CIVIL SOCIETY
PROJECT REPORT
2005

ANTI-DISCRIMINATION, INCLUSION AND EQUALITY IN MALTA

Edited by PETER G. XUEREB
(Project Co-ordinator)

THE EUROPEAN DOCUMENTATION AND RESEARCH CENTRE
JEAN MONNET EUROPEAN CENTRE OF EXCELLENCE
UNIVERSITY OF MALTA

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FOREWORD

I am pleased to introduce this Report on Anti-Discrimination, Inclusion and Equality in Malta. The report appears one year after Malta joined the European Union. It is the fruit of the labours of many under the umbrella of the Civil Society Project, co-ordinated by the European Documentation and Research Centre as a Jean Monnet European Centre of Excellence. The aim of the Project is more fully set out in the introductory chapter, but the focus is on Malta's experience as a Member State and this includes as a main component the response and experience of civil society in this context.

The list of contributors indicates the names of the authors of each of the several reports. Of course, my thanks are due in a special way to them, for making available their time and expertise, gratis and most generously, in pursuit of the common cause of equality. However, I emphasise that very often the work involved was the result of group work, and of meetings in which several other experts and players in the fields covered by the project participated, and therefore a fuller list of participants is included to indicate this other more general input from which the Project has benefited. Also, many of the participants could only take part with the support of their organizations, public and private, and this must also be recorded.

Every effort has been made to state the position across the several grounds of discrimination, in law and practice, as at May 2005, and to do so as comprehensively and holistically as possible. If there be shortcomings, and if there be the need to return to some of the themes, as I already foresee, this can hopefully be remedied in future years of the Project, perhaps as early as the coming year.

The Project is part-funded by the European Commission for the first three years of its five-year duration. This means that the EDRC has to raise the balance of the funds from public interest-minded public and private sources, and will be entirely dependent for the last two years of the Project on these sources and whatever can be made available out of its own budget. I am very pleased therefore to record that such support has been generously given for this first year by the sponsors whose names and logos appear on the covers of this Report. I hope that the efforts and results evidenced by this report will inspire also others to offer their support to the next and subsequent years of the Project. I have faith that more benefactors will emerge to enable us to achieve the aims of the Project with even greater effect than this year for the common good.

This report will form the backdrop to public discussion and debate in a National Conference to be held on September 15th of this year. The Conference is aimed at civil society in general. An international cast of speakers will address the Maltese public on trends in other Member States and in the development of Union policy in the area of discrimination and equality, and workshops will carry forward the debate and provide an opportunity to reach conclusions and make recommendations against that background and the findings of this report itself.

My thanks then once again to the University, to our sponsors and to the European Commission, to the expert authors of the various reports, to all participants in the research work and to all future participants in the Project, namely the attendees at the National Conference in September, for they too will, through their participation, become part of the ongoing Project. Of course, my thanks to the EDRC staff, and especially Ms. Doris Mangion and Ms. Joanne Navarro, whose unstinting efforts underlie all results of each EDRC project.

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INTRODUCTION

WORKING TOWARDS EQUALITY AND INCLUSION IN MALTA: THE CIVIL SOCIETY PROJECT

PETER G. XUEREB

The European Documentation Centre of the University of Malta was designated a Jean Monnet European Centre of Excellence in October 2004. Contemporaneously, it won a grant from the Jean Monnet Project to work on a range of issues connected to citizenship and civil society, and the general issues raised by actual membership of the European Union for Malta and Malta's role as a Member. This would include the Euro-Mediterranean dimension of Malta's role, a theme that we plan to introduce from the second year, starting in October 2005.

It is clear to any observer that Maltese civil society is itself in its tender years. It is itself in need of nurturing. Malta is not the only Member State where this is the case. Yet, Malta's experience in developing the role of civil society can be of direct relevance in the assertion of an effective Euro-Med role for Malta. It was decided that in the first year of the five-year Project it would be salutary, and a good grounding for further work, to focus on Malta's own experience, including that of its fledgling civil society, in adapting to the *acquis communautaire* in legal and socio-political terms. It is clear that at some point in the near future the Project will turn also to the Mediterranean dimension. A fundamental question in this second context is whether the lessons learnt in Malta and in Europe generally can be transposed as such to the non-Member Mediterranean countries. Even putting it in these terms is problematic, because no country, let alone region, is like any other and generalizations are only to be very cautiously made after exhaustive study. Therefore, we should start from the premise that lessons learned in Malta need to be analysed, but that the Mediterranean dimension involves an approach that does not start from any preconceptions about ease of transposition of these lessons, or indeed of those offered up by the experience of other Member States, to the Mediterranean context. The fact of Union membership itself, a crucial factor in the case of Malta, but not for the moment even foreseeable for our southern neighbours, is also a fundamental distinguishing factor that cannot be ignored.

Having said this, it is core and primary to the Project to monitor, examine, and add value to, Malta's membership experience. This will continue. The current study has focused on Anti-Discrimination, Inclusion and Equality under the *acquis* and Maltese law and practice. It was carried out between October and June 2005, and states the position effectively as at

May of 2005. This means that as far as implementation of the *acquis* is concerned, the studies report on the state of play at that time. The deadlines for transposition of certain measures have not yet elapsed. Even so, the studies indicate what amendments to current law may be required. Beyond that, in the absence of any legislative proposals in that regard having been tabled by the government, it has been only possible to say that such need to be tabled and passed. This applies in particular in the field of racial discrimination conceived broadly as including the treatment of refugees and asylum seekers. It is anticipated that study of this area will continue or be resumed under the Project at a later date. As far as Gender equality is concerned, several of the studies indicate the changes that are required for the *acquis* in this area to be fully implemented, with the required areas of amendment of Maltese law being identified.

This and subsequent studies in this Project will highlight what may be called 'horizontal' questions. The foremost among these is the need for legislation in Malta regulating NGOs. The current lack of regulation leaves NGOs in a limbo of non-recognition, non-regulation and consequent non-influence and non-accountability, as well as deprived of the sort of assistance that is their due -from the state and under EU programmes- in return for their contribution to the welfare of society. This would be a major step forward in the nurturing of civil society in Malta. While a White Paper and a Bill are known to have been in draft form for many months, they have not been made public by the time of conclusion of this report although pressure is being exerted on government all the time and we may shortly hear news on this front.

The studies included in this report point to a number of conclusions that will be the subject of discussion at the National Conference at which the report will be presented formally and discussed, and also beyond. These include:

1. Transposition of EU Directives is not always precise. This applies not only to obvious points such as the scope (in the sense of reach or coverage) of the law, or the definition of conduct that is prohibited, but also to the less obvious such as the adequacy and effectiveness of sanctions and remedies. In some cases, such as the question of remedies, only the building up of a body of case-law will fully expose the suspected deficits, but already many contributors express serious concerns on these points.

2. NGOs often feel that there is room for fuller consultation and debate before matters are decided by government. This is a concern for NGOs. Examples include the question of "one equality Body or several?" Other examples are put forward by the authors of the reports on race/religious and age discrimination.

3. There has been little debate in Malta on Positive Action. Even the NGOs themselves have no 'Positive Action Agenda'. Nevertheless, there are signs that official government thinking in this area may be changing, though this does not seem to be mainly as a result of input by the NGOs. This means that there is much thinking to be done, with further study of the Maltese situation and comparative research to indicate the broad lines on which a policy may develop where required to establish real equality of opportunity. While some of the contributors argue for positive action as needed, such as in the gender

or religion or race fields, others are more circumspect about it in the field they cover, such as with regard to addressing sexual orientation discrimination.

4. With specific reference to race and/or religious discrimination, this sensitive area has rarely if ever been the subject of public discussion or even of academic enquiry. Malta is under an obligation to implement measures in the field of justice and home affairs that impact directly on the treatment of persons of other nationalities, races and creeds as they seek asylum on our shores, as also after they have been accorded a status that should secure them rights on a basis of equality. There is an urgent need to fully implement Directive 2003/9/EC. The integration of such persons and their families has to become a priority concern, supported by good policies in this regard. There is evidence of some government thinking on these lines. But the issue also relates to persons of Non-Catholic religious belief, even Maltese nationals by birth, such as Muslims, whose number is not negligible (numbers are not easy to come by, but it seems a few thousand would not be far off the mark), and who appear from the reports in this study to live their lives in a measure of alienation as a result of their faith, often adopting stratagems to avoid social interaction for fear of discrimination, or suffering in other ways that may include outright discrimination, overt or covert. Clearly there is much to be done to find a *modus vivendi* based on mutual respect and understanding. Forceful papers appear in this section of the Report; they ask difficult questions of the majority of the population, which is asked indeed to look closely at itself, and to ask itself the meaning not only of tolerance but of respect going beyond tolerance. By the same token, the invitation is to minority groups to respect the views of others, which happen to be the majority of the population. Government, and all constituted bodies and authorities clearly have a great responsibility to re-think policies, not just on employment but in all spheres; and to create an inclusive society where balance is appropriately struck and discrimination, fear and victimization eradicated, for these ills clearly exist not only in peoples' minds but in day to day life in Malta. This study has only scratched the surface of the problem; but it is clear that much is hidden that needs to be brought to the surface. Future studies must continue to bring the truth out into the open. In the meantime, government has announced that a single equality body will be organized 'around' the existing gender equality body to assume the obligations deriving from the Race Directive. This body will shoulder a large part of this task and may yet have an even broader remit covering all grounds of discrimination. But nor must it be left only to a government body to champion equality, and NGOs in general will have a role to play in identifying the problem and forming part of the solution. They too must be empowered .

5. Social factors, including values and culture, generally play a large part in the equation. Facing up to one's own prejudice is never easy; nor is it easy to reach out to 'the other'. It may be that those who would be 'helped' themselves resist such 'help', that the 'assistance' on offer is not wanted or appreciated, or that a *modus vivendi* has been found (be this alternative sources of income, legitimate or not; over-reliance on family or social support structures). The studies in this Report testify, as have some other studies produced by other quarters, that this phenomenon is present - for example in the gender and the disability fields. Altering a status quo begs questions that many may not be prepared to contemplate. But being asked to do so at least causes one to question that status quo, and to ask whether other models on offer are not more truly consonant with

respect, including respect for fundamental human rights and enhanced personal development.

6. Then, as these studies show, Malta has made important strides forward, in terms of implementation of the *acquis communautaire*, and this in practically all areas. Indeed, it is even possible to say that in some areas Malta is well advanced (especially in the disability field), yet there appear to be two main problem areas in general. The first is the one referred to already: problems of enforcement, and the ability of the citizen to mobilize his or her rights and remedies. This extends from information about rights (both for the beneficiary of the right and those who might deny it) to access to bodies able to effectively represent the injured party and assist in the enforcement of rights, through to the imposition of adequate and dissuasive sanctions. The second refers to the area of positive action and the drawing up and implementing of pro-equality policies and legislation as well as 'soft law' or non-law measures.

There will be those who disagree with parts or all of this analysis. The Conference that is called to discuss this Report will be a major occasion to discuss the findings and these preliminary conclusions. In any event this is the first time that a Maltese project has approached and sought to present the issue of discrimination and equality in a holistic way. The Conference presents a prime opportunity to compare the approaches being taken -both at Union and at national level- to address in policy and implementation terms the issues raised by the various grounds of discrimination. Much can be learned from experience gained in the fight against one form or ground of discrimination that is transposable to the fight against other grounds of discrimination.

Every effort has been made to publish this Report in advance of the Civil Society Conference that is planned by the EDRC for September. It will there be assumed that attendees have become acquainted with its contents. We shall be hearing from a number of expert speakers from overseas as to trends and priorities in Union policy and the experience of other Member States. The object of the Conference workshops will be to juxtapose the findings of this Project and the aspirations of civil society here in Malta with these trends and experiences, and in this way to carry debates and efforts forward in the common task of working towards equality and inclusion.

GENDER

GENDER EQUALITY IN EMPLOYMENT IN THE EU AND MALTA: AN OVERVIEW BY THE NATIONAL COUNCIL OF WOMEN

GRACE ATTARD
DORIS BINGLEY

1. Overview of Equal Treatment for Men and Women in European Union Legislation

Equal treatment for men and women is a fundamental principle of the European Union. From the beginning the provisions of primary legislation set out in the Treaty of Rome stated this and since then, subsequent amendments have reinforced it, making it integral to the European Union's Social Policy.

The principle of equal treatment had developed from an isolated provision of equal pay in the Treaty of Rome, to a very important and far reaching *acquis* in the area of equality - a feature that sets Europe to the fore internationally. Article 2 EC recognises equality between men and women as a fundamental principle and one of the objectives and tasks of the community. Moreover, under Article 3(2) EC a specific mission is conferred on the Community i.e. to mainstream equality between men and women in all activities. The Amsterdam Treaty increased significantly the primary law and the European Union's ability to take action in the area of equal opportunities and equal treatment between men and women by giving to the Community legislator specific legal bases (articles 13, 137,141 EC).

The European Court of Justice has stressed that Article 141 forms part of the social objectives of the Community which is not merely an Economic Union but at the same time intended by common action to ensure social progress and seek constant improvement in living and working conditions. The Court concluded that the economic aim pursued by Article 141 EC is secondary to the social aim, which constitutes the expression of a fundamental right.

The Charter of fundamental rights of the European Union, signed in Nice on the 7th December 2000, also recognizes in Article 23 equality between men and women as a fundamental principle.

The existing Directives have laid the legal ground for radical changes in national legislation, attitudes and practices while the Court by its caselaw has helped clarify and further develop the interpretation and scope of the principle of equal treatment.

From a first directive (75/117/EEC) on equal pay which was adopted on the basis of article 100 in 1975, and which further implemented and applied ex-Article 119 of the EC Treaty, the scope of equal treatment has been extended to cover other areas of social policy. In 1976 a second Directive, dealing with equal treatment relating to access to employment, vocational training, promotion and working conditions (Directive 76/207/EEC) was adopted on the basis of ex-Article 235 EC. In 1979, a third Directive (79/7/EEC) relating to the progressive implementation of the principle of equal treatment in matters of social security (statutory schemes) was adopted on the basis of ex-Article 235 EC.

In 1986, two further Directives were adopted, one on the basis of ex-Articles 100 and 235 of the EC Treaty in relation to occupational social security schemes (86/378/EEC) and the other on the basis of ex-Article 235 of the EC Treaty on the application of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (86/613/EEC)

The successive modifications of the Treaty permitted the adoption of Directives with new legal bases and under other procedures emphasizing *inter alia* the role that the social partners can play in the area of equality, namely Directive on the protection of pregnancy and maternity (92/85/EEC) adopted on the basis of ex-Article 18A of the EC Treaty and on parental leave (96/34/EC). Directive 96/34/EC was the first directive adopted following the first agreement of social partners at Community level after the Maastricht Treaty under Agreement on social policy, annexed to the Protocol (No.14) on social policy, annexed to the Treaty establishing the European Community, and in particular Article 4(2) thereof.

Following a series of important judgements of the Court of Justice, it was felt necessary to adopt the post-Barber Directive 96/97/EC, amending Directive 86/378/EEC, in order to ensure conformity between Directive 86/378 and ex-Article 119 (new Article 141) as interpreted in the Barber and subsequent judgements.

Caselaw of the Court and the need for effectiveness of Community law prompted the Council, on the basis of a Commission proposal, to adopt Directive 97/80EC on the burden of proof under Agreement on social policy, annexed to the Protocol (No.14) on social policy annexed to the Treaty establishing the European Community and in particular Article 2(2) thereof.

Based on different legal bases, the existing directives with their amendments provide a strong legislative environment. There is no doubt however that they need to be updated and

simplified in order to guarantee greater clarity and certainty across an enlarged Union and in order to make them more readable.

The recent modification of Directive 76/207/EEC by Directive 2002/73/EC, adopted under the specific legal base of Article 141 (3) EC which was introduced by the Amsterdam Treaty also demonstrated that the legislator agreed that there is a real need to update existing Directives (some of which are more than 20 years old). Directive 2002/73/EC takes into account the new developments in the Treaty (the legal means to implement the principle of equal treatment and work towards achieving equality between men and women was considerably enhanced after the Amsterdam Treaty) the case law of the Court (which developed considerably the principle of equal treatment) and the adoption of other similar legislation (Directive 2000/43/EC and 2000/78/EC based on Article 13 EC).

2. EU Directives on Gender Equality in Employment - An Overview

Directive 75/117/EC on equal pay for male and female workers, enshrining the principle of 'equal pay for equal work' laid down in Article 119 and introducing the concept of 'equal pay for work of equal value'.

Directive 76/207 (9th February 1976) on the implementation of the principle of equal treatment with regard to access to employment, vocational training, promotion and working conditions which provides that the 'principle of equal treatment' means 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. The Directive provides for an opportunity for positive measures. Council Directive 76/207/EEC does not define the concepts of direct and indirect discrimination.

On the basis of Article 13 of the Treaty, the Council has adopted Directive 2000/43/EC (29th June 2000) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC (27th November 2000) establishing a general framework for equal treatment in employment and occupation which defines direct and indirect discrimination.

Directive 79/7 on the progressive implementation of equal treatment with regard to statutory social security measures.

Directive 86/378/EEC on implementation of equal treatment in occupational schemes of social security (subsequently amended by Directive 86/977/EC).

Directive 86/613/EEC on equal treatment for men and women carrying out a self-employed activity, including agriculture.

Directive 92/85/EC improving the health and safety of workers who are pregnant or who have recently given birth.

Directive 96/34/EC on parental leave.

Directive 97/80EC on the burden of proof in cases of discrimination based on sex. Under the terms of this Directive, the onus is on the defendants accused of discrimination to prove that the principle of equal treatment has not been violated.

Directive 2002/73/EC (23rd September 2002) amending Council Directive 76/207/EEC covers the following:

- defining direct and indirect discrimination
- harassment and sexual harassment
- preventive measures
- unfavourable treatment of women related to pregnancy or maternity constitutes direct discrimination
- paternity leave
- positive action (optional)
- protection even after the employment relationship has ended
- adequate compensation, no a priori fixing of upper limit of compensation and no award of interest
- time limits for bringing actions
- adequate legal protection
- dialogue with social partners and non-governmental organisations
- effective and dissuasive sanctions

Council Directive 97/80/EC (15th December 1997) on the Burden of Proof in cases of discrimination based on sex.

Council Directive 92/85/EEC (19th October 1992) on the Burden of Proof. Measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (Council Directive 92/85/EEC) also to be covered by the burden of proof (Article 4 *Burden of Proof.* It shall be for the respondent to prove that there has been no breach of the principle of equal treatment)

3. Overview of Maltese Legislation

(a) Gender Equality in The Employment and Industrial Relations Act (EIRA) (2002)

The Conditions of Employment (Regulation) Act had been enacted nearly 50 years ago; in fact some of the provisions of the CERA were outdated and needed to be changed since they did not counter effectively to the present requirements of Malta's workforce.

With effect from 27th December 2002, the Employment and Industrial Relations Act 2002 (EIRA) came into force. This Act replaced what was previously the Conditions of Employment (Regulation) Act and the Industrial Relations Act and also includes a series of Regulations that were previously issued as legal notices in the White Paper: Employment Relations Act and Industrial Relations Act of December 2001.

The EIRA provides for enhanced rights for Maltese workers and aims to promote a better arrangement between working and family life.

Discrimination Related to Employment

The EIRA introduces provisions on "Protection against discrimination related to employment". These articles are further enhanced in an Act to promote equality for men and women, which was signed by the President of Malta on 4th February 2003 (see below).

The EIRA stipulates that a person whether male or female cannot be discriminated against, from advertising a vacancy to the selection procedure of applicants. In addition the EIRA also states that an employer cannot employ a person having fewer qualifications than a person of the opposite sex. The employer cannot distribute tasks or work on the basis of discriminatory treatment. Employees in the same class of employment, whether male or female are entitled to the same remuneration for work of equal value. Both the EIRA and the Act to promote equality for men and women introduce the protection against harassment and sexual harassment at the place of work.

Part-Time Employees Regulations, 2002

The significant aim of this Regulation is to remove discrimination between part-time and comparable whole time employees. Nonetheless, different treatment could be justified on objective grounds.

A part-timer shall be entitled to the pro-rata benefits of whole time employees if:

- The part time employment is also the principal employment of the employee concerned AND
- He/she is employed for not less than twenty hours a week.

In cases where the maximum number of hours permissible in terms of the recognized conditions of employment for a part-time employee is less than twenty hours a week, a part-timer shall be entitled to the pro-rata benefits of whole time employees if:

- The part time employment is also the principal employment of the employee concerned;
- He/she is employed for not less than fourteen hours a week.
- The pro rata benefits include: Public holidays, Annual leave, Sick leave, Birth leave, Bereavement leave, Marriage leave and Injury leave
- Any other leave to which a whole time employee is entitled (vide parental leave).
- Statutory bonuses and other income supplements to which comparable whole time employees are entitled. (This was not the case before the Act came into effect)

These part-timers are also entitled to participate in vocational training programmes available to whole time employees.

The Regulations also state that part time employees are to be informed about opportunities available to work as a whole time employee and vice versa.

A Part-time employee also has access to the Industrial Tribunal if he feels that his employer has infringed a right conferred on him by these regulations.

Parental Leave Entitlement Regulations, 2003

The Parental Leave Entitlement Regulations 2002 have been repealed and are now replaced by the Parental Leave (Entitlement) Regulations 2003, Legal Notice 225 of 2003.

These regulations apply to:

- Both male and female parents.
- Whole time employees as defined in the Act.
- Part timers who are entitled to pro rata leave and who have been in the employment of the same employer for a cumulative period of at least twelve months.

The entitlement consists of unpaid parental leave of up to three months (i.e. 13 weeks) until the child has attained the age of eight years and such leave is to be availed of in established periods of one month each. This provision applies to birth, adoption and also legal custody of a child.

The regulation also specifies the manner in which such leave may be taken: "*the employer together with the employee may decide whether to grant the parental leave on a full time or a part time basis, in a piecemeal way or in the form of a time credit system*".

Any balance of parental leave not availed of during employment with a company is carried forward if there is a change in employer or if the employee changes jobs. This is a point that would need clarification during recruitment, since the regulations specify that employers are to keep records of the parental leave granted to employees and have to submit written statements of the parental leave balance even after termination of employment upon request by the employee.

Employees have to give employers at least three weeks' notice in writing specifying the beginning and the end of the parental leave.

The Regulation allows for cases where the employer may postpone the granting of parental leave. These 'justifiable reasons' include:

- Places where the work is of a seasonal nature;
- Where a replacement cannot be found within the notice given by the employee;
- Where the specific employment of the employee requesting parental leave is of strategic importance to the undertaking or place of business;
- Where the business does not employ more than ten persons;
- Where a significant proportion of the workforce applies for parental leave simultaneously.

- Where the employee is still undergoing the 6 month period from date of resumption after the maternity leave:

Provided that an employer who decides to postpone the granting of parental leave shall inform the employee in writing of the reasons for the postponement within 2 weeks. The postponement by the employer of the taking of parental leave is to be without prejudice to the employee's right to take the parental leave entitlement at the latest before the child reaches 8 years of age and if such postponement may result in the loss of the parental leave entitlement or part thereof, it shall be the duty of the employer to immediately grant parental leave for a period equivalent to the leave still unavailed of, or for such other lesser period as may be requested by the employee.

The Director of Employment and Industrial Relations shall act as mediator in cases of disagreement between employer and employee related to the entitlements covered by the regulations.

Any person contravening the provisions of these regulations shall be guilty of an offence and shall be liable, on conviction, to a fine of not less than 50 liri and not more than 500 hundred liri.

(b) Income Tax Reforms - Separate Income Tax Assessment, 1990

The 1990 amendments to the Income Tax Act were welcomed by Maltese married working women and their spouses as the new law meant that the working woman's income would no longer form part of an aggregate income for the year's assessment but would be assessed separately and consequently income tax payments would be considerably lower. This measure was introduced as an incentive to encourage married women to remain within the workforce, where their moving out is nowadays considered to be a loss of investment as well as a loss of potential.

(c) Social Security Act, 1987

The Social Security Act of 1987 replaced and consolidated previous enactments which covered national insurance, national assistance, and related matters. The National Insurance Act of 1956 and the National Assistance Act of 1956 were separate enactments rooted in two different concepts. The National Insurance Act was a contributory scheme, gender neutral but reflecting the social structure of the '50s in that the married male was the working partner who needed insurance while the wife was only entitled to a derived right. The National Assistance Act was a non-contributory scheme, usually directed at the male head of household as he was the one to register as unemployed.

Reforms in Social Security were carried out in 1991 to remove discrimination between married and single employees, giving the former the entitlement to sickness and unemployment benefits without losing out on National Insurance contributions paid before marriage and cessation of work at the time of marriage. Up to this date contributions paid by single female workers were not taken into consideration for social security purposes once they married.

In August 1999 The Commission for the Advancement of Women (Department of Women in Society) commissioned the law firm Muscat Azzopardi, Spiteri and Associates to study the provisions of Act X of the Social Security Act of 1987 and its subsidiary legislation with the aim of identifying those provisions which are gender-biased or gender-sensitive, as well as with the objective of identifying gender-sensitive situations which are not contemplated under current legislation and make recommendations accordingly. The report was finalized in February 2000.

In the introduction to the text the researchers wrote that the realities of social security and the cultural attitudes and mores that gave rise to them, were previously thought of as being cast in stone. For the best part of the century, but mainly in the last three decades, they have been questioned. The great racial debates which hit the United States of America in the 1960s, and Britain in the 1970s, only served to focus attention on another social and legislative anomaly. As the cry went up for equal treatment under the law for whites and blacks, it became impossible to ignore the social and legal injustice perpetrated by inequality of gender. The report highlighted worrying factors in social security, including the fact that women who dedicate themselves to child-raising and housekeeping do not have a pension cheque of their own, leading to poverty and vulnerability in the case of a marriage breakdown, and that women with no income of their own are extremely vulnerable. The report makes some interesting highlights, including that of *"... the misconception that only those who work for 15 years without a break are entitled to a pension"*. This misconception is widely held, apparently based on a misunderstanding, for it is not true that a person, whether male or female, must work for 15 unbroken years so as to receive a pension. The number 15 refers to the minimum yearly average contributions that one must pay during a period of 30 years of contribution so as to qualify for the minimum pension. The figure of 15 is equivalent to 750 contributions.

Further on the Report points out that:

"Right through the Schedules to the Social Security Act, there is reference to 'a married man who is maintaining his 'wife'. Nowhere is there a reference to a married woman who is maintaining her 'husband'" .

The White Paper - Pensions Adequate and Sustainable (November 2004) draws attention to the need for measures to increase the participation of women in the labour market. The current consultation process should address these and other issues.

(d) Act to Promote Equality for Men and Women (2003)

This Act makes it unlawful for employers to discriminate in employment on the basis of sex or because of family responsibilities. This includes treating women less favourably for reasons of actual or potential pregnancy, parenthood, family responsibility or for some other reason related to sex.

- It also makes provision for indirect discrimination so that any treatment based on a provision, criterion or practice which disadvantages a substantial proportion of members of one sex is unlawful unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.
- It shall be unlawful for employers to discriminate directly or indirectly against a person in the recruitment stage, management of works, in giving promotions, distributing tasks, altering the working conditions or the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment.
- The burden of proof falls on the employer.
- The Act, in line with the Employment and Industrial Relations Act, makes sexual harassment unlawful, but does not include harassment.
- It also provides anti-discrimination measures where banks and financial institutions or insurance companies are concerned so that it is unlawful to discriminate against any person in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self-employment or the insurance of that business or the person in self employment.
- Spouses of self-employed workers not being employees or partners, who participate in the activities of the self-employed workers and perform the same or ancillary tasks as their spouses shall be entitled to receive from their spouse a fair compensation for their activity commensurate to the value of their contribution.
- The Act also states that it is unlawful to discriminate in education and vocational guidance and in advertising.
- The Commissioner may initiate investigations and take action following an investigation.
- A person who alleges that any other person has committed an act in his or her regard which under any of the provisions of this Act is unlawful shall have a right of action before the competent court of civil jurisdiction.
- The Minister may make regulations generally for giving effect to the provisions of this Act and the enforcement thereof.
- The Equality Act does not include the principle of Equal Pay for Work of Equal Value which is found in the Employment and Industrial Relations Act.

Implementation

- The National Commission for the Promotion of Equality for Men and Women set up by this Act has a legal personality. It has a number of functions, including investigating complaints of discrimination and acting as mediator when necessary; providing assistance where necessary; advising the Minister concerned regarding amendments where necessary.
- The Commission's main thrust is in the areas of investigating complaints and discrimination in advertising.
- There is also the need to ensure harmonization with the Employment and Industrial Relations Act regarding the principle of Equal Pay for Work of Equal Value which is not in the Equality Act.

- The Commission needs to take measures to pave the way for the implementation of the EU Directive on Access to Goods and Services, which comes into force in 2007.
- There is also dire need to ensure that both private and public sectors have a gender equality and sexual harassment policy in practice and reports are drawn up regularly.
- The Commission has been the first National Commission to publish a Quality Service Charter, however it requires more human, financial and technical resources to be able to carry out its work more efficiently.

4. Equal Treatment and the Constitution of Malta

The highest law of the Land, the Constitution of Malta in Section 14 and Section 45 (both of which were amended by Act XIX of 1991) provides for equal treatment between men and women. Hence Malta's commitment to fundamental human rights is also highlighted in these provisions which give the woman an equal right to that of the man. The Constitution establishes that if any other law is inconsistent with the Constitution the Constitution prevails, thus making this right attained by women even more fundamental.

Section 14 of the Constitution provides that:

> "The State shall promote the equal right of men and women to enjoy all economic, social and cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men".

Section 32 of the Constitution, under Chapter IV which deals with the fundamental rights and freedoms of the individual, guarantees equality between men and women:

> "Whereas 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, but subject to respect for the rights and freedoms of others and for the public interest....."

Section 45(1) binds the State not to legislate any provision that is discriminatory either of itself or in its effect. Moreover Section 45(2) lays down 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 term "discriminatory" is defined in the Constitution 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 Constitution of Malta - Article 45 (3)).

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GENDER EQUALITY - CORE EU LAW CONCEPTS IN THE EQUAL TREATMENT DIRECTIVE

DANIÈLE COP

The aim of this paper is, firstly, to give an insight in the notions of equal treatment and non-discrimination as defined in the Equal Treatment Directive[1] and interpreted by the European Court of Justice; and, secondly, to examine the limitations to scope of application of the Equal Treatment Directive. This analysis will then be used as a basis for assessment of the relevant provisions of the Maltese laws implementing the Equal Treatment Directive, namely the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta).

The Equal Pay Directive[2] will not be treated in this paper. It must be said though that the bulk of European Court of Justice case law regards the concept of pay as contemplated in the Equal Pay Directive (and article 141 of the EC Treaty).[3]

The effectiveness of legal provisions on gender equality in the employment context depends to a significant extent on the level of awareness of the stakeholders, including employees, employers, unions, NGOs and the national authorities. This seems to be particularly pertinent in the new Member States (EU10), including Malta, considering that the Community *acquis* came into force in those States relatively recently (1st May 2004) and that the respective local cultures may perhaps not boast a long-standing or advanced "equality culture". With this in mind, it may be useful to describe what the prohibitions imposed and the rights conferred by the Equal Treatment Directive encompass and in particular what is understood by the core concepts of equal treatment, direct and indirect discrimination, harassment and sexual harassment. Whereas measures of positive action

[1] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (as amended by Directive 2002/73/EC) ("the Equal Treatment Directive")

[2] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. For an overview of case-law, one may wish to refer to the Explanatory memorandum of the Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) COM(2004) 279 final

[3] See the Digest of case law under heading B-15.01 Égalité entre travailleurs masculins et travailleurs féminins (http://curia.eu.int/common/recdoc/repertoire_jurisp/bull_cee/data/index_B-15_01.htm)

arguably belong to the realm of policy making and may therefore be categorised under rather vague terms or dynamic concepts such as "gender mainstreaming" without causing great concern, notions such as (direct and indirect) "discrimination", "harassment" and "sexual harassment" actually define the scope of application of individual rights and, in certain cases, may constitute one of the elements of the description of a criminal offence.[4]

This paper adopts the following scheme:

1. The Principle of Equal Treatment in Terms of the Equal Treatment Directive

The principle of equal treatment in the context of access to employment (including promotion and vocational training) and employment conditions means that any discrimination on grounds of sex either directly or indirectly by reference in particular to marital or family status is prohibited.[5]

For the purposes of this paper, reference will be made to the Equal Treatment Directive as amended by Directive 2002/73/EC. It should be borne in mind though that the deadline for implementation by the Member States of Directive 2002/73/EC is 5 October 2005 and that Member States whose laws, regulations or administrative provisions are not, for the time being, aligned with the amendments introduced by Directive 2002/73/EC, are not necessarily infringing Community law.

Directive 2002/73/EC has clarified what is understood by direct and indirect discrimination in a manner consistent with the Racial Equality and Employment Equality Directives[6] and has incorporated the notions of harassment and sexual harassment into the definitions

[4] See articles 9(3), 10(3) of the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and article 30 of the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta)

[5] Article 2(1) of the Equal Treatment Directive

[6] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

section of the Equal Treatment Directive. The same definitions are used in Directive 2004/113/EC[7] which contemplates the implementation of the principle of equal treatment between men and women in the access to and supply of goods and services (albeit to a limited extent[8]). Moreover, an instruction to discriminate against persons on grounds of sex is deemed to be a form of discrimination by virtue of Directive 2002/73/EC.

With a view to updating, simplifying, modernising and improving the Community *acquis* in the area of equal treatment between men and women, the Commission has adopted a Proposal for a recast Directive.[9] In this proposal, the same definitions as those contained in Directive 2002/73/EC are applied to all areas covered by the proposal (including equal pay and occupational social security schemes).

1.1 The Meaning of the Principle of Non-Discrimination

The prohibition on discrimination is traditionally regarded as the expression of the principle of equality, which is one of the fundamental principles of Community.[10]

The term discrimination as such refers to the application of different rules to comparable situations or the application of the same rule to different situations.[11] Thus, the prohibition on discrimination may, depending on the circumstances, entail an obligation to differentiate. Take, for example, a contractual term providing that an employer may dismiss workers of either sex after a stipulated number of weeks of continuous absence which is relied on to dismiss a pregnant worker because of absences due to incapacity for work resulting from her pregnancy. The situation of a pregnant worker who is unfit for work as a result of disorders associated with her pregnancy cannot be considered to be the same, and should not be treated to the same way, as that of a male worker who is ill and absent through incapacity for work for the same length of time.[12] Therefore to apply the term to her case would amount to discrimination.

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[7] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[8] Pursuant to article 3 of Directive 2004/113/EC, the scope of application of the Directive is limited to persons who provide goods and services which are available to the public (irrespective of the person concerned as regards both the public and private sectors, including public bodies) and which are offered outside the area of private and family life and the transactions carried out in this context. The Directive does not prejudice the individual's contractual freedom as long as the individual's choice of contractual partner is not based on that person's sex. Moreover, it does not apply to the content of media and advertising nor education. In order to prevent overlap with other Directives, the Directive does not cover matters of employment and education and, insofar as covered by other Community legislative acts, matters of self-employment. As regards the use of sex as an actuarial factor for the purposes of insurance and related financial services a moratorium is granted until 21 December 2007, reserving the possibility to Member States to allow certain exemptions that may be maintained after that date (see article 5 of the Directive).

[9] Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) COM(2004) 279 final

[10] See e.g. Case C-13/94 P. v S. [1996] ECR I-2143, para. 18

[11] See e.g. Case C-394/96 Brown v Rentokil [1998] ECR I-4185, para. 30; Case C-313/02 Wippel v P&C [2004] ECR

[12] Case C-394/96 Brown v Rentokil [1998] ECR I-4185

1.2 Prohibition of Discrimination on Grounds of Sex

The Equal Treatment Directive prohibits discrimination based on sex in the context of employment. In *P. v S.* the European Court of Justice held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure and that, accordingly, the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned.[13]

In later cases the Court seems to have been more reluctant to adopt a broad interpretation of discrimination based on sex. The Court stated in the *Grant* judgment that the reasoning in the *P. v S.* ruling (which leads to the conclusion that discrimination which is in fact based, essentially if not exclusively, on the sex of the person concerned is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex) is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation.

At the time of the decision in *Grant*, Community law did not cover discrimination based on sexual orientation, but the Court indicated that the Treaty of Amsterdam provided for the insertion in the EC Treaty of an Article 6a (now Article 13 of the EC Treaty) which would allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation. In fact, discrimination based on sexual orientation can now be tackled on the basis of the Employment Equality Directive.[14]

1.3 Definition and Examples of Direct Discrimination

Direct discrimination refers to situations where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.[15]

Examples of direct sex-based discrimination taken from the body of case-law developed by the European Court of Justice in relation to the Equal Treatment Directive are:

(i) a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and women[16];

(ii) Member States laying down by legislation the principle that night-work by women is prohibited, even if that obligation is subject to exceptions, where night-work by men is not prohibited[17];

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[13] Case C-13/94 P. v S. [1996] ECR I-02143, para. 19-20. See also Case C-125/99 D. v Council [2001] ECR I-4319

[14] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

[15] New article 2(2)

[16] Case C-271-91 Marshall [1993] ECR I-4367

(iii) an employment contract for an indefinite period for the performance of night-time work concluded between an employer and a pregnant employee, both of whom were unaware of the pregnancy, which is held to be void on account of the statutory prohibition on night-time work which applies, by virtue of national law, during pregnancy and breastfeeding, or which is being avoided by the employer on account of a mistake on his part as to the essential personal characteristics of the woman at the time when the contract was concluded[18].

According to settled case-law of the European Court of Justice, the dismissal of a female worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex.[19] For instance, a woman who is accorded unfavourable treatment regarding her working conditions, in that she is deprived of the right to an annual assessment of her performance and, therefore, of the opportunity of qualifying for promotion as a result of absence on account of maternity leave, is discriminated against on grounds of her pregnancy and her maternity leave. Such conduct constitutes discrimination based directly on grounds of sex within the meaning of the Equal Treatment Directive.[20]

The Equal Treatment Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.[21] However, according to the Court, the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment.[22] Since the amendments of Directive 2002/73/EC it is now explicitly provided that less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC[23] constitutes discrimination within the meaning of the Equal Treatment Directive.

Although pregnancy as such is not in any way comparable to a pathological condition, dismissals which are the result of absences due to and illness attributable to pregnancy or confinement are not necessarily precluded by the Equal Treatment Directive, even where such illness first appeared during pregnancy and continued during and after the period of maternity leave. It appears that in such cases the Court will determine whether in the factual situation submitted to it, there are reasons to distinguish, from the point of view of the principle of equal treatment enshrined in the Directive, between an illness attributable to pregnancy or confinement and any other illness. Male and female workers are equally exposed to illness. Although certain disorders are specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same

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[17] Case C-345/89 Stoeckel [1991] ECR I-04047; cf. Case C-158/91 Levy [1993] ECR I-04287

[18] Case C-421/92Habermann-Beltermann [1994] ECR I-1657

[19] See e.g. Case C-177/88 Dekker [[1990] ECR I-3941; Case C-394/96 Brown [1998] ECR I-4185, para.16 and references made there.

[20] Case C-136/95 Thibault [1998] ECR I-2011

[21] Article 2(3) and new article 2(7) of the Equal Treatment Directive

[22] Case C-207/98 Mahlburg [2000] ECR I-549

[23] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex.[24]

However, since the coming into force of Directive 92/85/EEC (article 10), dismissal during the period from the beginning of pregnancy to the end of maternity leave is prohibited, save in exceptional cases unconnected with the woman's condition. It is clear from the objective of that provision that absence during the protected period, other than for reasons unconnected with the employee's condition, can no longer be taken into account as grounds for subsequent dismissal.[25] Moreover, pursuant to the amended Equal Treatment Directive a woman on maternity leave is entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.[26] [27]

In *Webb* the Court held that the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive. This means that, for instance, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged. The fact that a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment is immaterial.[28] In *Tele Danmark* the Court ruled that the interpretation given in *Webb* cannot be altered by the fact that the contract of employment was concluded for a fixed term.[29]

Furthermore, the Court has endorsed the Commission's opinion that, since the employer may not take the employee's pregnancy into consideration for the purpose of applying her working conditions, she is not obliged to inform the employer that she is pregnant.[30]

1.4 Definition and Examples of Indirect Discrimination

Indirect discrimination takes place where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.[31]

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[24] See Case C-179/88 Handels - og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening [1990] ECR I-3979 (the "Hertz" judgment)

[25] See Case C-400/95 Larsson [1997] ECR I-2757

[26] New article 2(7) of the Equal Treatment Directive

[27] As regards maternity leave see: Case C-411/96 Margaret Boyle and Others v Equal Opportunities Commission [1998] ECR I-06401

[28] Case C-32/93 Webb [1994] ECR I-03567

[29] Case C-109/00 Tele Danmark A/S v Handels - og Kontorfunktionærernes Forbund i Danmark (HK) [2001] ECR I-6993

[30] Case C-109/00 Tele Danmark A/S v Handels - og Kontorfunktionærernes Forbund i Danmark (HK) [2001] ECR I-6993; Case C-320/01 Wiebke Busch v Klinikum Neustadt GmbH & Co. [2003] ECR Page I-2041

[31] New article 2(2) of the Equal Treatment Directive. This new definition introduced by Directive 2002/73/EC reflects the Court's case-law according to which national rules discriminate indirectly against women where, although worded in neutral terms, they are more disadvantageous to women than men, unless that difference in treatment is justified by

Establishing what exactly falls within the boundaries of the concept indirect discrimination may sometimes prove to be a delicate exercise. To illustrate this with some examples of situations that are *not* covered by the Directive:

(i) in the *Jackson and Cresswell* case[32] the Court decided that the Equal Treatment Directive is to be interpreted as not applying to a social security scheme, such as supplementary allowance or income support, simply because the conditions of entitlement for receipt of the benefits may be such as to affect the ability of a single parent to take up access to vocational training or part-time employment;

(ii) the Equal Treatment Directive does not preclude the application of a national provision which does not take into account employees whose working hours are not more than ten hours per week or 45 hours per month when determining whether or not an undertaking must apply a system of protection against unfair dismissal, where it is not established that undertakings which are not subject to that system employ a considerably greater number of women than men. Even if that were the case, such a measure might be justified by objective reasons not related to the sex of the employees in so far as it is intended to alleviate the constraints weighing on small businesses[33];

(iii) national legislation which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours, save where such legislation is justified by objective criteria unrelated to any discrimination on grounds of sex.

This brings us to the two-step approach used in relation to indirect discrimination. In the first instance it is to be determined whether a given criterion applying irrespective of gender, actually affects a greater number of women than men. It should be noted that a situation may only reveal a *prima facie* case of indirect discrimination if the statistics describing that situation are valid, that is to say, if they cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and appear, in general, to be significant.[34]

If it is found to be the case that persons of one sex are put at a particular disadvantage compared with other persons of the other sex, the second step is to establish whether the measure chosen reflects a legitimate social policy aim, and is suitable and necessary for achieving that aim (objective justification and proportionality test). The national authorities have a certain margin of appreciation in the application of this test considering that, as Community law stands at present, social policy is a matter for the Member States, which enjoy a reasonable margin of discretion as regards the nature of social protection measures and the detailed arrangements for their implementation.[35]

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objective factors unrelated to any discrimination on grounds of sex. (Case 171/88 Rinner-Kuehn [1989] ECR 2743, para. 12; Case C-189/91 Kirsammer-Hack v Sidal [1993] ECR I-0618, para. 22)

[32] Joined cases C-63/91 and C-64/91 Jackson and Cresswell [1992] ECR I-4737

[33] Case C-189/91Kirsammer-Hack v Sidal [1993] ECR I-618

[34] Case C-226/98 Jørgensen [2000] ECR I-2447, para. 33

[35] Most cases seem to regard comparability of part-time employment with full-time employment. In certain Member States (e.g. Germany) it is common ground that part-time workers are far more likely to be women than men see e.g.

1.5 Harassment and Sexual Harassment as a Form of Discrimination

Following the amendments introduced by Directive 2002/73/EC, harassment and sexual harassment are treated as forms of discrimination on grounds of sex.[36] Harassment is defined as an unwanted conduct related to the sex of a person occurring with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Sexual harassment is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurring, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.[37]

So far, no cases regarding harassment or sexual harassment have been ruled upon by the European Court of Justice.

2. Exceptions and Limitations to the Scope of Application of The Equal Treatment Directive

2.1 Derogations

Articles 30, 39, 46, 58, 64, 296 and 297 of the EC Treaty provide for derogations applicable in situations which may affect public security or public safety. Those articles deal with exceptional and clearly defined cases. The Court has clarified that it is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application. Thus, decisions taken by Member States in regard to access to employment, vocational training and working conditions, for instance, in the armed forces do not fall altogether outside the scope of Community law.

Under (old) article 2(2) of the Equal Treatment Directive[38], Member States have the option of excluding from the scope of that Directive occupational activities for which, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor. As a derogation from an individual right laid down in the Directive, that provision must be interpreted strictly and due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary

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Case C-1/95 Hellen Gerster v Freistaat Bayern [1997] ECR I-5253; Case C-100/95 Brigitte Kording v Senator für Finanzen [1997] ECR I-5289; Case C-322/98 Kachelmann [2000] ECR I-7505; Case C-77/02 Steinicke [2003] ECR I-9027; Case C-187/00 Kutz-Bauer [2003] ECR I-2741. Also: Case C-226/98 Jørgensen [2000] ECR I-2447; Case C-79/99 Schnorbus [2000] ECR I-10997; Case C-319/03 Briheche [2004]

[36] Article 2(3) of the Equal Treatment Directive

[37] New article 2(2) and (3) of the Equal Treatment Directive

[38] Following the amendments by Directive 2002/73/EC, Member States may rely on the provisions of article 2(6) of the original Directive which entitles Member States to provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.

Derogations on the basis of (old) article 2(2) of the Equal Treatment Directive were allowed for instance for mid-wives.[39] The Court also recognised, for example, that sex may be a determining factor for posts such as those of prison warders and head of prison, for certain activities such as policing activities where there are serious internal disturbances, and for service in certain special combat units. The application of national provisions which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services is not allowed. Community law does not preclude compulsory military service being reserved to men. [40]

2.2 The Delineation of the Scope of Application of the Equal Treatment Directive

The scope of application of the Equal Treatment Directive is limited to access to employment, including promotion, and to vocational training and to working conditions.

In determining whether a given differential treatment amounts to a form of discrimination prohibited under Community law, regard should be had for differences in treatment that are allowed in terms of a certain Community instrument and that are therefore not covered by the Equal Treatment Directive. For instance, in the *Burton* case, applying different age conditions for men and women with regard to access to voluntary redundancy was not regarded as discrimination within the meaning of the Equal Treatment Directive. The Court considered that in deciding whether the difference in treatment in question is discriminatory within the meaning of the said Directive, account must be taken of the relationship between the measure at issue and national provisions on normal retirement age. The determination of a minimum pensionable age for social security purposes which is not the same for men as for women does not amount to discrimination prohibited by Community law since Directive 79/7/EEC[41] allows Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.[42]

Nevertheless it is established case law that, in view of the fundamental importance of the principle of equal treatment, the exclusion of social security matters from the scope of the Directive provided for in article 1(2) must be interpreted strictly.[43] Thus, the Court has held that a scheme of benefits cannot be excluded from the scope of the Equal Treatment Directive solely because, formally, it is part of a national social security system. Such a scheme may come within the scope of the said Directive if its subject matter is access to employment, including vocational training and promotion, or working conditions. For instance, a benefit with the characteristics and purpose of family credit (i.e. an income-

[39] Case 165/82 Commission v UK [1983]

[40] See: Case 222/84 Johnston [1986] ECR 1651; Case C-273/97 Sirdar [1999] ECR I-7403; Case C-285/98 Kreil [2000] ECR I-69; Case C-186/01 Dory [2003] ECR I-2479.

