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**Summary of legislation implementing**

***Directive 2000/78/EC establishing a general framework  
for equal treatment in employment and occupation***

**with respect to sexual orientation**

**in Malta**

This summary was written in 2005 at the request of Kees Waaldijk & Matteo Bonini-Baraldi, when they were writing their book *Sexual orientation discrimination in the European Union: national laws and the Employment Equality Directive* (The Hague: T.M.C. Asser Press, 2006), and has been published on the website of the E.M. Meijers Institute of Legal Studies of the Universiteit Leiden; see [www.emmeijers.nl/experts](http://www.emmeijers.nl/experts).

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## 1. General Legal Situation

Legislative power in Malta is always vested in the Parliament. However, it is common practice for Acts of Parliament to contain 'enabling provisions' that grant the power to the Minister responsible for a given area of policy to publish subsidiary (or delegated) legislation. The regulations so issued however have to be within the limits of the power vested in the Minister by the wording of that enabling provision in the Act of Parliament in question.

Protection from discrimination in the Maltese legal system can be found scattered in the provisions of the Constitution, the European Convention Act,<sup>2</sup> the Equal Opportunities (Persons with Disability) Act,<sup>3</sup> the Employment and Industrial Relations Act,<sup>4</sup> the Equality for Men and Women Act,<sup>5</sup> the Employment and Industrial Relations Interpretation Order<sup>6</sup> and the Equal Treatment in Employment Regulations.<sup>7</sup>

Article 45 of the Constitution of Malta states that 'no law shall make any provision that is discriminatory either in itself or in its effect'. It also states that 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'. Paragraph 3 of article 45 however then defines 'discriminatory treatment' as '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.' The list of grounds being exhaustive, protection from sexual orientation discrimination under the Constitution is excluded. Moreover, the same article lists a considerable number of exceptions to the prohibition of discrimination. These include laws on marriage, adoption and other matters governed by the law on personal status as well as qualifications for service as a public officer or service with a local government authority or body corporate established for public purposes by any law. There is also a specific exemption for someone teaching Roman Catholicism having to profess that faith. Being a public law provision, the prohibition of discrimination under article 45 of the Maltese Constitution does not extend to private individuals.

The European Convention Act, which incorporates into the laws of Malta provisions of the European Convention on Human Rights and Fundamental Freedoms, reproduces the wording of article 14 of the Convention, which bans discrimination, on any ground, but only in matters relating to the enjoyment of the freedoms set out in the Convention, and therefore discrimination in

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<sup>2</sup> Chapter 319 of the Laws of Malta

<sup>3</sup> Chapter 413 of the Laws of Malta

<sup>4</sup> Chapter 452 of the Laws of Malta

<sup>5</sup> Chapter 456 of the Laws of Malta

<sup>6</sup> Legal Notice 297 of 2003

<sup>7</sup> Legal Notice 461 of 2004

employment in the private sector would not be covered. Malta also has yet to sign and ratify Protocol 12 to the European Convention. However, the Act states clearly that its provisions are to take precedence, in cases of conflict, over any other ordinary law.<sup>8</sup>

The Equal Opportunities (Persons with Disability) Act and the Equality For Men and Women Act contain provisions on disability and sex discrimination respectively. The former Act covers discrimination in employment, education, access to premises, provision of goods, facilities and services and accommodation. The Equality For Men and Women Act, on the other hand, covers employment, the provision of financial services, education and vocational training and bans discriminatory advertisements. Despite the fact that it does not cover sexual orientation discrimination, it also contains provisions on sexual harassment which are worded in gender-neutral terms and which would therefore cover sexual harassment between two persons of the same sex, this also applies outside the workplace.

The protection from employment discrimination under these two Acts is to a large extent analogous to that afforded under the Employment and Industrial Relations Act, which came into force on 2 and 27 December 2002. This Act governs employment relations in the private sector and consequently does not apply to government employment or to employment in the disciplined forces. Article 48 of the Act however lays down that the Prime Minister can prescribe, by regulations, which provisions of the Act are to be made applicable to public employment. So far however no such regulations have been published.

This Act contains a chapter on discrimination in employment and more specifically, a general ban on discrimination. The non-exhaustive list of grounds of discrimination given in the definition of 'discriminatory treatment' does not mention sexual orientation specifically but includes marital status. The prohibition of harassment on the other hand is limited to that based on the sex of the victim. This Act was initially deemed by the Maltese Government as being sufficient in transposing the Directive into Maltese law. Subsequently however, it became clear that this was not the case, and in October 2003 the Minister for Social Policy published the Employment and Industrial Relations Interpretation Order, which instructed the Industrial Tribunal to take into account the provisions of the Directive when interpreting the Employment and Industrial Relations Act and referred explicitly to sexual orientation as a ground of discrimination.

