employment in the public sector are those which relate to industrial relations, saving certain exceptions. The provisions of the said Act which relate to discrimination in employment have not been extended to cover employees in the public sector. Consequently, this means that there is no legislation in force in Malta which implements the provisions of Council Directives 2000/78 and 2000/43 in relation to public service employees.

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:

a. Name of the court

b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.

c. Name of the parties

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

In February 2005 the Maltese Courts decided the case National Commission Persons with Disability vs. Michele Peresso Limited¹. 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 bound persons 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.

This judgment is still pending appeal and no developments have been recorded in this matter.

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 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."

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

Chapter II of the Maltese Constitution² 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,³ 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 Court⁴ for redress. Article 32 provides that “every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex” subject to the respect of the rights and freedoms of others.

Article 45 of the Constitution specifically caters for the protection from discrimination on the basis of race, place of origin, political opinions, colour, creed or sex. This list is ground-specific and exhaustive. In fact, the Maltese Courts have held that if there is any other consideration upon which the discrimination is based, besides those mentioned, such discrimination will not be deemed unconstitutional.⁵ 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’. 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.⁶

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.

² Articles 7 to 21 (inclusive).

³ Articles 32 to 47 (inclusive).

⁴ 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.

⁵ *Dr Walter Cuschieri et vs. The Hon. Prime Minister et noe* – Constitutional Court – 30 November 1977.

⁶ 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.

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.

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 Maltese legal instruments:

- (a) the 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;
- (b) the European Convention Act - sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- (c) 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 ;
- (d) Equal Opportunities (Persons with Disability) Act, 2000 - disability on the basis of physical and/or mental impairment;
- (e) Equality between Men and Women Act 2001 – sex and family responsibility.

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 on 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 reach 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 minimum age below which the anti-discrimination.

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 29th June 2000 and Council Directive 2000/78/EC of 27th 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.

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.

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 such rules. Furthermore there has been no case-law on this matter. In spite of such, there are no legal restrictions for a person to claim discrimination on one or more grounds under one or more laws.

2.1.2 Assumed and associated discrimination

a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.

b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

Article 3 (1) (b) of the Equal Opportunities (Persons with a Disability) Act, 2000, provides that a person is considered to be acting discriminatorily when:

“he treats or proposes to treat a person less favourably on the basis of a characteristic that appertains generally to persons who have such a disability or a presumed characteristic that is generally imputed to persons who have such a disability.”

Article 6 of the said Act also provides that a person shall 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. It is argued that this could be deemed to constitute discrimination by association.

Furthermore, since Legal Notice 461 of 2004 now provides 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. This has not been raised before a judicial authority in Malta as yet.

There is no case-law which deals with the prohibition of discrimination based on association with persons with particular characteristics.

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

a) How is direct discrimination defined in national law?

b) 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)

c) 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?

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

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:

(a) in circumstances which are similar or not materially different, he treats or proposes to treat a person who has a disability less favourably than he treats or would treat a person who does not have such a disability; or

(b) he treats or proposes to treat a person less favourably on the basis of a characteristic that appertains generally to persons who have such a disability or a presumed characteristic that is generally imputed to persons who have such a disability”.

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:

- (a) an interpreter; or
- (b) a reader; or
- (c) an assistant; or
- (d) a carer,

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

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.

2.2.1 Situation Testing

- a) *Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*
- b) *Is there any reluctance to use situational 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)?*
- c) *Outline important case-law within the national legal system on this issue.*
- d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

Maltese law does not provide for situational testing and in fact Maltese legislation does not address the issue of situational testing. Furthermore, there is no reported case-law on the matter and neither have there 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.

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

- a) *How is indirect discrimination defined in national law?*
- b) *What test must be satisfied to justify indirect discrimination?*
- c) *Is this compatible with the Directives?*
- d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

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.”

As this definition is taken from Article 2(2)(b) of Council Directive 2000/78, it is 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.