[41] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

[42] Case 19/81Burton v. British Railway Board [1982]

[43] Case 151/84 Roberts v Tate & Lyle [1986] ECR 703, para. 35; Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723, para. 36

related benefit which is awarded in order to supplement the income of low-paid workers who are responsible for a child) is concerned with both access to employment and working conditions and falls, therefore, within the scope of the Directive.[44] However, the Directive is not rendered applicable simply because the conditions of entitlement for receipt of benefits may be such as to affect the ability of a single parent to take up employment.[45]

2.3 The Symmetrical Concept of Equal Treatment and Conditions for Measures of Positive Discrimination

Non-discrimination on the ground of sex is a symmetrical concept which protects both men and women. Taking into account that the promotion of equality between men and women, of which the principle of equal treatment is a cornerstone, is deemed necessary primarily because of the disadvantaged position of women, this type of symmetric and formal approach is not sufficient on its own to achieve substantive gender equality and is sometimes criticised because it tends to set male standards as the norm. However, the right of equal treatment is clearly a human right that is enjoyed by both men and women. In fact, in a considerable number of cases brought before the European Court of Justice sex discrimination was claimed by men.[46]

Promotion of substantive gender equality is allowed by virtue of article 2(4) of the original Directive of 1976 and article 141(4) of the EC Treaty[47]. Following the amendments by Directive 2002/73/EC recourse should be had to new article 2(8), which explicitly refers to article 141(4) of the EC treaty.

It is settled case-law that Article 2(4) is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. It authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. However, the European Court of Justice has adopted a rather restrictive approach towards measures of positive discrimination.

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[44] Case C-116/94 Meyers v Adjudication Officer [1995] ECR I-2131

[45] Joined Cases C-63/91 and C-64/91 Jackson and Cresswell v Chief Adjudication Officer [1992] ECR I-4737, para. 27, 28 and 31.

[46] For instance, Mr. Burton claimed that he was treated less favourably than female employees in as much as the benefit concerned, linked to the normal retirement age, would have been granted to a women of his age. Case 19/81Burton v. British Railway Board [1982] Mr. Kalanke disputed a German system whereby women who have the same qualifications as men applying for the same post were to be given priority in sectors where they are under-represented. Case C-450/93 Eckhard Kalanke v Freie Hansestadt Bremen [1995] ECR I-03051. It was decided that a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women, while it is to men in the same situation as those women, cannot be allowed under Article 2(4) of the Directive (Case C-319/03 Briheche [2004]) See also: Case C-180/95 Draehmpaehl v Urania [1997] ECR I-2195; Case C-407/98 Abrahamsson and Anderson v Fogelqvist [2000] ECR I-5539; Case C-186/01 Dory [2003] ECR I-2479; Case C-476/99 Lommers [2002] ECR I-2891

[47] Article 141(4) EC Treaty reads: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

At the heart of the landmark case *Kalanke* lay a national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented. Since such a rule involves discrimination on grounds of sex, the Court considered whether such a national rule is permissible under Article 2(4) of the original Directive. As a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly. The Court reasoned that national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.[48]

A fortiori, it was not accepted that, pursuant to national legislation a candidate for a public post who belongs to the under-represented sex and possesses *sufficient* qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.[49]

In contrast, national rules entailing positive discrimination that passed the proportionality test and that have therefore been declared compatible with the Equal Treatment Directive are those measures which are intended to give priority in promotion to women in sectors of the public service where they are under-represented if they do not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.[50]

Another example of a positive discrimination measure which was held to be compatible with article 2(1) and (4) of the Directive can be found in *Lommers*. This case concerned a scheme set up by a Dutch Ministry to tackle extensive under-representation of women within it under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff was reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be determined by the employer. However, such measure is acceptable only in so far, in particular, as the exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials.51

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[48] Case C-450/93 Eckhard Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051. its Communication on the interpretation of the judgment delivered by the European Court of Justice in Case C-450/93 (*Eckhard Kalanka v Freie Hansestadt Bremen*), the Commission expressed its belief that there are many forms of positive discrimination that are not affected by the *Kalanke* judgment, and that Member States and employers may avail themselves of a wide range of positive measures such as State subsidies granted to employers who recruit women in sectors where they are underrepresented, positive training-oriented action, vocational guidance
See also: Case C-319/03 Briheche [2004]

[49] Case C-407/98 Abrahamsson and Anderson v Fogelqvist [2000] ECR I-5539

[50] See: Case C409/95 Hellmut Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363; Case C-158/97 Badeck e.a. [2000] ECR I-1875;

[51] Case C-476/99 Lommers [2002] ECR I-2891

3. The Case of Malta

In Malta there are two parallel, or perhaps complementary, laws with provisions implementing the principle of gender equality in employment: the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta).

Clearly, the Maltese legislator did not wish to merely copy the definitions of the Equal Treatment Directive. According to the definitions section in article 2 of the Equality for Men and Women Act ("EMWA"), "discrimination" means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than another person has been or would be treated on the grounds of sex or because of family responsibilities. The EMWA then goes on to specify that discrimination based on sex or because of family responsibilities is:

(a) the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities;

(b) treating a woman less favourably for reasons of actual or potential pregnancy or childbirth;

(c) treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex;

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

Unlike the new definition of indirect discrimination in the Equal Treatment Directive, the description of (indirect) discrimination in article 2(3)(d) of the EWMA contains a statistical element.

"Discriminatory treatment" is defined in the Employment and Industrial Relations Act ("EIRA") 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. For the purposes of article 26 of the EIRA, discriminatory treatment includes:

(a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience;

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

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

"Sexual harassment"[52] means the unlawful activities listed in article 9(1) of the EMWA. On the basis of the said article it is unlawful for any person to sexually harass other persons, that is to say:

(a) to subject other persons to an act of physical intimacy; or

(b) to request sexual favours from other persons; or

(c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or

(d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.

This is supposed to be "without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act". Article 29 of the EIRA deals with harassment - a term not defined as such - and states that:

"(1) It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

(2) It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by:

(a) subjecting the victim to an act of physical intimacy; or
(b) requesting sexual favours from the victim; or
(c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where -

[52] Guidelines on the matter of sexual harassment were published in April by the National Commission for the Promotion of Equality for Men and Women.

(i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim;

(ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct."

Since a Directive is binding upon the Member States to which it is addressed as to the result to be achieved and thus leaves to the national authorities the choice of form and methods, the Maltese legislature cannot be said to infringe Community law just because it has adopted a number of specific provisions in relation to the most important forms of discrimination and/or working conditions, whilst confining itself in relation to other forms of discrimination and/or working conditions to a general provision, covering all other forms and/or conditions not specifically mentioned. It should therefore be determined whether the result sought to be achieved by the Directive has been attained.[53] In any event, when applying national law, in particular the provisions of a national law specifically enacted in order to implement a Directive, national courts are required to interpret their national law in the light of the wording and purpose of the Directive.[54]

At some points, the Maltese implementing provisions seem to go beyond what is required as per the Equal Treatment Directive. For instance, whilst the scope of application of the Directive covers vocational training, article 8(1) of the EMWA declares it unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in -

(a) the access to any course, vocational training or guidance; or
(b) the award of educational support for students or trainees; or
(c) in the selection and implementation of the curricula; or
(d) in the assessment of the skills or knowledge of the students or trainees.

The wording "any educational establishment or for any other entity providing vocational training or guidance" would seem ambiguous. One is led to wonder for example whether this would render it unlawful for an institute offering language courses (not as such intended as vocational training) by women to women to deny men access to the course or job posts, unless it can be demonstrated that it is a measure of positive action for the purpose of achieving substantive equality for men and women or that it falls under article 2(5) of the EMWA.[55]

Finally, it appears that there are some lacunae in the Maltese legal provisions of the EMWA and the EIRA implementing the Equal Treatment Directive, at least insofar as they aim to transpose the amendments introduced by Directive 2002/73/EC. For instance, whilst pursuant to new article 2(4) an instruction to discriminate against persons on grounds of sex

[53] The European Court of Justice was faced with a similar situation in Case 163/82 Commission v Italian Republic [1983] ECR 3273

[54] See, as regards the Equal Treatment Directive, Case 222/84 Johnston [1986] ECR 1651; Case C-476/99 Lommers [2002] ECR I-2891

[55] It should be noted that Directive 2004/113/EC does not cover matters of education.

shall be deemed to be discrimination within the meaning of the Directive, no provisions to that effect are to be found in the EMWA or the EIRA.

4. Concluding Remarks

In the debate on gender equality, the Equal Treatment Directive should be judged on its own merits. As an instrument to promote gender equality[56] it probably has limited potential. Perhaps it should rather been seen, first, as an instrument for the elimination of discrimination (direct and indirect) on the basis of sex, and, second, as a measuring stick for the lawfulness of national measures designed to promote full equality between men and women in practice.

Whilst formal equality of treatment is a necessary condition for substantive gender equality, it is obviously not a sufficient condition therefore. The creation of equal opportunities and the intervention of positive action are complementary means towards the creation of a true level playing field for men and women. Arguably equal opportunities and positive action are aims that may, to a certain extent, be better achieved through soft law and social dialogue.

Bearing in mind that the right not to be discriminated against on the basis of gender is a human right enjoyed equally by men and woman, one might appreciate that, although the Equal Treatment Directive allows for measures of positive action to be adopted by Member States, the European Court of Justice has condemned certain forms of positive discrimination such as rigid quota systems under which there is no possibility of taking particular individual circumstances into account.

As to the transposition into national law of the core concepts of the Community *acquis* in the field of equality of treatment between men and women, it may be useful to point out that the European Commission, in its proposal for a recast Directive, indicated that "Legislation ensuring equal treatment between men and women in the area of employment and occupation adopted under and/or covered by Article 141 EC should, for all areas covered, use the same concepts as those used in the legislation adopted recently such as Directive 2002/73/EC amending Directive 76/207/EEC, as well as in similar legislation adopted under Article 13 EC, to combat discrimination on grounds other than sex, insofar as the latter also concerns the area of employment, in order to ensure legal and political coherence between pieces of legislation, which have similar objectives. It is therefore necessary to ensure coherence between secondary legislation on identical issues, such as the concept of indirect discrimination or the need for Member States to have bodies for the promotion of equal treatment, in broader areas of employment and occupation and not only for matters covered by Directive 2002/73/EC, amending Directive 76/207/EEC."

Looking at the case of Malta, concerns in relation to coherence and legal certainty might arise due to the fact that account should be taken of two separate pieces of legislation that, moreover, use definitions which are not identical to the ones used in the Community's (gender) equality legislation. Technically speaking this does not necessarily mean that Malta

[56] The promotion of equality between men and women is both a task and an aim of the Community according Articles 2 and 3(2) of the EC Treaty

is in breach of Community law. Nonetheless, it could be argued that having a set of uniform and flexible definitions or provisions (and a central legal instrument), would avoid causing interpretation issues where strictly speaking there should be none and would leave less room to jeopardise to the harmonious application of Community law.

Table of Correspondence - Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (as amended by Directive 2002/73/EC)

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions came into force in Malta upon its accession to the European Union on the 1st of May 2004. This date was also the implementation deadline for Malta.

The deadline for implementation by the Member States of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions is the 5th of October 2005. In the Table below, the amendments introduced by Directive 2002/73/EC are printed in italics.

This Table of Correspondence was prepared for the purposes of the paper entitled "Core EU Law concepts of the Equal Treatment Directive" to serve as a tool for comparison of the provisions of the articles of Directive 76/207/EEC, as amended by Directive 2002/73/EC, with the relevant provisions of the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta) that, in the author's view, appear to be relevant for the transposition of the provisions of said Directives.

Directive 76/207/EEC, as amended by Directive 2002/73/EC	**Equality for Men and Women Act (Chapter 456 of the Laws of Malta)**	**Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta)**
1(1) The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter [*sic*] referred to as 'the principle of equal treatment.'	**2(1)** [...] "employment" means any gainful activity including self-employment and includes promotion and transfer to another post, as well as access to vocational or professional training, the duration of the employment or its extension or termination; [...] "vocational training" includes all forms of vocational training and retraining. **2(2)** For the purposes of this Act, and unless the context otherwise requires, the terms "man" and "woman" include males and females irrespective of their age. **4(1)** It shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment.	**26(1)** It shall not be lawful for any person - (a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment; (b) in regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment. **26(4)** For the purposes of this article, 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 to a higher grade or engagement in a different class of employment

	4(2) Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - (a) manage the work, give promotions, distribute tasks, offer training opportunities or otherwise arrange the working conditions in a manner that employees are assigned a less favourable status than others on the basis of sex or because of family responsibilities; or (b) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; or (c) neglect their obligation to suppress sexual harassment as provided under article 9(2). **8(1)** It shall be unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in - (a) the access to any course, vocational training or guidance; or (b) the award of educational support for students or trainees; or (c) in the selection and implementation of the curricula; or (d) in the assessment of the skills or knowledge of the students or trainees. **8(2)** Failure by the persons responsible for such establishments and entities to fulfil their obligation to suppress sexual harassment as provided under article 9(2) shall for the purposes of subarticle (1) of this article constitute discrimination. **8(3)** It shall be the duty of educational establishments and entities providing vocational training, within the limits of their competence to ensure that curricula and textbooks do not propagate discrimination.	**2(1)** In this Act, unless the context otherwise requires - [...] "conditions of employment" means wages, the period of employment, the hours of work and leave and includes any conditions related to the employment of any employee under a contract of service including any benefits arising therefrom, terms of engagement, terms of work participation, manner of termination of any employment agreement and the mode of settling any differences which may arise between the parties to the agreement; but it does not include professional ethics arising from any professional relationship between an employer and an employee; [...]
1(1a) Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1.		(See articles 26-32 EIRA)

1(2) With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.		
2(1) For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsover [*sic*] on grounds of sex either directly or indirectly by reference in particular to marital or family status.	(See articles 2(1) and 2(3) in combination with articles 4, 8 and 10) **2(1)** [...] "discrimination" means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than other person [*sic*] has been or would be treated on the grounds of sex or because of family responsibilities and "discriminate" shall be construed accordingly; [...]	**2(1)** [...] "discriminatory treatment" means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association; [...] **26(2)** For the purposes of this article, discriminatory treatment shall include: (a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience; (b) actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment; (c) actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.
2(2) This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.	**3** Nothing in this Act shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities. **2(5)** In relation to access to employment, a less favourable treatment which is based on a characteristic related to sex shall not constitute discrimination where by reason of the particular occupational activities concerned, or	**26(3)** The provisions of subarticles (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

	of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances: Provided that the burden of proof shall lie on the person who alleges that there is a genuine occupational requirement. **20** The Minister may make regulations generally for giving effect to the provisions of this Act, and the enforcement thereof, and in particular, but without prejudice to the generality of the foregoing: (c) for the exemption of any person, or class of persons or body, from the requirements of article 4(1) in so far as it relates to article 4(1)(*a*) and (*b*), article 5 and article 10 as may be specified in the aforesaid regulations; provided that any such exemption shall only be prescribed by the Minister after consultation with the Commission and provided that such exemption shall be for a specified period of time which can be renewed by the Minister after consultation with the Commission.	the requirements are established by any applicable laws or regulations. (See article 84)
2(3) This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.	**2(4)** Nothing in subarticle (2) shall be deemed to constitute discrimination in so far as such treatment - (*a*) is given to grant special protection to women during childbirth or pregnancy; [...]	**10** The Minister may, after consultation with the Board, make regulations establishing minimum periods of maternity leave, parental leave and leave for urgent family reasons to which an employee shall be entitled and the conditions regulating such entitlement (See Protection of Maternity (Employment) Regulations (Legal Notice 439 of 2003, as amended))
2(4) This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).	**2(4)** Nothing in subarticle (2) shall be deemed to constitute discrimination in so far as such treatment - [...] (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women.	**26(2)** For the purposes of this article, discriminatory treatment shall include: (a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience; [...] **31.** Subject to the foregoing, the Minister may, after consultation with the Board, prescribe regulations

		to give better effect to the provisions of articles 26, 27, 28 and 29 and in particular for the elimination of any discriminatory practices in the employment or in the conditions of employment of any person or class of persons, for providing equal opportunities of employment for classes of persons who are at a disadvantage and to regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal of complaints of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment.
2(1) For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.	(See articles 2(1) and 2(3) in combination with articles 4, 8 and 10) **2(1)** [...] "discrimination" means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than other person [*sic*] has been or would be treated on the grounds of sex or because of family responsibilities and "discriminate" shall be construed accordingly; [...]	**2(1)** [...] "discriminatory treatment" means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association; [...]
2(2) For the purposes of this Directive, the following definitions shall apply: - *direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,* - *indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,* - *harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,* - *sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the*	**2(1)** [...] "discrimination" means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than other person [*sic*] has been or would be treated on the grounds of sex or because of family responsibilities and "discriminate" shall be construed accordingly; [...] **2(3)** For the purposes of subarticle (1) discrimination based on sex or because of family responsibilities is: (a) the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities; (b) treating a woman less favourably for reasons of actual or potential pregnancy or childbirth; (c) treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex; (d) any treatment based on a provision, criterion or practice which disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or	**26(2)** For the purposes of this article, discriminatory treatment shall include: (a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience; (b) actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment; (c) actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.

purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.	practice is appropriate and necessary and can be justified by objective factors unrelated to sex. **2(4)** Nothing in subarticle (2) [sic] shall be deemed to constitute discrimination in so far as such treatment - [...] (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women. **2(1)**[...] "sexual harassment" means the unlawful activities listed in article 9(1); [...] **9(1)** Without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act, it shall be unlawful for any person to sexually harass other persons, that is to say: (a) to subject other persons to an act of physical intimacy; or (b) to request sexual favours from other persons; or (c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or (d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.	
2(3) Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. *A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.*	**2(1)** [...] "sexual harassment" means the unlawful activities listed in article 9(1); [...] **9(1)** Without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act, it shall be unlawful for any person to sexually harass other persons, that is to say: (a) to subject other persons to an act of physical intimacy; or	**29(1)** It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as

	(b) to request sexual favours from other persons; or (c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or (d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated. **9(2)** (a) Persons responsible for any work place, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, shall not permit other persons who have a right to be present in, or to avail themselves of any facility, goods or service provided at that place, to suffer sexual harassment at that place. (b) It shall be a defence for persons responsible as aforesaid to prove that they took such steps as are reasonably practicable to prevent such sexual harassment. **9(3)** Persons who sexually harass other persons shall be guilty of an offence against this article and shall, without prejudice to any greater liability under any other law, be liable on conviction to a fine (*multa*) of not more than one thousand liri or to imprisonment of not more than six months or to both such fine and imprisonment. **4(2)** Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - [...]	offensive, humiliating or intimidating to such person. **29(2)** It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by: (a) subjecting the victim to an act of physical intimacy; or (b) requesting sexual favours from the victim; or (c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where - (i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim; (ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct.

	(c) neglect their obligation to suppress sexual harassment as provided under article 9(2).	
2(4) An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination within the meaning of this Directive.		
2(5) Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace.		
2(6) Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.	**2(5)** In relation to access to employment, a less favourable treatment which is based on a characteristic related to sex shall not constitute discrimination where by reason of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances: Provided that the burden of proof shall lie on the person who alleges that there is a genuine occupational requirement. **10(1)** [...]Provided that the provisions of this subarticle shall not apply in such cases where employers prove that the work in connection with the situation advertised can only be performed by a person of a specific sex. **20** The Minister may make regulations generally for giving effect to the provisions of this Act, and the enforcement thereof, and in particular, but without prejudice to the generality of the foregoing: [...] (c) for the exemption of any person, or class of persons or body, from the requirements of article 4(1) in so far as it relates to article 4(1)(*a*) and (*b*), article 5 and article 10 as may be specified in the aforesaid regulations; provided that any such exemption shall only be prescribed by the Minister after consultation with the Commission and provided that such exemption shall be for a specified period of time which can be	**26(3)** The provisions of subarticles (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.

	renewed by the Minister after consultation with the Commission. **3** Nothing in this Act shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities.	
2(7) This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. *A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.* *Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive.* *This Directive shall also be without prejudice to the provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (1) and of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC). It is also without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they shall be entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.*	**2(4)** Nothing in subarticle (2) [*sic*] shall be deemed to constitute discrimination in so far as such treatment - (a) is given to grant special protection to women during childbirth or pregnancy; [...]	**10** The Minister may, after consultation with the Board, make regulations establishing minimum periods of maternity leave, parental leave and leave for urgent family reasons to which an employee shall be entitled and the conditions regulating such entitlement (See Protection of Maternity (Employment) Regulations (Legal Notice 439 of 2003, as amended))

2(8) Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.	**2(4)** Nothing in subarticle (2) [*sic*] shall be deemed to constitute discrimination in so far as such treatment - [...] (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women. **7(1)** Spouses of self employed workers not being employees or partners, who participate in the activities of the self employed workers and perform the same or ancillary tasks as their spouse shall be entitled to receive from their spouse a fair compensation for their activity commensurate to the value of their contribution. **7(2)** The provisions of subarticle (1) shall not apply where the system of community of acquests or community of the residue under separate administration subsists between the spouses.	**31.** Subject to the foregoing, the Minister may, after consultation with the Board, prescribe regulations to give better effect to the provisions of articles 26, 27, 28 and 29 and in particular for the elimination of any discriminatory practices in the employment or in the conditions of employment of any person or class of persons, for providing equal opportunities of employment for classes of persons who are at a disadvantage and to regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal of complaints of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment.
3(1) Application of the principle of equal treatment means that there shall be no discrimination whatsover on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.	(See articles 2(1) and 2(3) in combination with articles 4 and 10)	**26(1)** It shall not be lawful for any person - (a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment; [...] **26(4)** For the purposes of this article, 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 to a higher grade or engagement in a different class of employment
3(2) To this end, Member States shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished; (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be,		

or may be declared, null and void or may be amended; (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.		
3(1) Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to: *(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;* *(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;* *(c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC;* *(d) 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.*	**4(1)** It shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment. **4(2)** Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - (a) manage the work, give promotions, distribute tasks, offer training opportunities or otherwise arrange the working conditions in a manner that employees are assigned a less favourable status than others on the basis of sex or because of family responsibilities; or (b) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; or (c) neglect their obligation to suppress sexual harassment as provided under article 9(2). **8(1)** It shall be unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in - (a) the access to any course, vocational training or guidance; or (b) the award of educational support for students or trainees; or (c) in the selection and	**26(1)** It shall not be lawful for any person - (a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment; (b) in regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment. **26(4)** For the purposes of this article, 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 to a higher grade or engagement in a different class of employment (See article 84)

	implementation of the curricula; or (d) in the assessment of the skills or knowledge of the students or trainees. **8(2)** Failure by the persons responsible for such establishments and entities to fulfil their obligation to suppress sexual harassment as provided under article 9(2) shall for the purposes of subarticle (1) of this article constitute discrimination. **8(3)** It shall be the duty of educational establishments and entities providing vocational training, within the limits of their competence to ensure that curricula and textbooks do not propagate discrimination. **10(1)** Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, it shall be unlawful for persons to publish or display or cause to be published or displayed any advertisement, or, otherwise to advertise a vacancy for employment which discriminates between job seekers or to request from job seekers information concerning their private life or family plans: Provided that the provisions of this subarticle shall not apply in such cases where employers prove that the work in connection with the situation advertised can only be performed by a person of a specific sex. **10(2)** It shall not be lawful for persons to publish or display or cause to be published or displayed any advertisement which promotes discrimination or which otherwise discriminate. **10(4)** For the purposes of subarticle (1), advertising includes disseminating information about the vacancy by word of mouth from person to person.	
3(2) To that end, Member States shall take the necessary measures to ensure that: *(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;* *(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective*		

agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations shall be, or may be declared, null and void or are amended.		
4[57] Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished; (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended; (c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.	(See articles 2(1) and 2(3) in combination with article 8)	
5(1)[58] Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.	(See articles 2(1) and 2(3) in combination with article 4)	**26(1)** It shall not be lawful for any person - [...] (b) in regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment.
5(2)[59] To this end, Member States shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished; (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment,		

[57] Deleted by Directive 2002/73/EC
[58] Deleted by Directive 2002/73/EC
[59] Deleted by Directive 2002/73/EC

internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended; (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.		
6 Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.	(See articles 5, 17 and 19)	(See article 30)
6(1) *Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.*	**5(1)** It shall be the duty of employers upon the request of any person claiming to have been sexually harassed or discriminated against, or upon a request made by the Commissioner acting upon a complaint or otherwise, to provide such person or the Commissioner, as the case may be, within ten working days of such a request with a report on the allegation made or the procedures used by the employers in the matter alleged to constitute such sexual harassment or discrimination. **5(2)** The employers shall be entitled to claim from the person requesting the report, reimbursement of such reasonable expenses incurred in drawing up and making the report: Provided that such expenses may be recovered from the person responsible for such sexual harassment or discrimination if it is found that such sexual harassment or discrimination did in fact take place. **19(1)** Without prejudice to the provisions of article 30 of the Employment and Industrial Relations Act, a person who alleges that any other person has committed in his or	**30(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. **30(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. **30(3)** For the purposes of hearing and deciding cases of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment, the Industrial Tribunal shall be composed of a chairperson alone in the manner set out in article 73(4). **30(4)** Any action taken by a complainant in accordance with the

	her regard any act which under any of the provisions of this Act is unlawful, shall have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful acts and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act. **19(2)** In any proceedings under subarticle (1) it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities and it shall be incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of this Act.	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.
6(2) *Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination contrary to Article 3, in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.*	**19(1)** Without prejudice to the provisions of article 30 of the Employment and Industrial Relations Act, a person who alleges that any other person has committed in his or her regard any act which under any of the provisions of this Act is unlawful, shall have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful acts and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act.	**30(3)** 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.
6(3) *Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainants, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*	(See article 12(1)) **17(1)** The Commissioner may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of this Act. **17(2)** The Commissioner may also initiate investigations on the receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of this Act. **17(3)** If it appears to the Commissioner that persons who wish to make a complaint under subarticle (2) require assistance to formulate the complaint, the Commissioner	

	shall take or order the taking of such reasonable steps as may be necessary to assist such persons in making the complaint. **18(1)** After carrying out an investigation the Commissioner may - (a) dismiss the complaint, or (b) find that the complaint is proved and thereupon, shall: (i) where the action complained of constitutes an offence, make a report to the Commissioner of Police for action on his part; or (ii) where the action complained of does not constitute an offence, call upon the person against whom the complaint is directed to redress the situation, and mediate between the complainant and such person to settle the matter. **18(2)** The findings of the Commissioner under subarticle (1) shall not be binding on the complainant and the person against whom the complaint is directed unless they expressly declare in writing to be so bound. **18(3)** In respect of general investigations or of investigations upon complaints by the Commissioner, the Minister may prescribe: (a) the procedure whereby the Commissioner may require any person to furnish such information as may be necessary for the investigation, as well as the time within which and the manner in which such information is to be furnished; (b) the procedures to be followed where a person fails to supply such information, the circumstances in which following an investigation as aforesaid, the Commission may itself take legal action. **18(4)** Regulations under subarticle (3) may provide, in the case of an alleged discrimination by one person against another, the arrangements whereby the Commission may itself refer the matter to the competent civil court or to the Industrial Tribunal for redress: Provided that nothing in this subarticle shall prevent any person having a legal interest from himself taking action for redress or where	

	action has been taken by the Commission, from joining in and becoming a party to the suit. **18(5)** The Commissioner and every other member of the Commission or any member of the staff of the Commission shall treat any matter coming to their knowledge in the course of an investigation as confidential and shall not disclose the same unless such disclosure is necessary in the course of a prosecution or an action for redress under this Act.	
6(4) *Paragraphs 1 and 3 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.*		
7 Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.	**4(2)** Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - [...] (*b*) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; [...]	**28** 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.
7 Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.	**4(2)** Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - [...] (*b*) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; [...]	**28** 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.
8 Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.		
8a(1) *Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and*	**11(1)** The Prime Minister shall upon the advice of the Minister appoint a Commission to be called the National Commission for the Promotion of	

support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.	Equality for Men and Women (hereinafter referred to as "the Commission") composed of a chairperson who shall be called the Commissioner for the Promotion of Equality (hereinafter referred to as "the Commissioner") and six other members, at least three of whom shall be women. **11(2)** All the members of the Commission shall be 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. **11(3)** 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. **11(4)** 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. **11(5)** The quorum of the Commission shall be of four members, one of whom shall be the Commissioner. **11(6)** The validity of any proceedings of the Commission shall not be affected by any vacancy among the members of the Commission or by any defect in the appointment of any member. **11(7)** Decisions of the Commission shall be taken by the majority of the votes of the members present. The Commissioner shall also have a casting vote.	

	11(8) Subject to the provisions of this Act and of any regulation made thereunder, the Commission may appoint sub-committees and, in general, shall regulate its own proceedings.	
8a(2) *Member States shall ensure that the competences of these bodies include:* *(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 6(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;* *(b) conducting independent surveys concerning discrimination;* *(c) publishing independent reports and making recommendations on any issue relating to such discrimination.*	**12(1)** The Commissioner, with the assistance of the Commission, shall have the following functions, that is to say: (a) to identify, establish and update all policies directly or indirectly related to issues of equality for men and women; (b) to identify the needs of persons who are disadvantaged by reasons of their sex and to take such steps within its power and to propose appropriate measures in order to cater for such needs in the widest manner possible; (c) to monitor the implementation of national policies with respect to the promotion of equality for men and women; (d) 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; (e) to keep direct and continuous contact with local and foreign bodies working in the field of equality issues, and with other groups, agencies or individuals as the need arises; (f) to work towards the elimination of discrimination between men and women; (g) to carry out general investigations with a view to determine whether the provisions of this Act are being complied with; (h) 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; (i) 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; (j) to provide assistance, where and as appropriate, to persons suffering from discrimination in enforcing	

	their rights under this Act; (k) to keep under review the working of this Act, and where deemed required, at the request of the Minister or otherwise, submit proposals for its amendment or substitution; (l) to perform such other function as may be assigned by this or any other Act or such other functions as may be assigned by the Minister. **17(1)** The Commissioner may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of this Act. **17(2)** The Commissioner may also initiate investigations on the receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of this Act. **17(3)** If it appears to the Commissioner that persons who wish to make a complaint under subarticle (2) require assistance to formulate the complaint, the Commissioner shall take or order the taking of such reasonable steps as may be necessary to assist such persons in making the complaint. **18(1)** After carrying out an investigation the Commissioner may - (a) dismiss the complaint, or (b) find that the complaint is proved and thereupon, shall: (i) where the action complained of constitutes an offence, make a report to the Commissioner of Police for action on his part; or (ii) where the action complained of does not constitute an offence, call upon the person against whom the complaint is directed to redress the situation, and mediate between the complainant and such person to settle the matter. **18(2)** The findings of the Commissioner under subarticle (1) shall not be binding on the complainant and the person against whom the complaint is directed unless they expressly declare in writing to be so bound.	

	18(3) In respect of general investigations or of investigations upon complaints by the Commissioner, the Minister may prescribe: (a) the procedure whereby the Commissioner may require any person to furnish such information as may be necessary for the investigation, as well as the time within which and the manner in which such information is to be furnished; (b) the procedures to be followed where a person fails to supply such information, the circumstances in which following an investigation as aforesaid, the Commission may itself take legal action. **18(4)** Regulations under subarticle (3) may provide, in the case of an alleged discrimination by one person against another, the arrangements whereby the Commission may itself refer the matter to the competent civil court or to the Industrial Tribunal for redress: Provided that nothing in this subarticle shall prevent any person having a legal interest from himself taking action for redress or where action has been taken by the Commission, from joining in and becoming a party to the suit. **18(5)** The Commissioner and every other member of the Commission or any member of the staff of the Commission shall treat any matter coming to their knowledge in the course of an investigation as confidential and shall not disclose the same unless such disclosure is necessary in the course of a prosecution or an action for redress under this Act.	
8b(1) *Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.*		
8b(2) *Where consistent with national traditions and practice, Member*		

States shall encourage the social partners, without prejudice to their autonomy, to promote equality between women and men and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.		
***8b(3)** Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.*		
***8b(4)** To this end, employers should be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.* *Such information may include statistics on proportions of men and women at different levels of the organisation and possible measures to improve the situation in cooperation with employees' representatives.*		
***8c** Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.*		
***8d** Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied.* *The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.*	**9(3)** Persons who sexually harass other persons shall be guilty of an offence against this article and shall, without prejudice to any greater liability under any other law, be liable on conviction to a fine (*multa*) of not more than one thousand liri or to imprisonment of not more than six months or to both such fine and imprisonment. **10(3)** Persons who act in breach of subarticle (1) or (2) shall be guilty of an offence against this article and shall, on conviction, be liable to the penalties established for contraventions.	**32** Any person contravening the provisions of articles 28 and 29 shall be guilty of an offence and shall be liable on conviction to a fine (*multa*) not exceeding one thousand liri (Lm 1000) or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.

8e(1) *Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.*	**6(1)** No bank or financial institution or insurance company shall discriminate against any person in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self employment or the insurance of that business or the person in self employment. **6(2)** Nothing in subarticle (1) shall be deemed to constitute discrimination in so far as the conditions under which the facility or the insurance cover is offered or withheld reflect genuine considerations based on the financial risk in the grant of such facilities or of such insurance cover.	**31.** Subject to the foregoing, the Minister may, after consultation with the Board, prescribe regulations to give better effect to the provisions of articles 26, 27, 28 and 29 and in particular for the elimination of any discriminatory practices in the employment or in the conditions of employment of any person or class of persons, for providing equal opportunities of employment for classes of persons who are at a disadvantage and to regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal of complaints of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment.
8e(2) *The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.*		
9(1) Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within 30 months of its notification and shall immediately inform the Commission thereof. However, as regards the first part of Article 3 (2) (c) and the first part of Article 5 (2) (c), Member States shall carry out a first examination and if necessary a first revision of the laws, regulations and administrative provisions referred to therein within four years of notification of this Directive.	(Date of coming into force: 9 December 2003)	
9(2) Member States shall periodically assess the occupational activities referred to in Article 2 (2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.		
9(3) Member States shall also communicate to the Commission the texts of laws, regulations and administrative provisions which they adopt in the field covered by this Directive.		

10 Within two years following expiry of the 30- month period laid down in the first subparagraph of Article 9 (1), Member States shall forward all necessary information to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council.		
11 This Directive is addressed to the Member States.		

IMPLEMENTATION OF THE GENDER *ACQUIS* OF THE UNION IN MALTA

PETER G. XUEREB

SECTION A

In Section A, I report on Directives 75/117, 79/7, 86/378 and 96/97 and Maltese Law.

1. Directive 75/117/EEC - Equal Pay

This was transposed via the Employment and Industrial Relations Act 2002 (Act XXII of 2002, henceforth 'EIRA'). The Equality of Men and Women Act of 2003 (Act 1 of 2003, henceforth the 'EMW Act') supplements the protection afforded by the former.

Article 26(1) of the *EIRA* makes it unlawful for any person when advertising or offering or selecting for employment to subject applicants or any class of applicants to discriminatory treatment; and in regard to existing employees, for the employer to subject such employees or any class of employees to discriminatory treatment in regard to conditions of employment. Article 26(2) provides that for these purposes, discriminatory treatment shall include "actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory measures", subject to reasonable justification (Article 26(3)). Article 27 provides that employees in the same class of employment are entitled to the same rate of remuneration for work of equal value, and declares any distinction between class of employment based on discriminatory treatment otherwise than in accordance with the provisions of the Act or any other law to be null and of no effect. There is no exhaustive definition of 'work of equal value' in the law.

Article 28 of the Act implements Article 5 of the Directive, making it unlawful to victimize any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress. Article 32 makes victimization an offence punishable by a fine of up to Lm 1000 or to imprisonment for up to six months or to both such fine and imprisonment. By Article 30, provision is made for the lodging of complaints to the Industrial tribunal alleging a breach of articles 26, 27 or 28 (or 29) for the purpose of investigation by the Tribunal. The Tribunal is empowered to take all measures it deems fit if it be satisfied that the complaint is justified, including the cancellation of any contract of

service or any clause in a contract or collective agreement which is discriminatory, and may order the payment of a reasonable sum of money as compensation to the aggrieved party. This is declared to be without prejudice to any other actions or remedies available under any other law (article 30(4)). This provision is clearly intended to implement articles 4, 5 and 6 of the Directive. The Minister is empowered to make further regulations to give better effect to the above provisions (article 31).

It is for the Prime Minister to prescribe by regulations the applicability of any article or sub-article of Title 1 (wherein the above provisions appear) or Title II of the Act to service with the government (Article 48).

The EMW Act supplements this by generally prohibiting discrimination based on sex or family responsibilities, in particular in Article 4 relating to discrimination in employment. It remains to be seen whether the scope of this Act will be interpreted as extending to discrimination in pay, as this is not expressly referred to. "Discrimination" is defined in Article 2 (1) as meaning "discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than any other person has been or would be treated on the grounds of sex or because of family responsibilities". Article 4(1), dealing with discrimination in employment, refers to "arrangements made to determine who should be offered employment ", the "terms and conditions on which employment is offered" (which covers pay, at least at the time of the job offer), and "the determination of who should be dismissed from employment". Article 4(2) details specific instances of discrimination, which however do not deal with equal pay, but in a manner so as to be without prejudice to Article 26 of the EIRA, so that many if not most instances of pay discrimination will be dealt with through the machinery of the EIRA. Article 30 provides for the reference, without prejudice to other avenues open to the complainant, of breaches of the principle of equal pay to the Industrial Tribunal. Regulations made under Article 18(3) may provide for arrangements whereby the Commission itself may refer a question of alleged discrimination to the Industrial Tribunal for redress, without prejudice to the individual right of action.

The EMW Act sets up a National Commission, whose brief (Article 12) includes the carrying out of general investigations and the investigation of complaints of a more particular or individual character, to provide assistance to persons suffering from discrimination in enforcing their rights under the Act. The powers of the Commission, after carrying out an investigation, include making a report to the Commissioner of Police where the infraction constitutes an offence. Generally, as in the case of pay discrimination, its powers include calling on the infringer to redress the situation and mediating as necessary with a view to a settlement; this is without prejudice to the complainant's right to take action for redress (Article 18(4)), and in particular, and without prejudice to Article 30 of EIRA, to bring an action before the competent civil court for an order to desist and/or payment of compensation. In such proceedings, it is sufficient for plaintiff to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities, and the onus is then on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of the Act (Article 19).

2. Directives 79/7, 96/378 and 96/97 - Social Security/Occupational Social Security

The government had declared its intention to implement these Directives by amendment where necessary of the Social Security Act (Act X of 1987, Chapter 318 of the Laws of Malta) by the first quarter of 2002.

It needs to be borne in mind that the Equality of Men and Women Act and the Employment and Industrial Relations Act prohibit gender discrimination. Therefore, insofar as one is dealing with 'pay' or 'dismissal' the case law of the European Court of Justice should be applied in the interpretation in particular of the EIRA, and of the EMW Act. However, no specific effort has yet been made to implement these Directives. The Social Security Act makes no specific mention of gender equality, although it is provided that "widow' shall include widower in the context of the widow's pension. The Equality for Men and Women Act does not deal with pension schemes. No specific legal provision exists for gender equality re occupational schemes either.

Attempts to glean concrete information from official and unofficial sources as to any proposals to further amend the Social Security Act itself have yielded no result at this point, no doubt also due to the ongoing efforts to mobilize a debate on Pensions Reform and a Social Pact, as well as on the draft National Action Plan for Employment.

As things stand at the moment, for example, the state pension age for men and women differs, with 61 for men and 60 for women, and 'retirement' is defined as the "attainment of pension age", but by Article 66 of the Act it is provided as a rule that any person who has attained the age of 60 and fulfils certain conditions as to citizenship (of Malta), residence and means, shall be entitled to an age pension, with the wife forfeiting her pension if a pension is payable in respect of the husband. A similar rule exists in relation to invalidity (Article 27). Again, apart from re widow's pension (see above), the Social Security Act tends to speak sometimes of 'man' and at others of 'woman', thus allowing for the possibility at least of different treatment.

It is beyond the scope of this report to enter into a detailed analysis of the Social Security Act's provisions. It is a notoriously complex piece of legislation. The answer to some questions is not immediately obvious: for example the Act often speaks of "head of household and his wife", but it is only in relation to some provisions and for the purposes of particular parts of the Act that it is then expressly provided that "wife" shall include a male who in the opinion of the Director is living with such head of household (where the Director deems a 'female' to be such). On the other hand, it is thought that the application of the Interpretation Act and reference to the European Union Act (which provides for the application in Malta of the *acquis*) could lead in concrete cases to equal application of the Act as it stands, so that for example, where "married man" and "wife" are used (as in article 26(6)) there will be substituted the words "married woman" and "husband", leading to the same rights under the Act. However, this cannot be sure in an Act which tends to speak of 'woman' or 'man' as the context dictates.

Part VIII of the Act sets out the procedures for redress. It provides for decisions by the Director, the Umpire and appeals to the Court of appeal; it also provides that in proceedings in any court certain decisions of the Umpire shall be conclusive (Article 111).

SECTION B

1. Council Directive 76/207 - Equal Treatment

Some of the ground relating to this Directive is covered in Section A above and in Section D below on the Gender Equality Body in Malta, including the relevant body (the National Commission for the Promotion of Equality), the definition of discrimination, and sexual harassment, the scope of the prohibitions in the Employment and Industrial Relations Act 2002 (EIRA) and in the Equality of Men and Women Act of 2003 (EMW Act), with reference to the respective provisions therein on access to judicial and administrative procedures and the making of compensation. I make some further main points here.

In general it is EIRA and EMW Act that seek to implement Directive 76/207 (a further attempt will need to be made to implement Directive 76/207 as amended by Directive 2002/73).

The EIRA (Section 2) defines 'discriminatory treatment (prohibited)' as including '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...', and 'unfair dismissal' as 'termination of employment which is not made solely on the grounds of redundancy or for a good and sufficient cause, or which, although made on grounds of redundancy or for a good and sufficient cause, is discriminatory as defined in this Act, and includes a failure to re-employ such person'. By Section 26, it is unlawful (a) when advertising or offering employment or when selecting applicants to subject applicants or any class of applicants to discriminatory treatment, or (b) in regard to any persons in employment, to subject any such employees or any class to such treatment in regard to conditions of employment. And for the purposes of this provision, discriminatory treatment shall include (a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous performance and experience, (b) actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value on the basis of discriminatory treatment, (c) actions where the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that the employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment. By Section 26(3) it is provided that the above prohibitions do 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 the required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by any applicable laws or regulations'. This is significantly repeated in terms of 'access to employment' in Section 2(5) of EMW Act, though not exactly, but in this context the burden of proof is placed expressly on the employer (see below).

The EIRA does not make express reference to the concept of indirect discrimination, and legal certainty (as well as eventual compliance with Directive 2002/73) would require express provision. This is in some contrast to the later and broader EMW Act, which, however, although broader in scope, expressly prohibits indirect, as well as direct, discrimination in the context of arrangements made to determine or in determining who should be offered employment, in the terms and conditions on which employment is offered, or in the determination of who should be dismissed from employment. It appears that there may be the need for some legislative amendment if the legislation is to be brought fully into line with the new version of Directive 76/207 on the definitional side, both as regards indirect discrimination and as regards harassment and sexual harassment (see below). Otherwise, Section 4 of the EMW Act involves considerable overlap with the above provisions of the EIRA.

Section 2(4) of EMW Act represents an attempt to reproduce Article 2(3) and (4) of Directive 76/207 as is, and may be referred to in order to argue that there is implementation of a new version of Article 2(7)(1) and (8) (which cross-refers to Article 141(4) EC). They certainly come close in terms of wording. The EMW Act uses the phrases 'positive action' and 'substantive equality', without defining them.

Provision on harassment is to be found in the EIRA in Section 29. Further provision against sexual harassment is to be found in Section 9 of EMW Act. Section 29 of EIRA speaks (separately) of acts 'based on sexual discrimination', and of sexual harassment 'by' (and then setting out) three broad types of behaviour. Section 9(1) of the EMW Act (without prejudice to Section 29 of EIRA) sets out three types of behaviour and one set of results in four paragraphs together defining the phrase to 'sexually harass'. The language of 'purpose and effect' present in the Directive as amended is not used. The wording comes close to that of the new version of Article 2 of the Directive though it is not identical.

2. Council Directive 97/80 - Burden of Proof in Sex Discrimination Cases

The general rule of evidence in Malta is that the plaintiff must prove the facts alleged. However, the Maltese legislature has taken some steps to implement Directive 97/80, with what result remains unclear.

The Employment and Industrial Relations Act 2002 (EIRA) contains no general provision introducing a new rule shifting the burden of proof of compliance with the principle of equality once the plaintiff establishes facts giving rise to a presumption of breach. This includes, but is not limited to, alleged discrimination on grounds of sex.

Sections 31 (regulations for the 'giving of better effect to Sections 26, 27, 28 and 29 on discrimination and gender equality, work of equal value, victimisation and harassment respectively) and 78 (procedure and proceedings before the Industrial Tribunal) give the Minister the power to make regulations for the greater effectiveness of enforcement of gender equality, and this mechanism could be used to introduce general burden of proof rules.

Section 26(2)(a) of EIRA does provide 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'. This then is a specific application of the principle of reversal of burden of proof.

Some argue that where it is the employer who is the plaintiff, not necessarily the usual case at all, the normal rule requiring the employer to prove all relevant facts could of itself result in the employer having to 'disprove' any breach of the equality principle.

The other relevant piece of Maltese legislation is the Equality of Men and Women Act of 2003 (EMW Act). Section 2(5) provides, in relation to access to employment, that any less favourable treatment based on sex shall not constitute discrimination where, by reason of the particular occupational activities concerned or of the context, such characteristic is a genuine occupational requirement and such treatment is appropriate and necessary, but in a proviso provides that the above applies *provided* that *the burden of proof shall lie on the person alleging that there is a genuine occupational requirement.* There is no similar express provision in Section 4 on discrimination in employment (offers, dismissals, management of work, status, victimisation, and sexual harassment). The National Commission for the Promotion of Equality (the equality body) set up by the Act can in general regulate its own proceedings, but it appears that all complaints and investigations are in the hands of the Commissioner him/herself (Section 17), and it is provided in Section 18(3) that in respect of general investigations or of investigations upon complaints by the Commissioner, the Minister may prescribe the procedure whereby the Commissioner may require any person to furnish information, but this does not appear to extend to burden of proof rules. It should be noted that by Section 18(2) it is envisaged that the findings of the Commissioner will be binding on the complainant and the person against whom the complaint is lodged if they expressly agreed to be so bound.