This Legal Notice was however still not sufficient and, following a Cabinet reshuffle, the Minister for Employment, Education and Sports published, in October 2004, the Equal Treatment in Employment Regulations, which contain provisions that represent the most comprehensive transposition of the Directive to date. The Regulations in fact go much further than the provisions of the Act. They came into force on the 5 November 2004.

Due to the recent enactment or publication of the above-mentioned legislation, and also probably due to the lack of a support structure for victims of sexual orientation discrimination, which is certainly crucial in ensuring the effective application of the new rights in a conservative society such as that in Malta,

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<sup>8</sup> The phrase 'ordinary law' means any law of Malta excluding the Constitution.

no cases have as yet reached the Courts or the Industrial Tribunal on sexual orientation discrimination.

Apart from protection in the field of employment and in the enjoyment of the rights guaranteed under the European Convention, legislation against sexual orientation discrimination in other areas in Malta has still to be enacted. In the field of criminal law, no discrimination can be found in the wording of the law. However, discrimination can result from the enforcement of the crime of 'defilement of minors'. This crime is committed when an individual defiles a minor by 'lewd acts'. It is equally applicable when the perpetrator is of the same or of the opposite sex as the minor. However the crime is prosecutable by the police upon receipt of a complaint by either the minor in question or his or her legal guardian. This may therefore lead to a higher incidence of cases in which the minor and the perpetrator are of the same sex, given that there may be parents who would not resort to legal proceedings should their 17-year old child have sexual relations with another person of the opposite sex but would do so if the person is of the same sex. Moreover, even another minor can be guilty of this crime, and therefore you could have the situation of a minor being prosecuted for 'defiling' another minor. 'Lewd acts' do not necessarily refer to sexual intercourse or even sex; even a violent kiss has been deemed by the Maltese criminal courts as amounting to a 'lewd act'.<sup>9</sup>

In the family law area, same-sex relationships and de facto relationships in general are to a large extent ignored. The only exceptions are in some matters relating to social assistance with housing and a Bill on Domestic Violence that is currently being debated in Parliament will extend protection to any person living under the same roof as the perpetrator, including cohabiting partners.

## **2. The prohibition of discrimination required by the Directive**

The main legislative instruments that transpose the Directive into Maltese law are the Employment and Industrial Relations Act (EIRA) and the Equal Treatment in Employment Regulations (ETER). Article 2 of the EIRA defines 'discriminatory treatment' as 'any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.' Sexual orientation was therefore not originally referred to explicitly when Malta's labour legislation was overhauled in 2002. Moreover, there was no reference whatsoever to direct or indirect discrimination, instruction to discriminate or harassment in the definition.

Regulation 1(3) of the ETER remedied these shortcomings by amongst other things making express reference to sexual orientation as a ground of

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<sup>9</sup> See *Police vs. Spuru Silvio*, judgment of the Court of Criminal Appeal (Inferior) of 12 March 1960. This case dealt with what constituted an 'indecent act' under the offence of violent indecent assault, but jurists have held that this would be the equivalent of a 'lewd act' under the offence of defilement of minors. In this case the Court pointed out that a violent kiss shows an intent to satisfy one's lust and therefore constitutes an indecent act, as opposed to a consensual kiss which happens normally.

discrimination. This was undoubtedly a positive development given that an explicit reference to sexual orientation was necessary in order for the principle of legal certainty to be respected. This also appeared to be the position adopted by the European Commission.<sup>10</sup> Unfortunately it took the Maltese Government three years to acknowledge this, and the result of this reluctance may be still observed in the overall legislative framework and certain shortcomings, as will be described further below.

The ETER also included indirect discrimination, instruction to discriminate and harassment as instances which amount to discrimination. The definitions of the various terms given by the Directive are also mirrored in the Regulations, which give definitions which are almost identical to those given by the Directive.<sup>11</sup> The only minor departure from the text of the Directive is with respect to the definition of harassment, which under Maltese law does not require the act in question to 'violate the dignity of the person' AND create 'an intimidating, hostile, degrading, humiliating or offensive environment' but merely that it either does one or the other. In other words, the two requirements are alternative, not cumulative for the offence to arise.