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 permit or prohibit the use of statistical evidence to establish indirect discrimination

b) Is the use of such evidence commonly used? 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?

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?

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.⁷ In fact, sensitive personal 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.⁸

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.⁹ It is important to note that the employer is still

⁷ Ibid. Article 2.

⁸ Ibid. Article 12(2).

⁹ Ibid. Article 13(a).

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,¹⁰ which obliges employers to employ a certain quota of persons with disability,¹¹ 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 persons¹² employed by them and such other matter as shall be necessary to show compliance by the employer with the provisions of this Act.¹³

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 -

- (a) 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
- (b) 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
- (c) 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 one hundred liri (equivalent to 233 Euros) or to both such imprisonment and fine.

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.

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

¹⁰ The Laws of Malta, Chapter 210

¹¹ According to Legal Notice 157 of 1995, the quota is two percent.

¹² Chapter 210 obliges the Employment and Training Corporation (ETC) to keep a register of persons with disability.

¹³ Ibid. Article 20(1).

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 recently 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 now listed as a serious offence under the regulations.

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.

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.

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

The only existing Code of Practice on harassment in Malta to date is a Code of Practice against Sexual Harassment¹⁴. This Code of Practice also refers to harassment on the ground

¹⁴ “Sexual Harassment: A Code of Practice”, National Commission for the Promotion of Equality, 2005.

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.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Is it contrary to national law to give instructions to discriminate? Does this conform to the Directives?

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

Article 45(3) of the Constitution of Malta provides that, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. The Equal Opportunities (Persons with Disability) Act, 2000, and the Equality for Men and Women Act, 2003 do not contain specific prohibition against the giving of instructions to discriminate.¹⁵

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.

Article 1044 of the Civil Code¹⁶ and Article 42 of the Criminal Code¹⁷ 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 disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. does national law define what would

¹⁵ 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.

¹⁶ 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".

¹⁷ This deals with the offence of complicity,

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?

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

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),¹⁸ 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.

There is no requirement under Maltese legislation to provide reasonable accommodation to people discriminated against on the other grounds covered by the two Directives.

To date there have been no judicial pronouncements with regards to what constitutes 'reasonable' accommodation or whether such accommodation imposes a 'disproportionate burden' on the persons who are required to make such accommodation. However, an indication as to what constitutes 'reasonable' accommodation is laid down in Article 20 of the Equal Opportunities (Persons with Disability) Act, 2000, which provides for the test of reasonableness. Thus for the purposes of interpreting the provisions of the Act, in determining the reasonableness of (a) any modification to rules, policies or practices, or (b) the removal of architectural, communication or transport barriers, or (c) the provision of auxiliary aids or services, regard shall be had as to whether such actions could be undertaken without unjustifiable hardship.

Article 20(2) contains an illustrative list of those factors which are to be considered in determining whether such actions could be undertaken without unjustifiable hardship:

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

(a) the nature and cost of the actions in question;

¹⁸ 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.

- (b) 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
- (c) 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 failure to meet the duty 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.

c) Has national Law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

There is no duty to provide reasonable accommodation in respect of the grounds of religion or religious belief, age, sexual orientation, and racial or ethnic origin.

d) Does national law require 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 Limited¹⁹, mentioned above.

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 disabled workers?

¹⁹ Civil Court, First Hall - 25 February, 2005 - Writ of Summons no. 413/2001/1.

Maltese law does not specifically provide for sheltered or semi-sheltered accommodation/employment for disabled workers. As regards the question whether such activities be considered to constitute employment under Maltese law, this 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.

b) Would such activities be considered to constitute employment under national law?

If the above-mentioned criteria are fulfilled, sheltered/semi-sheltered employment could be deemed to be employment under Maltese law.

3. PERSONAL AND MATERIAL SCOPE

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?

In 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.

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 this 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.

Furthermore, 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.