It is nevertheless provided in Section 19(1) that a person who alleges the fact of commission of *any act made unlawful* by the EMW Act shall have a right of action before the civil courts seeking a injunction and/or compensation; *and* Section 19(2), which purports to be a general burden of proof rule, provides that in any proceedings before the competent court of civil jurisdiction it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably *on the basis of sex or because of family responsibilities*...it then becoming 'incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of this Act'. The Section therefore purports to lay down the burden of proof rule in most if not all cases of discrimination on grounds of sex or because of family responsibilities (in the cases covered by Council Directive 97/80). The Minister's power to make regulations in Section 20, otherwise wide, would not of itself extend to varying this, though the power to make regulations for the purpose of giving effect to the *acquis* under the European Union Act 2003 might. Yet Section 19(2) would not appear to fully implement the Directive, for it is arguable that the plaintiff should be called upon only to prove basic facts from which it can be presumed that there was discrimination and this apparently on the basis of sex or family responsibilities ., it then being incumbent on the defendant to prove either that there was no discrimination or that there were justifiable reasons quite extraneous to sex or family responsibilities at play, rather than initially

requiring the plaintiff to prove not only the fact of less favourable treatment *but also that this was on the ground of sex or because of family responsibilities.*

The question then is whether Maltese law is fully in line with Article 4(1) of the Directive, which obliges Member States to provide that it is enough for the plaintiff to establish 'facts from which it may be presumed that there has been direct or indirect discrimination' interpreted in the spirit of the more recent case-law of the European Court of Justice (Danfoss, Enderby, Royal Copenhagen). It remains to be seen whether these doubts are justified, as court judgments begin to emerge on these points. The second question is whether the two laws mentioned provide clearly enough for this burden of proof in both the public and private sphere and therefore in all bodies that might determine the issue in a binding way. Nor, it may be, depending on the proper interpretation of Article 7(3) of the Directive, has there been a sufficiently clear reference in these laws or regulations made under them to Directive 97/80. However, access to the judicial process in terms of Article 1 of the Directive appears to have been fully respected.

SECTION C: Directives 92/85, 96/34, 86/613

1. Directive 92/85 - Pregnant Workers and Working Mothers

This Directive was sought to be transposed into Maltese Law by the Protection of Maternity (Employment) Regulations of 5th January 2004 (Legal Notice 439 of 2003 as amended by Legal Notice 3 of 2004), made under the Employment and Industrial Relations Act (EIRA). These came into force on that date. They speak of 'maintaining employment rights', 'facilitating' (rather than 'encouraging') improvements in the health and safety of pregnant employees, those who have recently given birth and breastfeeding employees. 'Employee" is not defined and therefore has the meaning as prescribed in the EIRA, wherein 'employee' is defined 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, but excluding work or service performed 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".

The Maltese Regulations are so worded as to provide that Regulation 3 (2), which protects the employee's rights under her contract of employment as to continued employment and wages, applies "when an employer takes measures", rather than imposing the obligation to take such measures. The regulations in fact cross-refer to the Occupational Health and Safety Authority Act as the statutory source of the obligation on the employer.

Regulation 3(4) of the Protection of Maternity Regulations provides that if the employer shows to the satisfaction of the Occupational Health and Safety Authority that he is unable to comply with Regulation 3(3) (i.e. to adjust the working environment or the hours of work of the employee, or assign the employee to suitable alternative work in the event that the above are not feasible or cannot reasonably be required as per Art. 5 of the Directive) the employee shall be given special maternity leave for the whole of the period necessary to protect her safety or health without prejudice to her other entitlement under Regs. 6 and 7 (maternity leave and pay). During such special maternity leave the employee shall be paid,

for a period of eight weeks, a 'special allowance' equivalent to the rate of sickness benefit as payable under the Social Security Act (Cap.318). Beyond eight weeks there will be no pay or allowance but other rights accrue or are restored on termination of special maternity leave. [Reg. 3 (4) and (5) and Reg.11]Provided the employee duly notifies her employer, she "may apply" for maternity leave for an uninterrupted period of 14 weeks (Reg.6) and 'an employee on maternity leave' is (then) entitled to maternity leave with full wages for 13 weeks, but no pay for the fourteenth week (Reg. 7).

Article 10 on dismissal is implemented by Regulation 12. Regulation 13 provides for access to the industrial Tribunal in the event of unfair dismissal and Regulation 14 makes it an offence for 'any person' to contravene any of the regulations, punishable by a fine of not less than Lm 200. The EIRA and the Equality for Men and Women Act (EMWA) provide for civil liability in cases of 'discrimination' and this remedy should also be available on general principles in the event of a proven breach of these Regulations.

2. Directive 96/34 - Parental Leave

The Parental Leave Directive was sought to be implemented by the Parental Leave (Entitlement) Regulations 2003, (Legal Notice 225 of 2003) and by the Urgent Family Leave Regulations 2003 (Legal Notice 296 of 2003), both adopted under the Employment and Industrial Relations Act 2002. The regulations cover working parents, and apply to full-time employees and also to part-time employees as defined in terms of the Part-Time Regulations of 2002. A minimum period of continuous employment of twelve months is established (in line with Clause 2 of the Framework Agreement)."Employee", rather than "worker", is used, and has the same meaning as in the EIRA, as with the Protection of Maternity (Employment) Regulations (see above).

Regulation 4(1) grants the right to *unpaid* parental leave on the grounds of birth, adoption or legal custody for a period of three months until the child has attained the age of 8years, provided that the leave is to be availed of in established periods of one month each. Regulation 5 adjusts conditions of access to the special circumstances of adoption. By regulation 7, an employer who has received such notice has the right to postpone the granting of such leave 'for justifiable reasons relating to the operation of the place of work'; 'justifiable reasons are stated to include the examples set out in Clause 2.3(e) and (f) of the framework agreement. Protection from unfair dismissal is provided by Regulation 10.The right to return is safeguarded by Regulation 8. Regulation 9 seeks to implement Clause 2.6 of the Framework Agreement. Entitlements to other leave, bonuses or allowances that might have accrued during the period of leave are excluded. Disputes are to be referred to the Director of Employment and Industrial Relations for mediation. Regulation 13 makes the breach of these regulations an offence punishable by a fine of not less than Lm 50 (circa 122 euros) and not more than Lm 500 (circa 1220 euros). It is doubtful how far this is an effective deterrent.

3. Directive 86/613 - Self-employed, Equal Treatment

For the purposes of the EMWA, "employment" is defined as meaning "any gainful activity including self-employment" (Art.2(1)). Then most of the provisions declare unlawful certain

acts of 'employers'. Nevertheless, the Act contains certain provisions purporting to implement the provisions of Directive 86/613.

Article 6(1), EMWA provides that no bank or financial institution or insurance company shall discriminate against any person in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self-employment or the insurance of that business or the person in self-employment; saving by article 6(2) genuine considerations based on the financial risk in the grant of such facilities or of such insurance cover. This is clearly intended to implement Article 4 of the Directive. There is as yet no caselaw on the proviso in article 6(2).

There is no specific provision in EMWA regarding article 5 of the Directive. Neither the Companies Act of 1995 nor any other law relating to the formation of companies would appear to set out any conditions that make it more difficult for spouses to form a company as between themselves than for unmarried persons.

As to spouses, not being employees or partners, who habitually participate in the activities of the self-employed worker and perform the same or ancillary tasks regulation 7(1) provides that spouses of self-employed workers not being employees or partners, who participate in the activities of the self-employed workers and perform the same or ancillary tasks as their spouse "shall be entitled to receive from their spouse a fair compensation for their activity commensurate to the value of their contribution". The entitlement referred to in sub-article 1 does not apply where the system of community of acquests or community of the residue under separate administration subsists between the spouses (Article 7(2)). In these latter cases, there is the entitlement to participate in income or profits in virtue of the law applicable to such marital regimes.

As for Article 6 of the Directive, there is no problem with women engaged in declared work and who pay national insurance contributions; they are obliged indeed to pay contributions under the Social Security Act (Cap.318). The problem arises because many women apparently do such work 'with' their spouses, but do not declare it and do not pay contributions.

As for Article 8 of the Directive, according to the Social Security Act (Cap. 318), a female worker who is gainfully active and is insured in her own name is entitled to sickness, maternity and other benefits under the Act. Again, if the spouse of a self-employed person is insured in view of her gainful activity she is entitled as above. However, there are no rights entitling the spouse of a self-employed person to benefits except for maternity benefit if she is not paying national insurance contributions in her own name.

SECTION D: The Maltese Gender Equality Body

Introduction

The National Commission for the Promotion of Equality for Men and Women was set up in January 2004. It incorporated the preceding Commission for the Advancement of Women

and the Department for Women in Society. It was set up under the Equality for Men and Women Act of 2003 (Chapter 456 of the Laws of Malta), an Act passed to promote equality for men and women. The Act came into force in December 2003. Gender issues had received treatment in the Employment and Industrial Relations Act of 2002, which includes specific clauses regulating discriminatory practices in the employment sector and introduced gender mainstreaming and family-friendly concepts. Other issues, such as protection of maternity at the workplace, were addressed in the Occupational Health and Safety at Work Act of 2000. The web address for the National Commission is : http://www.equality.gov.mt

Composition

Article11 of the Act provided for the setting up of a Commission to be chaired by a Commissioner for the Promotion of equality and six other members, at least three of whom were to be women. All the members are appointed by the Prime Minister from among such persons as the Prime Minister considered to be best suited to deal with issues of equality for men and women, and, or, administrative issues connected therewith. The term of appointment is of two years renewable. Appointments may be terminated by the Prime Minister if he is satisfied that a member has failed to attend meetings for six months, or a member is an undischarged bankrupt or has made an arrangement with creditors or is guilty of an offence against the person, or that a member is incapable of carrying out his or her duties.

Independence

Apart from matters of appointment and dismissal (on stated grounds) as above, the Commission is clearly intended by the law to act autonomously. It is declared to have a legal personality separate from that of the Government. Its judicial representation vests in the Commissioner. However, the Commission may appoint one or more of its members or any other person to appear in its name and on its behalf in judicial proceedings and on any act, contract, agreement or document whatsoever (Article12 (2) of the Act). Article 13 provides for the appointment of an Executive Director who shall administer the Commission in accordance with the policies established by the Commission and such instructions as may be given by the Commissioner. The terms of appointment are fixed by the Commissioner "with the concurrence of the Minister (responsible for equality)". It is anticipated in the Act that the Executive Director may be a public officer seconded form Government (Article 13(2)).

The Commission may appoint such officers as it may deem fit, after consultations with the Minister and with his approval as to their number, remuneration and terms of service (Article 13 (3)). The Prime Minister may, at the request of the Commission, detail any public officers for duty with the Commission (Article 13 (4)), however it is provided that where this occurs such officer shall, during the time the direction has effect, be under the administrative authority and control of the Commission, while remaining for all other purposes a public officer, without prejudice for example to pension and other rights (Article 13 (6)).

The Minister has power to make regulations generally for giving effect to the provisions of the Act and its enforcement (Article 20). In particular, he may make regulations for

providing for any matter which is required or authorized by the Act to be prescribed, and for "providing for any matter relating to equality between men and women".

The Act also envisages close co-operation between the Commission and the Government, and the Commission would appear to be largely (currently in practice totally) dependent on the Government for its funding and its staffing. The intention of the Act however appears to be, and surely is, that the Commission otherwise operate autonomously. There is a clear intention to empower the Commission to provide independent assistance to victims of discrimination in pursuing complaints, to conduct independent surveys concerning discrimination, and to publish reports and make recommendations on any issue relating to discrimination as defined. This appears to be borne out in practice thus far.

Functioning

The Commission acts by majority vote of those present at the meeting. It may appoint sub-committees and, in general, regulate its own proceedings. This is expressly made subject to the provisions of the Act and of any regulations made thereunder.

General Purpose and Objective

The Commission was set up with the general aim of monitoring the implementation of the Equality of Men and Women Act, and to promote equality in spheres where it may be lacking. The Quality Service Charter issued by the National Commission in June 2004 (http://www.servicecharters.gov.mt) declares that the Commission works "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 to opportunities, services and benefits". The functions of the Commission are set out as functions of the Commissioner 'with the assistance of the Commission' in Article 12 of the Act. These include: to identify, establish and update all policies directly or indirectly related to gender issues; identifying the needs of persons who are disadvantaged and to take steps within (its) power to propose appropriate measures to cater for such needs; to monitor the implementation of national policies of promotion of equality; to liaise between, and ensure co-ordination between government departments and other agencies in the implementation of measures, services or initiatives proposed by Government or the Commission; to keep direct contact with local and foreign bodies in the field; to work towards the elimination of discrimination; to carry out 'general investigations' with a view to determining whether the provisions of the Act are being complied with; to investigate complaints of a more particular or individual character to determine any contravention of the Act and mediate with regard to such; to inquire into and advise or make determinations on any matter referred to the Commission by the Minister; to provide assistance to persons suffering from discrimination in enforcing their rights under the Act; 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; to perform any other function as may be assigned by the Act or any other Act or such other functions as may be assigned by the Minister.

By Articles 17 and 18, the Commissioner may investigate alleged breaches of the Act or individual complaints. The Commission may dismiss a complaint; or, if it be found proved and where the action or omission complained of constitutes and offence, refer the matter to

the Commissioner of Police; or mediate. Article 18(3) provides that the Minister may prescribe (by regulation) rules as to the procedure whereby the Commissioner may require any person to submit information as may be required for the investigation etc. and the procedures to be followed where a person fails to supply such information, the circumstances in which following an investigation the Commission itself may take legal action, or may refer the matter to the competent civil court or to the Industrial Tribunal for redress.

Funding

By Article 14 of the Act, the Commission is to be funded through funds allocated to it by the Minister out of funds voted by Parliament to the Ministry or through funds donated or allocated to it 'from other sources in Malta or abroad'. The Commission must submit a business plan for its activities over each forthcoming financial year for the approval of the Minister responsible for equality and the Minister responsible for finance, leading to its approved budget (Article 14). The level of funding provided in its first year was in the order of Lm 72,000 (circa 168,480 euros) but this was essentially by 'inheritance' by the Commission of the funds previously allocated to the earlier bodies absorbed by the new Commission. The real test came with the last national budget. The Commission did reasonably well but could do with more. The Commission is known to be making vigorous efforts to raise funds from outside sources, including from the European Social Fund and other Community sources.

Role and Functions

Grounds of Discrimination Covered: The Act (Article 2) defines 'discrimination' as discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than another person has been or would be treated on the grounds of sex or because of family responsibilities". Further, 'discrimination based on sex or because of family responsibilities' is defined as the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or family responsibilities; treating a woman less favourably for reasons of actual or potential pregnancy or childbirth; treating women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex; any treatment based on a provision, criterion or practice which disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex (indirect discrimination). Article 3 excludes the application of the Act to any rule relating to religious practice, access to the priesthood or membership in any religious order or other religious communities. Discrimination in employment, whether as to employment, terms and conditions of employment, allocation of tasks, promotion and dismissal is made unlawful by Article 4. Other matters covered include sexual harassment (Article 9, supplementing the Employment and Industrial relations Act provisions), equal treatment for the self-employed, including access to finance and insurance cover (Article 6), the compensation of spouses of self-employed workers who participate in the latter's activities (Article 7), non-discrimination in educational and training establishments (Article 8), discriminatory advertising, covering advertisements that

discriminate or promote discrimination (Article 10, supplementing the Employment and Industrial Relations Act).

As soon as practicable after the end of each calendar year, but not later than the 31st March of the following year, the Commission 'may' submit to the minister a report of its activities during that year (the Annual Report). This 'shall' include a general report of developments during the period in respect of matters falling within the functions of the Commission and also include a report on the activities, initiatives, investigations and initiatives undertaken to suppress discrimination and to promote equality for men and women. The Minister shall then within two months table the Annual report and a copy of the then current Business Plan in Parliament (Article 15). The Commission has published its first annual report, which also sets out its priorities and action plan as endorsed by the government.

Any Proposals to Change the Body

None that have been made public at this stage. The Commission has the remit to keep the working of the Act under review, as noted above. A significant issue is the question whether a single Equality Body should be created, possibly with divisions and a certain element of Chinese walls but otherwise a single overarching top-management structure, or alternatively whether there should continue to be separate (but more) equality bodies, each focusing autonomously on a particular ground of discrimination (gender, race, disability, and so on). Government has proposed a single National Commission for Equality.

Any Problems in Relation to Functioning and Significant Results Achieved

The main problem is that of inadequate funding for the wide-ranging role and tasks of the Commission. Another problem is that of the scarcity of suitably-qualified human resources, an issue which the National Commission is seeking to address as a matter of priority.

In the short time in which the National Commission has been established, it has been working hard to ensure that gender mainstreaming in government policy takes root, with likely future impact on legislation and the amendment of current (sometimes archaic) legislation.

The above is an overview of the main provisions of law concerning the remit, composition, functions and legal basis of the National Commission for the Promotion of Equality for Men and Women under the Equality for Men and Women Act of 2003.

SECTION E: Putting Rights into Practice

1. Description of National Procedures for the Enforcement of Rights

One possible avenue for redress is the 'constitutional' route by action before the Civil Court, First Hall, sitting in its constitutional jurisdiction, or the Constitutional Court. Also, the civil court in its ordinary jurisdiction.

Other avenues include the Industrial Tribunal, established by the Employment and Industrial Relations Act 2002 (EIRA), and accessible also with the assistance of the National Commission for the Promotion of Equality for Men and Women established by the Equality for Men and Women Act 2003 (EMWA); the Public Service Commission (under the Constitution); the Ombudsman (established by the Ombudsman Act 1995), and some other authorities. The broader legal background includes Articles 45, 14 and 32 of the Maltese Constitution, and the European Convention Act of 1997, which makes the substantive articles of the European Convention for the Protection of Human rights and Fundamental Freedoms enforceable as part of the law of Malta (with some important reservations relating to tax and social security treatment). Cases brought under Article 14 of the European Convention are outside the remit of this report. Most cases are expected to come before the Industrial Tribunal.

Article 30 of the Employment and Industrial Relations Act provides for the lodging of complaints before the Industrial Tribunal.

More generally, the Equality of Men and Women Act (EMWA) set up a National Commission for the Promotion of Equality of Men and Women (the Equality Body) whose brief includes the carrying out of investigations as to breaches of equal pay and also more widely as refers to discrimination, and providing assistance with rights enforcement to persons suffering from discrimination. Generally, as in the case of the pay discrimination, the Commission's powers include calling on the infringer to redress the situation and mediating as necessary; it is also provided that the Minister may make regulations (not yet done) providing arrangements whereby the Commission may itself refer the matter to the competent civil court or to the industrial tribunal for redress, without prejudice to the right of any person having a legal interest from herself or himself taking action for redress or, where action has been taken by the Commission, from joining in and becoming a party to the suit (Article 18(4)). Such regulations are not yet in place and the Commission has not as yet brought such proceedings, although the Commission has dealt with a number of cases of sexual harassment by way of mediation with the employer. The first annual report on the activities of the National Commission was published in March 2005and gave some indication of the enforcement activities of the Commission but there was not a high level of detail and at this stage it is too early to gauge the activity of the Commission in regard to enforcement, although it does report that it receives complaints form the general public as to discrimination on a regular basis and claims to have assisted in the resolution of a number of cases of sexual harassment.

2. Time Limits

The EIRA sets a peremptory period of four months from the date of the alleged breach ("within four months of the alleged breach") for the lodging of a claim for discrimination before the industrial tribunal. In certain circumstances this might cause difficulty; for example, would the period begin to run from the date of the conclusion of a collective agreement in which an offending clause occurred, or from the date of its application in a particular case? One practicing lawyer argues that the law should be amended to clarify such points rather than leaving it up to a Tribunal to decide the matter if and when such a point is raised. The normal limitation period is of five years in civil actions, so that this is

the time period that would apply before the civil court in other employment-related claims, such as to unpaid wages, or where the Civil Court otherwise had jurisdiction. The saving for other 'further action that a complainant may be entitled to take under any other applicable law, in terms of Article 30 (4) of EIRA, refers to 'any action *taken* by a complainant' under the terms of EIRA, so it is not clear what the position is if *no* action has been taken under EIRA, and in any case this saving for other remedies appears to refer to action other than on the merits (for example, a challenge to the composition of the tribunal).

There is no stipulated time period for the bringing of an action under the Equality of Men and Women Act, leading to some uncertainty as to any applicable time-limit for the purposes of this legislation. The Minister is empowered by the Act to make regulations but none have yet been made in these matters. Article 19(1) provides that without prejudice to Article 30 of EIRA a right to compensation shall lie in the civil courts. The overlap between these provisions is clear, and it is therefore unclear whether the fact of an action in the Tribunal under the EIRA becoming time-barred under that Act leads to an action on the same facts also becoming time-barred for the purposes of this apparent other avenue of redress.

3. Sanctions

The Constitutional Court or the Civil Court can order relief including compensation, as can the Industrial Tribunal. Imprisonment is possible in cases of harassment or victimization, but is not likely to be resorted to with any frequency in the current cultural climate, and it would in a sense take a policy decision at the highest levels to turn this into a real policy tool for culture or mentality change.

As to remedies in general, Article 19 (1) of the EMW Act provides that, 'without prejudice to the provisions of Article 30 of EIRA', a person who alleges that any other person has committed in his or her regard any act which under any of the provisions of the Act is unlawful shall have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful acts and where applicable, to order the payment of compensation for such damage suffered through such unlawful act. The relationship between Article 19(1) and Article 30 EIRA is not clear, particularly as Article 75 EIRA declares the jurisdiction of the Industrial Tribunal under Art.30 to be 'exclusive', and as the relevant provisions of the EMWA (which are often practically identical to their sister provisions in EIRA) invariably state that they apply 'without prejudice to their 'sister' provisions in the EIRA. Article 75 of EIRA in fact does not content itself with stating that "Notwithstanding any other law, the Industrial Tribunal shall have exclusive jurisdiction to consider and decide...all cases falling within its jurisdiction by virtue of Title I or of any regulations prescribed thereunder' but proceeds to add "for all purposes other than proceedings in respect of an offence against any enactment and the remedy of the worker so dismissed or otherwise alleging a breach of his right under Title I of this Act shall be by way of reference of the complaint to the Tribunal *and not otherwise*". It would seem then that apart from the case of an offence, where the courts of criminal jurisdiction would be competent, the position is as follows. If the matter falls squarely within the wording of the relevant provisions of EIRA (Articles 26,27,28,29) the Industrial Tribunal has exclusive competence, and the ordinary courts may not be seized,

while if the matter falls as a matter of interpretation outside EIRA but within the relevant provisions of EMWA then the civil courts have jurisdiction under Article 19 of this latter Act.

Article 30 of the EIRA provides for the lodging of complaints before the Industrial Tribunal, which can take all measures of redress including cancellation of the contract of service or of any clause in a contract of service or collective agreement, and may order the payment of a 'reasonable' sum of money by way of compensation in the instances covered by Article 30 i.e. breaches of Article 26 (gender discrimination: covering advertising, offering employment - which includes recruitment or training with a view to engagement, promotion or engagement in a different class of employment, selecting for employment; discriminatory conditions for those already in employment), Article 27 (work of equal value), 28 (victimization) or article 29 (harassment). This is declared to be without prejudice to any other 'further action' available to complainant under any other applicable law (see above). However, it is not absolutely clear that the determination of what is ' a reasonable sum of money' will always be based on the criteria for the quantification of compensation under the civil law. The awards that there have been do not throw up any clear conclusion at this stage.

4. Analysis as to Whether National Procedures Comply with the Principles of Equivalence and Effectiveness in the Meaning of EU Law

The court costs for the filing of a suit in the Civil Court amount to a minimum of Lm 350 (circa 800 euros), which many regard as a hefty sum for the average employee. However, this is not to say that these fees are any more than the norm. What is more worrying is that some lawyers argue that employees may be put off from seeking redress in the Industrial Tribunal itself despite the fact that there are no judicial fees attached to this form of redress. This for the reason that in 2004, the Industrial tribunal gave awards for dismissal apparently in the range of Lm 500, considered to be a very small sum from the point of view of deterrence. As one lawyer also participating in this project puts it, it is hard to predict on what basis awards will be quantified. His suggestion is that the law should be amended to provide for a minimum award, so as to better achieve the purpose intended by the Directive in requiring that remedies be effective, proportionate and dissuasive.

In one recent judgment, the civil court held that the Cargo Handling Co. Ltd had discriminated by not allocating overtime to women clerks when the relevant collective agreement made no distinction (therefore there was no issue as to the validity of the collective agreement clauses on overtime) between male and female clerks. It deferred judgment on the damages point pending an attempt at an out of court settlement, but when this did not materialize it quantified the damages in October of this year. These were calculated on the basis of the number of hours that could have been expected to be allocated. The general view is that the award made can not be regarded as dissuasive. No appeal has been lodged against the quantification of damages.[1]

[1] Margaret Camilleri et. V. Cargo Handling Co. Ltd., Civil Court, First Hall decided on 3rd October 2003. Damages quantified and awarded in October 2004.

Otherwise as far as time limits are concerned, claims before the industrial tribunal under EIRA are time-barred after four months. There is no stipulated time-limit under the EMW Act. Actions in contract before the ordinary courts are time-barred after five years. The problem is that Article 75, "notwithstanding any other law", gives the Industrial Tribunal 'exclusive' jurisdiction over all cases of unfair dismissal and all cases falling within its jurisdiction in virtue of Title I of the EIRA or any regulations made thereunder, and this includes Articles 26 et seq. on discrimination in employment. Yet Article 30 (4), as stated above, provides that any action taken by the complainant before the tribunal shall be without prejudice to any 'further' action that such complainant may be entitled to take under 'any other applicable law' and Article 19(1) EMWA appears to enshrine the right to seize the civil courts. There appears to be a contradiction here, on which there has as yet been no guidance by the courts. However, the likely interpretation is given above.
A further point is that where the law creates a criminal offence the maximum penalty is often set at a fine of Lm1000. Again, as with the level of compensation awards in practice, there is a feeling among practitioners that a maximum penalty of Lm1000 is too low to provide any real deterrent. However, it would take a deep analysis of the caselaw as it happens, something not yet scientifically done, to establish the proper deterrent in each case.

While then it is not possible perhaps to say that the national procedures, with particular reference to access to justice and remedies, would necessarily fail the test of equivalence it may be that they will turn out after study over a period of time to be regarded as not fully effective or dissuasive.

5. Number of Cases

Apart from the Cargo Handling case referred to above there have been only a handful of cases in the civil court in the last three years, while we are beginning to see more cases come before the Industrial Tribunal. The number is small. Due to the fact that the legislation is so new and the lack of any statistics, it is too early at this stage to identify trends therein.

6. Trends in Types of Redress Awarded in Practice

The difficulty with perceiving any trends arises from the paucity of cases actually brought before the relevant courts or tribunals. On the other hand there have been a few (even successful) cases that do throw some light on the application of the law in practice (e.g. the Cargo Handling case, see above). However, for the cultural reasons mentioned below, emanating also from the smallness of the country, the tendency is to settle cases out of court. The National Commission for the Promotion of Equality between Men and Women has reported verbally (the Commission's first annual report has not yet been published) that well over half of the complaints made to it have been settled in this way. There is no public information on the content or progress of the others.

7. Publication of the Outcomes of Cases

The court judgments are reported often with a considerable time-lag. There are some gaps in the printed version. On-line, selected judgments dating from 1944 are reported in summary form, with judgments after 2002 available in fuller form on-line: http://www.justice.gov.mt). The awards of the Industrial Tribunal are not reported fully on this on-line service but are

available in printed form and accessible at the Tribunal itself and at the Department of Industrial and Employment Relations, 121, Melita Street, Valletta, Malta. Yet Industrial Tribunal awards are not indexed by subject-matter and are not therefore easily accessible to the general public.

8. Short Analysis of Potential Obstacles and Facilitating Factors in Relation to Access to Redress Procedures

Awareness

Most NGOs take the line that awareness of rights in this area is poor, and they are very conscious of their own role in promoting this among employers and employees, especially in regard to sexual harassment and means of redress. Employers' bodies are also aware of the problem and are taking steps to heighten awareness among their members. The unions clearly have a significant role to play in this context. However, it is no doubt the case that recourse to law will be the very last resort opted for.

Cultural Factors

There is no doubt, although there have been no exhaustive studies on this of which I am aware, that women will not readily come forward to press claims. The cultural factors can range form deference to a male-dominated justice system and background culture, to sheer embarrassment for themselves and their family in pressing claims related, for example, to sexual harassment. Further studies on this are urgently needed, in conjunction with awareness-raising measures. It remains true to say that there is still an element of social pressure bearing against working mothers. Traditional 'values' based on certain perceptions of gender remain strong, and this must clearly have an impact on individual decisions about accessing justice. The uncertainties in the law as to time-limits, certain definitional vagueness, and the low level of damages awards will feature in the equation.

Conclusion

It is very difficult, at this early stage in the operation of the relevant legislation, to assess the impact of this legislation. It is too early to extrapolate trends with confidence from the few cases that there have been. However, it is possible to raise queries as to the interpretation of the current legislation, and to point out that the law is unclear as to time-limits and that awards tend to be regarded as being on the low side if they are to have any truly dissuasive function. It is also true that there is no provision in Maltese law for punitive damages, and it could well be an emerging general issue for the enforcement of EU law in Malta that the absence of provision for criteria for moral and punitive damages will lead to similar comments being made across the board. Hefty awards in test cases might be the single most effective means of ensuring compliance. It is also often said that the costs attached to litigation before the civil court may militate against the choice of this route for the poorer complainant, but for the less poor complainant this would be weighed against what may be an apparent tendency on the part of the Industrial Tribunal to make awards that are regarded (on anecdotal comment by some practitioners) as being on the 'low'side when tested against the measure of 'dissuasion'. There is the need for ongoing monitoring of cases and awards

over time if a scientific conclusion on this matter is to be arrived at. No such study has as yet been carried out.

SECTION F: Positive Action - Current Law, and is Positive Action Needed?

1. The Equality for Men and Women Act

Article 2(4) of the Equality For Men and Women Act (Chapter 456 of the Laws of Malta, hereinafter 'EMWA') provides that nothing shall be deemed to constitute discriminatory treatment for the purposes of the Act "in so far as such treatment (a) is given to grant special protection to women during childbirth or pregnancy; (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women". Article 2(5) of the Act further provides that, in relation to access to employment, less favourable treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances.

The National Commission for the Promotion of Equality for Men and Women (NCPE),set up by the Act, has wide functions including policy-formulation and monitoring functions. The first annual report (2004) of the Commission has just been published (ISBN 99909-89-13-3, 2005). It covers the first year of the NCPE's operation. As far as positive action is concerned, it refers (page 11) to the initiation of 'discussions with various local institutions in order to promote practices based on the principle of equality". The NCPE has drafted a 'gender equality clause' which it hopes will be included in all public tender contracts under the new Public Contracts Regulations of 2006; this provides *inter alia* that "...the Contractor shall be bound to ensure an equal distribution of the sexes in the different occupational levels. If this for some reason is not possible, and therefore, the distribution is unbalanced in favour of one of the sexes, the Contractor is required to submit a proper explanation to justify such imbalances" (Source: NCPE Annual Report 2004, p.45). The NCPE's priorities for action for 2004-2006 include that of undertaking a feasibility study on the implications of introducing targets/quotas with respect to gender in Malta (Source: NCPE Annual Report 2004, p.5).

2. Employment and Industrial Relations Act

For the purposes of the Employment and Industrial Relations Act of 2002 (Chapter 452, Laws of Malta, hereinafter 'EIRA'), "discriminatory treatment" means any distinction, exclusion or restriction *which is not justifiable in a democratic society.*

3. The Constitution

The Constitution itself provides in Article 45 (11) that nothing in the provisions of Article 45 (on non-discrimination) "shall apply to any law or anything done under the authority of a law, or to any procedure or arrangement, in so far as such law, thing done, procedure or arrangement provides for the taking of special measures aimed at accelerating *de facto*

equality between men and women and in so far only as such measures, taking into account the social fabric of Malta, are shown to be reasonably justifiable in a democratic society". Readers will note the cryptic 'taking into account the social fabric of Malta' as additional to the phrase 'reasonably justifiable in a democratic society'. This constitutional provision therefore sets out the legal criteria for the adoption of legitimate positive action.

4. Background and the Current Scene in Outline

The female participation rate in employment remains low (around 33%) when compared to the EU average. So is the female participation rate in the holding of public office, not least in Parliament itself (six out of sixty-five seats in Parliament; one in five seats on local councils). The same holds for women in science and more generally in top academic posts (Vide Irene Sciriha Aquilina's report). The situation has been somewhat redressed in the lower levels of the judiciary in recent years (four magistrates out of twelve), but not at the higher levels of the judiciary (there is no female judge), although the Maltese judge at the Court of First Instance in Luxembourg is a woman. It has been pointed out in previous reports that there are socio-cultural and religious factors that must go a long way to explain low participation rates. They can also explain the difficulties in the path of those who may want to encourage greater participation of women in work and public service. For many women, no doubt, full-time child-rearing is a matter of preference, but male or more broadly societal attitudes no doubt can have a strong influence on this 'choice'. Yet there appears to be a trend in favour of women keeping employment after marriage, and increasingly after giving birth. The need for two salaries is keenly felt, although the majority of women work part-time.

Recent (failed) negotiations on a Social Pact made clear that one primary plank in the revitalization of the economy must be that of increasing the participation of women in work. While a Social Pact, if concluded, might also result in favourable legislative changes, the government has moved to boost female participation in employment by making some legislative provision for child care in the last budget. Much, however, still remains under study, with work of this type being done by the Employment and Training Corporation (see the ETC's Gender Equality Action Plan 2003-2004), the National Commission for the Promotion of Equality For Men and Women and a number of NGOs.

Aside from the above efforts on child-care, no real specific positive action legislation has been proposed or adopted. Studies have included that by Prof. Patricia Leighton on Women in Decision-Making Positions in Malta. Action programmes have included the ETC's 'The Women Returners Scheme', aimed at encouraging women to return to work after childbirth. Mainstreaming efforts have been made, especially in the public service. Otherwise the emphasis still seems to be on areas that clearly benefit the woman, society and the family by 'permitting' or facilitating matters for the woman to fulfill both roles (home and out of home), such as day-care initiatives and re-entry schemes. The Pensions Reform White Paper promises that instruments will be put in place by the time of the projected pensions reform in January 2007 to remove the disincentives against women taking part-time employment (one main disincentive is the level of social security contributions) and managing career breaks. It is not clear that much more is proposed beyond such. Some suggestions to have a Code of Practice or special rules on recruitment have not yet been taken up. In general, the

bias has been antagonistic to positive discrimination/ action. However, the NCPE's priority actions for 2004-2006 include ensuring that a Gender equality policy is in place both in the public and the private sectors, and the initiation of a feasibility study on the implications of introducing targets/quotas. These initiatives have the endorsement of the Minister for the Family and Social Solidarity.

Therefore, a recent culture change is beginning perhaps to become discernible. At the recent General Conference of the Nationalist Party (this is the party in government), it was decided to revise the Party's statute to apply a version of a proportional representation system to encourage representation of women in all party structures. Of course, this is an internal party matter, but one can imagine that this new attitude (with strong supporting statements by the leader of the party, also Prime Minister, and by other members of the party hierarchy with government positions) may herald a shift in official thinking at government level relating to participation of women in politics generally. The opposition Labour Party has long made general statements in support of positive action, including quotas. While a quota policy has for the moment been ruled out (and whether we can expect movement towards positive action in employment and other matters is yet to be seen) there is clearly serious consideration being given at government level to possibilities for positive action, but the arguments still have to be made out. NGOs have a vital function to fulfill in this regard.

Some Sources

Annual Report 2004, National Commission for the Promotion of Equality for Men and Women. ISBN 99909-89-13-3. Year of publication, 2005.
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NCPE e-mail address: gender.equality@gov.mt

SECTION G: Exclusions and Exceptions. Directive 76/207 and Maltese Law

1. Exclusions

The principal law implementing the Directive is the *Employment and Industrial Relations Act 2002* (Chapter 452 of the Laws of Malta). The definition of employee makes no exclusion. However, that public servants and members of a disciplined force (armed Forces, Police, Prison Service) are in principle excluded from the scope of the relevant parts of the Act is clear from Article 84 and Article 48 which gives the Prime Minister the power to prescribe the applicability of any article or sub-article of Title 1 of the Act to service with the government, which power has not been exercised. Therefore, employees in the public service are in general excluded, although the Act does apply to employees in 'parastatal' companies. The excluded categories have their terms and conditions, appointment and dismissal regulated by the Public Service Management Code in the case of public servants, and the relevant legislation in the case of the disciplined forces.

This means that the relevant adjudicating body for public servants is the Public Service Commission established under the Constitution, rather than the Industrial Tribunal. One exception is made in favour of employees in designated essential services, who do have access to the industrial tribunal in the event of a trade dispute at least. The Public Service

Commission is meant to operate according to the Constitution and to respect prohibitions against discrimination. However, the fact remains that the EIRA does not apply to these categories. This means that a very large section of the labour force, without distinction on grounds of sex, are in fact excluded from the specific protection of the EIRA, and need to rely on their Constitutional rights and remedies and the procedures operative under the specific legislation applicable to their employment status, saving what is said below *re* the Equality of Men and Women Act.

The other main piece of legislation is the *Equality for Men and Women Act* (Chapter 456, Laws of Malta). It contains provisions that overlap to a considerable extent with the relevant sex discrimination provisions of EIRA. It provides in Article 3 that nothing in the EMW Act shall affect any rule relating to religious practice, access to the priesthood or membership in a religious order. Otherwise there is no express exclusion regarding any category of employee in that Act. 'Employment' is defined widely, and the prohibitions are addressed to 'employers'. It is not clear therefore that the EMWA does not apply to public servants or other categories excluded from the EIRA. Indeed, the assumption that is being made by the National Commission for the Promotion of Equality is that it does.

2. The First Exception: Article 2(2) of the Directive

The ECJ has held that the exceptions provided for in Article 2(2) of the Directive may relate only to specific activities, that they must be sufficiently transparent so as to permit effective supervision by the Commission and that in principle they must be capable of being adapted to social developments (Re Sex Discrimination in the Civil Service, Commission v. France Case 318/86 [1988]ECR 3559).

Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta, Act 22 of 2002)

Article 26 subarticle (3) can be regarded as a general provision. It provides that the prohibition of discrimination in subarticles (1) and (2) does not apply "to any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement *or where the requirements are established by any applicable laws or regulations*". The last alternative would appear to broaden the purport of the clause considerably unless read in the light of the previous clauses. No examples of such laws or regulations have been identified.

Article 26 of the EIRA makes unlawful discriminatory treatment in advertising or offering employment or employment opportunities or when selecting for employment, or in employment conditions, and it is provided in subarticle (2) that discriminatory treatment includes 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 proviso is vague, although the burden of proof is put on the employer. There have not as yet been any reported cases under this heading.

Equality For Men and Women Act (Chapter 456 of the Laws of Malta, Act 1 of 2003)

Article 2(5) of the Equality for Men and Women Act (EMWA) provides that "in relation to access to employment", a "less favourable treatment which is *based on* a *characteristic related to sex* shall not constitute discrimination where by reason of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances: provided that the burden of proof shall lie on the person who alleges that there is a genuine occupational requirement".

Therefore, within the scope of the EMW Act, this is a clear supplement to the EIRA and in the field of employment provides for the first exception in the Directive while attempting to implement it faithfully as interpreted by the ECJ. Hence, the principle of proportionality (see e.g. Johnston v. Chief Constable of the RUC, Case 222/84 [1986]ECR 1651,at 1687) is spelled out; also the enquiry must be as to the *particular* occupational activities concerned, and the burden of proof rule is also spelled out. This applies, by the terms of Article 2(5), "in relation to access to employment". The question arises whether the exception can be invoked in other contexts. Enquiries made of the National Commission indicated that no cases on this point have as yet been dealt with by them. Nor have any decisions of the Industrial Tribunal on this point been reported.

Further, Article 10 EMWA makes it an offence to publish or display or cause to be published or displayed any advertisement, or otherwise to advertise a vacancy for employment which discriminates between job-seekers or to request from job-seekers information concerning their private life or family plans; but the proviso excludes this "in cases where employers prove that the work in connection with the situation advertised can only be performed by a person of a specific sex". No prosecutions have yet been reported. The National Commission reports that it acts in this sphere by sensitizing and pressuring. Article 20 of the Act empowers the Minister to make regulations for the exemption of any person, or class of persons or body, from the requirements of (*inter alia*) article 10, provided that any such exemption shall only be prescribed after consultation with the Commission (for the Promotion of equality between Men and Women) and provided that such exemption shall be for a specified period of time which can be renewed by the Minister after consultation with the Commission". Enquiries made of the National Commission confirm that no such regulations have been proposed.

However, it must be noted that the EMW Act provides in Article 3 that nothing in that Act shall be construed as affecting 'any rule' relating to religious practice, access to the priesthood or membership in any religious order or other religious communities.

The Constitution of Malta

The Constitution prohibits discrimination, including on grounds of sex, in Article 45, subject to certain savings. One is that the restriction, disability or disadvantage be reasonably justified in a democratic society. There is little doubt that relevant EU law would be taken into account in any review as to whether any such restriction etc. were 'reasonably

justified in a democratic society', as must the Industrial Tribunal in virtue of the Employment and Industrial Relations Interpretation Order (Legal Notice 297 of 2003). It is also provided in article 45 that "nothing contained in any law shall be deemed to breach the prohibition in so far as it makes provision (a) with respect to qualifications for service or conditions of service in any disciplined force, or (b) with respect to qualifications (*not* being qualifications specifically relating to sex) for service as a public officer or for service of a local government authority or a body corporate established for public purposes by any law. This latter provision implies that in relation to service as a public officer etc. it is not envisaged that there be permitted any special qualification requirements specifically relating to sex. As to '(a)', no law making any provision to that effect has been identified.

3. The Second Exception : Directive, Article 2(3)

This refers to the "protection of women, particularly as regards pregnancy and maternity".

Article 2(4) of the EMW Act purports to exclude from the prohibition treatment given to grant special protection to women during childbirth or pregnancy (Cf Art. 2(3) of the Directive; cf also the Pregnancy Directive, Dir. 92/85, implemented in Malta under the EIRA via the Protection of Maternity (Employment) Regulations of 5/1/2004, LN 439 of 2003).

So Article 2(4) of the EMW Act provides that there shall not be discrimination within the meaning of that Act in so far as relates to 'provisions' that grant special protection to women 'during childbirth or pregnancy'. Note that the provision refers to 'childbirth' and not 'maternity' which is wider. Indeed, the ECJ has at times adopted a wide interpretation even of 'maternity' for the purposes of the Directive (Cf. re rights, including those of men, on adoption, Commission v. Italy Case 163/82 [1983] ECR 3273 and e.g. Hofmann v. Barmer Ersatzkasse Case184/83 [1984] ECR 3047 re 'motherhood'). So the EMW Act appears to limit the scope of exclusion to pregnancy and childbirth (leaving it for the courts to follow ECJ case law on the interpretation of 'maternity' if the ECJ adopted a wide interpretation). While later ECJ judgments make it clearer that there needs to be close relation to child-bearing, there might be some ongoing doubt as to interpretation in this connection. A further question might be raised by the use of the word 'particularly' in the Directive, a word omitted from article 2(4) of the EMW Act but offering scope to the ECJ in the interpretation of the Directive. While Article 2 (4) clearly envisages that such measures may be adopted, there has as yet been no enactment of 'provisions granting special protection' going beyond the implementation of Directive 92/85 via the Protection of Maternity (Employment) Regulations (Legal Notice 439 of 2003).

It might be worth pointing out what may amount to an instance of indirect discrimination. The Public Service Management Code (5th Edition, December 2004), which regulates public service employment, provides as a principle to be applied in assessing candidates that "it should not be assumed that men only or women only will be able to perform certain kinds of work" (rule 1.1.9). This implies an even- handed approach. So, the provision on reduced hours is framed to apply equally and there is no express connection with childbirth, for example. However, it is documented that far more women apply to go onto reduced hours than men. This is significant in the light of the rule which prescribes, in line with the

provisions on unpaid leave, that after the first 12 months during which service on reduced hours counts in full, it thereafter counts pro rata for purposes of progression and promotion (rule 3.1.6.11. (f)).

Regulations protecting women in pregnancy and maternity in an employment context include, besides the Protection of Maternity (Employment) Regulations: the Urgent Family Leave Regulations 2003 and the Parental Leave (Entitlement) Regulations 2003, which however apply equally to men and women.

CONCLUSION

This has been a survey of the implementation of the relevant Gender Directives of the EU in Malta. It raises several questions that will be answered only in time. However, it is presumed that during that time citizens will have acquired a knowledge of their rights and at least attempted to exercise and enforce them. They can be helped in this by all NGOs working in the field, and certainly by the Maltese gender equality body. Education and awareness are essential. So is support and assistance.

GENDER IN EMPLOYMENT UNDER MALTESE LAW - A LEGAL PRACTITIONER'S PERSPECTIVE

MATTHEW BRINCAT

In this contribution, I focus on some of the current practical problems that we face in our every day practice in relation to cases on sexual discrimination. Most of these topics are related to the legal structure or to the possible application of the law. The aim of this paper is not to criticize the government or any of the bodies involved in the drafting of the legislation concerned, but rather to fuel further discussion that may lead to improvements in the practical use of our legislation.

1. Cost and Accessibility of Remedies

According to the Equality for Men and Women Act (EMWA), in particular Section 19, if a person feels aggrieved by an act of his employer, he or she may apply to the competent court of civil jurisdiction for damages. In this regard it is submitted that an improvement of the accessibility to the current remedy needs to be addressed in the sense that if a person feels discriminated on the basis of his or her sex, one has two choices. In the first instance, the alleged victim may refer to the National Commission for the Promotion of Equality for Men and Women (NCPE) in order to file a complaint. In such cases, the NCPE investigates the matter and it acts in the name of the complainant. If the complainant is (a) either not pleased with the outcome of the investigation initiated by the NCPE or (b) the complainant wishes to file a suit individually without involving the NCPE, the EMWA (section 19) instructs that person to file a suit in the 1st Hall, Civil Court. The problem with such a remedy is the cost. In cases such as the one at hand, where the court will be asked to liquidate the damages payable to the plaintiff in terms of the EMWA, in order to file a suit a fee of LM250 in judicial fees and legal costs alone is levied. Unfortunately such costs are high when compared to the other remedies available and render such remedies inaccessible for some employees.

Another parallel remedy available to a complainant if the discrimination is linked to one's employment is recourse to the Industrial Tribunal. In such instance, the judicial fees are nil but in this regard another problem is present in the sense that, although there are no test cases, currently employers are encouraged not to worry too much about discrimination cases

brought against them. In 2004, the Industrial Tribunal is still giving awards for dismissal in the range of Lm500 so, as a result, employers aren't too worried about sex discrimination claims being brought against them. In this regard, it is submitted that, if the tribunal discovers that the employer discriminated against its employees, a minimum award as dictated by statute should be present in order to make employers more aware and proactive on the subject. If nothing is done in this regard, employers will not be incentivised to comply with the law and ensure equality on the place of work.

One could also argue further in that the above practical difficulties could in fact be contrary to the 2002 Directive[1] since there may be an argument that the above remedies are not adequate remedies since, according to the directive, all remedies available at law should be effective, proportionate and dissuasive.

2. A Lack of Clarity in Possible Cases of Indirect Discrimination

It is quite evident that the cases which have been decided so for by our Civil Courts in relation to breaches of the principle of non-discrimination on the basis of sex as found in our Constitution[2] concerned blatant infringements of the law.

So far, no case has been lodged either in our law courts or in particular in the industrial tribunal concerning an instance of 'opaque' or indirect discrimination. Let us consider that an application on the basis of alleged indirect discrimination has been filed in the Industrial Tribunal. In such cases, a complainant will find that a definition of indirect discrimination is not found under the definitions section of EIRA 2002 and one is forced to refer to the definition of indirect discrimination included in Equal Treatment in Employment Regulations 2004 and the relevant European directives, which, as such, do not really apply to sex discrimination.

In such instances, the Employment and Industrial Relations Interpretation order of 2003 is of no help either. At this stage allow me to make an assumption that the definition was not included most probably because when the law was drafted (in fact till this very day) the new proposed Directive on Equal Treatment of 2002[3] which would apply to sex discrimination was and is not yet in force.