As for the scope of the Directive, the following concerns need to be pointed out: The Directive also clearly covers self-employment, which neither the Act nor the Regulations make any reference to. More worryingly, the Act excludes, in its definition of the term 'employee', work performed in a professional capacity, whereas the Directive clearly does not. On the other hand, vocational training and guidance are covered by the Regulations. The Regulations also lay down that employment agencies, workers' organizations and professional bodies, as well as employers' organizations, are no longer allowed to discriminate against their members or in the provision of their services, on any of the grounds listed in the Regulations.

It should also be noted that neither the Employment and Industrial Relations Act (EIRA) nor the Equal Treatment in Employment Regulations (ETER) apply to public employment, since this is regulated under Chapter X of the Constitution. This Chapter sets up a Public Service Commission which has the power to advise the Prime Minister on the recruitment and disciplinary action against public service employees. Furthermore, public employment is not regulated under the ordinary laws (i.e. the EIRA and ETER) but under special regulations enacted under the Constitution, which do not however include any provisions against sexual orientation discrimination. Acts of the Public Service Commission cannot be challenged in any Court and the jurisdiction of the Industrial Tribunal is specifically excluded in article 75 of the EIRA.

The EIRA on the other hand states, in article 48, that the Prime Minister may by regulation prescribe which provisions of the EIRA are to apply to public

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<sup>10</sup> During an official visit to Malta in May 2003, Ms. Odile Quintin, Head of DG for Employment and Social Affairs stressed the need for sexual orientation to be mentioned specifically as a ground of discrimination while she was giving comments to the media. She said, "*there still needs to be more precision about anti-discrimination on all grounds, including age, including race, including sexual orientation, and this still needs to be further addressed*" (as reported on Net News, Net TV, 10<sup>th</sup> May 2003).

<sup>11</sup> Regulation 3(2)(a) and (b), 3(3) and 3(4)(a)

employment. No such regulations have been issued so far however. Thus the position to this day is that there is no protection from sexual orientation discrimination in public employment, although the government would be bound by the European Convention on Human Rights and might also be held liable under the Directive under the doctrine of vertical direct effect.

The main concern under this heading is that whereas the ban on all forms of harassment was another positive development and was long overdue, as well as the ban on discrimination by trade unions, professional bodies, employers' associations and employment agencies, it is doubtful whether the legal basis for these Regulations, i.e. articles 31 and 48(2) of the Act, was wide enough to justify the publication of the Regulations. This is mainly due to the fact that the said articles empower the Minister to issue regulations with a view to, for example, 'give better effect' to the provisions of the Act, or to 'regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal' of cases of discrimination, or for the 'carrying out and giving better effect to' the provisions of the Act. The regulatory power being so defined, it can hardly be said that it was justified to publish regulations which quite clearly *extend the scope* of the Act by, among other things, creating new offences (such as for example the ban on harassment on all grounds mentioned in the Regulations)<sup>12</sup> or imposing new legal obligations on persons that were hitherto not covered by the Act (such as employment agencies, trade unions and employer's organizations). The Minister might have therefore, with regard to some of the Regulations, acted *ultra vires*. Moreover, there is a contradiction between the Act and the Regulations in the sense that the former only bans harassment when it constitutes sexual discrimination whereas the latter extends the ban on harassment also to the other grounds contained in the Directive. This certainly gives rise to confusion. On the other hand, in application of the obligation of national courts to interpret national law in conformity with Community law, the Industrial Tribunal and the Civil Court might interpret articles 31 and 48(2) in a wide sense to justify the publication of the Regulations. The fact that there might be the possibility of criminal sanctions however might cause them to adopt a more cautious approach. It has to be kept in mind that although under the Directive 'harassment' is included within the concept of discrimination, the same does not apply to the Act, and therefore the reference to 'discrimination' in the legal basis under which the Regulations were published refers to this more restricted concept, thereby allowing a narrower range of measures that may be adopted by the Minister.

With regard to some aspects of the Regulations, the position under Maltese Law has now gone further than the minimum standards set out by the Directive. Such is the case, for example, of the obligation contained in Regulation 3(4)(b) on any persons covered by the ETER to suppress harassment at their workplaces or within their organizations.<sup>13</sup> Such an obligation provides further motivation for employers to make sure that they

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<sup>12</sup> The Act provides for a ban on sexual harassment and also for a more general ban on other forms of harassment, but only where this is based on 'sexual discrimination'. Thus extending this to cover the other grounds may be seen as amounting to a widening of its scope.

<sup>13</sup> This would hold however, only in the event that the ban on harassment is not deemed to have been *ultra vires*.

abide by their obligation to inform their employees as to their rights under the Regulations.