3.2 Material Scope

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

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

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

As stated above, protection against discriminatory treatment under Maltese law is provided for both by general and specific laws.

With regards to the protection afforded by the Constitution, this can only be pleaded by any person who feels that he is or has been discriminated against by any law that is discriminatory either of itself or in its effect or that he is or has been treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority and that such discrimination is based on any of the grounds provided for in Article 45 of the Constitution of Malta, namely race, place of origin, political opinions, colour, creed or sex. Consequently, such protection does not extend to matters between private persons such as, for example, between employers and employees and between private individuals. Furthermore, it does not extend to all the grounds but only to those specified in Article 45.

The protection afforded by The European Convention Act, on the other hand, is wider in view of the fact that the grounds for discrimination are not exhaustive and therefore all the grounds could be deemed to be covered by it. However, this Act only covers the rights laid down in

Articles 2 to 13 of the Convention. Thus, in practice, the protection afforded by Article 45 of the Constitution of Malta and by The European Convention Act can be deemed to be complementary to each other.

On the other hand, there are certain pieces of legislation that contain specific anti-discrimination provisions in respect of certain spheres (mainly employment) or persons (discrimination on the basis of sex and discrimination against disabled persons). In this case, the protection afforded by these laws also extends to matters between private persons, as well as to matters between private persons and public entities or authorities. In particular these include the Employment and Industrial Relations Act 2002, the Equal Opportunities (Persons with Disability) Act, 2000, and Legal Notice 461 of 2004 which filled the lacunae existing in Maltese legislation with regards to discrimination on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin in the field of employment.

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, as stated above, 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 no such regulations have been prescribed.

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 the other provisions of the Employment and Industrial Relations Act 2002 which deal with *inter alia* discrimination, harassment and victimisation are not applicable to public service employees.

In 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 concept 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 victimisation 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, 1990.²⁰

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?

As stated in 3.2.1 above, 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.

Article 26 (1) (a): “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 2²¹ 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 entitled “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.

Article 15(1) of the Employment and Training Services Act, 1990,²² 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

²⁰ Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

²¹ See page 5 above.

²² Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

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.

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

a) 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.

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 Legal Notice 461 of 2004 entitled “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.

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

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). Recent amendments to the law have introduced the concepts of Second Pension Funds and Third Pension Funds. Second and Third Pension Funds are regulated by the Special Funds (Regulation) Act. There is no specific prohibition of discrimination in the case of pensions. In the case of situations where pensions are payable by the State, then in case 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.

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 ?

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 entitled "Equal Treatment in Employment Regulations, 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.²³

With regards to access to university or other higher education, Article 11 of the Equal Opportunities (Persons with Disability) Act 2000, provides that it shall be unlawful for an educational authority or institution (defined 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

²³ 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.

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 Legal Notice 461 of 2004 entitled “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.

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 rely on the exception in Article 3(3) of Directive 2000/78 in relation to religion or belief, age, disability and sexual orientation, and there is no specific prohibition of discrimination on racial or ethnic origin in this field.

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 granted to people because of their employment or residence status, for example, e.g. 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 of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

It is to be noted that there are no specific provisions under Maltese law to implement the provisions of Article 3(1)(g) of Directive 2000/43. However, the Maltese Government is planning to enact legislation in the near future to address these shortcomings.

See also 3.2.4 above.

In Malta there are 5 schools catering for approximately 265 students with special needs. In these schools, there are approximately 120 teachers, facilitators and kindergarten assistants/supply kindergarten assistants. The Education Division 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 770 facilitators offering their services to just under 1,000 students who have a disability in state primary and secondary schools in Malta, while approximately 380 disabled students attend Church and Independent schools.

The Minister of Education has stated²⁴ 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. The 1988 Education Act provides that the State must provide special schools for children having special educational needs. 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.