In the light of the new Equal Treatment Directive 2002/73/EC and in the light of the EU *Acquis* generally, the Industrial Tribunal should most definitely give such cases of indirect discrimination their due weight and the definitions of 'direct' and 'indirect' discrimination should perhaps be inserted in EIRA as they are in EMWA. It would be interesting to see what would happen if the Industrial Tribunal decides that it is not competent to hear such cases? What happens if the tribunal decides that indirect discrimination on the basis of sex is not covered by EIRA and the case is thrown out? Presumably, the government intends to include such definitions in the forthcoming regulations on sex discrimination which will be issued when the new Equal Treatment Directive comes into force, but should we wait till then?

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[1] *vide* Article 8d
[2] Refer to Victoria Cassar v MMA et (2001) and to Margaret Camilleri et v The Cargo Handling Co Ltd (2003)
[3] 2002/73/EC

3. The Time to Claim

Under the current rules as found in EIRA, there is a 4 month peremptory period after which an employee cannot claim discrimination. Although the content of the provision in question is quite clear, its application leaves room for doubt and interpretation. In practice one can be faced with a problem in that it is not clear from when this period starts. Is it from when the act of discrimination affects the injured party or from when the employer implemented the discriminatory provision? What if, for example, a discriminatory collective agreement was agreed upon in 2004 but an aggrieved employee was only affected by the provision upon her employment in 2005. Can he/she claim?

In this instance it is submitted that the legislators should not leave it up to the tribunals to decide this point and a clarification of the sections of EIRA is definitely called for.

Also, under the EMWA there is no mention of a period within which an employee may claim. Since the action is one for damages, one can presume that the prescription period for such cases would be 2 years. It is submitted that the law should be clarified in this regard in order to clarify the issue for employers and employees alike.

4. Interviews and Results

Section 26(1)(a) of EIRA and Section 4 of the EMWA states that an employer cannot discriminate (a) when advertising or offering employment and (b) in determining who should be offered employment.

Although the sections in question place quite a heavy burden on the employer in that attention during interviews is definitely called for, a complainant will find a number of practical obstacles which could possibly be regulated by legislation. A fundamental question which remains unanswered in practice is: does the employee have the right to know what was the reason for not being chosen? Are their any obligations on the employer to keep any records in this regard?

This practical problem is one that should not be ignored. At present, employers may interview future personnel and a number of questions may be asked. Perhaps these questions are not discriminatory per se, but in the long run the employer discriminates just the same by choosing only male or female applicants for the job without stating so. There are no obligations on the employer to keep records of the interviews or to state the reasons why a person was not chosen. In fact, if a person who feels that he or she feels discriminated against during an interview and that person asks the interviewing employer why he/she was not chosen, he/she is probably told that other applicants had better qualifications and/or experience. That person however, does not have the possibility to verify such an answer.

It is submitted that the law should go further than uttering a general principle in that prior to proceedings, the employer in question should be bound to keep records of the interviews in question and the employee should have access to the results of her interview and to reasons why he/she was not chosen. This would of course be complementary to the powers of the

NCPE to investigate alleged discrimination and to the onus of proof rules that are applicable in court.

5. Justifications

It is submitted that the local legal position on the various justifications that may be brought by employers is unclear and insufficient. If one refers to EMWA 2(5) and EIRA 26(3) there are a lot of disparities and differences in provisions that are food for confusion. Each of these sections are, at times, not in line with the European Directive of 2002.

More specifically, the EMWA in Section 2(5) does not include the principle of proportionality as reflected in the phrase 'provided that the objective is legitimate and the requirement is proportionate' which was introduced in the 2002 Directive following a number of important decisions of the European Court of Justice. Section 26(3) of EIRA on the other hand takes a very general approach without specifying most elements of a proper justification as listed in the 2002 Directive.

In the light of the above, it is proposed that our laws should be amended and harmonised to include all the principles set out in Article 2(6) of the new 2002 directive, thereby effectively reflecting the recent developments which occurred at a European level.

6. Women's Participation in the Labour Market

A number of papers and discussion seminars have been held on the participation of women in the labour market. Although the following is simply a personal opinion, a number of provisions relating to the legal protection afforded to women may be a burden on Maltese employers and in the long run could hinder competitiveness with other markets.

The principles behind the protection of occupational health and safety in relation to pregnant women, for example, is usually welcomed by many employers. However, (a) does the maternity leave at law have to be on full pay or may the payment due by employers to pregnant women during maternity leave be reduced so as to enable Malta to compete on this front with its European counterparts? It is submitted that such a reduction in the maternity leave payment will possibly improve women's participation in the labour market and it will certainly change an employer's perception of the female labour market. Moreover, (b) the current parental leave regulations enable mothers who gave birth to take parental leave in conjunction with maternity leave. It is submitted that in this instance, there should be restrictions in this regard in that parental leave should only be taken after the child reaches the age of one year since this would enable the employer to eliminate some of the unpredictability, in terms of return to work, that a pregnancy entails.

7. Harassment

An examination of the provisions on harassment as found in EIRA[4], reveals that at present, only sexual harassment is protected under the provisions of the aforesaid act. The other forms of harassment which may not be directly linked with a sexual act or gesture are not

[4] Please refer to Section 29 of EIRA

mentioned. In such instances, a complainant may refer to the NCPE under the EMWA or to the Equal Treatment Regulations of 2004 if the harassment is linked with the subject matter being tackled by the Regulations. However, it is still recommended that in order to harmonise the position at law, EIRA should be amended to expand its remit in this regard in order to reflect the provisions and scope of the 2002 Directive in their entirety.

GENDER EQUALITY: MAIN ISSUES - THE GENERAL WORKERS' UNION PERSPECTIVE

CHARMAINE GRECH

Introduction

Gender equality is a matter of fundamental human rights. In fact, the second half of the twentieth century saw the development and ratification of a range of conventions concerning women's position in the labour market by supranational organizations. One such instrument is the United Nations Convention on the Elimination of all Forms of Discrimination Against Women which promotes women's economic rights and independence. This includes access to employment, appropriate working conditions and control over economic resources. Another objective of this Convention is the elimination of occupational segregation as well as of all forms of employment discrimination. The harmonization of work and family responsibilities for women and men is another objective of the Convention. Malta ratified this Convention in 1991.

Malta is also a member of the International Labour Organisation and thus it is covered by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up in 1998. Therefore, along with other countries, Malta is obliged to respect, promote and realize a number of fundamental principles and rights, one of which is the elimination of discrimination in respect of employment and occupation. Malta is also a signatory to various ILO Conventions and Recommendations. In 1998, Malta ratified The Equal Remuneration Convention 1951,1 and in 1968 it ratified The Discrimination (Employment and Occupation) Convention 1958.2 Therefore, Malta, as a signatory to these instruments, was obliged to bring its national law and practices in conformity with the provisions of these Conventions.

Malta's entry in the European Union in May of 2004 brought about a whole new array of legislation dealing with gender equality. Although most of the rights protected by the

[1] Convention No. 100, which establishes the principle of equal pay for work of equal value

[2] Convention No. 111, which addresses equality of treatment and opportunity including access to employment and conditions of work

transposed Directives were already protected by other pieces of Maltese legislation these new laws amalgamated them into clear and comprehensive legislation.

This report focuses on the manner in which some key provisions of Directives 75/117 and 76/207 have been transposed into Maltese law by virtue of the Employment and Industrial Relations Act (EIRA), which deals specifically with employment, and the Equality of Men and Women Act (EMWA) whose ambit is wider.

Definitions

The Maltese legislator has done away with the problem of interpretation in the transposition of Directive 76/207 since Maltese law,[3] defines 'discrimination based on sex or because of family responsibilities' as:

- the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities;
- treating a woman less favourably for reasons of actual or potential pregnancy or childbirth;
- treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex;
- any treatment based on a provision, criterion or practice which disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

This definition of "discrimination based on sex or because of family responsibilities" is quite a wide one, especially when it refers to family responsibilities, since these are not defined. It is important that the legislator take into account that there are still a lot of women in Malta who take care of their elderly relatives, and thus, it is important that these workers be protected by law. Apart from taking care of elderly relatives, it is common knowledge that usually women are the ones who take care of the family. An aspect which can be said to be discriminatory towards women is the hesitancy of some employers to promote young women to high positions, since they argue that these might marry, if they are not already married and become pregnant, and thus may leave work. It is important that this mentality be changed, mostly owing to the fact that women who are in high positions are the ones who are most likely to want to reconcile work and family responsibilities. Fortunately, nowadays, women have judicial recourse if they feel that they have been discriminated against due to these reasons.

Contrarily to the Directive, Maltese law does not use the terminology of 'access to employment'. In Article 4(1) of the Equality for Men and Women Act it is held that it is unlawful for employers to discriminate, both directly and indirectly, against a person in the arrangements made to determine or in determining who should be offered employment. In this way, the Maltese legislation did away with the possibility of issues arising over the interpretation of the term 'access to employment', in that it laid down specifically that it is unlawful to discriminate as to who is to be offered employment. It is still debatable whether

[3] Equality for Men and Women Act, Article 1(3)

grants such as those at issue in the *Meyers* case[4] brought before the European Court of Justice would fall under this Article, since the criterion is *who should be offered employment* and not access to employment. It should be noted that access to employment and who should be offered employment are not exactly the same thing. Access to employment is much broader in scope, since it implies that there is the possibility of entering the labour market or a particular job, whereas the term offering employment implies just an obligation on the employer, and not a whole state structure. Therefore, by using the terminology, the legislator has done away with the possibility of such grants falling under this definition.

Article 26(1)(a) of the Employment and Industrial Relations Act states that it shall be unlawful for any person to subject another person or a class of persons to discriminatory treatment when advertising, when offering employment, when advertising opportunities for employment or when selecting applicants for employment. The same Article goes on to state that *"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"* shall be considered as discriminatory treatment. The law uses the term "shall include" and lays down three instances of what discriminatory treatment may be. This means that there might be other instances which are not included in the law when discriminatory treatment may be present. This law also defines what the term "offering employment" shall mean for the purposes of this Article and states that it *"includes recruitment or training of any person with a view to engagement in employment and in regard to a person already in employment, also promotion to a higher grade or engagement in a different class of employment."*

Advertising is very closely linked to access to employment. When it comes to advertising, Article 10 of the Equality for Men and Women Act states that it is unlawful for persons to publish or display, or cause to be published or displayed any advertisement, or otherwise to advertise a vacancy for employment which discriminates between job seekers. It is also unlawful to request any information concerning the private life or family plans of any job seekers. Advertising is also deemed to include the dissemination of information about the vacancy by word of mouth from person to person. The proviso to this Article states that this shall not apply in the cases where the employer can prove that the work in connection with the situation advertised can only be performed by a person of a specific sex.

Education and Vocational Guidance

Education and vocational training and guidance are key aspects in the life of workers. Due to the constantly evolving and changing world of work it is imperative that workers be educated in new technologies and skills which will enable them to remain competitive in the labour market. In fact, the Maltese legislator has upheld the right of workers to vocational

[4] In these cases *Meyers v. Chief Adjudication Officer* (Case C-116/94 [1995] ECR I-2131) where a benefit having the characteristics and benefits of a family credit was held to fall within the scope of the Directive, as the Court held that the concept of access to employment also covers the factors which influence a person's decision whether or not to accept a job offer.

training for quite some time. This right is in fact enshrined in the Constitution and Article 12(2) of the Maltese Constitution lays down that:

> *"The State...shall provide for the professional or vocational training and advancement of workers."*

Apart from the obligation laid down by the Constitution, Maltese legislation in the Equality for Men and Women Act also deals with education and vocational guidance in Article 8. This Article states that it is unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in the access to any course, vocational training or guidance or the award of educational support for students or trainees. This Act also goes into discrimination issues in the giving of the education itself when it states that it is unlawful to discriminate in the selection and implementation of the curricula or in the assessment of the skills or knowledge of the students or trainees. This Act makes no distinction between Government-run educational or vocational training establishments and privately-run ones. Article 8(3) also states that it is the duty of these educational entities and those entities which provide vocational training to ensure that curricula and textbooks do not propagate discrimination. It is in fact the duty of educators to ensure that equality is promulgated at a very early stage in children's lives and education because it is only through education that attitudes will change and real equality be achieved.

Working Conditions and Dismissal

Another important factor in the life of a worker is that of having good working conditions as well as the peace of mind of job security. Maltese legislation deals with working conditions in the Employment and Industrial Relations Act. In Article 26(1)(b) it states that in the case of employees already in employment, the employer cannot subject any such employees or any class of employees to any discriminatory treatment regarding conditions of employment. Discriminatory treatment is also held to include:

> "actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value as well as actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that the employee is assigned to a clearly less favourable status than others".

The Equality for Men and Women Act deals both with working conditions as well as dismissals, and states that it shall be unlawful for employers to discriminate, whether directly or indirectly, against a person in the determination of who should be dismissed from employment. This Act states that discrimination shall be present when employees are assigned a less favourable status than others on the basis of sex or because of family responsibilities. Discriminatory treatment is also deemed to be present when an employer alters the working conditions or the terms of employment to the detriment of an employee after the latter has invoked rights conferred under the Act or claimed the performance in favour of such employee of any obligation or duty under the same Act.

Harassment and Sexual Harassment

Harassment and sexual harassment are discriminatory treatment. Workers in Malta are protected from harassment and sexual harassment by virtue of two laws - the Employment and Industrial Relations Act and the Equality for Men and Women Act. Article 29 of the Employment and Industrial Relations Act protects a worker from harassment, both from the employer as well as from another employee. In fact, Article 29(1) states that:

> "It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures, or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could be reasonably be regarded as offensive, humiliating or intimidating to such person."

Maltese law did away with the objective factor and the purpose or intent of the perpetrator but rather bases on the 'reasonable person' test. In such a case, the question whether the acts committed could be considered as sexual harassment would be based on whether such acts would be considered as such by a reasonable man.

The ways in which a person can be harassed are found in Article 29(2):

"it shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter referred to as "the victim") by:

- subjecting the person to an act of physical intimacy; or
- requesting sexual favours from the victim; or
- subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where:
    - the act, request or conduct is unwelcome to the victim and could be reasonably be regarded as offensive, humiliating or intimidating to the victim;
    - the victim is treated differently, or it could be reasonably anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct."

A woman who feels that she has been subjected to sexual harassment has recourse to the Industrial Tribunal. She may, within four months of the alleged happening of the harassment, lodge a complaint to the Tribunal, which shall hear such complaint and carry out any investigations as it deems fit. The Tribunal may order the payment of reasonable sums of money as compensation to the victim.

Unfortunately, the law does not lay down any special procedure to be followed in the case of such a complaint. In view of the delicate matter of the complaint in question, it would be

ideal that the sittings to this kind of complaint be held in private.[5] It is acknowledged that this decision is within the Chairperson's discretion, however, the fact that sittings would be held in private would be of a big help to the victim. This is due to the fact that, sometimes, certain intimate questions will have to be asked to the victim, and that certain facts will have to be ascertained. The fact that this may occur in public may prove to be intimidating to victims, who may hesitate to bring forward their complaint precisely due to these reasons.

The Equality for Men and Women Act, Article 9(1) reproduces the provisions of the Employment and Industrial Relations Act dealing with sexual harassment. However, this Act, in Article 9(2) provides for an added obligation on persons responsible for any work place, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, to ensure that other persons who have a right to be present in or to avail themselves of any facility, goods or service provided in that place do not suffer sexual harassment at that place. This ensures that these people are on the lookout for acts of sexual harassment and thus it would be their duty to ensure that it does not occur.

Moreover, this Act criminalizes sexual harassment and any person who is found guilty of this offence shall be liable on conviction to a fine *(multa)* of not more than one thousand liri or to imprisonment of not more than six months or to both the fine and the imprisonment.[6]

The Commission for the Promotion of Equality can also help a worker who has suffered sexual harassment by investigating such complaints and mediating where necessary.[7] The Commission can also assist such worker in making the complaint.[8]

Sexual harassment can be prevented by introducing a sexual harassment code of practice whereby rules and procedures should be introduced. In this way anyone who feels harassed would know exactly what to do. Management should ensure that this code of practice provides for confidential, impartial procedures and moreover should serve as a deterrent for this behaviour. Continuous training on this code of practice would ensure that all employees are aware of this code and what to do in case they come into contact with such harassment.

Access to Justice and Remedies

As yet, it is a bit difficult to say whether our courts and tribunals are giving full effect to the law since there have been few cases brought on grounds of discrimination. We are still waiting for the judgment in the case of plaintiffs who had worked as teachers with the Education Department before they married. Upon marriage, they were forced to retire according to the existing law of the time which prohibited married women from working as civil servants. Subsequently there was a call for applications which allowed married women to be teachers in government schools. This was only possible after September 1979 when

[5] The Tribunal in fact does have this power to hold sittings in private. Art. 78(4) of the Employment and Industrial Relations Act states that: *"The Tribunal shall hold its sittings in public unless, having regard to the nature of the dispute or other matter before it, the Chairperson deems it proper to conduct the proceeding or part thereof in private."*

[6] Article 9(3), Equality for Men and Women Act

[7] Article 12(1)(h), *ibid*

[8] Article 17(3), *ibid*

married women were allowed to remain in employment with the public service. At the time when the case was presented the employment conditions of the plaintiffs were regulated by a Collective Agreement of which Clause 2.1 stated that "A teacher will proceed to Scale 8 after ten (10) years' service in the grade of Teacher (not Temporary Teacher), in State Schools and will further proceed to Scale 7 after a further ten (10) years service in both cases subject to satisfactory performance and to the provisions of Section 2.1.3 below". All the plaintiffs, apart from one of them who had nineteen years experience as a full time teacher, have individually more than ten years of service as regular teachers in Government schools. The Collective Agreement does not state anywhere that the ten years or the twenty years experience have to be uninterrupted or expressly excludes the fact that the mentioned terms cannot be cumulative. The plaintiffs claimed that a promotion is being denied to them due to their previous forced resignation. They argue that this is unjust and discriminatory on the basis of their sex due to the fact that they are women and that they chose to get married at a particular time, when at no time were men in their same position forced to resign. This case is still pending. While it is recognized that the law which prohibited married women from continuing to work in the public service was an unjust and discriminatory one, it is hoped that the situation where women are still being disadvantaged, as in the case of these plaintiffs, due to a past discriminatory law, will be remedied.

With Malta's entry into to the European Union, a new right to recourse has been introduced when it comes to labour law, and that is the extension of these new rights within the jurisdiction of the Industrial Tribunal. The Industrial Tribunal is a means of judicial recourse which is fast, effective and inexpensive. Therefore, it is more accessible to workers than recourse to the Civil Court. According to Article 78 of the Employment and Industrial Relations Act the Industrial Tribunal is to decide any issue referred to it within a period that does not exceed one month from the date of referral, unless in the opinion of the chairperson, a longer period is necessary for a valid reason. Most of the time, this longer period is availed of, however experience has shown that issues referred to the Industrial Tribunal are resolved in a much shorter time, which makes this method of recourse more efficient than action in the Civil Court.

Another advantage of the Tribunal is that no application fee or Court fees are payable, to the contrary of recourse to the Civil Court, where in many cases, the fees payable are a deterrent to victims seeking redress. In fact, the only expenses of the Tribunal are the transcripts, which are obtained from the Court transcribers and the fees due to the person assisting the applicant. These fees are stipulated by Legal Notice 48 of 1986 and the maximum charge allowed is of Lm40.

The Chairpersons sitting in all cases falling within the jurisdiction of the Industrial Tribunal by virtue of Title I, which concerns Employment Relations, and therefore any case concerning discrimination, shall be advocates of at least seven years experience.[9] This ensures that the Chairperson is a person who has a sound legal knowledge and background and will not be biased either towards the side of the employee or that of the employer. Unfortunately, the same cannot be said in cases of alleged unfair dismissal since there is no obligation that the Chairperson is to be an advocate. This may create a situation where there

[9] Employment and Industrial Relations Act, Article 73(4)

might be bias. It would be ideal that all the Chairpersons sitting on the Industrial Tribunal be advocates so that any risk of bias will be diminished.

Apart from awarding compensation to the victim, the Industrial Tribunal has also the power to order re-instatement. In cases of unfair dismissal, should the Tribunal find that the grounds of the complaint are well founded and the complainant has specifically asked in the referral or in the statement of his case to be reinstated or re-engaged, the Tribunal has the power to order this. This remedy is within the discretion of the Tribunal, according to whether it considers it to be practicable and in accordance to equity. This may create a dangerous situation, since as already stated above, the Chairperson sitting in such a case, does not necessarily have to be an advocate, and therefore, the situation may be viewed from a biased perspective. Article 81 of the Employment and Industrial Relations Act also makes it clear that "where the complainant is employed in such managerial or executive post as requires a special trust in the person of the holder of that post or in his ability to perform the duties thereof", reinstatement or re-engagement shall not be ordered. Although in some cases this may be understandable, it is not often justifiable, since a woman in a high position can also be subject to discrimination. Therefore in such an instance the victim would have found herself to have been discriminated against and unemployed at the same time. In such a case, the remedy of the Tribunal is not an effective one.

When there is unfair dismissal and the complainant does not ask for reinstatement or re-employment, the Tribunal is to award compensation to the victim. The amount of compensation is to be the real damages and losses incurred by the worker who was unjustly dismissed. In cases of discrimination, the Tribunal may order the remedy of the breach or else it may award compensation. The problem with these provisions is that it is solely up to the Chairperson to decide as to the award of compensation, which in many cases, may be inadequate.

Another shortcoming of recourse to the Industrial Tribunal in cases of discrimination and harassment is the extremely short prescriptive period. Article 30 of the Employment and Industrial Relations Act states that "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..." This might pose a problem in that the victim might not be aware that she is being discriminated against. There is also the possibility and the reality that in many situations of discrimination and harassment, the victim is not of the frame of mind to seek legal recourse. Therefore, this prescriptive is too short when dealing with such delicate situations and a longer period would render recourse more accessible.

Analysis of Implementation of the Directives

More or less the Directives have been properly implemented, although with some minor amendments things might be clearer. For example, if the Directive on the Burden of Proof[10] is implemented by a legal notice which states specifically that the onus of proof is shifted onto the respondent. The way the law stands today does leave some doubts and thus if the afore- mentioned legal notice were to be enacted the situation would be much clearer. In the

[10] Directive 97/80/EC

Equality for Men and Women Act there is this express provision and thus it would be much better that the same happen in relation to the Employment and Industrial Relations Act.

Unfortunately when it comes to the disciplined forces and the public service we cannot say that employees are given the same protection as those in the private sector. These employees are deprived of a right of recourse in that they do not have a right of recourse to the Industrial Tribunal, which is discriminatory in itself. When it comes to the disciplined forces they are at an even greater disadvantage in that they cannot even be members of a trade union. The only right of action lies in the Civil Court, which is not always a feasible option, especially when it comes to discrimination cases.

When it comes to mechanisms for fighting a 'discrimination mentality' few good practices come to mind. Although it is now illegal to discriminate[11] in an advertisement for a job or otherwise discriminate in any advertisement, it is commonplace to see adverts, especially promoting certain services and/or products in which women are portrayed as sexual objects and as having the sole care and responsibility of the family. In this aspect the National Commission for the Promotion of Equality of Men and Women (NCPE) is making its voice heard in that there have been several instances of the Commission making public a complaint regarding discriminatory advertising.

An effective anti-discrimination body would be one which has the power to monitor as well as have the power to deal with complaints. Ideally it would also be able to bring collective complaints, as well as bringing complaints on behalf of another person, something which as yet is not possible under our law.

Culture Change

The evidence that Social Change is needed is glaringly obvious when one looks at the latest National Statistics Office (NSO) statistics issued on International Women's Day, 8th March. If one had to examine the statistics regarding time use, one would see how family responsibilities are still considered as the domain of women. As the news release by NSO aptly put it "Family responsibilities not only condition women's level of participation in the labour market but also affect the way they use their time in general".[12] While men devote more time to gainful work or study women spend more time on domestic work than men do on gainful work or study. These statistics are alarming in that while we are encouraging women to participate in the labour market the mentalities still remain the same. Thus women are ending up doing two full time jobs - the job which they do for financial remuneration and the housework. What is needed is education and awareness that family responsibilities are not the sole domain of women but rather should be shared by both parents. The Catholic Church is still a major player in Malta and the fact that the Church is still advocating that the role of women is that of mothers who stay at home to take care of the family, and that women who do work and pursue a career are not responsible mothers, does not help at all in society moving towards gender equality. Some even lay the blame on

[11] Discriminatory advertising is illegal both under the Equality for Men and Women Act, the Broadcasting Act and incidents of threatening, insulting, exposing to hatred and similar acts because of race, colour, creed, nationality, sex or disability are an offence under the Press Act

[12] NSO news release no. 39/2005 p. 2

working women for the escalating amount of personal separation cases. This mentality does not help society to move towards a tolerant society based on equality but rather ends up with hindering this move, in that even women themselves are made to feel guilty for pursuing a career or even vocational training or participating actively in society through NGOs etc.

Gender and Other Grounds

While the EU has been working in the area of gender discrimination for the past four decades, other areas of discrimination have only started to be tackled recently. Obviously while the area of gender discrimination is the most regulated one now the focus of the EU may be shifting in order to start tackling other areas of discrimination, which are equally in need to be regulated. On the other hand, while it is important that the EU work on 'new' discrimination areas it is equally important that the EU keeps working on gender discrimination. Despite the fact that gender discrimination has been tackled since the 1970s there are still major inequalities, not least the gender pay gap which is still to be found all around Europe.

Positive Action

The issue on whether positive action is needed in Malta is a much debated issue. While on one hand some argue that positive action is needed to get the ball rolling, others say that women should be recognized for their capabilities and not to be just a number in a quota. Unfortunately the term 'positive action' in Malta is synonymous with quotas. Positive action also includes State subsidies granted to employers who recruit women in sectors where they are under-represented, positive training-oriented action, vocational guidance, child care and flexible quotas. For example, if one had to take the issue of child care into account, it is very important that this be regulated but not so much as to render child care more expensive and inaccessible than it already is. If one had to take a look at the 'Early Childcare Development and Care' consultative document, the proposals found in this document will render child care more expensive than it already is. Government should also provide subsidized child care. The situation as it is now hardly makes it feasible for a woman working on a minimum wage to go to work and send her child/children to child care as most probably if she had to add up the costs she would either be working for a small wage or else just break even.

It is also very difficult for a woman to work full time if she does not find help from her family. School finishes at 2.30 pm and should a woman be working full time until 5.00pm she is stuck with trying to find someone who takes care of the child. Maybe it is time that schools be providing extra curricular activities for those children whose parents decide they would like this. These activities should be carried out in the same premises or else transport be provided since if these were lacking parents would still be faced with a problem - that is of having to leave work to take the child to the place where these activities take place.

Positive action is needed to combat the advantages that men have been given over the years. Maybe the introduction of positive action or affirmative action, will be an impetus for the situation to start changing.

What is the General Workers' Union Doing to Promote Gender Equality?

The fact that trade unions are members of the Employment Relations Board helps for influencing government. The General Workers' Union also makes proposals for introduction of new laws through Legal Notices. During the amending of what were then the Conditions of Employment (Regulation) Act (CERA) and Industrial Relations Act (IRA), the GWU put forward a number of proposals, most of which we were already implementing through our collective agreements. For example we had introduced a policy against sexual harassment in some companies even before sexual harassment was penalized by law.

The General Workers' Union also works towards gender equality through collective bargaining. In fact the GWU managed to get more favourable conditions for employees than those laid down by law e.g. the fourteenth week of maternity leave be paid, a year (unpaid) parental leave in companies in the private sector, flexible hours and reduced hours. Apart from collective bargaining, GWU also negotiates on a case by case basis.

Every shop steward (workers' representatives), as well as every section secretary of GWU works to assist any employee who feels that s/he is suffering discrimination. These are trained in what rights are protected by law and thus can make workers aware of what their rights are. Through regular seminars organized by the Reggie Miller Foundation, the educational foundation of GWU, shop stewards and section secretaries are given training on what the rights of workers are. GWU also offers the services of free legal advice and assistance to those members who have need of such.

General Workers' Union also helps in promoting gender equality by liasing with various NGOs working in this field as well as with the National Commission for the Promotion of Equality (NCPE).

Conclusion

Gender equality is an issue which concerns society as a whole. Gender equality does not only mean the right to equal pay for work of equal value but goes far beyond than that. Both sexes have the same obligations towards society and this responsibility has to be fostered from within the family where family responsibilities are not the sole domain of women but is a responsibility pertaining to both parents.

It is also Government's responsibility to ensure that females' contribution to the labour market be encouraged and facilitated, however it is also the responsibility of all the social partners to work together that gender equality exists in reality and is not just something to be found on paper.

PARTICIPATION OF WOMEN IN EMPLOYMENT IN MALTA - THE POSITION OF THE UHM*

ROMINA BARTOLO

Introduction

Malta has the lowest level of participation rate of women in the labour market. A recent labour force survey published shows a figure of 32.6%. This figure is worrying not only because it is so low compared to the rest of the European Union, but also because it is the first time that the figure has gone down, albeit by a tiny percentage, when compared to the previous labour force surveys. Reaching the Lisbon targets, as far as the participation rate of women goes, seems to be an objective which needs energy and initiative from all the social partners.

In the past 20 years the gap between the male and female segment of the population has narrowed slightly; from 51.5 per cent of the population being women in 1982, to 50.5 per cent in 2003.[1] Although more boys than girls are born, women live longer and therefore the percentage rate of women who live more than 65 years is greater than that of men. In fact the life expectancy for women in 2002 stood at nearly 81 years whilst that for men stood at 76.[2]

Causes

The low participation rate of women in the labour market is attributable to various causes. There are many obstacles hindering the entry of women into the labour market. These obstacles are also present throughout her working life and are increased in cases of marriage and/or family responsibilities.

There are hardly any support structures available and atypical work is still an innovative term. Only 17.4 per cent of working-women worked full time in 2003, while 3.9 per cent worked part-time and 1.1 per cent were in full-time employment but with reduced hours[3].

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* Union Haddiema Mag_qudin

[1] National Statistics Office (NSO) News Release 8th March 2004

[2] Ibid.

[3] Ibid

The latter is available for public service employees but very few private companies offer this possibility. It is hardly surprising that where there is the possibility of working full-time with reduced hours, very few men take this option. This is still seen as a diminution in virility for men. Being the bread-winner is still the man's responsibility in our country.

Very often, women work part-time in order to contribute financially to their family, particularly to the costs of the upbringing of children. Working part-time very often reduces a person's career prospects. Part-time workers are also ineligible for certain social benefits unless they work beyond the minimum threshold, which in Malta stands at 20 hours per week. Part-timers must also pay a relatively high national insurance contribution even if the hours worked are minimal.

Malta has quite a high percentage of inactive persons.[4] Inactivity refers to that section of society who are neither employed nor unemployed. The percentage rate of inactive men is much lower than that of women, who make up 70.9% of the inactive population. The main reason for inactivity is attributable to personal or family responsibilities. This means that very often women stay out of the labour market due to child-care and family commitments. The percentage of inactive women is highest for married women (65%[5]), and therefore in the age bracket of mothers with young children.

Very often, women also care *for sick or elderly relatives* - another factor alienating women from the labour market.

On the other hand, our fertility rate is going down and Maltese women are having their children later on in life. In fact the average age of mothers of first born children in Malta is the highest in the European Union at 25.8 years.[6]

Child-care and day-care centers may provide a remedy for women who have these responsibilities. However, when one looks at what is available in our country, one is in for disappointment. Schools would provide a remedy if school hour patterns were more in line with working hours patterns. However this is not the case. In fact in Malta, schools finish very early.

The few child-care centres available in Malta are still not regulated and very expensive. A document for consultation was issued recently for public debate. No licences are available and although many carers are undergoing training, there are many who do this work without any form of qualifications. This has been possible since no inspections are held. In this light, parents may find it difficult to leave their children in the trust of these centres. So, parents very often rely on grandparents to take care of their children. However, this solution will not last for long since there may be more cases of both grandparents working.

Another major obstacle is our *traditional values*, which is in itself a very positive aspect of Maltese society. However, there is a stigma surrounding working mothers. The prospect of a working mother and a househusband is hard to come by. Those men who venture into the

[4] Inactivity means that a person is neither employed not unemployed.
[5] Labour Force Survey 2003
[6] Fertility and family issues in an enlarged Europe, 2004. European Commission.

realms of atypical work such as reduced hours in order to share family responsibilities, usually bear the brunt of interminable jokes about a reduction in virility. The concept of sharing both financial and family responsibilities should be promoted and praised. It would reduce tension in many families and ease the burdens on both parents. The Maltese Church should play a pivotal role on this issue.

Very often, women tend to opt for part-time work in order to reconcile work with family life. The way our *taxation system* functions, it is not financially viable for these women to work since they end up paying all that they earn to the Commissioner of Inland Revenue. Time and again, suggestions have been put forward to the Government to change tax burdens on the second wage earner. However, to-date, this has fallen on deaf ears. The system is such that even in marriages governed by the community of acquests, pension cheques are received only by the husband. This is so even though the wife is legally entitled to half the earnings - even if she has never worked outside the home.

When one looks at the situation regarding *education* for women, it is immediately obvious that the participation of women in further education kept increasing throughout the years. In fact, even in 2001/2002, the female component of University students made up 56.9%[6]. A more detailed analysis of the situation shows that female participation was highest within the Faculty of Education at 75.2% of the total faculty students. The teaching profession is very much a women's domain. Very often, girls are enticed to take up this course with a future family in mind. The short working hours and long summer vacations, matching those of future children if any, are very tantalizing, aside from the teaching vocation pursued. The caring professions are next in line with 68.5% of the students of the Institute of Health Care being composed of girls. The Faculty of Arts has a representation of 66.7%, the Centre for Communication Technology 61.9%, the Faculty of Law 57.1%, Medicine and Surgery 56.1% and the Faculty of Economics, Management and Accountancy 51.5% of the total faculty students. The upward trend in the number of female graduates at tertiary level began in 1999/2000 and has continued since.

I strongly believe that flexible hours and teleworking would go some way towards improving the situation and increasing the employment rate for women. Job-sharing and flexible hours may also be beneficial. However, we need the laws and the structures to protect those women who opt for these types of atypical jobs. There are laws governing part-time workers and workers on fixed-term contracts but there are no laws backing temping agencies and persons to use their services, for example. These types of jobs would not only entice women workers but would also increase the employment rate as a whole. More jobs would be created, thus helping entrepreneurs and the economy as a whole.

There are very few women in top-level and decision-making positions, although there has been a noticeable improvement over the last 16 years. In fact only 6 women held top level positions in the public service in 1987. This figure has increased to 89 in 2003 making up 15.7 per cent of the high level positions[7].

[6] NSO News Release 2004
[7] ibid.

Moreover, the annual salary for women is on average less than that for males in all occupations except for that in skilled agriculture and fisheries works. Statistics show that professionals earn Lm902.59 less annually than their male counterparts. Female clerks earn Lm618.62 less per annum than males while female Technicians and Associate Professionals earn Lm830.38 less than males per year.[8]

We hear a lot about family-friendly measures, and parental leave is a case in point. Parental leave is a very recent introduction for employees in the private sector other than those whose collective agreement provided for a stipulated period of parental leave. The new Employment and Industrial Relations Act introduced a 3-month parental leave for employees in the private sector although subject to exceptions. However, the situation pertaining in the public service has been different for quite some time. In fact employees in the public service may benefit from a career break of 3 years as well as a year for every child born to him or her.

A recent study commissioned by the Department of Women in Society within the Ministry for Social Policy studied the career progression of women and men and the impact of parental leave in the Maltese public service.[9] It transpired from the study that during the years 1997 to 2001, 98% of those employees who availed themselves of parental leave were women. The Ministry of Education had the highest record of officers who availed themselves of parental leave followed by the Ministry of Health.

Public Service employees may also avail themselves of responsibility breaks in order to look after a sick or disabled relative. The study shows that even in this case, it is women who take up this leave. In fact, 68% of those who avail themselves of this leave are women.

Various issues emerge from this study. The take-up of these options is substantial and is mainly due to take-up by women employees. Few officers who avail themselves actually leave the service. Another issue which emerges is that family friendly measures have facilitated the retention of jobs. Moreover, once women remain in the labour market at the crucial stage of childrearing, the probability that they will continue to do so is high. The study shows that for the public service to make optimum use of the retention of human resources, there is a need for "keep-in-touch" policies. In this way, officers who are on parental leave, on a career break or on responsibility leave, are kept up-to-date with developments in their workplace in order to facilitate their resumption of duties or their return, and address the possibility that their career advancement may be jeopardised by such absent periods. These include granting employees on leave access to Government circulars, to training courses offered by the Staff Development Organisation (SDO) and other occupational and training organisations as well as access to departmental meetings.[10]

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[8] ibid.

[9] The Career Progression of Women and Men: Equal Opportunities. The Impact of Parental Leave in the Maltese Public Service. Study. Department for Women in Society. Ministry for Social Policy 2003.

[10] Ibid.

Conclusion

Malta needs to adopt a policy of support structures for women who wish to enter or to remain in the labour market. This would benefit not only those availing themselves of such support structures but also our welfare state. It would help increase the participation rate of women overall, leading to a situation of value for money. Our education system is expensive and much goes towards the education of women. Permitting these women to give back something to the State would contribute towards the population as a whole.

The UHM has been striving on this issue and shall continue with its endeavours to ensure a structure which is more family friendly. Maybe time is ripe for a major change in the way politicians think about these issues. Some improvements seem to be underway but policies in place are of paramount importance. We still need to change the way we behave and a mentality shift is necessary.

GENDER EQUALITY - SOME PROPOSALS BY THE MALTA EMPLOYERS ASSOCIATION

ROSELYN BORG

Directive 26/207 has played a very important role in reducing sex discrimination in the EU Member States and once Maltese legislation is truly implemented and enforced the law will make a major contribution to the reduction of discrimination and the improvement of the position of women in the labour market.

The Employment and Industrial Relations Act, 2002 includes provisions which protect employees against discrimination related to employment. The definition of discriminatory treatment in this Act does include a gender perspective as it incorporates discrimination on the basis of marital status, pregnancy or potential pregnancy and sex. Furthermore the Act to promote equality between men and women enhances further the gender equality principles and transposes Council Directive 76/207. This Act aims to promote gender equality in a person's working life and also establishes the National Commission for the Promotion of Equality for Men and Women.

Employers have been faced with a number of legal obligations and have to find ways and means to abide by all the laws which are today in force, this including legislation on gender equality. Employers require guidance on how to put these laws into practice and need further direction of what the law is in truth expecting. For example sexual harassment is a big concern for employers as the burden of proof lies on the employers and they are to prove that they took steps as are reasonable practicable to prevent such sexual harassment. What are the required steps? What should they put in place so that they will be able to prove that they did take the necessary steps? These questions need to be addressed.

Proper definitions of direct and indirect discrimination are welcome as these would give a clearer indication of what is meant by direct and indirect discrimination.

Female Participation in the Labour Market

A number of regulations which enhance female participation are today in force in Malta: The Parental Leave Regulations, The Maternity Leave Regulations and the Part-time

Regulations. It is important to keep in mind that these regulations have a financial commitment on the employer.

The Malta Employers' Association has already in a document entitled "Generating Productive Employment. A National Priority" put forward proposals to enhance female participation in the labour market.

Malta has a long way to go to achieve the Lisbon target of 60% employment rate for women, and it is doubtful whether this target can be achieved by 2010. However there can be a number of measures that may be implemented to increase female the activity rate. The following are our proposals:

Setting Up of Child Care Day Centres at Subsidised Rates and Giving Tax Rebates

MEA agrees that family obligations are amongst the factors that contribute to the low female participation rate in Malta. Every effort must be made to increase the number of licensed child care centers. These should offer the services at affordable rates and working mothers should be given tax rebates on the expenses incurred. The local councils may be involved in the setting up of such centers.

Providing a One Year Break for Female Returners to the Labour Force

It is being proposed to offer a one year tax break to female workers who would have stopped working for family reasons. The tax break would apply to those who return to employment between four and six years since the date that they had stopped. This should act as a strong incentive for female returners.

Flexi Time Arrangements

Employers will try to introduce flexi-time working systems to cater for family related commitments of both male and female employees.

Temping Agencies

The MEA encourages the setting up of temping agencies to cater for temporary labour shortages. Employers in many countries see great benefit in the services offered by temping agencies. These agencies need to recognized by law.

Fostering a Culture of Gender Equality

Employers should strive to provide equal opportunities to employees irrespective of gender. This is not only to comply with legal obligations, but also because of the economic and social benefits that arise from a higher female participation rate in the labour force.

Conclusion

Real gender equality is not possible unless efforts to endorse it are established on the historical and cultural environment that have shaped perceptions about maleness and

femaleness, and how these work together in the family, working life, politics and, not least, in the academic world. Initiating a discussion on gender equality in terms of workplace culture and organisational logic may pose the greatest challenge of all in the forthcoming quest for equity and equal opportunity. It will require cultural change and the learning process this involves, as well as the enhancement of skills within the organisation.

Editor's Note: Since this paper was written, certain measures have been adopted on the lines of these recommendations, e.g. re childcare centres and return to work measures and the publication of a Code of Practice on sexual harassment, by the National Commission for the Promotion of Equality of Men and Women.

'LISBON' AND GENDER-GAPS IN EMPLOYMENT

IRENE SCIRIHA

The Lisbon European Council of 2000 set, as a new strategic goal for the EU over the 2000 - 2010 decade, "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion."

The Lisbon overall employment target is 70% for the enlarged EU and that for women is 60%. This requires the creation of 22 x 10^6 jobs translating to a net employment creation of around 3 x 10^6 jobs per year. Increased employment will not only contribute to the desired economic growth but will also reinforce the sustainability of social protection systems. Despite the current weak economic growth, the female employment rate increased reaching 55.6% in EU in 2002.

Since 1995, a phenomenon that has become known as the *European paradox* is emerging. A slowdown in EU productivity growth still persists, despite strong employment growth for skilled people. The US experience points towards the importance of the development of new mathematical, scientific and computing technologies. The continual transformation of ICT forces old knowledge to become fast obsolete so that personnel need to create, adapt to, absorb and implement new knowledge at an unprecedented accelerated rate.

- The impact on wage flexibility, training and career prospects, flexible contractual arrangements, investment in knowledge and indicators to measure the improvement in the quality of work needs to be addressed.

Where does the Maltese Situation Figure against this Backdrop?

The *socio-cultural background* in Malta is very specific, having developed over the centuries as a result of our historical and geographical position. The Maltese archipelago lies in the middle of the Mediterranean, where east meets west and north meets south, and has had a long history of colonialism due to this politically strategic position. Malta is extremely small in comparison to other European countries, has one of the highest population densities in the world, is an island group (with resultant lag in change and

resilience), is strongly Catholic, displays strong primacy of the 'family', and as found by Abela (1994), is rather traditional and quite resistant to divergent value systems.

Women work mostly in Education, Manufacturing, Wholesale and Retail Trade, Repairs, Health and Social Work, Hotels and Restaurants, in this stated order. As for men, Manufacturing, Wholesale and Retail Trade, Repairs, Public Administration & Defence, Construction, Transport, Storage and Communication are the most common economic activities. This clearly shows the traditional occupation sex-segregation, despite some overlapping.

Although the gender gap in Education, measured as a fraction of the male employee force, is low, that at the university is considerable. Moreover, because of various factors, that may not all stem from the unwillingness of management to show merited trust in competent and qualified women, female positions are predominant in the lower echelons of the vertical hierarchy of status posts, with at present only one full professor (appointed twenty years ago) and three associate professors (appointed during the past ten years). Even within the administrative sector, important positions are occupied by men.

A close look at the statistics reveals that for the pre-child-rearing age group (15-24) the gap in employment is just 3.3% whereas it is 43.4% overall. Only 8% of the female labour force are self-employed, equivalent to only 13% of all the self employed.

In spite of an overall overt and not so overt attitude against equality, the *legal structures* have been changing over the last 50 years (since women won the right to vote) to acknowledge, and enhance, the equal status of women. During this period, the public sector removed its ban on employment of married women. In 1991, amendments to the Constitution were passed that allowed redress against discrimination based on sex. Amendments to the Family Law gave men and women equal rights and responsibilities in marriage, and legalised the joint administration of property acquired after marriage (Naudi 1996). In 2004, the National Commission for the Promotion of Equality for Men and Women was set up as a result of the Equality for Men and Women Act (2003). This Commission will identify and monitor national policies with a view to preventing and addressing discrimination and promoting gender equality. That same year saw the passing of the Employment and Industrial Relations Act (2003) which also clearly lays out the illegality of harassment on the grounds of gender, besides introducing and regulating conditions of employment that are 'family friendly'. Although this list is not fully inclusive, it reflects public acknowledgement and awareness in the public consciousness, of issues concerning gender and employment.

It is clear that owing to Malta's long history of colonialism and relative seclusion, strategies that have produced the desired effects in most countries were not as effective in Malta. Notwithstanding the apparently wide discussion at the top rungs of society such as in Parliament and other prestigious constituted bodies, traditional trends of low female employment have not been reversed.

The Labour Force survey of 2004, carried out by NSO, shows that, *women's participation in the labour market,* for the 15-65 age cohort, remains low as compared to other European countries with a female activity rate of 34.5% as opposed to a male activity rate of 80.7%.

The Employment and Training Corporation (ETC) carried out a survey independently of the National Statistics Office (NSO). The general trends were shown to be the same and divergences in the actual statistics were due to the different definitions of *"unemployed"* used. Whereas the NSO includes all those actively seeking work, the ETC considers only those who register as unemployed with the corporation. This difference becomes significant since women tend to seek work without seeing the need to register for it. In fact 70.4% of all women and 28.8% of all men are inactive but only 20% of the registered unemployed are women.

The *gender pay gap* in Malta is lower than the 10% registered as the 2001 EU-15 average. However, that in Education is 9.3% and as much as 33.8% in the hotel and restaurant industry, measured as a percentage of men's average wage in the respective activities.

There is a welcome emphasis now being shown in the media prompted by government statements on:

- The reconciliation of the family and professional life.
- The re-integration of women (and men) who have left the labour market.
- Increasing the female employment rate.

Suggested Solutions

- Comparative studies on the quality of work by equally qualified females and males in a horizontal dimension.
- Development of objective indicators enabling performance to be measured.
- Innovative Curricula for primary and secondary schools which challenge traditional gender roles including the interpretation of chemical and physical laws in terms of everyday process such as baking, cooking and ironing which tend to give importance to household chores.
- The development of a tool to measure the extent to which mainstreaming (the integration and implementation of the promotion of competent women into policy and practice, right from the planning stage) is being put into practice.

Suggested Mainstreaming Mechanisms

- Identifying factors leading to inequality and discrimination against women.
- Analysing potential impact by policies on female employment/promotion.
- Identifying and measuring the factors that lead to good practice, thus setting benchmarks.
- Transfer and dissemination of good practice.
- Training management at the university, government departments and industry in gender-equality mainstreaming.

- Ensuring that promotion-selection boards do not wear gender-biased glasses and acknowledge top quality achievements from men and women alike.

Suggested policy:

- Repeated "*note and praise good practice*" exercises.
- Reward top achievers (companies, education centres) who promote women that occupy decision-taking positions.
- Combine gender-equality friendly groups among government departments, NGOs and industrial companies into a federation that society looks up to and is wary to irritate.
- Responsibility of gender mainstreaming to be placed with the management.
- Government to set up a powerful watchdog body that monitors and measures its commitment to gender mainstreaming.
- Redress to be seen to be implemented by "name and shame list".