### **3. What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?**

Lacking any definition of sexual orientation under the Act or the Regulations, it is difficult to foresee the breadth that the Industrial Tribunal and the Civil Court will give to the term, particularly given that they have until now had little opportunity to deal with this issue. It is quite clear however, that actual sexual orientation, both in terms of preference and of behaviour, should be covered. As for assumed sexual orientation, given that the Regulations reproduce the wording of the Directive, it should be covered as well. Coming out should therefore also not be a legitimate cause for adverse treatment permitted under the Regulations, subject to the religious exemption analysed further below. Likewise, it should be expected that adverse treatment due to a refusal to answer a question about sexual orientation, or giving an inaccurate answer, should also be prohibited.

Discrimination between same-sex and different-sex partners would still be allowed under Maltese law given that *de facto* unions are not granted any form of recognition under labour law. Neither the Act nor the Regulations refer to this issue at all however, and therefore it remains to be seen whether in some cases this form of discrimination between married and unmarried couples could amount to indirect discrimination.

As for discrimination due to association with a person belonging to a protected group, the Regulations are also silent. On the contrary, the Equal Opportunities (Persons with Disability) Act contains a provision precisely on this issue,<sup>14</sup> but as the name implies, it is limited to disability discrimination. Discrimination against LGB organizations in areas beyond employment is also not provided for, save for the protection of fundamental rights emanating from the Constitution and the European Convention.

Harassment would undoubtedly be covered and, as has been noted above, Maltese law provides that the requirements laid down by the Directive for an act to constitute harassment are alternative and not cumulative.

### **4. Exceptions to the prohibition of discrimination**

The provisions of the Directive on objectively justified indirect disadvantages, occupational requirements and the public security exceptions have been reproduced *verbatim* in the ETER. In contrast, the Regulations are silent on the issue of their applicability to social security and similar payments. On the other hand, they prohibit discrimination with respect to conditions of employment, which is defined in the EIRA as including any benefit resulting from the employment.

A serious concern however relates to the exemptions given to employers who have 'an ethos based on religion or religious belief'. Whereas the Directive

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<sup>14</sup> Article 9.

does contain such an exemption in article 4(2), it clearly states in that same article that 'Member States may *maintain* national legislation *in force at the date of adoption of this Directive* or provide for future legislation incorporating *national practices existing at the date of adoption of this Directive...*' (emphasis added). This, also taken in combination with article 8(2) of the Directive, merely lays down that if these employers benefited from such exemptions *prior* to the adoption of the Directive (or in Malta's case, prior to its accession to the EU), then such exemptions may be retained. The Directive clearly does not permit the introduction of new exemptions not existing prior to the adoption of the Directive. The wording of the Directive suggests that any practices had to have some form of official recognition and that it was specifically churches that benefited from some form of preferential treatment. The mere fact that discrimination took place should not be deemed to constitute such a 'national practice'. In the local context, no such legislative provisions or well documented and officially recognized practices existed prior to Malta's accession to the EU, and therefore Regulations 4(2) and (3) go contrary to the Directive. Even if such practices existed prior to the enactment of the Act, when the Act introduced the ban on discrimination it did not provide for any exemptions, and the position remained so until Malta's accession to the EU. Thus the introduction of exemptions under the Regulations are certainly to be considered as a 'step backwards' not allowed under the Directive.

With respect to positive action, the Regulations state that this is allowed in order to afford a person belonging to one of the protected groups access to benefits relating to training which would help them prepare for a particular type of work or in order to encourage them to take advantage of opportunities for doing a particular type of work.<sup>15</sup> This is allowed only 'when it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to any of the grounds referred to'.

The Regulations also make specific provision for upholding the validity of clauses in collective agreements which lay down anti-discrimination rules which comply with the minimum standards laid down in the Regulations.

## **5. Remedies en enforcement**

Maltese labour law is enforceable mainly through the Industrial Tribunal, which has jurisdiction to hear cases of unfair dismissals and any other matters over which it has jurisdiction by virtue of the EIRA or regulations prescribed under it. These include the ETER which also states that the Civil Court has jurisdiction if the victim is seeking compensation instead of the imposition of criminal sanctions.

There exist as yet no enforcement bodies which assist victims of sexual orientation discrimination. Such bodies so far have been set up only to deal with sex and disability discrimination.