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

²⁴ During the launching of a Working Group entrusted to review inclusive and special education in Malta, which concurred with World Disabled Persons Day 2004

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

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 does not distinguish between goods and services available to the public and those available privately and there is no specific prohibition of discrimination on racial or ethnic origin in this field.

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

To which aspects of housing does the law apply? Are there any exceptions?

In cases of alleged discrimination in respect of the matters mentioned in paragraphs 3(1)(e) to (h) of the Race Equality Directive, there is no specific legislation in Malta which prohibits discrimination in the provision of the said services. However, 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. This however is not sufficient since it means that discrimination by private actors in the field of housing is not covered by Maltese legislation. Furthermore, redress may also be sought under the Ombudsman Act 1995.

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 entitled “Equal Treatment in Employment Regulations, 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.

The Employment and Industrial Relations Act 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.”

4.2 Employers with an ethos based on religion or belief

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.

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?

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

4.3 Armed forces and other specific occupations

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

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

a) How does national law treat nationality discrimination?

b) Are there exceptions in anti-discrimination law that seek to rely on Art 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 state less persons in Malta and to any treatment which arises from the legal status of these individuals concerned;"

4.5 Work – related family benefits

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 employee and their partner. Certain employers limit these benefits to the married partners 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) Does national law permit an employer to provide benefits that are limited to those employees who are married?

(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

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 on average it is three days.

With regards to couples consisting of same sex partners, these are not given legal recognition by Maltese law. 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

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

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 in 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.

4.7 Exceptions related to discrimination on the ground of age

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?

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

Regulation 5 of Legal Notice 461 of 2004 reflects the provisions of Article 6 of Directive 2000/78:

(1) Notwithstanding regulation 3(1) and (2)²⁵, difference of treatment on the ground of age shall not constitute discriminatory treatment if: -

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

(b) 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: -

(a) the setting of special conditions on access to employment and vocational training, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

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

²⁵ Which deal with the concept of discriminatory treatment.

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Therefore, it may be seen that 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 under it taking up the possibility provided for by article 6(2) ?

When a person starts working, he/she is by law bound 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 4.7.4 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

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 age²⁶ 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, 1988,²⁷ 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.

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.

²⁶ 16 years of age.

²⁷ Act XXIV of 1988. Chapter 327 of the Laws of Malta.

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 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).

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 for longer, or can an individual collect a pension and still work?

The Social Security Act, 1987,²⁸ as recently amended, provides that the "pension age" in Malta is sixty-five; provided that (a) in the case of a person born on or before the 31st 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 31st December 1951, pension age shall be sixty years.

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 if one opts to continue working and no contributions are due.

As indicated above, the last proviso to Article 36 (14) of the Employment and Industrial Relations Act, 2002 provides that "the employer can terminate the employment of an employee when the employee reaches retirement age as defined in the Social Security Act".

The rights protecting employees from unfair dismissal are extinguished upon reaching retirement age.

²⁸ Act X of 1987. Chapter 318 of the Laws of Malta.

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 individuals 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 for longer, or can an individual collect a pension and still work?

No

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, 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.

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 then he would have been entitled to protection under the laws on discrimination. If, at 65, he continues working as explained in the previous page, he would not be afforded protection against dismissal on the grounds of age, however as he is still in employment he would retain some employment rights under other laws protecting employment rights during employment..

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

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 such²⁹ or on grounds of redundancy. It is to be noted, however, that an employee whose employment is terminated on grounds of redundancy shall be entitled to re-employment if the post formerly occupied by him is again available within a period of one year from the date of termination of employment. Furthermore such an employee must be so re-employed at conditions no less favourable than those to which he would have been entitled if the contract of service relating to him had not been terminated. Also, an employee who is re-employed shall, for the purposes of the Act, be deemed to have continued in his employment notwithstanding the termination due to redundancy.

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

²⁹ 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.