Conclusion

Although there is a noted increase in female employment, the rate is too low. At present tendency, ruling out reversal of trends, an optimistic estimate of the time required to reach the desired Lisbon 2010 target is *several decades*. It is clear that the strategies have to go beyond that of persuasion that women can deliver as much and in some areas more than men. *Means to kick-start a non-trivial increase in female employment need to be used.* Training in gender-mainstreaming techniques has been provided to all senior staff at ETC and on a voluntary basis, to directors of government departments. It is the opinion of many, who have been active for years in advocating gender mainstreaming and who see so little return for their untiring efforts, that authorities should follow the same norms to implement equality as for their priority policies. They ensure compliance by enforcement, complemented with an aggressive persuasion campaign.

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A NOTE ON CARING AND MALTESE SOCIAL SECURITY LEGISLATION

JOSANN CUTAJAR .

Maltese Social Security legislation is written with the male breadwinner in mind. It tends to penalize employees who opt out of the labour market to raise children. It is true that Maltese women working within the civil service are eligible to 13 weeks paid and one week unpaid maternity leave, one year unpaid parental leave for each child and a one-time career break of three years which is unpaid. These options are available within the civil service, while workers working within the private sector are eligible by law to the paid maternity leave and other arrangements made with a particular company.

The majority of paid workers within the civil service who opt for unpaid parental leave and the career break tend to be women (see Annual Report 2002, p. 28-29). Employees - whether within the public or private sector - who avail themselves of unpaid leave to undertake caring responsibilities are not covered by the social security scheme. The law maintains that since they have stopped working, they are not eligible to pay the statutory contributions. In fact, it says that "a married woman whose husband has not abandoned her" (Social Security Act (2003) Part II, 6.(1)a) is not deemed to be a self-employed person or a self-occupied person. This means that such workers are not eligible to pay out of their own pocket the national insurance contributions to cover the period when they are not eligible to paid caring leave.

This has short-term and long-term repercussions for the individual concerned. In the short term, these persons depend on the income and goodwill of the partner who is in employment, who may or may not share their income with them. At the same time, derived rights do not provide the beneficiary with the whole range of social protection to which the insured persons have access, such as sick leave, unemployment and maternity benefits (Brocas, 1990, p. 81).

Long term effects are felt when such persons apply for a retirement pension. Gaps in their contributions would mean that the person concerned will not be eligible to a full pension. This is also coupled to the fact that while they are taking care of their children, such persons would have had to forfeit promotions, which would have lead to a better salary and hence a better pension at the end of their employment. Caring, therefore, can lead to the pauperization of women when they reach pensionable age. Since women tend to live longer

in the Maltese Islands (Vassallo et al. 2002, pp. 155-190), they are more likely to experience this poverty for a longer period of time, with negative effects on their mental and physical health.

Solutions

Brocas et al. (1990 p.80) point out that governments often maintain that they cannot find the necessary funds to provide non-working women with the same level of protection as that offered to those who work. At the same time though, countries which might find it a problem to compensate for those periods when women's employment is interrupted for family reasons raise no concerns about crediting those periods that men spend in military service (Brocas, 1990, p. 95). In the Maltese Islands, those conducting voluntary work abroad are credited contributions (Social Security Act, 2003, Part I 16(2)c), but not individuals who voluntarily opt out of the labour market to raise a family. These are the people who in the future have to maintain a welfare society. Brocas et al (1990, p. 88) argue that whether women are in employment or not, they should be entitled to their own personal rights.

Brocas et al. argue in favor of an insurance scheme that does not lead to inequality when women take up motherhood as a vocation. They (1990, p. 91) argue that women who interrupt their employment for caring purposes should receive credits in their favor for pension calculation purposes. They suggest that non-working periods such as un/paid maternity or child-care should be credited as insured periods (Brocas, 1990, p. 91). In France, these credited contributions are paid by the state on the basis of the guaranteed minimum wage (Brocas, 1990, p. 92). Female beneficiaries of such schemes are entitled to these benefits on the same guaranteed minimum and this ensures them a minimum old age pension. However, this scheme does not provide carers with sick leave, unemployment or invalidity coverage.

Brocas et al (1990, p. 92) maintain that a flat rate, universally available pension ensures that women are not castigated for any gaps in insurance coverage resulting from family responsibilities. The researchers believe that this kind of pension scheme would guarantee women with interrupted employment histories the right to a pension (Brocas, 1990, p. 92).

Universal pensions are, however, financed from taxes and hence this solution might prove costly for certain countries. Brocas et al. (1990, p. 107) maintain that this is an effective but costly solution to the problem of poverty. This insurance scheme, which provides residents with a means-tested subsistence level income, ensures that nobody loses out. Such a scheme is already available within the Maltese Islands.

In some countries non-employed women or women who temporarily give up their employment, are given the chance to finance their own entitlements. This possibility is however limited to those who can shoulder the financial burden themselves or who have others to shoulder it for them.

Brocas et al. (1990, p. 94) maintain that the sharing of entitlements between the two spouses might help provide contribution-based personal rights for the spouse who opts to leave the

labor market for family reasons. They mention the case of Canada where the contributions amassed by the insured breadwinner are divided between spouses for old-age protection programs and pension plans. The sharing of entitlements confers identical rights to each of the spouses, and provides the care-giver with a personal pension or with an increment to any pension rights she or he may have earned as a result of paid activity (Brocas, 1990, p. 94). Such a scheme, however, is based on the premise that breadwinners will be able to reach retirement age. It does not therefore safeguard the personal rights of those carers who are single parents. Their rights are derived since they depend on welfare handouts. A system where contributions are transferred should have to safeguard the rights of women who find themselves divorced before they reach pensionable age.

A Point-by-Point Summary of Observations on the Social Security Law and Gender Discrimination

Main problem issues

1. the Maltese law still discriminates directly and indirectly against women
2. I focus mainly on the discrimination against women
3. I take into consideration mainly some aspects of the Social Security law

Social Security Law

1. the payment of NI contributions
2. women who are on unpaid maternity leave and career breaks with regards to domestic responsibilities cannot pay national insurance contributions
3. this means a break in NI contributions
4. this break will have an effect on whether or not they will have a full pension scheme
5. sometimes this break may necessitate working longer to cover the missing years
6. the Law is in this way directly discriminating against women who volunteer to stay at home to take care of children, disabled and/or elderly
7. when women leave the labour market to take care of children, they will experience a lag in their career projection
8. some opt for flexi-time, reduced hours and/or part-time to be able to cope with labour and domestic responsibilities
9. this may have an impact on the contributory pension they might be able to access
10. it is therefore no wonder that the majority of the elderly poor end up being women (JIM, 2003)

Solution

1. more ancillary services can be set up to ensure that women do not have to leave the labour market
2. some countries in the EU are rewarding women who have children and not punishing them as we are doing in the Maltese Islands
3. they accredit them NI contributions for the years they spend at home
4. others ensure that the NI paid by the one breadwinner is equally shared between the spouses

5. this ensures that there are no NI gaps
6. more educational programmes on the topic to ensure that women know the impact child rearing will have on their eventual economic well-being (and that of their children if they lose their spouse)

Stay at home mums

1. when there is one breadwinner in employment, those who stay at home are supposedly partaking of the NI contributions that this person is paying
2. the same thing happens when women are doing unpaid labour for family enterprises
3. this is especially true of those couples who are benefiting from the community of acquests regime
4. what happens when the couple separate is another thing
5. these women end up with no NI contributions to attest for during the years they stopped work if they separate from their spouses
6. this means that a number of them end up depending on non-contributory pensions, especially if the separation takes place when they are in their middle ages

Solution

1. changes in the way NI contributions are shared between spouses should be looked into
2. the law should make it clear that those women partaking in family businesses need to pay their NI contributions even if they do not receive a salary
3. educational programmes should establish that this is for their own protection with regards to invalidity, pensions and/or sickness

Changes in Definitions

1. the Social Security Act needs an overhaul
2. it is based on the premise of a two parent family when statistics show that this is not always the case in the Maltese Islands
3. some definitions such as breadwinner set out the 'male' breadwinner as being the head of household
4. women who are breadwinners need to write to the Director to ask to be acknowledged as such
5. it is up to the discretion of the Director to acknowledge whether or not to accept this claim
6. this is not the case for men - they are automatically seen as the breadwinners

Solution

1. studies conducted in the past say that legally, the Social Security Law is not discriminatory
2. There is a need to go through it word by word and underline the discriminatory concepts and laws implicated within this piece of legislation

There are many instances of discrimination on the basis of gender. I have here mentioned just a few of those that need to be addressed with particular urgency.

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DISABILITY

PROTECTION OF DISABLED PEOPLE UNDER MALTESE AND EUROPEAN LAW

AUDREY GATT

A. EU Law

Article 13 - Legal Basis for Framework Directives on Discrimination Issues

Building on the EU's experience of dealing with sex discrimination, a consensus emerged in the mid-1990s concerning the need for the European Community to tackle discrimination on a number of additional grounds. Civil society organizations and the European Parliament were instrumental in driving this debate forward.

The result of this process was the inclusion of a new Article 13 in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. Article 13 provides new powers to suspend the rights of a Member State which were found to be in breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. And, for the first time, the Treaty enabled the Community to combat discrimination on a wider range of grounds than ever before, such as disability, racial and ethnic origin, religion and belief, age and sexual orientation.

On the basis of this new Treaty Article the European Commission put into effect the powers set out in Article 13 and at the end of 1999 came forward with a package of proposals. This led to the unanimous adoption by the Council of two ground-breaking Directives. On 27 November 2000, *Directive 2000/78/EC*[1] 'Establishing a general framework for equal treatment in employment and occupation', was adopted. The Directive prohibits any

[1] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (published in OJ L 3032 of 2 December 2000).

discrimination, be it direct or indirect, on the grounds of religion or belief, *disability,*[2] age or sexual orientation.[3]

This Directive together with the Racial Equality Directive *2000/43/EC*,[4] prohibit discrimination in employment and training. They cover, in particular, recruitment and promotion, the provision of training, pay, working conditions and practices and dismissals.

Directive 2000/78/EC

- provides the basic rights of protection and it requires employers to make reasonable adjustments to cater for the needs of a person with a disability who is qualified to do the job in question;
- provide a common level of protection against discrimination across the Union requiring changes to the existing legislative framework in all Member States;[5]
- forms part of an integral strategy to promote an improved quality of life for European citizens;
- by helping to eliminate discrimination and promote equal opportunities, the Union contributes actively to the protection of fundamental rights and freedoms and to reducing the human and financial costs of exclusion.

Scope of Directives

The Directives outlaw discrimination on grounds of racial or ethnic origin and on grounds of religion and belief, disability, age and sexual orientation, in respect of:

- access to employment and self-employment as well as to opportunities for promotion
- access to vocational guidance and training at all levels as well as work experience
- employment and working conditions, including dismissals and pay
- membership of trade unions and professional bodies and access to any benefits they provide

The abovementioned Directives outlaw the following forms of discrimination:

- *direct discrimination,* which arises where a person is treated less favourably than another is, has been or would be treated on any of the grounds covered by the Directives;

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[2] Before the revision of the Treaty in Amsterdam, the Community had no power to tackle discrimination based on disability. However, the European Parliament had repeatedly indicated in its resolutions since the beginning of the 1990s that "the status of disabled people in the Treaties is that of 'invisible citizens' " and that "human rights violations against disabled people take place in every area of daily life throughout the European Union in the form of discrimination based on the ground of disability."

[3] These Directives are supported by an action programme established by Council Decision 2000/750/EC.

[4] Council Directive 2000/43/EC implementing the Principle of equal treatment between persons irrespective of racial or ethnic origin (published in OJ L 180 of 19 July 2000).

[5] EU Member States were required to bring their national laws into line with the Racial Equality Directive by 19 July 2003 and with the Employment Equality Directive by 2 December 2003. They could, however, extend the deadline in respect of age and disability by up to three years, provided they informed the Commission. The new Member States were required to implement the Directives by the time they joined the Union on 1 May 2004.

- *indirect discrimination*, which arises where an apparently neutral provision, criterion or practice, whether intentionally or not, puts people of a particular racial or ethnic origin, religion or belief, disability, age or sexual orientation at a particular disadvantage compared with others. If it has this effect, the provision, criterion or practice will constitute discrimination unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;
- *harassment,* which arises when unwanted conduct related to any of the grounds covered by the Directives takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- the Directives also ban instructions to discriminate and *victimisation* (or retaliation against those complaining about or giving evidence of discrimination).

B. Member State Adoption of Legislation

Although some laws prohibiting discrimination were in place before the adoption of the Directives in most countries, in none of them did they provide the protection required under the Directives. Member States have, therefore, had the task of implementing national legislation to comply with the new requirements. It has been for each MS to choose how to do this in the light of their legal and cultural traditions and the legislation already in place.

In *Malta*, legislation in force protecting disabled people consists of the following:

- Chapter 210 Persons with Disability (Employment) Act[6]
  - Legal Notice 156 of 1995 Registration and Appeal of Persons with Disability Regulations
  - Legal Notice 157 of 1995 Standard Percentage of Employment of Persons with Disability Order
  - Legal Notice 158 of 1995 Designated Employment of Persons with Disability Order
  - Legal Notice 159 of 1995 Part-Time Employment of Persons with Disability Regulations
- Chapter 343 Employment and Training Services Act[7]
- Chapter 413 Equal Opportunities (Persons with Disability) Act
- Chapter 452 Employment and Industrial Relations Act[8]
  - Legal Notice 461 of 2004 Equal Treatment in Employment Regulations[9]

Maltese Law has been brought into line with Directive 2000/78/EC in the following way:

- It prohibits discriminatory treatment for membership in employees' and employers' organization (Regulation 7 of L.N. 461)

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[6] Enacted by Act II of 1969, as amended by Acts: XIV of 1969, XXII of 1976, XI of 1977, XIII of 1985 and XXVI of 1995.
[7] Act XXVIII of 1990, as amended by Acts XV of 1995, XVI of 1997 and II of 2005.
[8] Act XXII of 2002, as amended by Acts IX of 2003 and III of 2004.
[9] Act I of 2000.

- It prohibits discriminatory treatment by an employment agency (Regulation 8 of L.N. 461)
- remedies are allowed before Industrial Tribunal and under the competent court of civil jurisdiction. (Regulation 10 of L.N. 461)
- the complainant may be the person alleging to be discriminated against as well as any other person having a legitimate interest (may act on behalf or in support of complainant) in ensuring that regulations are complied with (Regulation 11 of L.N. 461)
- duty of employer or any person or organization to whom these regulations apply to disseminate information (Regulation 12 of L.N. 461)
- provides for sanctions - not exceed Lm1,000 or imprisonment of not exceeding 6 months (Regulation 14 of L.N. 461)
- discriminatory treatment includes both direct and indirect discrimination and includes harassment (Regulation 3 of L.N. 461). Victimisation is dealt with under Article 28 of Chapter 452.
- burden of proof - Once someone who considers that they have not been treated equally establishes facts from which it may be presumed that discrimination has occurred, it is then for the person accused of discrimination to prove that there has been no breach of the principle of equal treatment. (Regulation 10(3) of L.N. 461)

Maltese law has gone beyond the requirements of the Directive:

- Provides for a system of registration of disabled people into a 'Register of Persons with Disability' (Regulation 5 of Chapter 210);
- Minister responsible may determine which employers are to give employment to a number of registered persons. This is done by means of a quota determined by an Order published in the Government Gazette (Regulation 15 and 16 of Chapter 210);
- Positive action extends further than at the time of actual employment. It includes (a) vocational guidance services (b) vocational training courses (c) industrial rehabilitation courses (d) disablement resettlement services. While being provided with these services, a person suffering from a disability remains under adequate medical supervision. (Regulation 3 of Chapter 210);
- Minister responsible may extend regulations under Chapter 210 to apply to part-time employment (Regulation 28).

In spite of the abovementioned legislation protecting disabled people from discrimination in employment and occupation, a number of issues still need to be addressed:

(i) Definition of 'Disability'

Under Chapter 413 disability means 'any physical or mental impairment that substantially limits one or more of the major life activities of a person'. This definition is adopted under L.N.461 of 2004 (implementing Directive 2000/78/EC and Directive 2000/43/EC). On the other hand Chapter 210 defines disability in terms of employment, that is, a person who is 'substantially handicapped in obtaining or keeping employment or in undertaking work in his own account'. Once again reference is made to both physical and mental impairment.

Although different definitions are adopted they do not seem to create any conflict. However, a single definition should be adopted.

Furthermore a close look at definitions adopted in other countries highlights the limitation that exists under our definition of 'disability'. Under the law of New South Wales (Australia) the definition of disability is very broad and includes people with learning difficulties, intellectual disability, people having a disfigurement or different formation of any part of the body, people having a physical illness or disease that makes, or has made, any part of the body or brain work differently and any organism in the body that could cause disease or illness with no symptoms such as hepatitis or HIV. Under the Disability Discrimination Act (DDA), applicable in the UK as well as in Northern Ireland, a wide definition is adopted covering people with severe disfigurements and in certain circumstances people who have had a disability in the past such as people who had severe depression, but have since recovered.

For the purpose of an anti-discrimination debate a wider definition of 'disability' might have to be considered under Maltese law. The debate would then circle more on whether social services should be afforded equally to all. This might have the consequence of placing people with a different degree of disability on an equal playing field.

(ii) The Obligation to Employ a Disabled Person

As explained above, employers reaching a specified quota of employees are bound to employ a person with a disability. This quota might require further scrutiny. Although this appears to be a form of positive action it might still not produce the desired results, that is, of having disabled persons integrated in society on a more widespread basis. In the UK a similar system was adopted however after carrying out a survey it was established that a small number of employers fell under this quota (the UK Disability Discrimination Act (DDA) did not apply to an employer who had less than 15 employees) thereby excluding the majority of employers (90%). Therefore on 1 October 2004 the UK DDA abolished this exemption and all employers are subject to the DDA. In Malta there might be the need to revise this quota; however proper consultation would be required with all affected parties.

(iii) Justifying Discrimination

Regulation 4 of L.N. 461 allows difference in treatment where the objective is legitimate and the requirement is proportionate.[10] Unfortunately, due to a lack of Maltese case law this may be open to interpretation and abuse. In the UK the DDA has been amended to limit use of the existing "get out" clause that enables employers to justify some cases of direct discrimination against disabled people. Regulation 4 might also require amendments so as to have an exhaustive list of justifications.

Article 5 of Directive 2000/78 states that the employer is required to take appropriate measures, where necessary, to enable a person with a disability to have access to, participate or advance in employment, or to undergo training ... 'unless such measures would impose a

[10] Article 5 of Directive 2000/78 is phrased in the following manner. The employer may take appropriate measures ... 'unless such measures would impose a disproportionate burden on the employer.'

disproportionate burden on the employer.' Therefore the proof required under the Directive is that the measure is 'disproportionate' rather than 'legitimate and proportionate' as is required under Regulation 4 of L.N. 461.

(iv) Positive Action

The recognition of the limits of both direct and indirect discrimination had led law-makers to strike out in a new direction, namely the imposition of positive duties to promote equality, rather than just the negative requirement to refrain from discriminating. Therefore the concept of employment discrimination in Europe is expanding from direct and indirect discrimination to reasonable accommodation.

The requirement to take positive action with regard to disabled people is expressly provided for under Article 7 of Directive 2000/78/EC. This Article holds that

> With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds...

Regulation 6(1) of L.N. 461 states:

Nothing in these Regulations shall render unlawful 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 paragraph (a) to take advantage of opportunities for doing a particular work

where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to any of the grounds referred to in regulation 1(3).

The Directive goes further than L.N. 461 in that it implies the 'maintaining or adopting of specific measures' while L.N. 461 merely refers to encouragement to take advantage of opportunities related to a particular work. In no way does it impose an obligation on the employer or the State to increase those opportunities or make them more available to disabled people. Chapter 210 of the Laws of Malta which was enacted in 1969, and amended recently in 1995, shows that Malta has in fact been adopting measures to protect disabled persons way before the EU Directive was adopted. Therefore, the lack of incorrect implementation might not have any negative repercussions, although for clarity's sake this section should be amended to conform with the Directive.

(v) Social Dialogue

Articles 13 and 14 of Directive 2000/78/EC regarding dialogue with social partners and appropriate non-governmental organisations have been omitted from L.N. 461. This is

particularly important in the light of Article 19 of the Directive which requires Member States to communicate the necessary information to the Commission to enable it to draw up a report for the European Parliament and the Council on the application of the Directive. If the views of the social partners are omitted from any Maltese report drawn up for this purpose the result will be a report with incomplete information being submitted to the Commission, making it impossible to address specific problems encountered by employers and employees.

(vi) Chapter 452

Part IV of Chapter 452 of the Laws of Malta provides for the 'Protection against Discrimination related to Employment'.

Regulations 26 and 27 prohibit discrimination in the following instances:

(a) advertising or offering of employment
(b) terms of payment or employment conditions
(c) work management, distribution of tasks and working conditions
(d) employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.

L.N. 461 also refers to equal treatment with regards to selection criteria, conditions and similar matters. These provisions however should have been incorporated in the enabling Act to make matters more clear. In fact there are is repetition in Chapter 452 and Legal Notice 461 as regards (a) recourse to be made to Industrial Tribunal (b) applicable sanctions. On the other hand no reference is made to the civil court in Chapter 452 as was made under the Legal Notice.

(vii) Harassment

Under the 'Employment and Industrial Relations Act' it seems that reference is merely being made to sexual harassment[11] [Regulation 29], while under the L.N. adopted under this Act, the definition is wider to include (a) any form of harassment which has the 'purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment' and (b) harassment may also occur to people due to their disability, age, sexual orientation etc. Once again matters need to be clarified to make the definition applicable under the Legal Notice applicable under the abovementioned Act and thereby avoid any inconsistencies. Furthermore, Maltese lawmakers might have to consider introducing a new provision which makes it illegal to harass disabled people even after the employment relationship has ended. Such a provision has been introduced in the UK Disability Discrimination Act.

[11] 'subjecting such person to any unwelcome act, request or conduct, including spoken words ... which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.'

(viii) Equality Body

The Racial Equality Directive requires a specialised body to be designated in each Member State to promote equal treatment in relation to race or ethnic origin. These bodies must provide independent assistance to victims of discrimination to pursue their complaints, conduct independent surveys, publish independent reports and make recommendations.

Directive 2000/78 however does not provide for the establishment of such a specialised body to deal with other forms of discrimination. In spite of this, there is a trend towards the establishment of single equality bodies dealing with all of the grounds of discrimination covered by the Directives. In many cases, these national bodies deal with sex discrimination alongside the other grounds covered by Article 13 EC. The Maltese government is taking up this issue, possibly following models of equality bodies set up in other Member States.

(ix) Comprehensive Approach

Another consideration which needs to be made when addressing equal treatment of disabled people is their physical accessibility to the work place. The field of employment is closely linked to several other areas such as for example education, transportation and access to services and goods. Therefore legislation prohibiting discrimination within the field of employment only, is not enough.

In order for the disabled person to be an active member of society in all areas and to enhance a broad non-discrimination approach, a new disability-specific directive is needed. Disabled people in Europe look with envy to the legislation in the US (the Americans with Disabilities Act) and want an equivalent European Disabilities Act and ask for disability-specific comprehensive non-discrimination legislation.

A number of countries in Europe have already adopted laws that afford greater protection to disabled people. The Maltese government has taken action in this respect and in an attempt to remedy any marginalization suffered by disabled people adopted Act I of 2000 whereby a comprehensive approach was adopted. Disabled people under the 'Equal Opportunities (Persons with Disability) Act' have been given wide protection in a number fields. Apart from equal opportunities in Employment the Maltese government extended this protection to the field of education and accommodation and disabled persons were also given the right to access to premises as well as the right to expect that they are provided with goods, facilities and services including transport.

The UK has started discussions on a more comprehensive approach. The Government has signaled its intention to bring down any remaining barriers to equality for Britain's ten million disabled people, with the Minister responsible describing disability rights as 'the last great cause of emancipation in our time'. The DDA goes so far as to allow Government to set minimum standards so that disabled people can use public transport easily.

Talks have already started at an EU level and in 2002 it was proposed to draw up a Disability Specific Directive at a meeting of the Disability Intergroup of the European Parliament. The legal base of this *Disability Specific Directive* is Article 13 of the EC Treaty, which enables the Community to take initiatives to combat discrimination on the grounds of disability. A specific Disability Directive would complement the Commission's European Action plan on disability and would work in parallel to the Framework Directive on Equal Treatment in Employment. The 'Proposal for a Directive Implementing the Principle of Equal Treatment for Persons with Disabilities' would prohibit the discrimination disabled people experience in access to information and procedures, to buildings, telecommunication, transport modes and other public spaces and facilities and to education. Among other things the proposal also ensures that 'broadcasts, advertisements and the media do not contain insulting portrayals of disability or contain any incitement to hatred on the grounds of disability' and would ensure the respect for the dignity of disabled people in political and public life.

Although Malta is way ahead and has its equivalent of an EU Specific Disability Directive it would be wise to keep an eye on the developments of such an important piece of legislation. Apart from the possibility of having to introduce other forms of protection under Maltese law, the Maltese government might contribute to moving this proposal forward while sharing its five year experience with other European countries.

C. Commitment at EU Level

The European Union has made considerable progress in acknowledging the need to ensure the equal effective enjoyment of all human rights by people with disabilities. In its 1996 Communication on equal opportunities for disabled people,[12] the Commission made clear that 'the old medical-centred approach' was giving way to a social approach. A change in perspective has important implications. It recognizes the fact that the discrimination faced by disabled people is a socially created phenomena which is not directly related to the impairment *per se,* but rather arises from the environment which fails to accommodate people with disabilities.

This is a critical orientation of perspective. It has important implications for the way in which policy and law in relation to disability are developed and interpreted, as well as for its substantive content. It is under this perspective that Maltese law needs to be analysed and possibly be re-defined. The focus should be on the many barriers within the social environment which are faced daily by people with a disability who seek to carry out ordinary activities of everyday life.

The growing attention being given to discrimination on the ground of disability, as well as other grounds, is reflected in the work of the EU which although significant fall short of a specific Disability Directive mentioned earlier.

[12] COM(96) 406 final of 30 July 1996.

D. Fundamental Social Rights

The European Union's commitment to the principle of non-discrimination was reaffirmed by the proclamation in December 2000 of the Charter of Fundamental Rights.[13] Article 20 of the Charter sets out the general principle of equality before the law and Article 21 deals with the principle of non-discrimination. Article 21(1) states:

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

This Article goes further than Article 13 and includes seven additional grounds showing the commitment the Union has taken towards a policy of non-discrimination.

The Constitution under Article III-118 provides that 'In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or disbelief, disability, age or sexual orientation.' Therefore non-discrimination features once again among the central objectives of the EU.

The Charter has been incorporated in the Treaty establishing a Constitution for Europe and though both are not yet legally binding the Charter has already become an important reference document for the ECJ in its interpretation of Community law.[14] The ECJ has consistently held that fundamental human rights, derived from the international instruments to which all the Member States are signatories, form part of the general principles of Community law, the observance of which it ensures.

E. European Employment Guidelines

At the March 2000 Lisbon European Council, the EU defined a comprehensive 10-year strategy aimed at a long-term economic growth, full employment, social cohesion and sustainable development. This strategy is underpinned, in particular, by the European Employment Strategy and the EU's Social Inclusion Process. One of the aims of the so-called 'Lisbon agenda' is to raise the employment levels of groups that are currently under-represented in the labour market; among them are people with disabilities. The importance of taking action to promote the integration of disadvantaged groups and the link with non-discrimination has been reaffirmed within the framework of the EU's European Employment Strategy, which includes a Guideline highlighting the need to integrate disadvantaged groups in the labour market including measures to combat discrimination in the workplace.[15] Guideline 7 holds that:

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[13] http://europa.eu.int/comm/justice_home/unit/charte/index_en.html

[14] Case C-245/01 *RTL Television GmbH v Niedersachsische Landesmedienanstalt fur privaten Rundfunk* ECR [2003] 0000; Cases T-116/01 & T-118/01 *P&O European Ferries (Vizcaya) & SA v and Diputacion Foral de Vizcaya v Commission of the European Communities* ECR [2003] 0000.

[15] Council Decision 2003/578/EC of 22 July 2003 on guidelines for the employment policies of the Member States.

"Member States will foster the integration of people facing particular difficulties on the labour market, such as early school leavers, low-skilled workers, people with disabilities, immigrants, and ethnic minorities, by developing their employability, increasing job opportunities and preventing all forms of discrimination against them".

F. Commitment at International Level

A UN Ad Hoc Committee was set up by UN Resolution 56/168 to 'consider proposals for a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities.' A new UN legally binding instrument would complement the existing human rights framework. The emphasis on discrimination is fully in line with the Community rights-based approach to disability, which implies that people with disabilities should have the opportunity to enjoy the rights on an equal footing with the rest of the population. It is also in line with policy developments which have taken place on the basis of Article 13 of the EC Treaty, which enables the Community to take initiatives to combat discrimination on the grounds of disability.

The Special Rapporteur of the United Nations High Commission on Human Rights,[16] in its report on Human Rights and Disability indicated that:

> "In most countries, human rights violations against disabled people take the form of unconscious discrimination, including the creation and maintenance of man-made barriers preventing disabled people from enjoying full social, economic and political participation in their communities. Most governments appear to have a narrow understanding of human rights vis-à-vis disabled people and believe they need only abstain from taking measures, which have a negative impact on them. As a consequence, disabled people are neglected in the area of human rights policy and legislation".

Therefore the marginalisation of disabled people according to this Rapporteur is still a reality. They are often deprived of education or blocked from meaningful and gainful employment. People with intellectual disability may be incarcerated in inhumane institutions and their civil and political rights be frequently abused. Therefore it is important and useful to develop a new UN legally binding instruments which makes more clear the relevance and application of the general human rights standards to persons with disabilities. The Union's participation in the drawing up of such an instrument will only re-enforce the work already done within the Community and may turn out to be a 'political catalyst and educational tool to enable a change in the way people with disability enjoy their rights'.[17]

G. Equality and Non-Discrimination

When dealing with gender equality the Constitution, under Article III-116, provides that Community institutions and Member States should do more than merely ensure the absence

[16] Report on Human Rights and Disability by Leandri Despouy:
http://www.un.org/esa/socdev/enable/dispaperdes0.htm

[17] Communication from the Commission to the Council and the European Parliament COM(2003) 16 final.

of discrimination from its employment, educational and other specified functions. They should also act positively to promote equality between men and women throughout all policy making and in carrying out all those activities to which the duty applies. The Constitution does not impose a similar requirement with regard to other grounds which often are the cause of discrimination. There is some evidence of the notion of equality in Community law prior to the Constitution such as in Articles 2 and 3(2) of the EC Treaty as well as in case law such as the Dory case where Attorney General Stix-Hackl has interpreted this as imposing an obligation on the Community actively to promote equality between men and women.

The EC Treaty also states that European laws or framework laws 'shall establish measures to ensure the application of the principle of equal opportunities and equal treatment of women and men in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. They shall be adopted after consultation of the Economic and Social Committee.' Finally

> With a view to ensuring full equality in practice between women and men in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under represented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.

However neither in the EC treaty nor in the case law has there been a move towards equality in other grounds of discrimination. A move in that direction was only made in 2004 by the Commission through the publication of a Green Paper and previously in the draft Disability Specific Directive drawn up by the European Disability Forum where the principle of equal treatment was held to 'mean that there shall not be no direct or indirect discrimination'.[18] Throughout the draft Directive it is made clear what the intention of the European Disability Forum was when drawing up the Directive. The provision for access to information and procedures, to buildings, telecommunication, transport modes, education, public spaces and facilities for disabled people go beyond simple non-discrimination, but requires positive action by Member States to ensure equal treatment of disabled people.

H. Green Paper: '*Equality and Non-Discrimination in an Enlarged Union*'

In May 2004 the EU Commission published the Green Paper *Equality and Non-Discrimination in an Enlarged Union.*[19] The Green Paper sets out the European Commission's analysis of the progress that has been made so far. It is presented as an invitation to influence EU policy and legislation on discrimination and equality. In so doing, it responds to calls from the European Parliament and others to organize a public consultation on the future development of policy in this area.

To confirm the EU commitment towards the fight against discrimination the Green Paper mentions Article 21 of the *EU Charter of Fundamental Rights*. However the Green Paper overlooks the fact that this provision only prohibits discrimination. Indeed the principle of

[18] Article 2 of the draft Specific Disability Directive.
[19] COM (2004) 379 final.

gender equality in the EC Treaty requires the taking of active steps towards the achievement of equality. Furthermore, the Green Paper does not discuss the other relevant provisions of Title III of the EU Charter, in particular Article 23.

The Green Paper does not put enough emphasis on the concept of equality, as distinct from that of discrimination, and on how this has been shaped by the complex interaction between binding legislation, soft law and case law. There is a clear imbalance between background information and analysis devoted to non-discrimination on the one hand and the lack of attention paid to the positive duty of the Union to promote equality in general and gender inequality in particular.[20] It seems to reinforce the idea that there is a hierarchy of equalities with gender equality losing ground.

Conclusion

The question to be asked at this point is whether a much stronger move towards the notion of equality is desirable at an EU and Member State level? The answer to this question goes to the heart of current European political controversy, that is, on the relative balance that is appropriate between social progress and competitiveness, and the ability to sustain substantial social spending in the context of an increasingly globalised economic system. Such a point may not be ignored and must be taken into consideration at any stage of discussion between the concerned social partners. Only then may we aspire to go beyond the mere establishment of policy to actually having that policy implemented to the benefit of those more disadvantaged and in need.

[20] Social Platform's response to the Green paper on Equality and Non Discrimination in an Enlarged Union, August 2004 (www.socialplatform.org)

ISSUES RELATED TO DISABILITY AND EQUALITY - STATE OBLIGATIONS AND AN AGENDA FOR ACTION: A FIELDWORKER'S VIEW

NATHAN FARRUGIA

The following are issues that need to be addressed in full, or improved upon, or given more weight, in order to reduce discrimination and equalise opportunities for persons with disabilities.

The office of the *UN special rapporteur on Disability* issued a survey to all countries to assess the need for government action on quality of equality in all aspects of disability. The following titles encompass this report and others, and are guidelines for evaluation that this paper and future research will consider, with the highlighted words being the title description of each clause:

a. "States should take action to raise *awareness* in society about persons with disabilities, their rights, their needs and their potential and their contribution".
b. "States should ensure the provision of effective *medical care* to persons with disabilities".
c. "States should ensure the provision of *rehabilitation services* to persons with disabilities, in order for them to reach and sustain their optimum level of independence and functioning".
d. "States should ensure the development and supply of *support services*, including assistive devices for persons with disabilities, to assist them to their level of independence in their daily living and to exercise their rights".
e. "States should recognise the overall importance of *accessibility* in the process of equalisation of opportunities in all spheres of society... through the introduction of programmes of action to make the physical environment accessible; and undertake measures to provide access to information and communication".
f. "States should recognise the principle of equal primary, secondary and tertiary *educational* opportunities for children, youth and adults with disabilities, in integrated studies. They should ensure that the education of persons with disabilities is an integral part of the education system".

g. "States should recognise the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of *employment.* In both rural and urban areas, they must have equal opportunities for productive and gainful employment in the labour market".

h. "States are responsible for the provision of *social security and income* maintenance for persons with a disability".

i. "States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to *sexual relationships, marriage and parenthood".*

j. "States will ensure that persons with disabilities are integrated into and can participate in *cultural activities* on an equal basis".

k. "States will take measures to ensure that persons with disabilities have equal opportunities for *recreation and sports*".

l. "States will encourage measures for equal participation by persons with disabilities in the religious life of their communities".

m. "States assume the ultimate responsibility for the collection and dissemination of *information* on the living conditions of persons with disabilities and promote comprehensive *research* on all aspects, including obstacles that affect the lives of persons with disabilities".

n. "States have the financial responsibility for national programmes, *(Economic policies)* and measures to create equal opportunities for persons with disabilities".

o. "States are responsible for the establishment and strengthening of *national coordinating activities,* or similar bodies, to serve as a national focal point on disability matters".

p. "States should recognize the right of the *organisations of persons with disabilities* to represent persons with disabilities at national, regional and local levels. States should also recognise the advisory role of organisations of persons with disabilities in decision-making on disability matters".

q. "States are responsible for ensuring the adequate *training of personnel* at all levels, involved in the planning and provision of programmes and services concerning persons with disabilities".

r. "States are responsible for the *continuous monitoring and evaluation of the implementation of national programmes and services* concerning the equalisation of opportunities (as above) for persons with disabilities".

s. "States, both industrial and developing, have the responsibility to co-operate in and take measures for the improvement of the living conditions of persons with a disability in developing countries".

The above is an exhaustive list of "expectations" that covers all aspects of equal opportunities. Many of these are currently being addressed, but just as many are not taken to the level that can make a difference. Primarily, we see less effort put into "non-basic" activities such as leisure and rehabilitation than we do in housing and social funding.

The purpose of my paper is to assess these issues independently and also relate them to one another.

1. "States should take action to raise awareness in society about persons with disabilities, their rights, their needs and their potential and their contribution".

The KNPD (Kumitat Nazzjonali G_all-Persuni b'Dizabilità) organises regular campaigns and publications with regard to disability issues in society. It is their core competency and mission to promote awareness on Disability issues and Social Equality, and to advise and consult on reports of inequality through the Equal Opportunities Compliance Unit.

The Equal Opportunities (Persons with Disability) Act provided a pathway for action for the Commission, namely to increase awareness among persons with disability and their parents about their rights.

With the theme "Flimkien Naslu" (Together We Can Make It) the Commission is working to realise the ideals for which it was originally founded. One of its main objectives is to ensure that every citizen is aware of the meaning of disability. This campaign was supported by Billboard advertising, publications on various disability issues and a play entitled 'Lives worth living', written by Lawrence Evans and Jane Nash and translated into Maltese by Marcelle Theuma and Paul Portelli - who also took part in the play now renamed "Lajf". This play was shown in all schools throughout the European year of persons with a disability, in 2003.

After the YOTD 2003, little has been done to maintain the momentum gathered in the promotion and awareness of disability issues by the KNPD.

The rise in televised fundraising activities has brought forward disability issues to mainstream TV, however it is difficult to determine whether these have any positive effect (if not indeed negative) on equality and disability issues. These programmes have become more mundane and 'lottery' oriented, with less and less features on the achievements of persons with disabilities within these organisations. On a positive note, KNPD carefully monitor clips of the promotional material to ensure that the portrayals of persons with a disability are humane and respectful.

2. "States should ensure the provision of effective medical care and rehabilitation services to persons with disabilities".

The Health Service of the Department of Health provides healthcare services to persons with a disability. This service is free of charge, and disabled persons get preferential treatment such as 'queue jumping' and transportation. Their medication is also mostly supplied free of charge (Means-tested).

Health department services include inoculation, disability diagnosis, medical assessment and genetic counseling. Furthermore Physio, occupational and speech therapy as well as assessment for children at the Child Development and Assessment Unit (CDAU) with regular review are provided free of charge.

There are some private organisations, such as the Razzett tal-Hbiberija that provide an add-on free therapeutic service to persons with disabilities. Often persons with disabilities attend

hydrotherapy at this facility after they have been discharged from hospital or the physiotherapy department. Often the rehabilitation programmes are interrupted with the realization that disability may be permanent (Satisficing).

Other organizations such as Dar tal-Providenza, provide institutional care and medical treatment whilst other more specialized therapies can be obtained against payment from organisations like the Eden Foundation.

Special schools with severely disabled pupils provide daily physiotherapy programmes through in-house therapists or specialized carers. San Miguel School also has a small hydrotherapy pool which is surprisingly well used.

Other self help groups and service providers set up activities to help rehabilitate persons with acquired disabilities; however these are few and not staffed by professionals.

3. "States should ensure the development and supply of support services, including assistive devices for persons with disabilities, to assist them to their level of independence in their daily living and to exercise their rights".

There are an array of support services for persons with disabilities in Malta, many of which are government initiatives. The prime responsibility for support services is Agenzija Sapport. (Support Agency). This agency has the primary aim "of providing community and residential services so that persons with disabilities can exercise their right to participate fully in community life". Support Services aims to promote deinstitutionalization and community inclusion.

FITA assist disabled persons with ICT whilst the numerous employment and training courses available through the Education Department and the Employment and Training Corporation are accessible to persons with disabilities.

4. "States should recognise the overall importance of accessibility in the process of equalisation of opportunities in all spheres of society... through the introduction of programmes of action to make the physical environment accessible; and undertake measures to provide access to information and communication".

The KNPD set up the Accessibility section within its operation to ensure that physical access is considered in all new development, and to investigate issues of non-compliance. The KNPD rubber stamps any MEPA application after scrutinising access for disabled persons. FITA are providing training programmes for ICT access, and the MITI are developing community-based training facilities on ICT, some of which will be completely accessible (Such as the one planned at the Razzett tal-Hbiberija).

5. "States should recognise the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated studies. They should ensure that the education of persons with disabilities is an integral part of the education system".

The Education Division offers education services for children who have a disability or emotional, physical, intellectual or social impairment of whatever degree. A Statementing Moderating Panel determines the assistance required by each individual.

The Foundation for Educational Services of the Ministry of Education (MOE) is working closely with the Ministry for the Family and Social Solidarity (MFSS) to ensure that the educational needs of persons with disabilities are met. The Education division provides in-class facilitators to children with learning difficulties in mainstream, whereas those with more severe learning disabilities attend special schools.

Other organisations such as Equal Partners and the Eden Foundation provide facilitators to schools. The Razzett tal-Hbiberija provides Leisure Education services to school children in a unique (out of school) setting using activities such as horse-riding and drama to teach skills. Only the first two are funded by the education division.

Where issues of disability overlap with other disadvantages such as low income, literacy and broken home settings, other initiatives such as "Assist" APPOGG and other ESF funded initiatives for improving literacy and education exist.

6. "States should recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas, they must have equal opportunities for productive and gainful employment in the labour market".

"In order to find a job, a person with disability can register with the Employment and Training Corporation (ETC), as provided by the 1969 Employment Act (Persons with Disability). This Act provides that those companies employing twenty or more employees have to include 2% of the employees who are registered as persons with disability".

The above statement should ensure that in larger companies either 2% of the workforce is composed of persons with a disability, or if not, that there aren't enough employable persons with disability in Malta. One must determine what combination of the above two is slowing the uptake of persons with a disability in the workforce and make a better goalpost for the state to tackle.

The ETC offers financial incentives to employers, provides training and provides job coaching to ensure that not only are jobs found, but kept. Through cooperation with the Eden Foundation and the Richmond Foundation, persons with disabilities can be further trained and prepared for working life.
Some new schemes further encourage persons with disabilities to become self employed. Rare but true success stories are an example to others.

7. "States are responsible for the provision of social security and income maintenance for persons with a disability".

Means-tested measures have been introduced. However there is an array of social benefits for persons with a disability. Some time ago the Ministry for the Family and Social

Solidarity (MFSS) distributed a certain amount of money in disability pensions, allowances for children with disabilities, injury pensions, carer's pensions and chronic illness allowances. The average pension is Lm 30-Lm 40 a week.

The relative high value of the pension compared to the minimum wage structure often acts as a deterrent to employment. Even more so when payment 'off the books' is still a common occurrence in Malta. Aside from the psychological benefits of work, some see gainful employment as "not worth it" (Insight from Personal experience).

8. "States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood".

Little is being done by the state to develop the above issues. In recent months the social workers and social administrators have recently achieved professional status and independence as a profession. This change will give more liberty and autonomy to social work, amongst others in the field of disability. There is hope that issues such as these will be addressed.

The National Council of Women organised a conference on the Sexuality of the Disabled Person to further investigate what is being done to educate parents and carers on these issues. The findings, in general, were that there is a huge need to address these issues, partly due to the fact that Sexuality is still considered a taboo subject when involving persons with intellectual disability, and therefore as a consequence marriage and parenthood as well.

To my knowledge, there has been no solid follow-up to these investigations; however support services and KNPD will assist and provide counseling if asked. Not the most proactive of activities, to say the least.

9. "States will take measures to ensure that persons with disabilities have equal opportunities for recreation and sports".

There are no state organised activities for persons with physical disabilities. Youth with intellectual disabilities are invited to participate in Skola Sport, a government initiative to encourage active lifestyles. There are one or two qualified trainers helping on this scheme but participation is poor.

Special Olympics participation is left in the hands of a private organisation and open to the select few that can afford the programme.

The Malta Wheelchair Dancing Association is one of the few active organisations promoting disabled sports and participates in international competitions. The recent European championships of the sport where hosted and organised successfully by the MWDA late last year.

The Torball association for the blind organise torball sessions once a week but have problems with an adequate venue. They also organise tandem cycling and participated in a Triathlon organised by the Razzett tal-Hbiberija in 2004.

The Physically Handicapped Rehabilitation Fund used to be a very active group (Based in Corradino) mainly comprised of people afflicted by Polio. They participated in Paralympics and international competitions but have been dormant aside for sporadic participation by one or two individuals in the Malta Half Marathon and the Olympic Day Run.

The Malta Sports Council attempted, in vain, to set up a federation of organisations for disabled sports. The Razzett tal-Hbiberija and Pippa Roberts (Wheelchair Dancing Association) are the representatives of the Paralympics Games in Malta, however there are no budgeted funds from the state to assist in the development of an (Ideal) National Paralympics Centre. Discussions between the MOE and Razzett tal-Hbiberija ensue.

10. "States assume the ultimate responsibility for the collection and dissemination of information on the living conditions of persons with disabilities and promote comprehensive research on all aspects, including obstacles that affect the lives of persons with disabilities".

Aside from the National Statistics office, the KNPD organise surveys to collect demographic and economic information from persons with disabilities. Retrieval and participation is poor and the figures are therefore at best, approximate.

MOE created a focus group, and now a working group to gather information on disability issues, primarily to revise the special education operation.

11. "States have the financial responsibility for national programmes, (Economic policies) and measures to create equal opportunities for persons with disabilities".

Again, KNPD is funded by the state to ensure the above is maintained. The NGO unit of the MFSS budgets Lm750,000 annually for NGOs to develop programmes on welfare and social services, part of which involve organisations working with disabled persons or therapeutic, employment and social issues.

The MOE budgets Lm220,000 annually for the provision of add-on services to assist the needs of students with special needs. To date, this fund is entirely absorbed by the Eden Foundation.

12. "States should recognize the right of the organisations for persons with disabilities to represent persons with disabilities at national, regional and local levels. States should also recognise the advisory role of organisations of persons with disabilities in decision-making on disability matters".

The International Development Disability Consortium (IDDC) is a self-managing group currently consisting of 16 international non-government organisations supporting disability and development work in over 100 countries globally. IDDC's aim is to more effectively

and efficiently promote the rights of disabled people through collaboration and sharing of information and expertise.

An attempt was made to form a Federation of Organisations for Persons with a Disability, but the function of this Federation has been seriously impaired by internal politicking. Splintering of such groups is common-place. An attempt to create a federation for sports associations for disabled sports also failed to take off.

The Malta Council for Persons with a Disability, and the National Federation of Parents of Persons with a Disability are representative groups nearly entirely comprised of disabled persons. Although in principle, self-representation is ideal, often expertise is shunned due to the fact that interested parties do not have a disability or are not parents of persons with a disability. In a recent move, organisations working with disabled persons where prevented from being on the core committee of the NFOPD due to the above criteria, even though their entire existence was to support persons with a disability.

13. "States are responsible for ensuring the adequate training of personnel at all levels, involved in the planning and provision of programmes and services concerning persons with disabilities".

There is a diploma in individual educational needs that trains facilitators to work with children in schools. There is a diploma and degree of Occupational and Speech and Language therapy that includes training on disability issues. There is a Masters degree in psychology that trains in further clinical & educational psychology that can be used in the field. A Masters in Special Educational Needs Co-Ordinators (SENCO) is new and aimed at overseeing and co-ordinating the work of facilitators in schools. The ETC trains Job Coaches to assist disabled persons in new employment.