A person who deems himself wronged under the Act or the Regulations has the possibility of either lodging a complaint with the Industrial Tribunal, in

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<sup>15</sup> Regulation 6.

which case proceedings will be criminal in nature, or they might opt to ask for compensation before a Court of civil jurisdiction. With regard to the former, article 10 of the Directive on the sharing of the burden of proof does not apply. With respect to civil proceedings however it does. The issue is addressed in Regulation 10(3), which is inadequate for a number of reasons. This provision merely states that in legal proceedings instituted for a breach of the principle of equal treatment, it is sufficient for the victim to prove that discrimination occurred, and that it shall then be incumbent on the defendant to prove that his actions were justified under any of the provisions of the Regulations.

First of all, this provision does not state clearly that it is not applicable to criminal proceedings. Secondly, it does not reflect the real purpose behind this article of the Directive, which merely requires the plaintiff in civil proceedings to make a *prima facie* case in proving discrimination, and not to go all the way in proving it. As it stands, Regulation 10(3) merely restates what is a general principle of Maltese procedural law, as expressed in article 562 of the Code of Organization and Civil Procedure, i.e. that whoever alleges something in a court of law is bound to prove it. This regulation is therefore both superfluous and inadequate in transposing article 10 of the Directive.

The prohibition on victimization contained in article 11 of the Directive was transposed into Maltese law with the enactment of the Act, which prohibits victimization in article 28. The obligation imposed on Member States to disseminate information as to the rights protected under the Directive is on the other hand passed on to employers and to the other organizations covered by the Regulations. Whereas this might be seen as another positive development, it remains to be seen how the authorities will ensure that such an obligation is complied with.

Another positive development introduced by the Regulations was the introduction of the right to request a report from the employer in cases where discrimination occurs. Regulation 9(1) lays down that after the discrimination takes place, the victim or the Director for Industrial Relations can ask the employer or whoever is alleged to have discriminated for a written report in which the person alleged to have discriminated has to give their version of events. This report does not have to be in any specific form as long as it is written, and therefore a letter would suffice. It has to reach the victim within ten working days. If the person involved does not reply, or replies in an unclear way, this fact will be used against them if legal proceedings are instituted and it will be inferred that they 'had something to hide'. This is not however an obligatory procedure and if resorted to it has to be utilized before the institution of the action. Its purpose is to try and obtain evidence as soon as possible and thereby assist victims in enforcing their rights. In fact Regulation 9(3) states that if the action has started already and a request for a report is made, then the alleged perpetrator will be under no obligation to reply.

The specific reference to 'organizations having a legitimate interest' in Regulation 11, and the fact that they have been granted legal standing in assisting victims of discrimination is both welcome and in conformity with the Directive. However, in reproducing the wording of the Directive by saying that they can support the victim in 'judicial or administrative procedures', it is

doubtful how a legitimate interest organization could request a report from the employer as per Regulation 9, since that procedure will probably not be deemed to be either judicial or administrative in nature.

One final issue of concern is a direct consequence of the rules on quantification of damages under Maltese law. The Directive makes it clear in article 17 that sanctions that are to be applied on a breach of the principle of equal treatment must be 'effective, proportionate and dissuasive'. Whereas in criminal proceedings this requirement may be said to have been respected, the same cannot be said in all cases when compensation is sought in civil proceedings, due to the prohibition of the award of non-material damages under Maltese law. A problem may arise for example, where the discrimination occurred in relation to access to employment, where material damages beyond the cost of getting to the place where the interview took place may be hard to envisage.

## **6. Reform of existing discriminatory laws and provisions**

There are currently no laws or administrative provisions relating to employment that may be deemed as being discriminatory in Malta, at least in so far as these go contrary to the Directive. As for discriminatory clauses contained in contracts, collective agreements, internal rules of undertakings, rules on independent occupations or professions or workers' or employers' organizations, their nullity is ensured by Regulation 13 of the ETER.

## **7. Conclusion**

Whereas the publication of the Regulations was definitely a step forward in a full and proper implementation of the Directive, the overall legal framework currently in place fails to satisfy the principle of legal certainty. This is mainly due to the following reasons:

- The existing legal framework consists of three legal instruments which in some cases contradict each other. This approach is both fragmented and incoherent.
- Protection from discrimination across the different grounds is regulated differently. Some grounds are included in the Act, whereas others are covered by the Regulations. This enshrines in the law the so-called 'hierarchy of discrimination' and while it creates confusion as to the degree of protection given to different categories of persons, it also gives the mistaken impression that some groups are worthy of more protection than others.
- As stated above, the publication of some of the regulations might be deemed as not justified taking into consideration the legal basis under which they were issued. This creates confusion as to their legality.