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment 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)(b) of Legal Notice 461 of 2004 provides that 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 in that any act done in or in connection with:

(a) 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

(b) encouraging such persons referred to in sub-regulation (1) (a) of this regulation to take advantage of opportunities for doing a particular work, shall be unlawful 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 of positive action exist in your country? Which are the most important? Refer, in particular, to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

The Persons with a Disability (Employment) Act, 1969³⁰ provides for the compulsory engagement, on a quota basis, of disabled persons registering for employment. Article 15 of this Act states, *inter alia*, that:

³⁰ Act II of 1969. Chapter 210 of the Laws of Malta.

“(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.

(6) The Minister may, in consultation with the Corporation, and after application is made in that behalf by any person to whom section 15 of this Act applies, reduce the standard percentage or special percentage, as the case may be, applicable to him if it is proved that his quota would be too great having regard to the particular circumstances in which all or any of

the persons employed by him, are employed, which reduction shall be for a term not greater than twelve months.”

In accordance with article 15(8), this provision is applicable to a person employing not less than twenty (20) workers. The employers are obliged to keep a register showing the number and the names of persons employed, the number and the names of registered persons employed and other matter which would be useful for the company to show compliance with this Act³¹. Any person who commits an offence against any of the provisions of this Act or of any regulations made thereunder shall, on conviction, be liable to a fine (*multa*) not exceeding one hundred liri or to imprisonment not exceeding three months or to both such fine and imprisonment.

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

6. REMEDIES AND ENFORCEMENT

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

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- b) *Are these binding or non-binding?*
- c) *Can a person bring a case after the employment relationship has ended?*

In relation to each, 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)?

Maltese legislation lays down various courses of action that one may follow should an individual believe that they were 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 for 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).

³¹ Article 20 (1) of Chapter 210 of the Laws of Malta.

The Employment and Industrial Relations Act does not make mention of 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 section 2 of this section continues by saying that, any submission to arbitration in regard to any dispute, 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 reasonable sums of money as compensation to the aggrieved party”.

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

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.

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:

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

Article 30 of the Act provides that if a person alleges that his employer is, or that the conditions of employment are, in breach of Articles 26 to 29, he may lodge a complaint to the Industrial Tribunal as described in more detail above.

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

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

- (i) ensuring that all government programmes concerning the affairs and interests of persons with disabilities, their families and voluntary bodies working in the field of disability issues, are implemented in accordance with national policies for disability issues;
- (ii) ensuring the necessary co-ordination between all government departments and agencies in implementing measures, services or initiatives proposed by government or proposed by the Commission from time to time;

- (iii) monitoring the provision of services offered by the government or its agencies or by any other person or group of persons, where the clients of such services are persons with a disability;
- (iv) working towards the elimination of discrimination against people with disabilities;
- (v) carrying out general investigations with a view to determining whether the provisions of the Act are being complied with;
- (vi) investigating such complaints as may be made to them regarding a failure to comply with any provision of the Act in an individual case and, where it seems appropriate, conciliate in relation to such complaints;
- (vii) providing, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act;
- (viii) keeping under review the working of the Act and, when deemed necessary by the Commission or so required by the Minister, draw up and submit to the Minister proposals for amendments to same;
- (ix) examining enactments, and (when requested to do so by the Minister) propose enactments, for the purpose of ascertaining whether the enactments or proposed enactments are or would be, inconsistent with or contrary to the objects of the Act, and to report to the Minister the results of any such examination.

(c) The National Commission for the Promotion of Equality for Men and Women which is provided for under Article 11 of the Equality for Men and Women Act, 2003.

(d) The Public Service Commission, set up in terms of Article 109 of the Constitution of Malta;

(e) The Ombudsman, appointed in accordance with Article 3 of the Ombudsman Act, 1995;³²

(f) 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.

(g) The Employment Commission, which is established under Article 120 of the Constitution of Malta.

The function of this Commission to ensure that, in respect of employment, no distinction, exclusion or preference that is not justifiable in a democratic society is made or given in favour or against any person by reason of his political opinions.