There is a lack of Early Intervention Educators and training is not available in Malta today. There is also no training available for carers to assist disabled adults.

14. "States are responsible for the continuous monitoring and evaluation of the implementation of national programmes and services concerning the equalisation of opportunities (as above) for persons with disabilities".

KNPD is responsible for ensuring that the national programmes and services are implemented. There is some doubt whether KNPD is effective in ensuring full provision of services. The MOE has set up a New Working Group on Inclusion, primarily to assess inclusion in schooling; however this may or may not extend to social inclusion.

It is important to note that in the latest Education Act (albeit dated 1988) Part 1 General Provisions, it is provided that:

> "It is the right of every citizen of the Republic of Malta to receive education and instruction without any distinction of age, sex, belief or economic means."
> There is no mention of disability!

These conflict with the United Nations Convention of the rights of the child, disability is included. This discrepancy needs to be addressed.

15. "States, both industrial and developing, have the responsibility to co-operate in and take measures for the improvement of the living conditions of persons with a disability in developing countries".

Aside from individual private activities such as the recent efforts to assist the Tsunami victims, there seems to be little provided by the State to developing countries aside from the contributions imposed by EU. (Possibly the commonwealth and United Nations?)

A number of NGOs raise funds locally to support initiatives in Sub Saharan Africa, Albania, Peru and Brazil, however these are not strictly for, but do include persons with disabilities.

Conclusion

The above is an overview of issues related to Equality pertaining to disability. We have seen a solid investment to educate and de-stigmatise disability in Malta, however little is being done to assist disabled persons to become self-sufficient and an integral part of society. There is still heavy dependence on the state for pensions and funds.

This dependence drains financial resources that could be invested in further ICT development, stronger support for employment and tertiary education, so this vicious cycle needs to be broken.

We also need to investigate further issues such as sexuality and parenthood. Our culture is such that makes us less vocal on issues of sexuality, and it is often left in the hands of poorly educated or old fashioned parents and carers to determine the best practice for the disabled persons in their care.

Overall, there is more acceptance, accessibility and education on disability issues, and investment of time and resources must be weighted against those issues we are slacking in. Accessibility and enforcement of the rights of the disabled seem to be the predominant achievers in the above list. We need to make an effort to improve on the rest.

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CONCERNS OF DISABLED PEOPLE - ESSENTIALS

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These essential observations are based on recent research conducted by the Kunsill Nazzjonali Persuni b'Dizabilita' (KNPD) and National Statistics Office (NSO). The main focus of this research study was to establish the major concerns of disabled people. The number of respondents was 599, who are registered with the KNPD. A social model perspective was adopted, meaning that disability is viewed as being caused by social oppression. The focus therefore was on the barriers created by society.

1. A major problem disabled persons have is when it comes to *financial independence.* Indeed, most disabled people still rely on social security benefits for support whilst a majority do not earn more than the minimum wage. Besides limiting their choices, this also means that they are dependent on their families. Moreover, the general tendency is for disabled people to require specialised equipment which also limits their family's expenditure. The pension for disability cannot realistically support disabled persons in their everyday lives. The family remains an important element in the life of disabled people. This is because they consider it a source of adequate support and assistance. Though this bond with the family is a positive thing, disabled people are prepared to pay for support and assistance to be able to be more independent and less of a burden on their families. The Church, and social workers, for example, also provide support but this is limited. Moreover, much has still be to be done to balance the financial problems with the cost of services.

2. *Education* is also a key concern for disabled persons. Only a small percentage of disabled people have reached post-secondary and tertiary education, whilst some never attended school. Indeed, much of the problem for participation is the lack of support services, though children currently attending schools are provided with facilitators. A strong need was expressed by disabled people for children to attend regular classrooms and not special schools.

3. Disabled people have also shown concerns about employment. Most disabled people do not work, and most of those who do are engaged in either elementary or clerical work. Moreover, they have few opportunities for on-the-job training and promotions.

Disabled people have the expressed the need for training to be able to perform their job and flexible hours when it comes to working times.

4. Information and communication technology is another sector that is important for disabled people. Though many disabled people recognise the advantages of using a computer, only a small percentage actually use it. A general need is felt from disabled people to be given the opportunity for training in accessible premises.

5. Disabled people still do not feel fully included in their communities. The fact that many disabled people find it difficult to go out without support means that a significant number stay at home most of the time. Moreover, less than half of disabled people in this study felt that local councils or the Church supported them. More assistance is needed for disabled people to be fully included, including more accessible structures.

6. Health and government services are considered to be fairly adequate. However, disabled people feel that they should be given the right to apply for health assurance as this is often denied them. Moreover, certain government buildings providing a service such as the housing department should be made more accessible so as to ensure disabled people are given equal opportunities in applying for services. As in the case of provision of services via telephone, there has been a general expression of disappointment over such services because in some departments it is difficult to be served.

Summary

Though it is undeniable that the lives of disabled people have improved over the years, there are still things to be done. Disabled people are still facing challenges in maintaining their financial upkeep, education, employability, and their knowledge of information technology. Moreover, the fact that disabled people find it difficult to go out on their own both because of physical and attitudinal barriers means that they are unable to be active players in the community. The inclusion of disabled people by providing them with equal opportunities and access should be a key priority.

RELIGION AND RACE

WORKING AMONG ASYLUM-SEEKERS AND REFUGEES - THE EMIGRANTS' COMMISSION'S EXPERIENCE

ALFRED VELLA

Introduction

In this paper, I focus on the specific areas which form the basis of the Emigrants' Commission's day-to-day work dealings with asylum seekers and refugees.

The purpose of this contribution is twofold. First of all, I aim to give an overview of the existing relationships and work practices (including some current problems) for which we continuously struggle to make every effort to be of best service to the asylum seekers and the refugees. Secondly, I aim to propose possible ways to develop these relationships by considering the measures needed to improve and strengthen the existing relationships between the interested stakeholders (local and foreign, including the European Commission in particular) and the Emigrants' Commission.

In particular, I seek to deal with the question of State and European Commission support for our activities, and look at improved methods of dialogue and consultation. I also feel obliged to address the question of EU funding for our NGO-managed activities. We at the Commission believe in the provision of a more coherent Commission-wide framework for co-operation.

At the same time, we at the Commission are hopeful that these proposals provide a useful input and give new impetus to the ongoing process of internal and external appraisal of the way in which we should all function and relate to one another. It is understood that specific proposals must be established as a coherent part of the process of the overall reforms and necessary legislation.

The realisation of these goals would strengthen the Emigrants' Commission's *raison d'être* and position to see to the needs of the people who seek its help - particularly to the growing needs of protection and assistance to asylum seekers and refugees.

Background

The Emigrants' Commission - which is strictly the NGO founded and directed by the local Church Authorities - has for a long number of years been concerned and involved in the protection of asylum seekers and refugees. Until the introduction of the Refugees' Law in 2002, it used to give a significant contribution in the UNHCR's programme of work-related activities.

Nowadays, the Emigrants' Commission focuses mostly on the provision of protection and assistance to all those people who 'pass out' of the Detention Centres. It is presently providing shelter to about three hundred and fifty people; this totals to an approximate 44% of all those who are in the Open Centres. Involved in the day-to-day management of this activity, the Emigrants' Commission has a complement of nineteen service providers: including volunteers and full-time paid personnel.

A typical proof of the Emigrants' Commission's commitment to this cause is last year's water and electricity consumption bill which totalled Lm5,000 (approximately of 12,000 euros) - which it dutifully paid. Another recurrent expenditure includes our telephone bill which, in 2004, spiralled to Lm1, 200 (2,800 euros).

The following highlights some typical examples of the range of work we get involved in:

- We nurture contacts with personnel who have the potential to offer work opportunities while we do our outmost to secure full-time jobs for our clients;
- We have a small complement of medical practitioners who see to our clients' needs on a regular basis, both at our headquarters in Valletta as well as the Balzan Residential Complex;
- We provide free milk and nappies to all babies; this service taxes us more than Lm100 per month; simultaneously, we see to the children's needs in schools. At the beginning of this current scholastic year, we spent Lm500 to provide the children with their initial school needs;
- We offer assistance to trace documents and other relevant information that shed light on the true identity or kinship of our clients;
- We provide legal assistance when we are involved in cases that are not directly related to the asylum process of documentation.
- We process applications and help in the provision of the necessary documents for travelling purposes. In 2004, we offered assistance to a total of eight hundred and thirty-three people; their requirements varied from the processing of fresh applications to renewals and re-issues;
- We seek to foster and maintain a healthy rapport with all relevant authorities/stakeholders to be able to nurture a political social climate that is conducive to the best interests of our clients in all circumstances.

Furthermore, we embarked on an ambitious project at Balzan Residential Complex. Thanks to the Sisters of the Good Shepherd, who are the owners of these premises, we reached legal agreement to carry out the necessary structural alterations to change what had been an uninhabited convent for a long number of years into decent living unit quarters that

accommodate married couples with their families as well as male and female single persons (a total of 210 residents). The realisation of this ambitious project which is now in its final stage of completion has been, not only terribly taxing in currency, but, equally so, in the supervision of work.

At this complex, we make every effort to nurture the concept of building *a community of communities*. Every effort is made to transmit to our friends intrinsic values that have to respect diversity in all its potential forms, be it gender and sexual orientation, racial or ethnic, religion or belief, age, disability, education, etc. While we keep a watchful eye with tender love but, nonetheless, with assuring co-responsibility, we empower those we help to stand on their own two feet, become independent, possibly self-sufficient, and, above all, responsible for their own deeds. As expected, they are responsible for the upkeep of the premises, for the cooking of their food, etc.

Still, we are striving even harder for further development, as there is room for improvement. With the availability of additional human and material resource provision, we aim to engage all our friends into different training programmes that would hook them on to inspiring value-added life fulfilments.

Presently, we are also considering the organisation of an ethnic festival at Balzan Residential Complex. The general aims behind this activity include: the fostering of positive attitudes towards the relationships and well-being of our nationals and the asylum seekers; and the awareness, appreciation, and promotion of cultural and ethnic heritage. This is intended to be celebrated on June 20th, which is precisely the day dedicated to the immigrants. We are hopeful that we will receive adequate support to help us in the realisation of this socially educational project. As a matter of fact, we hope that this will not be a one-off activity. We envisage the need for more varied opportunities.

In fact, we are precisely going for this task as we have the true perception that a good number of our nationals are apprehensive of the presence of these people in our country. It is a fact that we meet people from all walks of life and of all ages who express fear and pass discriminatory remarks on grounds of colour, belief, employment and education in particular. This activity should thereby help us to inculcate respect for diversity and proof, to one and all, that such fears are unfounded - freaks of our intolerance and pitiful imagination!

Although the above is intended to give a quick snapshot of our main spread of work-related activities (*practically, from the moment they leave the Reception Centre onwards*), we would like to emphasise that our interests in the well- being of our clients go beyond the span of time they spend under our care and guidance. In fact, our concern prompts us to forward suggestions for the holistic betterment of the whole process; from day one when, for a multitude of complex factors, they find themselves on our shores until they are helped to settle, possibly with a long term solution, tailored to their specific needs.

The Way Forward

- Reception time

Our direct contacts with the people in *detention* (when we witness first hand what our would-be clients endure during this phase) compel us to state openly that *radical changes need to take place with immediate effect.*

First and foremost, it is a question of referring to this first stop as a Reception Centre and *not* as a Detention Centre. The word *detention* denotes negative messages that are painful to the asylum seeker and harmful and fearful to our population at large. There is a lot of weighting to this suggestion; the Authorities should be responsible to see to the change with immediate effect. If possible, the necessary course of action should be taken to ensure that the right message is communicated to all stakeholders, including the media and the people in the different communities of our country.

It is not enough that people at the Reception Centres are provided with basic shelter and food; the ambience and living standards (in the "accommodation" provided) badly need to be improved or changed.

The Emigrants' Commission acknowledges that some time spent in the Reception Centre is inevitable; during this time, it is vital to ensure that each asylum seeker's state of health and identity is by no measure a threat to the national well being and security of each and every one of us in our country. However, once the necessary precautions are taken to establish this safety, we see no reason why people who are seeking asylum/refuge should be kept further in the Reception Centre. So much so, that we believe the time spent there should never be made to exceed a three-month span. We go so far as to state, with all responsibility, that such time should be the longest span during which a person is kept against his/her wishes in *detention*, or better still *under controlled custody.*

Every effort should also be made to ensure that the time spent during the reception phase is decently and well spent. Other than the provision of humanly decent living conditions (reference to which has already been made), these people should be engaged in meaningful activities. Different programmes that cater for the holistic development of one's physical, mental, social and emotional well-being should be put in place. At the same time, there should be continuous access to information and guidance as regards the rights and responsibilities of immigrants; as well as prompt personal data information that keep each immigrant informed of the processing stages of his/her application for refugee status. Needless to say, all this has to be communicated in the language that the immigrant understands best.

In prevailing circumstances when an individual does not qualify for refugee status or temporary humanitarian protection, this person should be sent back to his/her country of origin at the very earliest. We understand that this process of repatriation is not as plain sailing as one would like it to be; nonetheless, it is, under no specific circumstance, acceptable for such people who are refused status to find themselves barred from the right to seek and take up employment, from medical assistance, from the provision of the necessary

travelling documents, etc. As long as repatriation remains a stumbling block, such people deserve to be given the basic, adequate means to make a decent living.

We find ourselves confronted with equally difficult situations when immigrants are granted temporary humanitarian status but refused refugee status. Their frustration gets even worse; it gets beyond their comprehension to come to terms with the harsh realities. Refusal of refugee status bars them from being able to join their families. During such sensitive episodes when the immigrants find themselves under great mental disturbance and emotional stress, they would be more in need of psychological than material support. Such support would help them understand their position in line with the parameters of the asylum process. Even those who would put their case before the Appeals' Board would require continuous help and support during the process. They would need to be informed of the best way in which they can get in contact with the lawyer who can give them legal assistance; other than the fact, that they would require regular briefings to help them come to terms with, and understand, the different stages the whole process would take.

The Emigrants' Commission agrees that the service of a social worker or other trained personnel for this matter, is essentially crucial. Such provision should be made available to every immigrant. The validity of this recommendation should be unquestionable and cannot be over-emphasised. In fact, such service should be available to the asylum seeker from day one when he/she reaches our shores until the day when he/she is off to settle elsewhere outside our country. With hindsight, we agree that such provision would, by long term projection, help to alleviate significantly the unnecessary hardships and frustrations of the individual immigrant. Collectively, it would also ease significantly the levels of high tension in the present scenario.

- *Out in the Community*

The personnel of the Emigrants' Commission (which is strictly regarded as the first utility point of reference) are the very first people the asylum seekers would seek to consult immediately they step out of the Reception Centre. Somehow or other, they manage to get to our office and thereafter they are helped and guided to:

- reach a Polyclinic to be issued the relevant medical certificate that verifies that they are free from any infectious disease;
- apply for the issue of their identity card;
- visit the Refugee Commissioner's office to be given the relevant official documents, which they need to keep in their possession;
- register for work;
- apply for the issue of the passport document;
- enrol their children in school; ..... as well as other varied requirements. In a nutshell, we are at their beck and call; to meet their manifold needs for as long as they stay in our country.

But this experience prompts us, once again, to make our *recommendations* in spite of the fact that we have been making the same requests for ages. It is hoped that this time around these recommendations will not fall on deaf ears.

We propose that the necessary course of action to see to the provision of the essential documentation (reference to which is made in the preceding paragraph) is carried out during the time spent in the Reception Centre. The absence of this documentation creates hardship and postpones unnecessarily the time when the children can start school, the possibility of finding a residence, the acquisition of the passport document, to name but a few needs. Again, if action is taken as we are proposing, the identity card could be given immediately they leave the Reception Centre. The identity card should also include the official imprint that the holder has been granted permission to work in line with the official status he/she has been given. Unless this situation changes, the immigrant will, as at present, be forced to wait for about four weeks more to get permission to work. Add to this the fact that he/she is made to pay twenty five Maltese liri, and two Maltese liri and seventy five cents for the photos (66 euros in all). Usually the Emigrants' Commission forks out these amounts; in some cases, the amount is refunded when the asylum seeker finds employment.

- *Work and Training*

Every person under temporary humanitarian protection is also made to apply and pay ten Maltese Liri each time he/she changes employment. This norm is often keeping the immigrant away from adhering to its practice. With the resultant consequence that this is creating the unfortunate situation whereby the immigrant worker can be easily exploited by the employer. We come face to face with harsh realities - like the case of the immigrant worker who required fourteen stitches to his head because of his plea with his employer to get paid for the five weeks' work he had done; the hard, often menial, labour an immigrant is given against the low payment he/she is given in return. Besides the absence of compensation when the immigrant worker gets hurt during work. We have had cases such as that of one worker who lost one of his fingers, of another who had his arm squashed in some machinery, of other who had to have one of his feet amputated. Such tragedies make us, sorrowfully, hold our breath for long. The necessary legal structures should be put in place to prevent such situations and provide relief in such tragic cases.

We would also like to mention the case of the refugee who is entitled to work but not as a self employed person. Thereby, he/she has no right to employ other workers; and, if he /she has any offspring, they are not entitled to work before they reach the age of eighteen.

Similarly, a case in point concerns certain unaccompanied minors who have had to stop the course they were following at the MCAST a year ago. They could not follow an apprenticeship course as the very nature of the course would have required them to do their apprenticeship (their work phase) before they were eighteen years of age.

- *Accommodation*

Furthermore, when an immigrant prefers to find alternative accommodation other than the Emigrants' Commission's Open Centre and cluster homes, he/she is left with little choice, if any at all. The immigrant needs to abide by the Acquisition of Immovable Property (AIP) Law and he/she can only buy an apartment that would cost not less than thirty thousand Maltese liri and, if a house, not less than fifty thousand liri (an average of 72,000 euros and 120,000 euros respectively). Currently, we are informed of eight refugees who have applied

for housing assistance but, to date, none of them has as yet been forwarded any reply following their written requests.

- *'Returners'*

Another problem concerns the ones who are deported back to Malta following their attempt to try their luck and settle abroad. This happens even when the persons who travel own a regular passport document accompanied by the formality of an official temporary humanitarian status. This u-turn holds validity as Malta forms part of the Eurodac system; in practical terms, it results that any neighbouring country to Malta has the right to refuse settlement to these immigrants. We have had instances when the persons concerned had been away from the island for a good number of months. Often by the time that they return to our country, their place will have been taken up by somebody else.

- *Citizenship*

Yet another area of great apprehension concerns the citizenship issue. We have a complement of fifty five refugees who qualify for citizenship status because they have been in Malta for more than five years. A number of them have married Maltese nationals, speak fluent Maltese, have fixed employment, have their children attending local schools and have befriended Maltese nationals; yet, to date, not a single one of them has been granted citizenship status! On our part, we propose that the people with the right for this official status should be given a residence permit that encapsulates all the rights that are synonymous to this status.

Proposals

As a result of these prevailing situations, the Emigrants' Commission feels in duty bound to forward, once again, the following set of proposals. In effect, reference to these proposals and to the scenario referred to above has already been made verbally during the Emigrants' Commission presentation at the National Conference on "Irregular Immigration" which was held on the 7th and 8th February of the current year.

In parenthesis, we feel the need to state that in the National Policy Document (*titled "Irregular Immigrants, Refugees and Integration" and co-published by the Ministry of Justice and Home Affairs and the Ministry for the Family and Social Solidarity shortly before the national conference referred to in the preceding paragraph*), there is no reference to our proposals. We sincerely trust that the necessary course of action will be taken without further delay; to put the *legal* and *administrative* framework of all proposals in place.

- *Set of Proposals*

(a) *On the very day* of the immigrant's release from the Reception Centre, he/she *should receive the Identity Card.* This card should also include the official authentication that the person in question is entitled to work for the period of time which tallies with his/her Status Certificate;

(b) The *right to employment should start at the age of sixteen.* It should, furthermore, be the responsibility of the social worker and/or doctor to work out, especially when there is a doubtful case, the correct approximate age of the minor who claims that he/she is under age;

(c) *All the medical screening that is required should take place during the period of time spent in the Reception Centre.* If need be, adequate medical attention, care and supervision should also be given immediately this is required;

(d) Refugees *should be given permission to buy property* without adhering to the shackles of the AIP code of regulations. At the same time, they should also enjoy entitlement *to equal opportunity to social housing accommodation;*

(e) In cases *where repatriation is not a feasible solution, and* as such, these people find themselves *denied asylum protection*, adequate provision should be made to give these people *the right to make a decent living*;

(f) Every person with a refugee status or a temporary humanitarian protection should be entitled to a *residence permit*;

(g) When people with temporary humanitarian protection and with children find themselves fending without the support of the other parent/guardian to help in the children's rearing and upbringing, all *effort should be made to re-unite them all as one whole family;*

(h) While the asylum application is being processed, the immigrant should have *the right to get continuous feedback on every development and decision taken during the whole process;* at the same time, it is vital that this communication is carried out *in the language that the person concerned understands best;*

(i) Every immigrant *should be assigned the professional, caring service of a social worker;* in practical terms, the social worker is expected to ethically guide and follow his/her client's needs until the time when the immigrant leaves our country or integrates safely and securely within our community.

From the first-hand experience it has gained over the years, the Emigrants' Commission acknowledges that the set of proposals it is forwarding do not present complex issues that necessitate long term projection. On the contrary, it believes that the realisation of almost the absolute majority of its proposals should be prioritised within the *immediate short term* projection. It is also hopeful that its participation and contributory role in this EU Civil Society Project would strengthen its position in tangible terms.

At the same time, the Emigrants' Commission welcomes all proposals included in the National Policy Document referred to earlier. In a nutshell, there is the ultimate need for the design and introduction of a considerable number of new structures, services and, not least, meaningful investment for the future.

More General Issues

With the same positive spirit, the Emigrants' Commission would like to draw attention to further *issues of a general nature*; precisely, to generate a genuine and collaborative effort for a more systematic approach towards a stronger partnership with all interested stakeholders and the strengthening of effectiveness in the realisation of policy projects.

These include:

- *Civil Society*

Strengthening civil society is important for several reasons. It is recommended that there be put in place a policy dialogue between civil society and the government. In addition, the strengthening of civil society can contribute to the empowerment of marginalised parts of society which again can lead to poverty reduction and the development of a more just society.

When the EU supports NGO projects, not only does it spend its funds highly efficiently and make an important contribution to the reduction of injustices and poverty, but it also furthers the development of a vibrant civil society.

As a matter of fact, the importance of close links with the multi-sector alliances of society involved in refugee issues cannot be more strongly emphasised. Such alliances should seek the involvement of representations from the media, political parties, local councils and businesses, the police, governmental organisations and other associations. They should work in harmony with all refugee community representatives.

Social cohesion is best served by an inclusive and welcoming approach to cultural diversity, which emphasises shared values. This creates the need to promote positive images of refugees and their contribution to society and to formulate media messages based upon well-documented and comprehensive information, to improve the public's perception of refugees.

Trade Unions can also play an important part in promoting positive attitudes, dispelling prejudice in the workplace. It is recommended that trade unions take measures to educate their members on 'diversity management' in the work place. They can also engage in lobbying major employers and/or employers' associations and in highlighting the potential contributions refugees can make in the workplace.

- *Non-Governmental Organisations*

It is commendable that, over the last two decades, the partnership between the European Commission and NGOs has expanded on all fronts. This intensification has covered a range of issues, from policy dialogue and policy delivery, to project and programme management, both within the EU and its partner countries. This results from a number of interwoven factors, related both to changes and development within the EU institutions themselves, as well as to developments within the NGO Community.

Although the Commission's current practice clearly proves its willingness to maintain and strengthen its partnership with NGOs, the structures and procedures involved have not kept up with this.

The complexity of EC policies as well as the growing number of regulations and funding sources (budget line) coupled with recent financial security problems have created a great

deal of uncertainty for NGOs about co-operation with the Commission. The need is felt to put the relationship on a new footing. Provision should be made for improved methods of dialogue and consultation.

It is the prerogative of NGOs (*not least, the Emigrants' Commission*) to focus, in functional terms, on both operational and advocacy activities. From the operational standpoint, NGOs can contribute to the delivery of services (such as in the field of welfare); whereas, at the advocacy level, the primary aim of NGOs should be to influence the policies of public authorities and public opinion in general.

Therefore, the rationale of co-operation is grounded on five main considerations:

(a) the fostering of participatory democracy

The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.

The right of citizens to form associations to pursue a common purpose is a fundamental freedom of democracy. Increasingly, NGOs should all the more be recognised as significant components of civil society and as providing valuable support for a democratic system of government. NGOs deserve notice and involvement in the policy and decision-making process.

(b) representing the views of specific groups of citizens to the European Institutions

The role of NGOs in representing to the European Institutions the views of specific groups of citizens (for this purpose, the immigrants' case) shows the ability to reach the poorest and most disadvantaged and to provide a voice for those not sufficiently heard through other channels.

NGOs' involvement in policy shaping and policy implementation helps to win public acceptance for the EU. In some cases, NGOs can act as a balance to the activities and opinions of other interests in society.

(c) contributing to policy making

The specific expertise that NGOs can contribute to policy discussions is unquestionable. NGOs can provide expert input for EU policy-making. In particular, they can provide feedback on the success or otherwise of specific policies thereby contributing to the Commission's task of defining and implementing policies by fully taking into account its overall public policy responsibility.

(d) contributing to project management

The specific expertise and valid contribution of NGOs in managing, monitoring and evaluating projects financed by the EU are particularly important in tackling social

exclusion and discrimination, and the provision of humanitarian and development aid. The expertise and dedication of NGOs staff and their willingness to work under difficult operational conditions mean that NGOs are vital partners for the Commission both within the EU and beyond.

(e) contributing to European integration and co-operation

When NGOs work together to achieve common goals, this contributes to promoting European integration and co-operation in a practical way and often at grassroots level.

Moreover, the ability of European NGO associations and networks to channel and focus the views of the various national NGOs is very useful for the Commission.

Therefore, strengthening the relationship between the Commission and NGOs can help both parties to be more successful in achieving their respective goals. At the same time, *the Commission will need to recognise and support the development and independence of the NGO sector.*

- EU Funding

NGOs are aware of the low ratio of staff to financial resources in the European Commission. This, however, should not be the reason to finance only big projects. *Small projects can have a big impact.*

And the validity of this is all the more important to our country because the size of Malta calls for small projects in comparison to other countries. However, experience should teach us that size is not necessarily the decisive factor. The criterion for the funding decision should be the quality of the project not its size. Administration should be organised in a way that allows for effective development cooperation and not the other way round.

Furthermore, there is lack of sufficient information for NGOs in particular on funding and financial procedures. Better guidance on application procedures and more comprehensible application forms would be appreciated. When seeking information on funding, NGOs need different types of information at different stages in the application process, starting with general information on what is available, specific information on the criteria for the various grant programmes and details on how and when to apply.

The Emigrants' Commission cannot stress enough the need of getting this support (be it direct funding for the implementation and maintenance of different projects or indirect funding through the provision of different support services); truthfully, this will determine the extent of its operational and advocacy functions for the benefit of all asylum seekers.

- Access to Education

Education is a powerful tool in the process of adaptation and social integration. It promotes the personal development of refugees while at the same time it will be improving their chances to contribute to the host society through participation in the labour market.

Tuition should be a right and obligation until a satisfactory level of educational competency is reached. Special arrangements should be made for carers in terms of assistance with child-care facilities.

In fact, tuition arrangements need to be accessible and tailored to the needs and education requirements of refugees. A range of different education programmes and courses should be made available including intensive/accredited courses, courses dealing with problems of literacy and/or geared vocational training/career development.

Research has shown that, for refugees, following mainstream education programmes is the most successful route to finding later employment commensurate with their qualifications, skills and professional experience.

Once again we highlight the need to make provision for refugees receiving vocational training in our country to qualify for work phase experiences during their course of study. This can be done if, for the purpose of these courses, the age limit for a work permit is lowered from eighteen to sixteen.

Regular schooling for refugee children is so very essential. In fact, schools should play a key role not only as centres of knowledge acquisition but equally importantly as places of formal and informal preparation for the holistic development of refugee children to live harmoniously in a new society - that is in pluralist societies.

This calls for intercultural training which should be widely available in order to sensitise teachers and school staff to the effect of refugee experiences on children's learning processes. Such training is recommended to form part of the teacher training curriculum. Awareness-raising might be necessary with curriculum development bodies, including the Faculty of Education at the University of Malta and the Curriculum Department, Education Division.

Ideally, the Education Division should seek to support the development of appropriate methodologies to assess prior education gaps in refugee children's progress, recognise competency in language skills and develop the appropriate benchmarks to assess the different skills. It should ensure that there are sufficient and appropriate resources to facilitate learning for refugee children in schools, and should consider the availability of learning materials designed specifically for refugee children. The provision of facilitators within the normal stream setting is also advised. At the same time, refugee parents and carers should be empowered to participate in the education of their children.

- *Access to housing*

Shelter is a basic human right and necessity. The conditions in which people live determine to a great extent their health, well-being and ability to engage in gainful occupation, pursue self improvement through education and recreation and in consequence attain a decent standard of living.

It is a known fact that there are considerable differences in housing provision for refugees in European countries. In some countries, local municipalities allocate housing to refugees on the basis of a system or availability of accommodation. In other countries, refugees have to find housing in the private or public housing sectors.

In our case, as the need for housing is often for short term accommodation, we offer Open Centres, like the one we have already made reference to, that is the Balzan Residential Complex, and Cluster Home Accommodation whereby we have a limited number of houses (16) that can accommodate up to one, two or more families depending on the spatial area of the dwelling place in question. Needless to say, consideration is given to the presence of family ties or community links when refugees are to be settled, as well as to employment and educational opportunities. Presently, there seems to be the indication of making provision for the setting up of another residential complex, this time at Marsa. So far, the building site, which was previously a small trade school, has been earmarked; although progression of structural work alterations is still at a halt. No formal decisions have been taken as yet but it seems likely that it would be a joint venture between the State and the Emigrants' Commission.

At the same time, upon receiving permission to stay, persons with refugee status should be given full access to housing rights on the same basis as our nationals. In fact, reference has been made earlier to the need to waive the application of the AIP code of regulations at the very earliest. This is proving to be a taxing burden, a hidden discrimination, on the ones who would otherwise be interested in buying property.

- *Access to the Labour Market*

A review of recent international research related to refugee employment suggests that employers are not sufficiently aware of the skills and economic potential of refugees. Some employers experience difficulties assessing overseas qualifications and work experience.

It is a sad fact that, in our country, most of the refugees end up doing menial jobs; in some cases, they are also underpaid for the work that they do. Plus the fact, that, as has been referred to earlier in this presentation, employment regulations and restrictions risk pushing such people into illegal work or dependency on public assistance.

At this stage, it is also worth noting that *increasing refugee women's participation in employment programmes* through provision of information on employment and social assistance rights and assistance with childcare or transport/mobility difficulties should also be given special attention. Women need to be helped to overcome barriers; provision for flexi-services and opportunities should be made available to encourage them to utilise training and educational opportunities. *Women need to undertake new roles in support of themselves and their families.*

In particular, these limitations can be viewed as being in violation of the UN Convention of the Status of Refugees. This convention urges national governments to grant refugees unconditional rights to employment and automatic work permits on the same basis as nationals.

A key component of employment interventions could be the establishment of partnerships between institutions such as the Chamber of Commerce, public and private sector employers, development agencies, trade unions and employment advice providers. We need to develop initiatives to raise awareness of employers and ensure recruitment policies and practices to enable refugees to access jobs in both the private and public sectors. Refugees are, indeed, entitled to be involved continuously in the design, implementation and evaluation of strategies addressing their needs.

Conclusion

It is sincerely hoped that the issues raised in this paper are truly given their due attention by the Authorities concerned, be they the State, the NGOs and the EU. Since the National Conference which was held a couple of months ago, precisely in February, 2005, not much effort and progress of work have been reported to put into place the recommended structures and to get on with the implementation of the required work.

Earlier on in this paper, reference has been made to the concept of Burden-Sharing. It seems most appropriate to end by highlighting once again the importance of putting the philosophy behind this principle into practice. We cannot leave all the talk that is said (not least at the international fora!), about this concept on paper; unfortunately, sad to state, this is the stage where we have been for a long time now. Let us take this opportunity to speak loudly and clearly : Let all countries roll up their sleeves, and, to the best of their abilities, ensure that they do their utmost in full liaison and support with each other.

MUSLIMS IN MALTA: AVOIDING DISCRIMINATION

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Introduction

Equality is crucial to the European Union's survival. It is a very ambitious project to try joining all the existing mentalities and 'mainstreams' of Europe but this will not hold if the Union does not promote true justice, for the weak and for the strong. The people need to feel proud of belonging to the Union. This will only take place if and when the European Union really causes justice to dominate, and teaches all to love it and respect it at the same time.

Equality is not a bureaucratic concept in the minds of the people. The members of a civilised society demand it in many practical ways and it is the government's obligation that it be afforded to all. Equality for the weaker in society will, in the end, make all people feel safer, for 'majorities' will not be afraid of minorities and those who are not mainstream, knowing that all will have justice meted out to them and that all must be respected. Knowing that equality is available for the weaker and the most vulnerable of society will let the majority population perceive that as individuals they also can be guaranteed their slice of justice if ever they need it.

Equality has to be the backbone of the European Union. It is what will keep the Union together in the end- the surety that justice and as a result, true equality, will rule in the end be it between the large countries and the smaller ones, between the richer countries and the poorer, between the fairer and the darker people of the European Union, between the Christians, the Muslims, the Jews and all other people of good will. Equality must become the most important principle for the European Parliament and beyond it.

This report concentrates on the needs of the Muslim community in Malta. This report will, God Willing, indicate the most urgent needs of a group of people who embrace a different creed from the mainstream Maltese. The need arises simultaneously to clarify that not all Muslims are of Arab origin and there are quite a few Maltese who proclaim Islam as their religion. This religion is not as different from Christianity as many are led to think. There is a lot of untruth attached to Islam in the Western mind and this is what we deem has to

change, first of all. This by itself will be felt as 'justice' allotted to the Muslim community living here. To be understood and not to be belied, is the basic form of respect that all need in order to live and integrate in any society. Equality by itself is a lie if it is not accompanied by respect.

Equality is an obligation for our government to guarantee and procure. It is fundamental if we are to aspire to a world without war, a world that unifies under the banner of truth and respect. Many Muslims pay their taxes, work, take care of their family and are respectful citizens. Yet the government ignores their needs. The situation thus reads that these citizens have obligations towards the state but the state does not cater for theirs. This is what discrimination is all about. The state has to protect these people in better ways than it does the local population in that these are a minority group and thus are also weaker and more exposed. They face many barriers that the mainstream population does not encounter. The majority of the people keep them at the periphery of society and they are also kept away from true social advancement only due to their being different. These people, due to being from another country and embracing a different religion, are isolated, shunned and disdained.

A Muslim's Obligations

Islam is a just religion, a religion of peace. In Islam it is only the Will of God that ordains what man does and refrains from doing in this life. This makes it incumbent on all Muslims to obey the Shari'a, the Qur'anic Law as best they could, if they want to please God and enter Heaven.

It is demanded from all Muslims that they wear the 'hijab', the Muslim code of dress which is much more than just the scarf for the women. It is a code of ethics and dress for both men and women. It is a sin and not a caprice to go in public without the hijab, for both sexes.

A Muslim prays five times a day. This is one of the pillars of Islam. If a Muslim stops praying at the prescribed times, it is as if he is not a Muslim anymore and this is also a major sin. A Muslim also has to attend to the midday Friday prayer at the Mosque. This is obligatory for all Muslim men and optional for women.

A Muslim has to fast during the month of Ramadan. Fasting in Islam means to refrain from eating and drinking anything from the start of the day, that is before the sun starts to rise, till sunset. There are no other fasting-methods in Islam. For a whole month, the Muslim eats and drinks only at the start of the night or sunset, and at the end of the night, before dawn. *Muslim workers should be allotted a limit of protection so as not to find work impossible and life unbearable during this time.*

Islam is unknown to the majority of the Maltese population in general. Many think they know it but only know a set of lies propagated in ignorance. This is a very real problem and is causing most of the bad attitude one feels in Maltese society. The main exigency resulting from informal research is the need to fight this trend effectively. From the outset, this report asserts that *the real problem is the lack of true knowledge given out on Islam, the lack of objective reporting made by the media channels and the laws that are never implemented.*

The Challenges for the Maltese Government

The Maltese government is experiencing a very particular situation in that the Maltese Islands are receiving a substantial influx of refugees. *This, though apparently a problem in the eyes of public officials and the people, is not necessarily a disadvantage.* This attitude is to be seriously challenged and reconsidered as it is the one most effective discriminating tool operating in our country.

Malta can choose between profiting or drowning in the wake of a potential disaster and it is a guaranteed disaster to come if we do not change attitude and exploit the situation. *These people have a right to seek asylum and live as equals to the local population and these two factors are being ignored by all in Malta. These people represent potential income and economic growth for Malta if trained well and treated fairly.* It is also an opportunity and a test for the Maltese to open their minds and overcome any racist attitudes they harbour. This situation is also an opportunity to get Malta's disciplined forces educated and their acts cleaned up. The police and the soldiers in Malta need to be properly trained and disciplined. People's rights have been regularly abused without any legal or disciplining repercussions for the haughty perpetrators.

The trend to marginalise and victimise is well ingrained in the Maltese society and the law, though well written, is essentially ineffective. One can read, in the Tampere Council report that "In a genuine European Area of Justice, individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States." *In Malta the public very rarely perceives the courtrooms as the way to justice. Much less is it an option in case of discrimination experienced by refugees and other minorities.* Change is needed that cannot be postponed, and Malta will only find it has a harder challenge to confront if we procrastinate. Minds will change with good education and this takes time. *The law will be effective if and when the people are taught to uphold it in all walks of life and the government is fully committed to applying it.*

Discrimination is widespread in Malta. *The shame is that much of it goes unnoticed or is even accepted and perceived to be the norm or even a positive nationalistic (love for one's country) attitude by many Maltese.* It is a social illness that can lead to much social harm. The government must not wait till bad comes to worst to take action.

The European Union in Practice

The European Union can be uniquely decisive in promoting equality for all in that it is a foreign force and thus cannot be nose-led into apathy or worse. The European Union also gives financial benefits to those Member States which reach the goals set by it. This is the way forward if discrimination is to be overcome. It promotes efficiency and practicality.

The European Union must focus on justice so as to ensure that its citizens are satisfied and feel that it is beneficial for them to be members of this system. If the citizens are discontented and find it is better to be absolutely self-governed, then they will lobby for this in one way or another. This could, in the long run, topple the European Union completely.

Thus, the European Union has to stop injustices and prevent them. The case of the French government banning religious symbols and the hijab (the Muslim headscarf) was shaming and unjust. Yet the European Union condoned it. The fact that Turkey bans the wearing of the headscarf in schools and public offices is another black point. If the European Union really wants Turkey to have a good human rights record, why is it allowed to stop its people from practising their religion? Why doesn't the European Union demand that this phobia stop instead of allowing governments to enforce it legally? Institutional discrimination and injustice is even worse than individual violations. Institutional failures would furthermore help pave the way for an increase in individual violations. If one does not want to admit to this, it is still valid to say that prevention is better than cure and this tactic should thus be adopted.

The European Union needs to allow its Member States to function without forcing them to become homogenous. *It takes plurality to make the World* and the European Union needs to be a world in itself and also part of the World. This will ensure its continuous enrichment in all fields.

The Main Limitations of the Racial Equality Directive

The Directive promotes equality whereas it leaves the implementation of the principle at the discretion of the Member States. True equality cannot be interpreted in so many ways. France banning 'religious symbols', knowing full well that one of the banned was not a symbol at all, is not respect of liberty nor is it respect to the idea of a secular state.

Only a minimum of justice is requested from Member States whereas all those present within the European Union should be afforded wholesome equality and not the shadow of it.

The ways of implementing the Directive are loose whereas these are the tools and these are what have to be well controlled by the European Union. That is, there should be control of the media in that it is stopped from generating falsehoods, the education systems need to be cleaned up of racist and hate-fuelling teachings. There has to be effective monitoring of all echelons of society and work in line with the Directive has to give good results and these have to be compiled and compared effectively and regularly.

From the Maltese experience one can confirm that stateless persons need much more protection than anyone else in society. They have been mistreated in Malta in the name of the law. They have been kept in inhumane conditions and nobody could move a finger against this torment. Even up till today, the perpetrators of much violence and injustice have not been disciplined.

Organisations and especially NGOs need to be allowed the autonomous right of action so that if an individual complains to them and he is unable to start proceedings in court, they can take up the issue and sort it out, in or outside court.

The burden of proof has to be shared both by the victim and by the perpetrator, for the sake of true justice. To put the burden of proof on one shoulder would be unfair. Thus, the victim has to provide enough proof to be confirmed as the victim of discrimination whereas the

perpetrator should be obliged to carry the heavier load of proving his own innocence in court.

The Directive would be more effective if it enjoined that the government keep continuous dialogue with the Social Partners and NGOs. Also, the government should be obliged to discuss issues with them that have direct repercussions on any of the minority groups so that gross blunders and injustices are avoided.

Market imperatives should not be the guiding force behind the European Union nor behind the Directive. Good market performance comes about as a result of a well-led and just social system. If there is lack of justice, society will see many more rebels than good students and this to its loss.

The Directive considers 'outsiders' all those who do not possess citizenship of a Member State. One can see this is not fair nor is it working in societies. It stops many from benefiting from justice and stops many from building a good future for their families, for themselves and for their society.

The need for strict border controls is understandable, to an extent. Still, the governments should refrain from making an issue out of this and avoid giving the message that these immigrants are villains and their entrance unjustified. Their human rights do not have to be further derided with the excuse that their countries of origin afford them only worse, or with the lame excuse that they have come in without proper documentation. This sort of message is not counterbalanced by the truth. The local population must know that many of these refugees have left harsh situations behind them and need our help and our respect. The locals need to understand that nobody is inferior to them, be he dark of skin or fair, Muslim, Christian or of any other belief, a gypsy or a king.

Proper Implementation of the Directive

The Directive is an attempt to give a right to those whom the democratic system, being the system of majorities only, has long disregarded. This is not a capricious gift but a right, long ignored, of those who cannot change the outcome of an election and yet have a right to be.

It is important that there be serious work done regarding this issue. As with many other crucial issues, our government needs the European Union's iron hand to move on. It is important that the European Union puts a limit to eliminate procrastination. *The Directive and the legislation have been limited to paper work in Malta. They have caused no real change in the Maltese society as yet.*

Compensation to victims in Maltese law has never been effective, proportionate and dissuasive. A court case in Malta can cost a person his monthly pay or more and the compensation is usually a pittance by Maltese standards. One example to mention is that of a journalist who had continuously tried to perpetrate islamophobia. When brought to court, she was deemed guilty. The fine she was made to pay was Lm10 and the sentence was overruled on appeal.

The implementation of these laws will always be held back by the delays in the administration of justice (long delays in the giving of judgment) and the ability of lawyers to postpone sentences in eternum for the benefit of their clients, often obstructing the course of justice. Discrimination will continue until the law courts turn into an efficient and fast system to justice. Malta needs a thorough overhaul of the whole system and the elimination of some old laws that only serve to keep people from justice.

The Gender Issue

Regarding the question on whether the European Union is dealing with other forms of discrimination in a better way than gender, it is hard to get to the truth. There is no serious monitoring of society that can give a true picture of what is going on. There is sure to be a lot of discrimination that the governments and the European Union do not know of. This means that one cannot say which sort of discrimination is being effectively eliminated on the ground.

Gender discrimination is a bull that has to be taken by the horns. It is rare that a woman decides to risk losing her job for a justified wage-increase especially if the job-opportunities open to her are limited.

The way to justice is effective monitoring and prevention by strong governmental policing at least for a span of years. Also there should be obligatory education of employers and employees. Employers need to understand how to treat their female employees and understand the bad results of gender discrimination. Employees need educating too in that no place can be in full control of the employer and it is mainly other employees that will affect the female staff of the place.

All need to understand that the female worker is not an object of temptation and lust. Yet, one must say that a lot depends on the female herself to prevent this from taking place. It is putting one's head in the sand if one does not mention that good manners, proper clothing and avoidance of too much familiarity with men will ensure the avoidance of gender discrimination, or at least of sexual harassment.

Society needs to change its perception regarding this matter. The woman must respect herself and not use her body and her image to gain and the man must stop evaluating the woman by her body, age and such exterior factors that prevent effective equality.

Gender discrimination is being given much lip service though there has been little change on the ground. One factor to mention is that the law leaves it to the discretion of the employer whether or not to allot child-care leave or not. Such liberties are costing women much and need to be changed.

It seems that other forms of discrimination are not being heeded at all due to the attitudes of the Maltese that usually favour such discrimination-as in the case of the boat-people and the bad image attached to Muslims in the media. Government figures are all the time mentioning and lobbying for more female presence in the work-force whereas they are

relatively mute on the issue of the police's aggressive behaviour towards the Hal-Far inmates and the injustices these have been undergoing in these last few years.

The Directive bans discriminatory acts committed by all members of society. This imposes the need of widespread educative programs for all, in all walks of life. Without education, the law will only be upheld if and when a policeman is present. Education would change minds and help instil respect for all and sundry. It would also be a preventive force and the system would not be condoning ignorance.

Practical Needs of the Muslim Minority in Malta

It is safe to say that most minorities have particular needs. Handicapped people need particular adaptations for access to buildings, toilets, PCs and the like. It is their right to be provided with these. People with special needs depend on the politicians to cater for them. Many of the needs of the Muslims of Malta are simply legal and can be catered for quite easily. Some are more expensive to provide but none are impossible to furnish.

Other than the practical side of supplying the facilities, the government has to consider the opportunity cost of leaving them lacking. There are various, not the least of which is that *many Muslim women will not feel comfortable to join the work force and thus will force their families to a degree of poverty. Another possible cost would be that Muslims avoid all training* and such help that could bring about a more productive work force, simply because there is the strong belief that Malta is anti-Muslim. *Many Muslims shun training because they think it is not open to them, it could hinder their practising their religion or the people providing the service would refuse their participation. This would change drastically if and when the government gives out the message that there is good will towards their integrating in society.*

Muslims are enjoined by their religion, the Will of God, to be exemplary citizens. There are good Muslims and negligent ones and it is usually these latter Muslims who give a bad name to the rest of the community. Still, helping Muslims to be comfortable in society and catering for them properly will mean that the practising Muslims will be out to merge in the Maltese system and show all that Muslims are good citizens.

The following is an *inventory* that attempts to be exhaustive in listing most of the needs that a Muslim community would need in order to function well and integrate fully into the Maltese system. Some of the needs are indispensable *and* easily provided, such as access to same-sex doctors for a Muslim patient, the right to leave work for an hour or so every Friday noon and the right to pray at the work place.

- Leave work on Friday to go to Mosque for obligatory prayers. This would take approximately an hour or so and could be deducted from pay or compensated for in any other decent way.
- Pause from work to offer the obligatory prayers during the day, at their particular timing - this does not mean that a Muslim will work less - one can get to work ten minutes earlier, or take a shorter break, but this must be enjoined on all employers

and not ignored. The prayers take five minutes each and they are spread along the day-some would have to be offered at work while others would be left for home.