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) *in support of a complainant*
- b) on behalf of one or more complainants?

³² Act XXI of 1995. Chapter 385 of the Laws of Malta. See page 6 above.

Associations

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

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

Until the publication of Legal Notice 461 of 2004, 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 has not been any 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 or in support of the complainant, with his or her approval, in any judicial or administrative procedure provided for the enforcement of obligations under these regulations.

An entity that is legislatively empowered to assist a complainant of alleged discriminatory treatment is the National Commission Persons with Disability. This Commission is empowered to provide, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act.³³ 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.³⁴

Legal Notice 13 of 2001 issued in terms of Article 33 of the Act and entitled “Procedure for the Investigation of Complaints Regulations, 2001”³⁵ 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.³⁶

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.

³³ Article 22(k).

³⁴ Article 32(3).

³⁵ In force as from 1 October 2000.

³⁶ Regulation 5.

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

b) on behalf of one or more complainants (please indicate if class actions are possible)

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.

6.4 Victimization (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses or persons that help the victim of discrimination to present 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.

With regards to that which is provided for under Article 9 of the Racial Equality Directive, as yet Maltese law does not specifically provide protection to individuals who may be subjected to adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment, other than for instances relating to employment which would be covered by Article 28 of the Employment and Industrial Relations Act, 2002.

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.³⁷

Furthermore, under Article 32, any person contravening the provisions of Articles 28 and 29 shall be guilty of an offence and shall be liable on conviction to pay a fine not exceeding one

³⁷ It is to be noted that in terms of Article 1045(1) of the Civil Code (Chapter 16 of the Laws of Malta), damage which is to be made good by the person responsible for causing such damage shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused. Thus, only real damages could be awarded. There have been very few cases concerning violations of human rights, where moral damages have been awarded. In its report mentioned in footnote 11 above, the Malta Gay Rights Movement expressed its reservations as to whether such provision could be an effective deterrent in cases of discrimination on grounds of sexual orientation since it would appear to be more of a case where moral rather than real damages would be suffered.

thousand Liri (Lm1000)³⁸ or to imprisonment for a period not exceeding six months or to both.

Apart from the above, Article 48(4) provides that any regulation made under the Act may provide for any matter relating to liability for the observance of such regulations, and the persons who may be liable, and for any matter relating to the enforcement of the said regulations, including, but not limited to, the imposition of a fine not exceeding five thousand liri (Lm5000)³⁹ 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 five hundred Liri (Lm500) but not exceeding five thousand Liri (Lm5000).⁴⁰

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 two hundred Liri (Lm200)⁴¹ 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.

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.⁴²

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 there have not been any reported decisions in this respect. This is one of the few instances where the victim can be awarded compensation since in the majority of cases the perpetrator of the discriminatory treatment can be ordered to pay a fine. This fine is paid to the State.

c) Is there any information available concerning the average amount of compensation available to victims and the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

No

³⁸ Equivalent to €2,500.

³⁹ Equivalent to €12,500.

⁴⁰ Equivalent to €750 to €12,500.

⁴¹ Equivalent to €500.

⁴² 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), 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?

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.

The body has not been designated yet but the Maltese Government plans to extend the mandate of the Commission for the Promotion of Equality for Men and Women (NCPE) to cover the promotion of equal treatment irrespective of racial or ethnic origin.

The National Commission for the Promotion of Equality (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. 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.

The current primary task of NCPE is to monitor the implementation of the Act to Promote Equality for Men and Women and to promote equality in spheres where it may be lacking. The Commission seeks to ensure that Maltese society is a society free from any form of discrimination based on sex 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

Till now, it only deals with discrimination on the basis of sex.

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 this Act are being complied with;
- (iii) to investigate complaints of a more particular or individual character to determine whether the provisions of this Act 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;
- (vi) to keep under review the working of the Act, and where deemed required, at the request of the Minister or otherwise, submit proposals for its amendment or substitution;
- (vii) to perform such other function as may be assigned by law or such other functions as may be assigned by the Minister.

As the body is not yet designated, its functions might change.

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.

d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

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

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

In the Ombudsman Act, 1995⁴³, 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:

⁴³ Act XXI of 1995. Chapter 385 of the Laws of Malta. See article 22.

“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 2000 – 2004 the Ombudsman received 471 complaints of discrimination and during the same period 95 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.

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)

Public awareness in combating anti-discrimination, racism and xenophobia is an ongoing process. The amendments to the Criminal Code that came into force in May 2002 were widely publicised in the media, printed and audio-visual. Furthermore, 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. During the action week held in March 2001 to mark the International Day for the Elimination of Racial Discrimination, the Malta Ecological Foundation (ECO), a non-Governmental organisation, organised a campaign against racism and distributed free of charge educational material on the subject.

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

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 of 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.

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

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 with Article 12 of the Employment Equality Directive.

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

In spite of the fact that NGOs have been active in Malta for many years, as yet there is no law regulating NGOs in Malta. A bill was published (Bill 80 of 2006 - Voluntary Organisations Act, 2006) but has not yet been enacted since it is still in consultation stage.

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 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:

- (a) The National Employment Authority created in terms of the Employment and Training Services Act, 1990,⁴⁴ which is composed of three independent persons, two other persons appearing to the President of Malta to represent the interests of employers and two other persons appearing to the President of Malta to represent the interests of employees;
- (b) The Employment Relations Board created in terms of The Employment and Industrial Relations Act, 2002.

In Malta, there are various non-governmental organisations which are involved in the promotion of awareness of social issues. One such organisation is the Malta Gay Rights Movement (MGRM) which represents the Maltese gay, lesbian and bisexual community. The MGRM submitted to the Maltese government its position paper regarding the Bill on Employment and Industrial Relations, in which it proposed certain modifications with the purpose of implementing the provisions of Employment Equality Directive. A delegation from MGRM also held a meeting with the Minister for Social Policy, during which MGRM's position paper and the government's obligations under the above Directive were discussed. 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, 2001,⁴⁵ sets up the legal framework for the Malta Council for Economic and Social Development (MCESD). The MCESD, which is a body corporate having a distinct legal personality, is composed of 16 members: a chairperson who shall be appointed after consultation with the social partners; a deputy chairperson who shall be appointed by the Prime Minister from amongst members of the public service; nine persons nominated by representative national employers' and workers' organisations constituted bodies;⁴⁶ four representatives of the Government, representing the Ministries responsible for Finance, Economic Services, Social Policy and European Union Affairs and the Governor of the Central Bank of Malta, *ex officio*.

The mission statement of the MCESD, is that it is "a Consultative and Advisory Body to the Government on issues relating to the sustainable economic and social development of Malta, whilst providing a forum for consultation and social dialogue between social partners and, where necessary, with Civil Society organizations." To achieve this mission, the Council in

⁴⁴ Act XXVIII of 1990. Chapter 343 of the Laws of Malta.

⁴⁵ Act XV of 2001. Chapter 431 of the Laws of Malta.

⁴⁶ There are two representatives of the General Workers' Union, and one each of the following: Union Haddiema Maghqudin (a trade union), Confederation of Malta Trade Unions, Malta Employers' Association, Chamber of Commerce, Federation of Industry, Malta Hotels and Restaurants Association and the General Retailers and Traders Union.

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.⁴⁷

Preliminary discussions have been initiated to appoint an 'ad hoc' Consultative Standing Committee to interface with the Inter-Ministerial Committee (IMC) for Regional Policy. The MCESD also has a number of sub-committees, which meet on a regular basis.⁴⁸

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.

Are any laws, regulations or rules 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 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. OVERVIEW

There are no other important considerations to be made.