- Respect and protection of women in hijab and obligation to accept it on all employers, including those in the public sector, universities and schools. The hijab on a woman is more distinguishing and they are weaker in society. They need more protection and will not succeed if they do not get it in the near future. Many women go to school and because of the hijab are continuously victimised. Later on they are discouraged from going to work due to these same attitudes. They would feel displaced and their families usually feel that society is a threat and thus try to keep their female members from taking active part in society.
- The right to have a female doctor for a female patient and a male doctor for a male patient for Muslims.
- Muslim marriage contract needs to be accepted and enforced by law in a way that the rights of each of the two parties, once violated, could be brought to court. This would safeguard women from many sorts of discrimination since the marriage contract is her opportunity to demand and share her ideal of marriage. Thus, the marriage contract could include that she be given money as dowry from her husband, that she has rights over her children and that she be given money in case of separation.
- Centres for recreation which afford a level of privacy and the facility to have sexual segregation so as to enable society to communicate without breaking Muslim ethics. This could be in the form of a restaurant having some light partitioning so as to protect Muslims from bad-mannered gazing; it could be a gym whose hours are split, some hours it would be available for men and for some hours it would be dedicated to women. This would enable Muslims to socialise outside the home, leading also to their consuming more goods and being less marginalised.
- The right to work different hours during the month of Ramadan, due to the fasting obligation. This is mostly needed in cases when the Muslim has a physically demanding job, say in the quarries, on building sites, driving and the like. It would help avoid accidents and unnecessary hardship. Again this does not have to cost the employer since these reductions would be deducted from one's leave or from one's pay.
- Courses, degrees and diplomas on Islam at the University. This is crucial and would help even the mainstream to respect Muslims. Knowledge is needed on Islam and having well-prepared people to do this is decisive for Malta to see good results. Also, this would help Muslims know their religion properly and thus be objective and rational about it. Just as students aspiring to priesthood have the facility to pursue their studies in Malta, those who wish to be Imams and understand Islam better should not be forced to emigrate to do so.
- Social support in all forms in schools to prevent Muslim students suffering bullying, discrimination from the teachers and lecturers themselves and other forms of discrimination. Social helpers are needed who are pro-Islamic in attitude and know what Islam allows and what it forbids so as to prevent clashes with its teachings.
- Lessons on Islam for Muslim students attending government schools since these cater only for Christian pupils. This would be equality. Currently, Muslim students are herded out of class and left to spend the hour as they will instead of attending the lesson on Christianity. Instead of wasting their time, they should be helped to

understand their religion. After all, we are talking of government schools and these should cater for all children and not just for the mainstream.

- Arabic should be offered early in schools especially for Muslim students who need to know Arabic well in order to be able to read the Qur'an.
- Inclusion and continuous dialogue and presence of Muslims and Muslim representatives in the public sector and the government are needed since it is understood that government officials, politicians and public servants appear to know and care little for the Muslims of Malta. Often, what they do with the Muslim community is for show. There is no true understanding of Muslims and no will to learn and procure results.
- Islamic holidays to be legally recognised for all Muslims living in Malta and an obligation set on all employers to allow their Muslim employees to take the days on leave. The holidays are two- the Easter at the end of Ramadan, and the second Easter coming a few months after this. We celebrate by meeting at the Mosque in the early morning and praying together and listening to a sermon by the Imam. Then, families eat together and visit friends and relatives. This is important in building a respectful, healthy relationship amongst the people.
- Islam to be legally recognised as a religion in Malta and thus respected as equal to Christianity, on paper and in fact if possible. It is the second largest religion in Malta but treated as non-existent.
- Divorce or 'Talaq' as known in Islamic Shari'a, a human right in the Islamic law, needs to be recognised by Maltese law and applied, at least for all Muslims in Malta. This would prevent that many Muslims side-step marrying by Maltese law, with the bad consequences this can harbour. Divorce guarantees liberty and justice. It would be healthier if the government were to continue banning pornographic magazines and promote decency and family values than ban divorce and condemn so many people to live together without the commitments of marriage.
- Polygyny - a man marrying up to four wives in Islam - is a right of Muslims. If it were acknowledged by the law, the women would be guaranteed that they know if their husband intends to marry a second wife, whereas a woman who has been asked to marry would be sure of knowing if her prospective husband is already married. Thus it would be more truthfully in the woman's hands to accept or reject polygyny. Otherwise the man could refrain from telling the truth and there is no reliable system that facilitates checking the man's situation.
- Muslim women, and preferably this should be an option open to all women, should be able to take unpaid leave for up to two years after childbirth. This because it is enjoined by the Holy Qur'an that she breast-feed her child for the first two years. This is currently impossible in Malta and the year allotted by the government is only given to employees at the employer's discretion. Many women, Muslim and otherwise, suffer because of this and would like to see change. At this point in time, a woman would rather be allowed to enjoy her maternity and take good care of her child than be forced to get back to work. It would also prevent many social ills that civilised countries are experiencing.
- Data collection, monitoring and training of social forces, e.g.-media, private companies, public sector, schools, social security service officials. This is a commitment that our government has to take seriously. It is only with a preventive

and protecting presence that discrimination will be overcome. Monitoring will prevent it from increasing and training will change people's attitudes.

- Uniforms, in all sectors of work and in all circumstances should be legally adaptable in case of Muslim workers. Example, if the uniform is made of a short skirt for women, the Muslim woman should be allotted a long skirt instead. The same for sleeves, and a scarf for the woman to combine with the usual uniform.
- Education programmes even for the very young should avoid injecting racism in children's minds. Schoolbooks have to be mind-opening and not prejudiced or discriminatory. Television, radio and newspapers should be used to change the attitudes of the mature people of society so that equality is taught to all.
- Effective promotion by the media and the government of rights of minorities, so the majority understands it is its obligation to respect them.
- Effective integration programs for the minorities to gain the chance to work and socialise with the mainstream. This, if consolidated with better attitudes from the mainstream would ensure that the richness of these minority groups is enjoyed by all and not feared and mistrusted. This could lead to better work places, a greater aptitude for teamwork, greater productivity and a stronger economy.

Can Equality be Assured?

Training of people should be open-minded, truthful and pro-Islam. Many prejudices are taught in Malta by the system, the institutions and the schools and not casually. This is sure to procure us more 'accepted', 'official' discrimination. Society has to be properly educated and not led to be prejudiced.

There needs to be a disciplining body that reaches out to public officials in particular. This should be able to enforce the rules on all public employees, be they simple cleaners with the government or policemen or soldiers. The board should be able to suspend employees for breaking the law and should be able to bring them to court in serious cases. Otherwise they can act like the Industrial Tribunal but only function against and in cases of discrimination.

Assistance to victims of discrimination, both those that appeal to the legal body and to those who fail to. This should also be the NGOs' priority and if the government heeds their work and works with them, it should also be foolproof enough.

The approach to justice should be clear-cut. The costs of filing a suit should be lower; the law should stop lawyers from lengthening the process of justice unnecessarily. Good, motivated lawyers should be provided by the government for those who cannot afford to pay, sentences have to be backed by weighty punishments that serve as prevention as well as good compensation for the victim. Sentences should be given out within a decent time span and the cases thoroughly studied.

The punishment given to the perpetrator of discrimination should reflect his/her financial situation- if it is a company, or a person who is financially well-off, these should be made to pay higher fines than others who might be relatively poorer.

Public officials especially, need to change attitude and serve all alike. It is common knowledge that the police and soldiers in Malta are not even knowledgeable about the law and human rights. This is a serious hindrance for how can one respect that for which he has no regard and no thorough knowledge of? It is imperative that these be trained to respect human dignity and differing opinions and beliefs while enforcing the law. This, though not simple to achieve, should teach society to respect them in return and make them tools for justice.

Regarding social security, some points have to be seriously considered. One very serious blunder is that no payment is allotted to housewives, whereas they are workers too and help society in many ways. Pensions of husbands are not continued after their decease and women are given a widow's allowance, which is usually less than a pension. The woman who works for a few years and then becomes a housewife, is never given a pension. She is cut off the register as if she never did anything with her life. This is humiliating and utterly discriminatory. One last point, in repetition, the child-care leave is given the woman only at the employers' discretion. The needs of the employer are considered more important than the woman's need to care for her children and enjoy maternity. Otherwise she loses her claim on the job, her right to the career she might have been aspiring to and her right to pensions or any other social benefits.

The Change Needed for Equality to Win the Day

The government has to recognise NGOs and work with them continuously. Also there needs to be a controlled portfolio to help NGOs and give them legal recognition and legal help and strength in society so they can act as the bridge between the minorities and the Maltese legal framework.

There has to be continuous co-operation and dialogue of the government, with effective results and flexibility with Malta's NGOs, unions, and major companies and these should be enjoined to work together and help one another. *NGOs need to become stronger and united and give a composed and true image of those they represent.* They should be trained to see the whole perspective of their presence in Malta and work for justice rather than for their own interest only.

NGOs can be the vehicles that promote knowledge on people's rights. They could be the bodies that lead the victims of discrimination via the complicated road to justice, not necessarily via the court but surely to justice. They have to be in contact with other NGOs and other entities and work amongst their members with effectiveness and fairness. If this is a truly joint venture, society will feel them and back them.

The government has to help change the bad attitudes in society with effective advertising, information sent into homes via leaflets, TV programmes, radio programmes and the media as a whole and stop the media from giving a false and bad image to any group of people.

Legislation has to be implemented in practice and undue time-loss avoided. This may be achieved if and when the European Union decides to ensure effective measures are set in place.

The Mechanisms for Subduing the 'Discriminatory Mentality'

Whatever the tools for fighting this attitude, they are seldom implemented. The media are free to use whatever style of language they want, paint the picture they want and they are only tested and maybe stopped if and when they harm an individual who opens a case in court. This is not fair. The media, especially television, affects how people perceive things and a case in court does not. People listen to what journalists say and absorb the ideas, many times without challenging them. This attitude is highly dangerous but prevalent in Malta. If the victim opens a court case, few know of it or try to understand what the injustice really was. The ideals taught in the media must be right from the beginning. Otherwise, it is the tool in the hand of the ignorant.

The compensation allotted to victims of harassment, especially in the case of harassment by police officers, social security personnel and the like should be effective, proportionate and dissuasive. The mentality that government workers cannot be prosecuted has to change and all perpetrators of wrong must be brought to justice. The ultimate punishment, that is prison sentences, should not be left in writing only and where the victimisation is serious and harsh, the accused should be imprisoned and the issue should be publicised. This would be killing two birds with one stone. Discrimination would be seen as a serious crime and not a frivolity. Employers and those who could cause or allow it will see the possibility of punishment as serious and real and thus discrimination would be prevented.

In Malta we have had cases of true discrimination against Muslims and there have been public speeches and writings in Maltese newspapers propagating islamophobia and these have been ignored or worse still, the punishment was a ridiculous pittance.

The fight against this sickness has to come from all echelons of society. The European Union has to give a hand and get all Member States to be in line with its policy. The government has to change the law and put into practice that which would really help minorities live in justice. The local councils are also needed and can be effective on the ground in that they are necessarily nearer to the people than the politicians and could help spread justice in the minds of the people.

The Framework for the Maltese Equality Body

The need is felt for a single Equality Body within which the administration can be common to all sectors but then organised into separate "departments" for each minority group. This would turn each into an effective specialist unit in its field while working in synergy with the other units.

The reason for this is that each minority and each group claiming victimisation would need special attention and particular help. Not all would be helped with one policy. Thus one could build a system where the upper echelons of the body are common but the people dealing with the issues set on their desks would be concentrating and dealing exclusively with one ground of discrimination. The management would be one with the intention of keeping costs low. The workers would be specialists in one field, to help effectiveness and increase the know-how of each.

One other perceived benefit of the 'unit' approach is that at the 'coalface' you would get fewer conflicts of interest. For example, a Muslim would be averse to working for rights that others might claim and this would create conflict. One example of this would be homosexuals fighting for their 'right' to adopt children, or get married. A Muslim would be facing a dilemma and he would be going against his religion if he were to help them gain this 'right'. It would be more effective to have people from each minority working for their own concerns and not simply any employee working on whatever comes. This would guarantee effectiveness and good approach.

Islamophobia is not a myth. In Malta those in the higher and more educated echelons of society are in its grip just as much as those with lesser education and this means that having one equality body without specialist units and a representative governing council would fall short of that which is required. There need to be people who, together with discipline and good-will, feel the thorn in their own side to make the project worth a try. The anti-discrimination bodies need to be well trained and able to lead the victims through the legal labyrinth of Maltese Law. Thus they need to have legal help from lawyers and access to courts. In addition, there may be the need for specialist Discrimination Tribunals where people would apply for redress, with a right of appeal to the Courts of Law.

The Majority Needs to Change

Many Maltese people are indeed prejudiced and deem many minority groups to be inferior to them. This is unjust and leads to many forms of discrimination that are well accepted by society and by those with leading positions in society, like the police, local council members, ministers, lecturers, teachers etc.

It takes plurality to make a world and the World is full of minorities and is actually made up of minorities. The attitude that a minority is inferior to the mainstream is a form of hypocrisy and ignorance. This is very present in Malta and the attitude that certain foreigners in Malta have to face is proof of this. The Maltese expect foreigners to turn Maltese before accepting them to a limited extent. This shows immaturity in dealing with multiculturalism and limits richness that could be absorbed and enjoyed by the hosting society.

Maltese society is split into bi-polar attitudes mainly the Catholic Church and the mainstream political parties. One is expected to conform to these if one is to 'belong'. The Maltese accept this and there is no real will to change it yet. People split into Nationalist and Labour, the minor parties being disregarded completely. Then, they split into those from the North and those from the South of Malta. There are infinite splits that make Malta more varied. If one does not belong to one of these factions, one can never be wholly Maltese, it seems.

Social change is needed and one can prove this if one evaluates the level of integration the so perceived 'foreigners' enjoy. They are never fully integrated unless they 'seem' Maltese. Thus it is impossible to integrate if you have a darker skin or a different facial build than the Maltese.

Many people belonging to a minority group remain poorer than the average Maltese. This leads to hardships and their children are set at a disadvantage too. They are caught in a vicious circle that keeps them away from higher education and consequently, from better jobs.

The education system in Malta has to be revamped and set right. It is in itself discriminatory that only the Christian religion is taught in government schools. It is known but ignored that even history books in Malta teach hatred against Arabs and Muslims and this starts the process that results in having a racist population.

The Policies to Facilitate Equality for All

Positive action, or positive discrimination would help in that the minority groups do not have effective political voices or force, they are not numerous enough to change the outcome of an election so they cannot pressurise the government in that way. They need to be set in an advanced position from the outset so as not to be left behind and at a permanent disadvantage.

Housing has to be afforded to the poorer in our society, and it is impossible to contradict the statement that the refugees, coming to Malta, would need this more than anyone else. Refugees and such like could be allotted extra points when applying for government houses. *Education* is crucial if these are to integrate and move up the social ladder financially and socially. Training and giving these people the ability to get jobs and communicate effectively is crucial and cannot be ignored or postponed. The ETC should provide services for people having different religions, languages, cultures, and education. The ETC should be able to effectively help all incomers gain a rightful income. It should also understand special needs. Muslims would refuse jobs in factories of alcohol, cigarettes, selling these, jobs in casinos and the like and not because they do not want to work but because of their religion. This has to be known and respected.

Education itself in Malta can be racist, prejudiced and intolerant. The system tends to present pupils with a picture setting the Maltese and Catholic banner above respect for all humanity ultimately causing the people's attitude to favour discrimination. School books have to promote justice and should open minds and condemn all forms of discrimination. Patriotism can be taught in relation to the history of the time and the circumstances. Patriotism does not have to be a lie but pride presented hand in hand with respect for all without prejudice.

Hospitals and local clinics have to cater for the needs and demands of minorities as in the case of female nurses for female patients and male nurses for male patients. Also, those who have a right to the services should be respected, be they of different colour, religion, etc and the staff at hospitals and clinics have to be trained for this and not left to work at their whims.

An Internet site for minorities to appeal to, for legal help, for knowledge on their rights and obligations, for knowledge on other minority members could help them integrate more

easily and effectively. This would be a way to get feedback on the Equality Bodies' effectiveness on the ground as well.

Incomers should be well led and informed about options of training and work that they can avail of. Also, they should have access to courses at University and serious schooling even on a full-time basis if they show the will to commit themselves.

Monitoring and Effective Help for All

Monitoring is essential and uniquely effective in preventing discriminatory acts, if well managed. It stops the bug at source and does not allow it to get too deeply ingrained. The victim, most times, would wait till he cannot stand it any longer before appealing to court or taking any steps to stop abuse whereas monitoring would stop it at an earlier stage.

The victim, being a dependent in the employer's business, might find it hard to fight back effectively against discrimination. Monitoring would keep the employer conscious of his obligation to treat his workers well and justly. It is the most effective deterrent and promotes consciousness that justice is obligatory even if the person is foreign, different and weak.

Unions and other involved bodies, even NGOs and social organisations should be *given the right to appeal to the law* in the name of individual complainants, and if the individual is afraid of standing up and does not want to press charges, then the group or NGO should be able to pursue justice in his stead. They should be able to initiate litigation themselves, be able to investigate in an official way and assert themselves as champions of rights.

Quantified objectives would ease the minority groups' access to jobs, social circles etc. This would help secure their integration while heightening mutual respect and understanding. Putting the obligation on employers to accept them fully is the only way to have them in work places without draining them by bad wages, long hours of work, etc. Having multicultural work places is vital to societal health, and has to be well managed. Training for employees in such management is rarely provided in Malta though badly required.

Education and help must be given to employers by the ETC, for example, so they can deal with the pros and cons of diversity at the work place and help to make it positive and profitable.

Conclusion

Full respect for human rights will promote and strengthen the economy. For all that one should not want to put this factor at the fore, it is important that the people have a good standard of living for peace and happiness. Justice and the rule of law, in the purest sense, will help trigger the economy too. Pluralism in a society will bring about a variety of businesses, more knowledge in all stratas of society and interaction. Knowledge does not necessarily come out of books. It could be gained from other people too. It is important that social needs are continuously analysed. Then again, the government must be quick to meet

the needs of all in the best possible way. If the government loses contact with the people, there is no way it will promote or ensure social justice.

In Malta, the government has to change attitude and esteem the input of the social partners. This will prevent many mistakes that a bureaucratic system usually condones. The ministers, though probably wanting to take effective measures and wanting a better Malta, do not usually excel in their fields and this is causing serious disenchantment with the political system. This will lead to politicians losing effectiveness and sensitivity in dealing with issues.

The Maltese law is not inadequate. The worst problem is that nobody practices it properly. We get stories of policemen tearing the Holy Qur'an in a Muslim home, no one stops it, the person is too afraid to speak. We know the police's attitude is rough and bad towards Arabs because they hate them and this is prejudice and has to be stopped. We have a person who organises mass meetings in the streets and promotes racism and hatred for others and the police do not stop him. We have boat-people who were attacked by the police while at a peaceful protest, one of whom is permanently disabled- we have not heard of anyone being brought to book in this case.

To make a difference that matters on the ground, *the Maltese law needs to be implemented by people who love minorities and want to see true justice*, not by bureaucrats who couldn't care less. Work must start in all levels of the government- the police, the local councils, in parliament and on a national level and in the European Union's system. *Stimulated debates and continuous work to eliminate bad attitudes of the majority of society are a must* if the work is to compensate for the 'discrimination' that the democratic system allows.

Democracy is a just system in a way but it has its faults. It is not sensitive to the whole community but to those who are strong enough to cause a change. This is unfair if ignored. The minorities have to be considered and adjustments and help allotted them even though they cannot make or break the outcome of an election.

The minorities, just like the mainstream of the country, have obligations towards the State which they are expected to honour. Yet this is discriminatory if the government then ignores the particular needs of these groups because they are weaker and unable to pressurise the government into action.

A Muslim avoids and fights evil and sin. Thus, good Muslims are good citizens and a treasure in their respective societies. Equality for them is another door through which they will obey God better. It is also an opportunity for the good Muslims to function in society properly. Thus instead of hearing only of those who break the law, the mainstream population will get to know the ones who keep to the law. This will, God Willing, be an added strength for the whole of Malta and an asset in many ways.

This project, once implemented, whether through one equality body or a group of them, will be the way to true justice for all. It is important that the European Union motivates all Member States to make a genuine effort for it to be a success though close monitoring of

implementation of EU laws and best practice, starting in Malta with the relevant Directives on minimum protection of asylum seekers and the Race Directive.

THE TREATMENT OF IRREGULAR IMMIGRANTS IN MALTA

DIJONISJU MINTOFF
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The Peace Lab was founded with specific aims namely:

- To combat all theories and practices which propagate the superiority of one group over the other;
- To foster better understanding among all irrespective of creed, colour and nationality;
- To promote and preserve social justice.

In order to achieve these aims the Peace Lab has furnished schools with Social Science textbooks in which was given a description of the lives and work of people who preached and fostered among all peoples of the world the ideas of peace, cooperation, social justice, respect for human rights and respect for the environment - among others Mahatma Gandhi, Martin Luther King, John XXIII, Dag Hammarskjold, Albert Schweitzer, Jacques Cousteau, Albert Luthuli. Also, the Peace Lab

- Has a weekly programme on radio where issues concerning development and justice are discussed;
- Takes part in other broadcast and television discussions;
- Contributes articles to local newspapers;
- Organises seminars about peace, social justice, environment, racism etc.
- Collaborates with other NGOs on particular issues;
- Organises an annual Award for Kindness;
- Is giving shelter to "Illegal immigrants".

We became involved with "illegal immigrants" when these persons started to be housed in the barracks at Hal Far and felt it our Christian duty to visit them and help them in their plight. As we came to know them better, to know about the circumstances which forced them to leave their families and country and came to know what happened to those who were repatriated, we protested with the civil authorities against the way they were being treated, against their being detained as if they were criminals and against the established

procedure which did not give them a chance to state their case when applying for refugee status. We also initiated court proceedings against their repatriation.

Now the situation has changed. A good number of these persons have been allowed to live in houses, centres or "open camps" put at their disposal by government, church or voluntary organisations. A good number are finding employment in the private sector.

From what these people tell us we came to know that they are paid less than Maltese citizens, that the hours of work tend to be longer, that the conditions of work tend to be different and that safety precautions are not always adhered to. We are aware that Maltese legislation regulates conditions of work.

During the National Conference on Irregular Immigrants held on 7-8 February 2005 we took part and presented our position.

We feel that the policy document as presented by the Government represents an improvement of the theoretical approach by the Maltese authorities to the issue concerning immigrants' detention. *However a number of ambiguities and unacceptable positions are still present.*

The main sources of concern about the current legislation and practice are the following:

a) A time limit for a person's detention is not defined as he/ she is detained until his/her deportation.
b) The detention is an automatic consequence of the irregular status of the person concerned.
c) An 'effective' judicial review of his/her placement in detention is not provided by law as the possible instruments to appeal against detention are not suitable for the immigrants.

We can say that the Maltese authorities addressed (and continue to address) the issue of the irregular immigrants by adopting a policy of detention, irrespective of the status of asylum seekers or of illegal immigrants. Moreover in recent times the authorities faced and continue to face the increased number of arrivals by a massive resort to such an instrument: the deprivation of liberty.

They write: "Malta considers the fight against irregular migration as a priority issue, not only because such migration patterns undermine national stability and pose challenges to the labour market but also because it considers itself legally and morally obliged to combat human trafficking." We can agree with these statements. However the fundamental rights of each person have a primacy over other considerations. Therefore the duty to offer *protection should predominate over any other consideration.*

It goes without saying that States have the right to protect their borders and to introduce measures controlling migration within their jurisdiction. However, the exercise of this right must be in accordance with a State's international obligations, including those of a human

rights nature (falling under the ratified Conventions against ill-treatment and inhuman or degrading conditions of detention).

The Maltese authorities often emphasize that a large majority of immigrants, on arrival in Malta, apply for refugee status as soon as they are escorted into Maltese harbours. According to them such a large number of applications explains the absence of difference of treatment of asylum seekers and illegal immigrants. But such an approach is not acceptable.

How does the new policy address the above mentioned three issues?

Concerning Item a) above:

The government introduces the concept of *"unreasonable"* length of detention. This adjective is often used in other juridical contexts (for instance, the "unreasonable length of proceedings" is stigmatised by the European Court of Human Rights). However in such a context (automatic deprivation of the liberty under an administrative decision) it is too vague. *A time limit should be clearly indicated.*

In other paragraphs of the document they consider 18 months of detention as a reasonable duration. First, such a length is much longer than in other European countries; second it is unclear whether or not there is an obligation to release the person concerned after these 18 months have elapsed, even if his/her identification and/or deportation was not possible. Apparently the time limit is only indicative.

Concerning Item b) above:

The detention remains automatic, irrespective of any specific and personal consideration.

Concerning Item c) above:

The general guarantee given by section 34 of the Maltese Constitution and by section 409A of the Criminal code, allowing any person deprived of his/her liberty to challenge the legality of his/her detention before a Court is not an effective remedy to the situation as irregular immigrants have no effective possibilities to raise such an appeal to the Court, due to their vulnerability, to their ignorance of the domestic legislation and to their actual impossibility to have access to legal defence.

The authorities stress the importance of the new amendments to the Refugees Act (Cap. 420) and of the new procedure (Chamber of the Appeals Board etc). No doubt the newly adopted bill is an improvement on the current situation. However article 5 of the bill states: "Competence of the Appeals Board to determine whether a detention had an unreasonable length. Whenever the Board considers that a detention was unreasonably long, it can grant release from custody of the detained person. The released person shall report to the immigration authorities at least once a week.

However the release is forbidden if: the person has to be identified; when the persecution and the threats the person alleges in his country are not ascertained; when his/her release poses a threat to public security and order..."

The following observations should be considered:

- The new legal provisions determine a faster procedure (sections 1 and 2), but they are silent about the procedure itself, the lack of legal assistance and information, the lack of a hearing from the Appeals Board. On the contrary, their speed could open the way to fewer safeguards and a more perfunctory scrutiny of each case.
- The legal provision considered in section 3 is more restrictive than the present one. It is aimed only to limit the number of applications. No clear guidelines are given about the criteria applied to determine whether or not a country is considered as a "safe state" by the government.
- The procedure to examine the detention's length is linked to an undefined criterion of 'unreasonableness', which is not determined in time and open to wide discretionary power in its application.
- The cases of exemption from release are those actually characterising the vast majority of irregular immigrants. They are detained either for identification or for supposed investigations concerning their countries and the grounds of their claims.

Therefore the practical implementation of this new legal provision might have no effect on the current situation.

The exclusions listed by the bill quote the wording of the "UNHCR Revised Guidelines and Applicable Criteria and Standards Relating to the Detention of Asylum Seekers" (February 1999). *However in the Maltese Law the logic is the inverse of that provided by these Guidelines.* In the Guidelines, detention is the exception and not the routine. In principle asylum seekers should not be detained, because of their presumed vulnerability as victims of abuses in their countries. Detention can be resorted to only in individual cases of exceptionality (examined case by case) and on exceptional grounds. The list of situations where it is possible to resort to detention includes the cases here mentioned in section 5. In the new bill the logic is opposite: detention is the routine and a release from detention is possible only in exceptional cases, excluding those listed in section 5. This means that the meaning and the aim of the Guidelines is misrepresented, even if the wording is the same.

Moreover in the Continental experience the body entrusted to review the detention could be considered an administrative body, as the president is appointed by the government. So it will fall short of meeting the level of independent scrutiny expected from *a judicial review mechanism.*

In some other parts of the document the overall conditions of detention are considered and some standards are listed. This part can be shared, but the effective instruments provided for its implementation should be made explicit.

The approach to the problem of accommodating these people should be in line with the position expressed by the CPT in its 7th General Report, published in 1997. It is inappropriate to hold foreigners who are neither convicted nor suspected of a criminal offence in a prison-like environment.

Measures alternative to detention could - and should - be developed and used wherever possible, in particular vis-à-vis asylum seekers. Resort to alternatives to detention has great importance as regards asylum seekers, who might have been imprisoned and/or tortured or otherwise ill-treated in their country of origin. In addition, some vulnerable categories should, as a rule, be exempted from detention, i.e. women with children, juveniles, elderly persons, mentally and physically handicapped.

Currently Malta has neither adequate facilities to accommodate people, nor trained staff to handle the situation whenever figures dramatically increase. People are accommodated in conditions that cannot be considered acceptable under the material and health profile: cramped conditions, sanitary facilities characterised by filth and disrepair.

A policy document is clear and significant only if the statements in it are accompanied by clear indications about their implementation.

RELIGION, TOLERANCE AND DISCRIMINATION IN MALTA

ALFRED GRECH

Discrimination Based on Religion or Belief

Political legitimacy is a central issue. Since religion can be a powerful legitimizing force for society, the likelihood of achieving religious liberty, and therefore non-discrimination on the basis of religion is often reduced to the extent that the regime's political legitimacy is weak. Such a regime is likely to exploit the legitimizing power of the dominant religion with the corresponding risks of oppression for dissenting groups.

A State which is confessional, or has a dominant religion may be a democracy in its own right, and may also embrace human rights guarantees, but to what extent is the fundamental right to freedom of conscience safeguarded when the State decides how far and to what extent a ruling religion or the religion of the state determines or interferes with the political life of the country? It would appear that in situations like these the majority or the ruling class can determine the religious rights of everyone including the dissenting minority, which does not identify itself with the State religion. In such a case religion or the state religion interferes with, if it does not determine the political agenda.[1]

Article 2 of the Constitution of Malta provides:

2 (1) The religion of Malta is the Roman Catholic Apostolic Religion.

(2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.

(3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

[1] An example of how religion can become a legitimising force and how far an established Church can be determining in the political arena are the Politico-religious contestations of the recent past Maltese political history. The Catholic Church had imposed the "interdiction" sanction and in cases even "excommunication" on those who voted for the Labour Party in the 1962 and 1966 elections. But a recent version of this penchant, although drawn on different lines, is the campaign of the Interior Ministry to include the prohibition of and therefore the crime of abortion among the Constitutional provisions. Although ostensibly careening on a Pro-Life lobby group, the whole rhetoric rests upon the deep-seated Catholic notions and the teachings of the Roman Catholic Apostolic Church.

This article of the Constitution could be interpreted as giving the Catholic Church the monopoly in religious affairs. In the interrelationship of law and morality, the ethical and the legal, which are both necessary for the State to maintain law and order, it would appear that only the Roman Catholic Apostolic type of morality could be enforced in this country, to the exclusion of all other.

It is very obvious that this article of the Constitution is incompatible with religious liberty and non-discrimination provisions of article 21 of the European Charter of Fundamental Rights. Article 2 of our Constitution contrasts very heavily for example with Constitutions of other States aspiring to membership of the EU, like Turkey, whose Constitution provides in its preamble that "as required by the principle of secularism, sacred religious feelings shall in no way be permitted to interfere with state affairs and politics". Article 24 of the same Constitution grants all people freedom of religion but prohibits the "exploit [ation] or abuse of religion or religious feelings . . . . For the purpose of personal or political influence, or for even partially basing the fundamental social, economic, political, and legal order of the State on religious tenets".

One may very well be over simplistic about it and say that a Constitution that embraces a certain dominant religion is also an expression of the democratic will of the majority. But the argument about human rights and non-discrimination starts from the recognition of the basic assumption that a democracy is not only about the will of the majority but also, and more importantly, about the promotion of safeguards of individual and minority rights in a pluralistic society including a multicultural one. In that context it may become offensive for the majority (even if an overwhelming one) to embrace a religion as a Religion of the State. It becomes even scandalous then, if that established religion becomes the measuring stick with which the moral standards of a given society are measured. What is right and what is wrong should never be the prerogative of a dominant class or religion. The state cannot accept moral values that tend to discriminate in favour of a predominant or accepted religion or ideology. That prohibition is of the very essence of the respect for basic human rights and human dignity of which the freedom of conscience and religion are but fundamental facets of the whole edifice.

One predominantly facile argument brought forward by those who would turn their shoulders at the very suggestion that a confessional Christian State is an anomaly in terms of strict secularisation and liberal thought especially as far as the human rights discourse goes, comes in the form of a justification that human rights are the embodiment of Christian thought and the Christian religion is the best guarantee for the safeguard and maintenance of those basic rights. The argument goes that Christianity after all, has all to do about human dignity, and the "salvation" of the human being. What is human at the end becomes also divine. But this argument is question-begging. Embracing universal values, values that point ultimately towards the maintenance of human dignity under all circumstances and in all situations, such as the talk about human rights, is not the same thing as allowing the majority in a state to decide what sort of religious outlook or influence or indeed intervention should be allowed in the political life of the nation. The necessary consequence of article 2 of the Maltese Constitution is exactly to do that. It would appear that the best way to safeguard against religious discrimination is if the State remains neutral towards the

different denominations that might exist within its confines. The Constitutions of most European countries refrain from "confessing" any religion.

The "Forum Internum"

In a democratic society, the State has the obligation to protect vulnerable members of society from intrusion in the "forum internum" and indoctrination. It is generally agreed that using a school for religious or moral indoctrination is abhorrent and could become a tool of a totalitarian government. A basic norm in the Constitution of a State such as article 2 of our Constitution is evidence of a monolithic society and an intolerant State, which although not so much evident in this day and age is certainly a relic of past experience.

The other side of the coin, of course is the stance usually taken by the liberal or pseudo liberal orthodoxy installed in a country which embraces the values of "western" democracies, but which itself has some fundamental principles, values and norms for its foundation. How far and to what extent should religion remain at the centre of public life? If we say that all religions should be treated with equal respect and that the State should not prefer one religion for another, in the sense the state should not declare before what is the religion of the state, what we will be saying in the end is, that religion should not matter at all for public life. That would obviously mean that religion should not be taken into consideration for the purposes of enacting laws and formulating policy and that it should remain a matter of private concern. How can the legislator or the Executive prefer one type of morality over another in the sphere of normative evaluation? Therefore should religious reasoning form the basis of a political decision?

Even a secular state will in the end face the problem of religious freedom and the question of discrimination no matter how liberal and even-handed it will try to be or by simply declaring itself to be secular. Multicultural societies have to face the dilemma of accepting within them those cultural and religious groups that do not want to adopt the dominant form of cultural model of the multicultural societies in which they are living. Instead they opt for cultural (including religious) diversity and to preserve their own distinct identity as a minority of which religion is only but one manifestation of that identity. These minority groups simply refuse integration within the existing or dominant culture and therefore even when the secular state would mete out fairly and squarely the various forms of social welfare and assistance, there are barriers to be overcome and difficulties to be sorted out. Some religious minorities may even want to assert their own particular cultural distinction, and then no matter how secular the state professes to be, it is not enough.

Therefore a situation of equivalence of the strict separation between Church and state would not be enough to guarantee social harmony and cohesion where certain minority groups, even where offered, refuse social integration.

But the State can proclaim to be liberal more than patronising[2] and start financing religious propagation in the act of accommodating religious institutions that are at the very core and

[2] The modern democratic State tends to be patronising whenever it imposes rules or restrictions, even rules of conduct which normally should not interest the state at all. Traditionally, the State (or good government) was only interested in the keeping of law and order. The Welfare State has gone further and tried to provided minimum standards where

within the very fabric of any particular society. This sort of financing can take the form of state budgets providing for religious denominations, which is common in a number of European countries such as in Spain, Italy, Greece, Belgium and Luxembourg. We have a similar situation in our country. Act IV of 1992 entitled, "Att ta' l-1992 Dwar Proprjietà u Entitajiet Ekkle_jasti_i" provides for the issue in favour of the Roman Catholic Church in Malta of a Stock in favour of the Foundation for Church Schools. The Stock issued in favour of this foundation was the result of the ceding in favour of the State of Malta of the ecclesiastical property mentioned in the relative schedules to the Agreement between the State of Malta and the Vatican annexed as a Schedule to the abovementioned Act. A situation of this sort has been tested before the European Court of Human Rights in Strasbourg in the famous case of "Iglesia Baudista, El Salvador and Ortega Moratilla v. Spain" where the Commission held that there had been no breach of article 14 (non-discrimination) of the ECHR because there was "objective and reasonable" justification for the difference in treatment. There was such justification because of the existence of a Concordat, which placed an obligation on the Catholic Church to place its historical, artistic, and documentary heritage at the service of the Spanish people, in return for benefits from the State, in this case, tax exemptions. But one thing that that judgment does not address is the issue whether the state is therefore obliged to enter into similar agreements with "churches" of other religious denominations. One would presume that there would be no such right, because indeed if all religions had to be given the same privileges as the State Church the whole notion of State Church would be undermined.

State support and financing of religious institutions or religious propagation may be one way of integrating cultural or religious minorities especially if such needed support is offered to the least affluent or indeed the poorer of the lot. In that case that sort of support, even if it were deemed discriminatory could represent a factor of social integration through religion. Religion may represent an integrating factor in a multi-ethnic society. The state may need the collaboration of the religious groups whether dominant or otherwise in a given society to penetrate the social strata especially those that remain marginalized or hostile to the Public Administration. Because the State remains far removed from the reach of immigrants, and other ethnic minorities, it would require the persuasive influence of the religion of that group to help materialise the social assistance and social programme which the state may have for one and all.

The Long Shadows of a Dominant Religion

Article 17 of the Marriage Act 1975 as amended in 1995 provides for the recognition of marriages according to the rights and customs of a church or religion recognized by the Minister responsible for Justice. But Act No I of 1995 introduced a whole section relating to

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otherwise marked contrasts in social well-being supposedly lacerated the common good. The modern State has gone even further. Why should for example the State interfere and provide for my own personal safety, in the form of ordering me to put on a crash helmet if I ride a motor-bike, and a safety belt when driving a motor car. These are added precautions that I like a lot of other ordinary citizens have not asked or requested. I should assume that I, like the average grown up member of any society can take care of that sort of personal safety without the "patronising" state interfering with certain rules and regulations.

Catholic Marriages. Articles 21 and 22 lay down the procedure for the recognition of a marriage celebrated according to canon law rites. The subsequent provisions go into great detail to provide for the recognition and registration of a judgment of annulment delivered by an Ecclesiastical Tribunal in Malta. These provisions have the combined effect of rendering the Ecclesiastical Tribunal at the same level of competence as the civil courts in questions of annulment of marriage. But the most draconian provision is article 30, which gives precedence to the Ecclesiastical Tribunal over the Civil Courts. In fact when the Ecclesiastical Tribunal accepts a petition for annulment, the relative decree of acceptance is communicated to the registrar of the Civil Courts. According to subsection 2 of that article, "(2) Malli ssir ir-re_istrazzjoni msemmija fis-subartikolu (1) ta' dan l-artikolu, il-qorti tieqaf milli tkun iktar kompetenti li tittratta l-kwistjoni; u meta jkun hemm pendenti quddiem il-qorti azzjoni g_ad-dikjarazzjoni ta' nullità ta' _wieg li dwaru jkun intbaghat _ertifikat lir-Registratur skond is-subartikolu (1), il-qorti g_andha tissospendi s-smieg_ tal-ka_ pendenti quddiemha, u ma tistax ter_a' tibda tisma' l-ka_ u, f'kull ka_, ma ter_ax issir kompetenti sakemm il-ka_ ikun skond il-pro_eduri tat-tribunal irtirat minn quddiem it-tribunal jew ikun _ie dikjarat de_ert"[3]. A more discriminatory provision on the basis of religion can hardly be imagined. It gives preference to that party who professes the Catholic religion or who opts for the Ecclesiastical Tribunal as an edge over the other party. Besides, it almost gives rise to forum shopping in the case of annulment of marriage in Malta. It should be pointed out that in a recent judgment of the European Court of Human Rights, it was decided that the proceedings before the Ecclesiastical tribunal infringed the fundamental right of a fair hearing enshrined in article 6 of the Convention, most importantly the right of a party to a case to be present during the deposition of witnesses and the right to cross examine.

The Established Church and the Question of Tolerance - Some Observations

The question to be asked here is whether irrespective of the high degree of tolerance that there is in this country, one should become uneasy when one considers the traditionalist and close-knit society that we have in Malta. It is all a question of tolerance, and then again, the question of how far we are ready to tolerate religious expressions, symbols and manifestations of other creeds when these can "offend" our deep-seated religious sentiments. *It all boils down to a question of tolerance, simply because religion is also external manifestation.*

We like to think and believe that we are quite an evolved multi-cultural society. But, how much, and how far, are we prepared to tolerate other religious expressions and manifestations that do not concur with our beliefs, or are considered a threat? How tolerant are we and how far are we prepared to allow the idea of a multicultural society to pose any threat to those beliefs that have held together the social fabric in the past?

[3] (2) Upon the registration as is referred to in sub-article (1), the court shall cease to be competent to deal with the matter; and where an action is pending before the court for the declaration of nullity of a marriage in relation to which a certificate has been delivered to the Registrar in accordance with sub-article (1), the court shall suspend the hearing of the case before it, and may not resume hearing the case and, in any case, shall not again be competent until the said case has, in accordance with the procedures of the Tribunal, been withdrawn from before the Tribunal or been declared abandoned.

The problem of those who profess a liberal form of politics and who would want to accept religion in public life run the risk of contradicting themselves, the minute they start excluding, in the interest of stability and the maintenance of tradition, culture and identity some form of religion or religious belief that is considered fundamentalist. If the religion or religious belief does not conform with the democratic process, a process requiring dialogue and corrective reasoning, then such a religion or religious belief becomes fundamentalist, dangerous and breaks the fundamental precepts of secular thought or belief. The minute a secular and liberal position considers "right" or "wrong" a religion that does not conform to accepted liberal and secular way of thought they are taking the fundamentalist stand that is probably called liberalism or reasonableness but which is in itself exclusionary of other beliefs, other ways of seeing the world and arriving at truth.

Religious beliefs, religious mores and customs also influence the culture and folklore of society. Roman Catholicism has laid down the rules for the whole structure of Maltese society starting with topography (the Village churches at the centre of all thoroughfares) and ending with the type of folklore and entertainment e.g. the village festas and other types of festivities tied up and connected with Roman Catholic symbols. We can say also that the Roman Catholic Church remains one of the strongest, if not the strongest, influences in shaping the Maltese political status and still has a lot to say as to what is politically correct or otherwise.

An instance of this is the fact that Malta, together with The Philippines, remains one of only two nations in the world that have not admitted divorce. Time and again politicians of every party have grappled with the question of introduction of divorce and have fought shy of the question, because of the Roman Catholic Church's absolute and fundamentalist stance.

The converse of this argument is of course that if we were to consider this country's orthodoxy as a liberal one and that religious beliefs of whatever kind have to be admitted into the public life and possibly public institutions, are all religions and religious beliefs of whatever denomination to be admitted and accepted as part of the social fabric whatever the consequences may be? Admittedly liberal theorists would accept religious beliefs with which they feel comfortable and would exclude fundamentalist and other beliefs that tend to be exclusionary or imprint and impose their own views on public institutions. This sort of treatment will evidently marginalize strong religious beliefs instead of being tolerant to them. The established orthodoxy, therefore, however liberal it professes to be will necessarily discriminate against any strong religious belief (Islam if you find yourself in a "western" democracy, Christianity or any other denomination if you happen to be in an Islamic country). Rather than taking the other religions into account it is easier to dismiss or discriminate against them. This sort of phenomenon is present in secular countries (e.g. France and The Netherlands) where strong religious convictions and beliefs, including certain type of manifestations are simply dismissed and not tolerated, while at the same time the secular and non confessional regime manages to appear to be taking into account the religious sentiments of everyone. Here strong religious sentiments and manifestations are simply dismissed if they appear too strong and fundamentalist.

Constitutional Provision and Other Legislation

As already pointed out above, the importance of the Roman Catholic faith in Malta is reflected in the Constitution of the Republic of Malta. Article 2 is the result of the religious influence and pressure before the granting of Independence. One may also say that the fact that the state pronounces itself to be a confessional state in favour of a certain religion may create the suspicion that religious diversity is not respected and that there is a very strong imbalance in favour of that religion.

It would also appear that Malta is not the only member state of the EU with some form of an established state church. Like Malta, none of these states have an official policy of persecution or intolerance towards other religions. But most of these states like Malta, give privileges and benefits to the "state church" vis-à-vis other religions or churches. One has to see how far this sort of treatment could be characterised as discriminatory towards other religious denominations. It would appear that the United Nations instruments dealing with religious freedom tend to avoid the issue. The Draft Declaration on the Elimination of Intolerance or Discrimination on the Basis of Religion and Belief of 1967 states in Article I (d) that neither the establishment of a religion nor recognition of a religion or belief by a state should itself be considered a form of intolerance or discrimination. However, this has sometimes been considered as an "unfortunate departure from the conventional wisdom that the establishment or recognition of an official religion may promote intolerance of other beliefs".[4] It has been held by the European Commission of Human Rights that a State Church system cannot in itself be considered to infringe Article 9 of the European Convention on Human Rights; "However, a State church system must, in order to satisfy article 9, include specific safeguards for the individual's freedom of religion"[5].

The mere fact that an established Church exists can raise questions about how much assistance the state can give the Church before it becomes actively involved in promoting one religion in a way that puts inappropriate pressure on those outside the Church to become actively involved in the Church, or improperly penalises those who are not members. Sometimes the mere existence in a country of an Established Church or of a State Religion may bring about severe discrimination, and sometimes even outright persecution directed against 'dissenters'. This however is not always the case, because an Established Church in some countries to day is more of a historical value than a threat to religious freedom.

One can also note the amount of state support when it comes to taxation and financial contributions to a Church. It has been said already that Church and State support each other for the common good, and very often the presence of a dominant religion in a country does not necessarily result in predominantly negative results, although it is true that in such a situation the dominant religion or morality of a country tends to stifle all the others. The presence of religion in a state can help the State's function and mission as far as public order and the distribution of welfare benefits is concerned. It is a known fact that a large part of a religion's communal activity runs parallel with that of the State in social welfare and social assistance. But to what extent should all the churches or religions in any given

[4] McDougal, Lasswell and Chen: "The Right to Religious Freedom and World Public Order", 74, Michigan Law Review, 868, 869-9 (1976).
[5] "Darby vs. Sweden", 187, Eur. Ct.H.R [Ser.A] (1990) Annex to the Decision of the Court.

society merit the same equivalence and the same treatment in this regard. And here is the point of equality or the need, the commitment, to avoid discrimination between one religion and another. Some would of course say that equality among religions should not mean treating all religions in a state on the same level. This assertion in terms of eligibility for funds and other assistance carries a lot of weight. The importance, the content and the calibre in terms of the number of adherents is to be taken into consideration. The argument goes that in the same way as the state should not treat all minorities within its confines and subject to its jurisdiction in the same manner, so must it deal with the various churches. The point of equality becomes one of justice and equity, if not reasonableness and proportionality: each according to his due. One has to consider the social relevance of the religion and on this basis to portion out the assistance and finance of that religion. In the same way that the state recognises the importance of private organisation and non-governmental organisation, so in like manner it should also give assistance to each and every religion within its territory.

The influence of a state Church could also be seen in the ease of prosecution and Laws forbidding blasphemy against only one religion. Even when the Maltese state takes it upon itself to punish crimes against the religious sentiment, it does so discriminately. Punishing crimes against the Religious sentiment, should, also in a secular state become relevant only, and insofar as, the maintenance of law and order is concerned, and for no other reason. But Article 163 of the Criminal Code[6], provides expressly that:

"Whosoever by words, gestures, written matter, whether printed or not, or pictures or by some, other visible means, publicly vilifies the Roman Catholic Apostolic Religion which is the religion of Malta, or gives offence to the Roman Catholic Apostolic Religion by vilifying those who profess such religion or its ministers, or anything which forms the object of, or is consecrated to, or is necessarily destined to Roman Catholic worship, shall, on conviction, be liable to imprisonment for a term from one to six months." A more fundamentalist approach towards the Roman Catholic Apostolic Religion than this one cannot anticipate. But is this a relic of the past,[7] a dead letter, or a reality in today's Maltese experience capable of being used whenever it is convenient for the powers that be.