10. COORDINATION AT NATIONAL LEVEL

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

With regards to the Employment and Industrial Relations Act, the Minister of Education is responsible. While with regards to the Equal Opportunities (People with a Disability) Act and

⁴⁷ www.mcesd.org_mt/page.jsp?id=21&siteid=1

⁴⁸ 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.

the Equality for Men and Women Act the responsibility lies in the hands of the Minister for Social Policy.

ANNEX

Table of key national anti-discrimination legislation

Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Malta

Date: 1 February 2007

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
<i>This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.</i>	<i>Please give month / year</i>			<i>e.g. public employment, private employment, access to goods or services</i>	<i>e.g. prohibition of direct and indirect discrimination or creation of a specialised body</i>
Employment and Industrial Relations Act ⁴⁹	December 2002	Marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association	Civil Law/ Administrative Law	Private employment	Regulates employment in the private sector and, inter alia, prohibits discrimination
Legal Notice 461 of 2004 issued under the Employment and Industrial Relations Act	November 2004	religion or religious belief, disability, age, sexual orientation,	Civil Law/ Administrative Law	Private employment	Prohibition of discrimination on the grounds of religion or

⁴⁹ All Maltese Legislation (primary and secondary) may be viewed on: http://www2.justice.gov.mt/lom/Analytical_Index.asp?LangID=E&PubID=LG&PSB=B&LetterID=A

		and racial or ethnic origin.			religious belief, disability, age, sexual orientation, and racial or ethnic origin.
Equal Opportunities (Persons with Disability) Act	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
Equality for Men and Women Act	August 1987	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	April 1987	All grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.	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.

Constitution of Malta	September 1964	Protection from discrimination on the grounds listed in Article 45, that is, race, place of origin, political opinions, colour, creed or sex	Constitutional Law		
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Besides the national legislation which affords protection against discriminatory treatment, Malta is also a party to various international human rights instruments that provide for the protection against discrimination. These include: The European Convention for the Protection of Human Rights and Fundamental Freedoms and various protocols thereof (but not Protocol 12 thereof), The European Social Charter, The Framework Convention for the Protection of National Minorities, The International Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and ILO Convention 111 on Discrimination in Employment and Occupation, and the Revised European Social Charter of the Council of Europe.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Malta

Date: 1 February 2007

Instrument	Signed (yes/no)	Ratified (yes/no)	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?
European Convention on Human Rights (ECHR)	Yes	Yes	No reservation related to the right to education	Yes	Yes
Protocol 12, ECHR	No	No			
Revised European Social Charter	Yes	Yes		Collective complaints protocol not yet ratified	
International Covenant on Civil and Political Rights	Yes	Yes	The Government of Malta reserves the right not to apply article 22 to the extent that existing legislative measures may not be fully compatible with this article.		
Framework Convention for the Protection of National Minorities	Yes	Yes	No reservations.		
International Convention on Economic, Social and Cultural Rights	Yes	Yes	Article 13 - The Government of Malta declares that it is in favour of upholding the principle affirmed in the words " and to ensure the religious and moral education of their children in conformity		

			with their own convictions". However, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, which cases are very exceptional in Malta		
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No reservations	Yes – provided that the Committee shall not consider complaints without ascertaining whether the matter is not being considered or has not already been considered by another international body of investigation or settlement.	
Convention on the Elimination of Discrimination Against Women	Yes	Yes	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		

		<p>women in certain areas, or the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of Malta.</p> <p>Article 13 The Government of Malta reserves the right, notwithstanding anything in the Convention, to continue to apply its tax legislation which deems, in certain circumstances, the income of a married woman to be the income of her husband and taxable as such.</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 While the Government of Malta is committed to remove, in as far as possible, all aspects of family and property law which may be considered</p>		
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			<p>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 interpreted as imposing an obligation on Malta to legalize abortion."</p>		
ILO Convention No. 111 on Discrimination	Yes	Yes	No		
Convention on the rights of the child	Yes	Yes	No		