To be fair and objective, one must also mention here the provisions of the following section, which punishes vilification of any cult tolerated by law, but the punishment in this case is reduced to half of that mentioned in the previous section. The question to be decided by any prosecutor who decides to prosecute any of these crimes, and by a court of law, if and when the question arises before it, is what is to be meant by "cult tolerated by law." Section 165 provides against the disturbance of the performance of any function, ceremony or religious service of the Roman Catholic Apostolic Religion or of any other religion tolerated by law, which is carried out with the assistance of a minister of religion or in any place of worship or in any public place.

Should there be a distinction of a "cult" or religion "accepted" by the law and those that are not? And what is the criterion? Is this a distinction between a religion and a sect or are we referring to something more fundamental than that, such as those cults or small communities

[6] Cap 9 of The Revised Edition Of the Laws of Malta.
[7] This section was introduced by Act XXVIII of 1933.

practising deviant, sinister and eccentric rites that are also detrimental to the members of the community? The terminology used is significant in a way, and yet any religion or belief comes under the notion of a cult. But "cult" means something less than established religion, and very often the term includes sects within the same or established religion. A cult that is not tolerated by the law should therefore be one that violates fundamental social values both as a matter of belief as well as a matter of actual practice. And then how does a cult *become* accepted or tolerated by the law? What would be the case for example, when a sect such as the Jehovah Witnesses, embracing most of the Judeo-Christian philosophy and teaching, but then prohibiting blood transfusion even when such and intervention can save lives? Such a practice obviously offends human dignity guaranteed by the law.

It would appear that the Catholic Church has the authority under the constitution to teach its principles and diffuse its morality among the Maltese population. However several religious groups have become physically present in Malta, and evidence of their activities does not only come from the numerous buildings, such as mosques and synagogues that have appeared. It would appear that persons of different religious denominations are allowed to practice their faith freely so long as the religious practice and manifestation does not infringe upon the public order.

The third paragraph of Article 2 of the constitution would require the State to include as part of a compulsory curriculum the teaching of the Roman Catholic religion. However, in practice students of a different creed are allowed to opt out of religious studies and classes.

Article 2 (1) of the Maltese Civil Code reflects the Roman Catholic concept of marriage in requiring the essential elements of Unity, Fidelity and Indissolubility. It also embodies the canon law principles as regards essential validity and consequential grounds for nullity. It would appear therefore, that if a particular faith allows either of the spouses to marry more than one spouse such a marriage could never be recognised under Maltese Law as the "Lex Loci actus". But would Maltese Law recognise as valid such a marriage considered valid by the law of the place where the marriage was celebrated? The problem therefore is the result of our civil code's adoption of the concept and notion of marriage according to our particular religion - The Roman Catholic Religion.

The Question of Religious Symbols

The presence of the crucifix that is the symbol of the Roman Catholic religion in the classrooms of state schools has been the subject of some polemic. It has been suggested that the presence of the crucifix to the exclusion of any other religious symbol is discriminatory. To what extent a religious symbol offends the sentiments of other religions is debatable. It is however, true that the presence of a religious crucifix in state school classrooms is evidence of the predominance and importance of Catholicism over any other religion in this country. On the other hand, the presence or otherwise of the crucifix does not hinder the student of a different faith from practising his religion. It would be another matter when religious festivals recognised as public holidays interfere with important appointments in the calendar of other religious denominations.

The State should not legislate under pressure or in a situation of panic on matters touching the religious sentiments of the various religious groups within its territory. It is true that the amount of freedom to manifest one's religion in most western states would not be duplicated in an Islamic state, and this primarily because of the very theological structure of the Islamic religion itself.

It is argued, that the western democracies should not defend the rights of people coming from countries where very often multiculturalism is denied, and where there is no freedom of religion. Why should the West guarantee the freedom of religion or freedom from religious discrimination to people whose religions are themselves not tolerant of other religions in their midst?

However the way to defend freedom, freedom of religion, freedom from religious discrimination, is not to shut the door to freedom, but to let freedom be the instrument of persuasion, the beacon in the midst of the darkness. Case law has supported this stand. For example the Italian Constitutional Court in a judgment of 1996 decided that the oath taken in a court of law is not a religious manifestation it assumed a religious meaning that violated the freedom of conscience of the unbelieving witness. To respect the freedom of conscience, the formula of the oath must be neutral, the content of the value that the oath assumes can also be religious, but it remains a matter of conscience for the person who swears. The same Constitutional Court in 1984 had affirmed the principle that in public schools students should not be forced to take up religion classes. Such students cannot be obliged to attend alternative lessons because such an imposition would offend against the freedom of religion.

In 1989 the French Conseil d'Etat had decided that the wearing of veils by some Muslim students did not violate a school's principles of secularity, because there are certain signs of membership to a religious community which are actually the manifestation of belonging to a certain ethnic group, and against which, therefore, the state should not intervene.

It is therefore surprising how Muslim headscarves and other religious symbols were banned from French schools and public buildings after a specially appointed commission told the government that legislation was needed to defend the secular nature of the state. The 20-member group, appointed by President Jacques Chirac and headed by the national ombudsman, Bernard Stasi, recommended that all "conspicuous" signs of religious belief - specifically including Jewish skullcaps, oversized Christian crosses and Islamic headscarves - be outlawed in state-approved schools. The report also recommended that the laws should include a clause requiring "the strict neutrality of all public service employees".

The question of whether a "secularism law" is desirable or necessary - particularly to deal with the steadily increasing number of Muslim girls wanting to wear headscarves at school - may seem abstract, or even absurd, to those used to British or American notions of multiculturalism. In France, where secularism is a constitutional guarantee and everyone, in the eyes of the republic, is supposed to be equally French regardless of ethnic or religious differences, the issue has dominated media, public and political debate for several months.

The origin of the debate, which has split French society along unfamiliar lines, is considered to be the radicalisation of French Islam. Mr Stasi acknowledged as much, saying the law

aimed to preserve constitutional secularism and counter, "forces trying to destabilise the republic", a clear reference to Islamic fundamentalism. But he stressed that the law was not directed at France's mainly moderate Muslim community of 5 million. Its aim was to give all religions a more equal footing.

It is now illegal to wear religious symbols in French state schools, which are considered the cornerstone of the republic and a place where its core values must be transmitted and enforced. In any case, head teachers can suspend or expel pupils wearing "ostentatious" religious signs that "constitute an act of pressure, provocation, proselytism or propaganda". The commission agreed with most teachers that the rules have placed too great a burden on them. The main teachers' union, the SNES, said recently that the proposals did not go far enough to promote secularism in schools. On March 15, 2005 Reuters reported, "A senior official declared France's law against Muslim headscarves in schools a success, one year after the bill was passed, while a pro-veil group said the new line had claimed what it called 806 victims. Hanifa Cherifi, inspector general at the Education Ministry, said the law had eased tensions at state schools and reconfirmed the separation of church and state as an essential rule. After the stormy debate over the law, France now understood its Muslim population better and was more able to distinguish between radicals and moderates, she said. 'In terms of the numbers, the result is quite positive,' Cherifi told Radio France Internationale. 'Beyond that, the general atmosphere is quite positive and satisfactory for all, both the schools and the pupils. We are quite pleased.'[8]

On April 19, 2005 *BBC News* reported, "A French court has upheld a school's decision to expel three Sikh boys for wearing turbans to school. The tribunal said the boys' continued wearing of an under-turban made them 'immediately recognisable as Sikhs.' Under a law passed amid protests in March 2004, French students are barred from wearing conspicuous religious symbols at school. The boys' lawyers said they would appeal and if necessary take their case to the European Court of Human Rights. The boys, aged 15 to 18, were expelled from the Louise-Michel school in Bobigny, north-east of Paris, last November." There must be many more examples of similar incidents.

But freedom of religion is not only the personal beliefs of the individual. It includes the right to religious manifestation as well. Some signs and attire are necessarily part of the way one manifests himself/herself to belong to a certain religion or religious group. To what extent is denying the manifestation of one religion in this form an infringement of the freedom of religion or discrimination against a religious group? On October 8, 2004 the *Associated Press* reported, "Pope John Paul II exhorted Christians on Friday to display signs of their faith more forcefully, contending the practice neither infringes on separation of church and state nor breeds intolerance. His comments appeared to be a clear reference to raging debates over laws such as France's recent ban on wearing Islamic headscarves, Jewish skull caps or large Christian crosses in schools. In Italy, a Muslim activist's efforts last year to remove crucifixes from public school classrooms stirred widespread resentment in the overwhelmingly Roman Catholic country."[9]

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[8] March 15, 2005, *Reuters*.
[9] October 8, 2004, *Beliefnet.com/AP*.

Religious Discrimination and Employment

Article 45 of the Constitution of Malta prohibits discrimination on the basis of race, place of origin, political opinions or creed. That article may be more extensive in its application than article14 of the European Convention on Fundamental Human Rights and Freedoms 1950 which is the First Schedule of Act XIV of 1987. The non-discriminatory provisions of the Constitution would apply to a requirement made that the Roman Catholic Apostolic Religion shall be taught by a person professing that religion.[10] A similar exception has not been made with regard to other denominations. This principle however seems to be enshrined in the new employment Directive namely: Article 4(2).

"Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification."[11]

Act I of 2003, The Equality for Men and Women Act, created a National Commission for the Promotion of Equality for Men and Woman. In fact the declared purpose of the act is to eradicate any existing gender-based discrimination in Maltese society. Article 3 thereof specifically provides that nothing in that Act shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities. But the point to be made here is that there is no other similar legislation purporting to reduce religious discrimination in this country such as the Employment Equality (Religion or Belief) Regulations 2003 in the U.K. where there is:

Direct discrimination that is where there is less favourable treatment on grounds of religion or belief. This includes actual or perceived religion or belief and covers the complainant's association with someone of a particular religion or belief (meaning religion, religious belief or similar philosophical belief).

Indirect discrimination exists where there is a provision, criterion or practice applied equally to persons of a different religion or belief, which puts or would put persons of the same religion or belief as the complainant at a particular disadvantage when compared to other persons, which puts the complainant at a disadvantage, which the employer cannot show to be a proportionate means of achieving a legitimate aim. This is where a practice has the effect of disadvantaging people of a particular religion or belief, which cannot be justified by the employer.

The Regulations protect job applicants, workers and others in relation to recruitment, employment terms, promotion, training, dismissal and any other detriment. There are some exceptions, for example where possessing a particular religion or belief is a genuine occupational qualification.

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[10] Subsection 9 thereof.

[11] Council Directive 2000/78/EC of 27th November 2000.

It has been stated that although the U.K. is signatory to the major International Instruments providing against religious discrimination, its existing anti-discrimination legislation is insufficient to provide any meaningful protection for some of its largest religious minorities. The Race Relation Act 1976, the most significant piece of anti-discrimination legislation in the UK for ethnic minorities, has limitations. First, it outlaws discrimination by the markers of colour, race, nationality, and national or ethnic origin, but not the grounds of religion or belief. And second, its case law definition of 'racial group' includes ethnic religious minorities like Jews and Sikhs, but excludes multi-ethnic religious groups. The result is a loophole in the law with a hierarchy of religion in terms of the protection given to adherents. It also means that some ethnic minority groups are left unprotected where the perpetrator claims that his discrimination is on the basis of religion even though it may actually have been racist.

The anomalies, loopholes and inequalities in the law are recreated and reinforced by the Race Relations (Amendment) Act 2000, which requires all public bodies to prohibit direct and indirect racial discrimination in the performance of their public duties, to take positive steps to eliminate such discrimination and to promote equality of opportunity for all irrespective of race. Whilst the protection and provisions of this new Act rightly extend to some religious minority communities, like Jews and Sikhs, once again, they do not extend to multi-ethnic religious groups.

Given this current lack of legal protection of such minority communities, the EU Framework Employment Directive (Council Directive 2000/78/EC of 27 November 2000) is a welcome start. It seeks to establish a general framework for equal treatment and requires member states to introduce legislation no later than 2 December 2003 to outlaw religious discrimination amongst other strands of discrimination.

However, the scope of the Employment Directive is restricted to areas of employment and occupation only, as opposed to its sister directive on race and ethnic origin, which is far more extensive. Thus, after the implementation of the Employment directive, minority faith communities will still NOT be protected from discrimination in areas of social security and health care; education; goods and services available to the public (including housing); and social advantages (e.g. housing benefit, student maintenance grants and loans, bus passes for senior citizens, etc).

A shop, restaurant, hotel or any other private sector provider could refuse service to a person because he or she is from a particular religion. In the case of a Muslim - if the victim is from an ethnic community in which Muslims are a majority, for example the Bangladeshi or Pakistani community, then they may be covered under indirect racial discrimination, but if they are a Chinese, English, African or Caribbean Muslim then they would not.

Even if they are covered by indirect racial discrimination, however, the offender may not have to pay any compensation if there was no 'racial' motivation. If the shop, restaurant or hotel was to say that the reason for not serving the Muslim customer was precisely because s/he was a Muslim and not because of his/her ethnic origin ("I have no problems with

Pakistanis its them bearded Muslims that I don't like"), then it would have a defence to a claim for compensation, since his motivation was religious not racial discrimination.

In the U.S. the Civil Rights Act 1964 Title VII prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. The Act also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the employer. Flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers are examples of accommodating an employee's religious beliefs.

Employers cannot schedule examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquire about an applicant's future availability at certain times, maintain a restrictive dress code, or refuse to allow observance of a Sabbath or religious holiday, unless the employer can prove that not doing so would cause an undue hardship.

An employer can claim undue hardship when accommodating an employee's religious practices if allowing such practices requires more than ordinary administrative costs. Undue hardship also may be shown if changing a bona fide seniority system to accommodate one employee's religious practices denies another employee the job or shift preference guaranteed by the seniority system.

An employee whose religious practices prohibit payment of union dues to a labor organization cannot be required to pay the dues, but may pay an equal sum to a charitable organization.

Mandatory "new age" training programs, designed to improve employee motivation, cooperation or productivity through meditation, yoga, biofeedback or other practices, may conflict with the non-discriminatory provisions of Title VII. Employers must accommodate any employee who gives notice that these programs are inconsistent with the employee's religious beliefs, whether or not the employer believes there is a religious basis for the employee's objection.

It Remains a Question of Tolerance

The spate of terrorist acts prior to, and following 9/11 has triggered a high level of apprehension and anxiety in western countries hosting immigrant minorities. To what extent the democratic constitutional state can weather this delicate situation is not just a matter of conjecture. Anti-islamic feelings run high, and governments are then prone to interpret existing liberal and democratic laws in a different light, perhaps in a draconian and discriminatory manner. Western democracies have gone further, and with the excuse of providing security against terrorism have enacted laws and taken certain measures which are restrictive and offensive to accepted standards in human rights law. Religion is usually the object and the excuse, because religion is probably the most significant characteristic of ethnic identity. Attitutudes have changed and it may well be that the western secular state is falling back on itself to become introspective, questioning the very foundations and basic

principles of its liberalism and its freedom. In those States which, like Malta, embrace a State Religion the ruling class will have every excuse to use religion as a tool of imposition on the rest because once the cinders of racism and xenphobia are fanned control of emotions and prejudice becomes a problem. This happens when democratic principles are forgotten, when the majority manages the guarantee of rights in its own way, according to its beliefs and usually against the minorities. The entrenched provions in the Constitution or indeed any other instrument guaranteeing fundamental human rights and freedoms are not implemented on an equal footing and without discrimination. Then some become less equal than others.

The rejection by the French and Dutch electorates of the Constitution for Europe has certainly cast doubts on the whole process of European integration. The reasons for that rejection could be many and will long be debated. But there is a strong feeling that some of those reasons had something to do with the apprehension that the growing islamic communities in Europe have disseminated. A misplaced fear and the wrong reaction, it is true, but a strong fear nevertheless. It would appear that it is becoming more and more unacceptable that the rights of Islamic communities living in the West should be guaranteed,when some islamic movements challenge western culture and all that the west represents. After all, terrorism carried out in democratic countries like Spain is but a reminder of the fagility and insecurity of a system which however democratic and liberal itself rests primarily on the veiled use of force. The democratic and secular State should not withdraw within itself and operate in the same manner as a fundamentalist and monolithic State, that rejects cultural and political pluralism. Intolerance could only push the democratic organs of a free state to act under pressure and arbtrarily. Arbitrary powers are the negation of freedom and fundamental rights. Therefore eternal vigilance will always remain the price of freedom. Democracy has a right to defend itself, but only in a democratic and non-arbitrary manner.

SEXUAL ORIENTATION

DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION - THE EUROPEAN VIEW

CARLA CAMILLERI

Is the legal framework adequate and effective to prohibit discrimination on grounds of sexual orientation?

Does the law in the area of discrimination of grounds of sexual orientation lag behind other anti-discriminatory law? And can this gap be bridged?

1. Non-Discrimination, Sexual Orientation and EC Law

The principle of non-discrimination constitutes a general principle of EC law and only recently was expressly mentioned in legislation, with the insertion of Article 13 EC into the Amsterdam Treaty. Prior to this, the principle of non-discrimination was mainly used in the internal market area relating to free movement articles, discriminatory taxation and agriculture. However, over the years the concept has been applied more generally to cover those situations where persons were treated unjustly and in an arbitrary fashion.

In fact the Advocates General recognised, prior to the insertion of Article 13 EC, that the general principles of Community law imposed a requirement on the EC institutions and the Member States not to discriminate in areas of Community law on arbitrary grounds such as sexual orientation. However in *Grant*[1], one of its more conservative judgements, the ECJ examined travel benefits for the same-sex partners of employees and it decided that discrimination on grounds of sex in EC law did not cover discrimination on grounds of sexual orientation as this would extend the scope of the Treaty beyond Community competence.

D v Council[2] followed on the same cautious lines, although in this case there was no confusion as to Community competence since the case related to the regulation of Community employees. This case concerned the EU's refusal to pay a staff household allowance (which would have been payable to a married employee) to a homosexual employee who was in a "civil partnership" registered under Swedish law. The court

[1] Case C-249/96 Grant v South-West Trains, [1998] ECR I-621
[2] Case C-125/99P D v Council, [2001] ECR I-4319

concluded that although there had not been any discrimination on grounds of sexual orientation, it did not deny that there could be a possibility of the existence of an EC law prohibiting discrimination on grounds of sexual orientation. The court held that "*as regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner*".

In spite of these rulings it remains arguable that there exists a general principle of non-discrimination on the basis of sexual orientation, race and other arbitrary grounds. Furthermore the recent EU Charter of Fundamental Rights declares that "*Any discrimination based on any ground such as...sexual orientation shall be prohibited*". In addition, within the employment and social affairs area there is the recent equality Directive *2000/78 establishing a general framework for equal treatment in employment and occupation* that prohibits discrimination in employment based on grounds which include sexual orientation.

2. The Main Differences Between the Two Equality Directives

It is useful to compare the two main EC Equality Directives, which are *Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* and *Directive 2000/78 establishing a general framework for equal treatment in employment and occupation*. This exercise is of relevance in order to examine the varying levels of protection between the different rights, the width or otherwise of the scope of the legislation in question and the types of actions needed to implement the said legislation.

Article 3 of the *Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*[3] lays down the scope of this Directive. This scope is wide and not limited to equal treatment in employment and occupation issues only, but it also includes issues referring to social protection and social benefits, such as education, social advantages and access to and supply of goods and services.

On the other hand, *Directive 2000/78 establishing a general framework for equal treatment in employment and occupation*[4] has as its scope issues related to employment only: conditions of access to employment, access to all types of vocational guidance or training, employment and working conditions and membership of, and involvement in, organisations of workers or employers. This list would seem broad enough to encompass such grey areas as compulsory military service and voluntary work. In order to emphasis this, Paragraph 13 of the Preamble and Article 3(3) of the same Directive, expressly excludes social security or social protection schemes from application in the context of employment and occupation. Education and access to and supply of goods and services, which are covered in *Directive 2000/43,* are also excluded. Any consequence of this provision on the legislation of Member States will remain to be seen.

[3] Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [OJ 2000, L180/22]

[4] Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [OJ 2000, L303/16]

Directive 2000/78 covers the more controversial forms of discrimination based on *religion or belief, disability, age and sexual orientation,* and hence it follows that its scope would be narrower. Although it is understandable that the scope is narrow due to the differing attitudes in the Member States in certain controversial areas, a question that arises is whether it is justified to have a lesser degree of protection against discrimination based on religion, disability, age and sexual orientation. It shall be shown at a later stage that even within this Directive there exist varying levels of protection against discrimination between these so-called controversial grounds.

Furthermore *Directive 2000/43*, in Article 13, imposes an obligation on the Member States to set up a body or bodies for the promotion of equal treatment on grounds of racial or ethnic origin. The same Article obliges the Member States to ensure that the competences of these bodies include a number of tasks, such as reporting and assistance to victims. The corresponding obligation to set up a body to promote equal treatment in employment and occupation to combat discrimination on grounds of religion, disability, age and sexual orientation is not found in *Directive 2000/78*. Therefore, the two Directives differ not only in their scope but also in the obligations imposed on the Member States. The requirement to create a body vests the Member States with an obligation for positive action in the field of racial or ethnic discrimination, whereas the absence of such a requirement requires a more passive role for the authorities of the Member States.

Sexual Orientation Discrimination Under Directive 2000/78

Primarily, when one examines the provisions in the *2000/78 Directive*, discrimination on the grounds of sexual orientation is the only form of discrimination that is not dealt with individually. This results in that its individual scope and meaning remains wholly undefined, and hence leaves the implementing Member States to act in uncharted waters. The preamble to the Directive, for example makes reference to gender issues (paragraphs 2, 3), old age (paragraphs 6, 8, 25), race and ethnic origin (paragraph 10), disability (paragraphs 16, 17, 18, 19, 20, 21, 27) and religion (paragraphs 24). The only indirect reference to sexual orientation is in paragraph 22 of the Directive's Preamble, which states "*This Directive is without prejudice to national laws on marital status and the benefits dependent thereon*". Over and above the fact that there is no explicit reference to sexual orientation, there is an indirect leeway for Member States to avoid granting equal treatment to non-conventional families, which often involve cohabiting homosexual couples.

In addition, within the operative part of *Directive 2000/78* Articles 4, 5 and 6 refer specifically to issues of religion or belief, disability and age respectively and these Articles outline the limits of the protection afforded, such as the differential treatment in employment when ethos is based on religion or belief, special rights of accommodation for disabled persons and justifications of different treatment on grounds of age. Here, again, there is an evident omission of any reference to issues relating to sexual orientation. This increases the difficulty of defining the issues relating to discrimination on grounds of sexual orientation and of creating a harmonised minimum protection throughout the European Union. Therefore, Member States may provide that a difference of treatment, which would otherwise be prohibited, shall not constitute discrimination where *'by reason of the nature of the particular occupational activities concerned or of the context in which they are*

carried out', a characteristic related to one of the forbidden grounds constitutes a *'genuine and determining occupational requirement'*[5]. However, it is very difficult to imagine certain jobs where a particular sexual orientation is needed.

The question arises as to whether in reality there is actually discrimination between the anti-discrimination grounds themselves, whether the protection against discrimination based on sexual orientation is a less 'important' right. Contrary to this assertion, the European Council has declared that *'[t]he different forms of discrimination cannot be ranked: all are equally intolerable'*[6]; however needless to say such declarations should be put into practice and not merely written on paper.

3. Discrimination on the Grounds of Sexual Orientation

This paper studies the protection against discrimination based on sexual orientation in employment, and hence will focus on this. It is useful at this stage to attempt a definition of what sexual orientation consists of. The term has not been defined in *Directive 2000/78*, and sexual orientation may be seen both as an attraction or preference, and as a conduct or behaviour, which refers to the choice of the sex of the partner in the emotional-erotic sphere. This situation leaves the definition of this terminology in the hands of the individual Member States, which could obviously result in discrepancies and different degrees of protection afforded throughout the Union. The Commission, on its Equal website,[7] defines the ambit of discrimination on grounds of sexual orientation as covering persons who fall into the gay, bisexual and lesbian category. However, a wider view is taken by Sweden's Office of the Ombudsman against Discrimination on Grounds of Sexual Orientation[8]. They define sexual orientation as a collective term used to refer to the fact that everyone has a sexual orientation, whether this is gay, lesbian, bisexual or heterosexual. However, for the purposes of this paper the meaning given to 'sexual orientation' will be the meaning used by the European Commission, unless otherwise expressly stated, that is gay, bisexual and lesbian.

Another important distinction when it comes to defining the scope of sexual orientation is that between cohabitation for same-sex couples and sexual orientation. The difference is of importance when it comes to identifying the focus group and legislating on the issues that could arise from the two different groups. Should one identify the persons concerned with regards to their sexual practices (for example same-sex cohabitation or otherwise) or with regards to their sexual identities (for example gay, lesbian, bi-sexual or heterosexual)?

What is meant by discrimination on grounds of sexual orientation? Discrimination on these grounds would consist of situations when a person is subjected to different treatment on grounds of being gay, lesbian or bisexual, on grounds of having engaged in same-sex conduct or being in a same-sex relationship, or on grounds of coming out as gay, lesbian or bisexual. There would be discrimination on the grounds of sexual orientation even if the

[5] Article 4, Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [OJ 2000, L303/16]

[6] Council Directive 2000/750 of 27th November 2000 establishing a Community action programme to combat discrimination (2001-2006) [OJ 2000 L303/23]

[7] http://europa.eu.int/comm/employment_social/equal/policy-briefs/etg0-visibility-vision_en.cfm

[8] http://www.homo.se

aggrieved person does not actually identify as gay, lesbian or bisexual, but was perceived as such by the persons who discriminated or was treated differently because he or she associates with homosexual persons.[9]

The prohibition of sexual orientation discrimination also means that the same-sex partner of an employee must be treated in the same way as the different-sex partner in a heterosexual relationship is or would be. This holds true as long as the same-sex partner is compared with the different-sex partner who is not married to the employee.

Direct sexual orientation discrimination finds its source in a treatment that places on gay, lesbian and sexual persons burdens that are not placed on heterosexual persons. These burdens, in the case employment discrimination, are often the result of bias, stereotype and prejudice associated with homosexuality. On the other hand, indirect discrimination occurs when the criterion used to take decisions is apparently neutral (e.g. being married), but it puts at a particular disadvantage persons who have a particular sexual orientation (e.g. gays and lesbians) because for them it is more difficult to meet the condition requested (in many European countries a person cannot marry another person who is of the same sex).

Few Member States have truly understood the changes in perspective involved in the consideration of indirect discrimination. More than just extending the conventional use of legal sanctions to discriminatory acts, indirect discrimination requires the examination of all the apparently neutral procedures and practices, and, above all, the active promotion of equality.[10] Whilst actions fighting against direct discrimination require invisibilisation of personal characteristics in order to ensure impartiality, indirect discrimination, on the other hand requires making the invisible visible. This is problematic in the area of sexual orientation discrimination due to the fact that a person's sexual orientation, as for example a person's religious beliefs, is an invisible trait and is generally treated by that individual as private and personal[11]. For this reason, any reporting or direct questioning for statistics on the part of the authorities, for reasons of policy making and action programmes with regards to sexual orientation discrimination, may be found to be incompatible with privacy issues and hence this makes development in this field even more difficult.

Unlike direct discrimination, indirect discrimination may be justified by a legitimate aim or policy. This would include the prohibitions emanating from the laws on marriage, adoption and benefits relating to same-sex couples and families. Certain forms of direct discrimination may also be justified on policy grounds, as dubious as they may seem, such as the discriminatory access standards towards homosexuals in the United States Armed Forces. This practice is being eroded slowly across Europe, for example the ban on gays in the British Armed Forces was lifted in 2000 and the Royal Navy has become the first section of the British armed forces to join a scheme protecting gay rights. It has signed

[9] The European Group of Experts on Combating Sexual Orientation Discrimination, *Combating sexual orientation discrimination in employment: Legislation in Fifteen EU Member States*, November 2004

[10] European Commission, Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, the United Kingdom and the Netherlands., DG Employment and Social Affairs, August 2004

[11] Sexual orientation is not an immediately *visible* characteristic and in order to be perceived by observers, such must be expressed via distinctive and identifiable signs: codified clothing, attitudes, expressions, and even quite simply a public expression (coming out)

equal rights Diversity Champions Programme to promote fair treatment of lesbian, gay and bisexual recruits. Same-sex couples with a registered civil partnership will also be able to apply for married quarters, in all British armed forces, from autumn 2005.[12]

4. The Existence of Supporting Measures with Regard to Sexual Orientation

The *2000/78 Directive* relating to equal treatment in employment and occupation is a general framework Directive and consequently it is rather skeleton-like and would require independent action on the part of the Member States to fill in any gaps or include any additional obligations. The question one must pose is whether there exist other forms of legislation or guidelines in support of this Directive that fulfil the role of fleshing out the rights for equal treatment and the obligations on the Member States with regards to sexual orientation discrimination.

As mentioned above, the *2000/78 Directive* is a framework Directive which requires additional legislation at Member State level, and also, in my opinion, at Community level. There are various EU programmes and institutions that support the two Directives on equality, such as the Centre on Racism and Xenophobia, a variety of structures relating to gender discrimination and social measures for target groups (old age and disability). Besides these actions there are a number of guidelines and Directives, at a Community level, that regulate discrimination on grounds of age, disability and religion. However, yet again, both the specific programmes and the legislation are missing with regards to discrimination on grounds of sexual orientation, although one can take part in other EU programmes with a view to promoting non-discrimination on sexual orientation. What follows is a brief overview of the legislative and other supporting measures or initiatives undertaken by some Member States in the area of non-discrimination and with an emphasis on sexual orientation discrimination.

4.1 Legislative Provisions

Generally, in most of the old Member States, the legislation prohibiting sexual orientation discrimination in employment covers homosexual, heterosexual and bisexual persons. This does not only cover a person's sexual preference, but it also covers discrimination on grounds of a person's sexual behaviour or on grounds of a person's *coming out.* This encourages the persons involved to be more open about their sexual orientation and on the other hand, also giving them the right to keep their sexual preferences private.

In certain Member States, such as Italy[13] and Spain[14], there is uncertainty whether their anti-discrimination laws cover direct discrimination between same-sex and different-sex (cohabiting) partners, although the Directive expressly prohibits that form of discrimination. In other Member States, a problem arises with regard to the prohibition of indirect discrimination against same-sex partners; in employment the main concern is the most common form of indirect discrimination, that is the discrimination against unmarried

[12] BBC News, Royal Navy to promote gay rights, UK Edition, 21st February 2005

[13] Legislative Decree no 216 of 9 July 2003, Implementation of the Directive 2000/78/EC on equal treatment in employment and occupation.

[14] Law 62/2003 Fiscal, Administrative and Social measures.

employees and their partners. In Ireland[15], for example, a specific exception in the implementing legislation seeks to prevent the national Courts from assessing whether such discrimination is indeed justified. It remains to be seen whether such indirect discrimination would be considered objectively justified in day-to-day cases, one of the justifications being the aim not to prejudice national laws on marital status, as laid down in paragraph 22 of The Preamble *Directive 78/2000*[16].

In Maltese legislation, the non-discrimination areas are protected within the Equal Treatment Regulations (LN 452.95) and the Employment and Industrial Relations Act (Chapter 452). The latter makes reference exclusively to the issue of gender equality, whereas the former incorporates the two Equality Directives relating to racial and ethic origin and equal treatment in employment. This Regulation also makes no reference to the inclusion or the exclusion of social security rights, social protection and the right to social advantages in relation to equal treatment as laid down in *Directive 2000/43*.

The transposition of anti-discrimination provisions on sexual orientation has proved controversial in several of the new Member States, not excluding Malta. The fact that the Directive is a Framework law has caused a significant variation of implementation amongst the Member States, with some states implementing a specific act dealing with sexual orientation discrimination and other states merely transposing the framework EC Directive. An example of supporting legislation on equality in relation to sexual orientation is the United Kingdom's Employment Equality (Sexual Orientation) Regulations 2003[17], which lays down the definition of sexual orientation and the various scenarios in which discrimination is prohibited. The United Kingdom's Regulation defines sexual orientation as meaning sexual orientation towards persons of the same sex, persons of the opposite sex and persons of the same sex and of the opposite sex. The discrimination could consist of direct discrimination, indirect discrimination, discrimination by way of victimisation and harassment.

For the practical relevance of the prohibition of harassment, in any national legislation, much will depend on the attitude of employers, co-workers and national courts towards common forms of anti-homosexual behaviour (such as verbal abuse, forced disclosure of a person's sexual orientation and homophobic environments).

Another example of specific legislation relating to sexual orientation is the Swedish Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation[18] which was promulgated in 1999 and covers homosexual, bisexual or heterosexual orientation. This Act prohibits direct discrimination, indirect discrimination and harassment which are connected with sexual orientation and it also provides legal redress and the setting up of a

[15] The Social Welfare Act 2004 and the Equality Act 2004, that amend the Employment Equality Act 1998and the Equal Status Act 2000.

[16] Paragraph 22, "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon".

[17] Statutory Instrument 2003 No. 1661, The Employment Equality (Sexual Orientation) Regulations 2003. For explanation of text see the site: http://www.dti.gov.uk/er/equality/so_rb_longexplan.pdf

[18] Act (1999:133) on a Ban against Discrimination in Working Life on grounds of Sexual Orientation, Including amendments: up to and including SFS 2003:310.

[19] Draft of a European Anti-Discrimination Provisions' Transformation Act, ADG, 15 Dec. 2004, available at: http://dip.bundestag.de/btd/15/045/1504538.pdf

specific Ombudsman Office. Although this Act does not include socio-economic rights besides those that apply to salary and employment conditions, it has been shown above that these rights are catered for adequately in other measures within the Swedish legal system and hence there was no need for them in this Act relating to employment.

There is no such corresponding legislation in Germany, although a draft version of general application and covering all grounds of discrimination is up for approval in the first half of 2005[19]. However, the German Courts have already served as a tool for the granting of compensation for discrimination on the grounds of sexual identity.[20] In fact, a number of Member States have failed to implement *Directive 2000/78* within the stipulated time. Recently the European Commission announced that it will refer five Member States to the European Court of Justice for failing to transpose the Employment Equality Directive. The Commission therefore, decided to take the final step of the infringement procedure and to refer Germany, Luxembourg, Greece, Austria and Finland to the European Court of Justice.[21]

4.2 Other Supporting Measures

A number of Member States have set up a body for the promotion of equal treatment, under *Directive 2000/43*, and have included within the scope of this body *Directive 2000/78* and hence there would exist one unified body that would examine and promote equal treatment against discrimination on all the grounds covered under both Directives. These countries have chosen to entrust the enforcement of the prohibition of sexual orientation discrimination in employment to these specialised bodies. This is the case with the Netherlands's Commissie Gelijke Behandeling (Equal Treatment Commission), Austria's Equal Treatment Commission and Irelands' Equality Authority and Equality Tribunal. These specialised bodies cover all grounds of discrimination under the two Directives, including sexual orientation.

Sweden is the only Member State that established a specific body to deal with, sexual orientation discrimination and this is the Office of the Ombudsman against Discrimination on Grounds of Sexual Orientation.

In Malta, we have a number of Commissions set up to promote equality, but as yet none in relation to sexual orientation and none set up under these two EC Directives. The obligation to set up the bodies referred to in *Directive 2000/43* (Equal treatment irrespective of racial or ethnic origin) is not laid down in the Maltese Equal Treatment Regulations (LN 452.95) although it should have been implemented, and hence the legislature is even further away from introducing a body that would supervise one of the most controversial of the non-discrimination rights. This is also the case in the United Kingdom, where there exists the Commission for Racial Equality and the Disability Rights Commission and no special agency for sexual orientation issues. The proposed Commission for Equality and Human

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[20] Stork F, Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC & 2004/113/EC in German Private Law, GLJ Vol.6 No.2-1 Feb 05

[21] Commission takes Member States to the European Court of Justice for failing to implement EU anti-discrimination rules, IP/04/1512, 20/12/2004

Rights, which will have enforcement powers in relation to sexual orientation, will not begin operating until late 2006 at the earliest.

The existence of these bodies allows for specific non-judicial procedures for the enforcement of the obligation of non-discrimination on grounds of sexual orientation. Judicial procedures, in particular civil procedures are available in most of the Member States. Penal judicial procedures are available in most of the Member States, except in Austria, Denmark, Portugal and the United Kingdom.

5. Social Rights and Partner Benefits

The exclusion of a direct tackling of discrimination based on sexual orientation within the Directive is most probably due to the controversy within the Member States on issues relating to rights of homosexuals to marriage, cohabitation benefits and adoption, and any implications that employment benefits may have on such rights. Although the paper focuses on equal treatment in employment it is, in my opinion, impossible not to touch on other socio-economic issues that effect the individual's every day life. This is even more important in the area of homosexual rights where the negation of rights occurs in most cases within the social policy sphere.

The rights given to homosexual couples in each Member State vary to a great extent. On one side of the spectrum there is the Netherlands that in 2001 introduced marriage between same-sex partners and the introduction in 2003 of legislative amendments in Sweden that give the same rights to same-sex and opposite-sex couples with respect to all forms of adoption and legal custody of children (this also occurred in Denmark, Iceland and the Netherlands). Spain has recently moved in this direction. On the other side we have countries, such as Malta, which - although they have implemented the Directive in national law - do not have any other legislation that recognises the other familial and socio-economic rights for homosexuals that go beyond employment. This is common in predominantly religious countries, such as Malta, Cyprus and Poland, where "homophobic" statements by church leaders are common and where the church holds considerable political power[22].

The exclusion of social benefits and rights from *Directive 2000/78* leads to the question of whether it is "wise" to separate employment rights from social security rights, social protection and the right to social advantages. This question is more pertinent when it is seen that *Directive 2000/43* (Equal treatment irrespective of racial or ethnic origin) does not separate them and includes both employment and social rights. In other words, equal treatment on grounds of disability, religion, age and all the more so sexual orientation, can only be afforded protection in the ambit of employment, and not in other areas which are closely linked, such as the social aspect of day to day life of minorities. This of course, does not impede Member States from introducing or maintaining provisions which are more favourable to protect the principle of equal treatment, as laid down in Article 8 of *Directive 2000/78*. Nonetheless, as stated previously, this is totally at the discretion of the individual Member States, and in the area of sexual orientation discrimination the level of equal

[22] International Lesbian and Gay Association (ILGA), *Meeting the Challenge of Accession - Surveys on sexual orientation discrimination in Countries joining the European Union*, Policy Paper 2004

treatment legislation and the creation of supervisory bodies is most likely to differ enormously.

Examples in the Field of Employment

Through the elimination of discrimination on the basis of sexual orientation in employment benefits, the Union and in turn its Member States will counteract two negative aspects that this form of discrimination causes.[23] First and foremost, the disapproval of same-sex relationships by employers is challenged, as employers are actively prevented from applying their own personal understanding of anti-homosexual societal norms. Secondly, it must be recognised that the effect of non-recognition of partners can be quite substantial in monetary terms and thus the granting of "partner benefits" effectively puts an end to those in same-sex relationships receiving less reward for their work compared to different-sex partners in unmarried relationships[24].

Those benefits which employers provide to unmarried different-sex partners and which are denied to same-sex partners are termed 'discriminatory partner benefits'. Abolishing this direct form of discrimination would signify a radical change of the prevailing culture of the Member States' employers. The European Court of Justice recognised this form of discrimination between unmarried same-sex and different-sex couples back in 1998.[25] The prohibition of discriminatory partner benefits was also acknowledged by the European Court of Human Rights in *Karner*[26].The Court held that differences based on sexual orientation require serious reasons by way of justification and any such measure must be shown to be appropriate and also that in that particular instance discrimination was necessary in order to achieve the desired aim. In Denmark, Finland, Italy, the Netherlands, Portugal and Sweden the term 'employment conditions' is explicitly referred to in the respective national anti-discrimination legislation, and such encompasses partner benefits and pecuniary payments.

The existing types of discrimination within the employment and partner benefit field can be many. This discrimination may stem from legislation, although examples of directly discriminatory laws are close to non-existent. The only discriminatory legislation that came to light[27] concerns the Irish Parental Leave Act 1998, which laid down that this form of paid leave could only be claimed by an employee in respect of his/her spouse or "a person with whom the employee is living as husband or wife". This form of discrimination does not exist in Maltese Law due to the fact that the law, for example in the Social Security Act [Chapter 318] or in Urgent Family Leave [S.L. 452.88], makes no reference to cohabitating couples irrespective of whether they are different-sex or same-sex couples. The majority of social security rights and employment rights, such as urgent family leave, belong to "immediate family" meaning the *husband*, *wife* and *married or unmarried children*, as well

[23] Bell M., Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union, Wintemute R., & Andenaes M., (eds.) *Legal Recognition of Same-Sex Couples. A Study of National, European and International Law*, Hart Publishing, 2001

[24] This section refers to same-sex unmarried couples vis-à-vis opposite sex unmarried couples, due to paragraph 22 of *Directive 78/2000* on marital status.

[25] Case C-249/96 Grant v South-West Trains, [1998] ECR I-621

[26] Karner v Austria, 24th July 2003, No. 400016/98

[27] The European Group of Experts on Combating Sexual Orientation Discrimination, *Combating sexual orientation discrimination in employment: Legislation in Fifteen EU Member States*, November 2004

as *family relations up to the first degree*, and persons having legal custody of a child. In addition, certain rights found within the Maltese social security body of legislation are frequently based on the notion that the male is the prime bread-winner and head of the household. However, this form of gender discrimination is not the subject of this paper but arguably although there is no direct discrimination based on "sexual orientation", in order to offer a level playing field Maltese law needs to be reformed to cater for cohabitating couples of whatever sex.

Another interesting example of discrimination occurs in the Netherlands, between different-sex and same-sex *married* partners. The Roman Catholic Church in the Netherlands denies survivors' pensions to same-sex widows/widowers in the pension scheme for pastoral workers and it is uncertain as of yet whether this discrimination may be permitted under the exceptions of religious employers. This form of discrimination between same-sex and different-sex married couples is relatively unexplored since the Netherlands is one of the few Member States that actually allows same-sex marriages.

Case law in this area is scarce, most likely due to the specific nature of the claim, and whilst the law may protect against discrimination, the moral values in society inside and outside the workplace still have considerable influence. Legal commentary is also scarce; however several commentators consider that in the light of the prohibition on sexual orientation discrimination in employment law, same-sex partners should enjoy the same rights as opposite-sex partners as far as benefits are based on cohabitating without being married.[28]

6. Considerations

The field of sexual orientation discrimination is, as mentioned above, relatively unexplored and underdeveloped. This could be due to a number of reasons. Firstly, the examination of issues of discrimination in employment on the basis of sexual orientation is difficult due to the fact that in a substantial number of Member States sexual orientation issues, in particular discrimination, receive little attention. Therefore, awareness of the main issues and information relating to the possible remedies at law are minimal.

Secondly, sexual orientation discrimination, in particular with regard to partner benefits, remains somewhat of a taboo in most Member States. Due to the social stigma surrounding homo- or bi- sexual orientation many employees are reluctant to reveal their sexual orientation to claim a benefit or to seek clarification on points of law where such could extend to same-sex partners.

And finally it can be said that whereas in other anti-discrimination areas such as gender and race, a lot has been done, in the area of sexual orientation not much has been done to monitor, prevent and educate on issues relating to sexual orientation discrimination. Although there may be no express legislative provisions that directly discriminate within the system of a Member State, the lack of supporting bodies and measures help in retaining the status quo for homosexual and bisexual couples and prohibiting the much-needed advances in this area. In fact, the anti-discrimination action taken at Community level demonstrates

[28] Daubler W. Kittner M. & Klebe T. (Eds.), Betriebsverfassungsgesetz (BetrVG)-Kommentar, 8. Auflage, Frankfurt am Main 2002

that there is not one general undifferentiated equality principle, but instead shows a clear hierarchy within the anti-discrimination grounds[29] listed in the Treaty and also in *Directive 78/2000*, with sexual orientation ranking as one of the non-priority grounds for action at Union level.

[29] Waddington L. & Bell M., More Equality than Others: Distinguishing European Union Equality Directives, [2001] CMLRev 587

SEXUAL ORIENTATION DISCRIMINATION IN MALTA - THE EMPLOYMENT FRAMEWORK DIRECTIVE AND BEYOND

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Introduction

Malta's accession to the European Union has undoubtedly given a huge impetus to equal opportunities legislation and policies to be introduced locally. In the context of sexual orientation discrimination, it has resulted in the enactment of the first anti-discrimination measures in the field of employment. This was due to Malta's obligations under the European *acquis*, specifically under Directive 2000/78/EC. Whereas the enactment of anti-discrimination legislation is a first step towards ensuring equal treatment, much more needs to be done to achieve this objective in practice. *Government, employers, trade unions and NGOs all have a role to play in ensuring that the anti-discrimination measures are used by those who are most vulnerable.*

The need for equal opportunities measures and policies to be further strengthened is evidenced by various factors. Foremost among them we find the fact itself that the local gay, lesbian and bisexual (LGB) community has slowly started to organise itself into a lobby that pushes for legislative changes in this area. This will inevitably result in a higher degree of visibility and participation of the local LGB community in Maltese society, which will in turn result in more acceptance and consequently in more members of sexual minorities feeling safe enough to 'come out' and live openly as gay, lesbian or bisexual. The end result will be that cases of discrimination will start to be documented and acted upon more frequently than ever before. The local LGB community is increasingly demanding not mere tolerance but full acceptance and equal treatment.

Another factor is the fact that Malta is now a member of the European Union. In the long run we may expect further legislation from Brussels and it therefore makes sense to start getting used to an equal opportunities mentality and to slowly start introducing such

measures of our own initiative and expanding them beyond the field of employment. EU membership, and the potential it presented in terms of providing an impetus for the increased inclusion of the local LGB community was one of the main factors behind the emergence of the local gay and lesbian movement in recent years.

This paper will deal with two questions: first of all it will analyse whether the provisions on sexual orientation discrimination contained in the Directive have been adequately transposed into Maltese law, and secondly, it will delve into the question of how the local equal opportunities measures should be further strengthened and developed, and how it can be ensured that they are made effective in practice. Both questions will be dealt with from the context of sexual orientation as a ground of discrimination.

I. The Implementation in Malta of Council Directive 2000/78/EC

Three legislative instruments have been cited by the Maltese Government as implementing measures for the Directive. These are:

1. The Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta), hereinafter referred to as the 'Act'
2. The Employment and Industrial Relations Interpretation Order (Legal Notice 297 of 2003)
3. The Equal Treatment in Employment Regulations (Legal Notice 461 of 2004), hereinafter referred to as the 'Regulations'

The Malta Gay Rights Movement (MGRM) was actively involved in the process leading up to the enactment or publication of these three instruments through its membership in the International Lesbian and Gay Association, that frequently brought up our concerns with the European Commission, through face-to-face meetings and correspondence with Commission officials in Brussels, meetings with the responsible Ministers and shadow Ministers locally, through the drafting of position papers in relation to the Employment and Industrial Relations Act and the Equality Between Men and Women Act, press releases, lobbying with MEPs, and co-operation with opposition MPs who brought the matter up in Parliament. This last course of action was particularly effective in allowing us to keep abreast of developments whenever the Government was reluctant in consulting or giving information as to future measures that were to be adopted. Research carried out a few years ago among the local LGB community documenting discrimination, harassment and violence against them in most areas of life, including employment, also provided an effective tool in bringing this problem to the attention of the general public. Its findings were in fact quoted numerous times on the local media.

In this part of the paper the adequacy of the above-mentioned legislative framework in transposing the Directive will be analysed, and any shortcomings that remain in its implementation will be identified. The second of the above pieces of legislation, being a mere interpretation order which for all effects and purposes has been superseded by the Regulations, will not be delved into.

Concept of Discrimination

The Directive lays down that discrimination based on religion or belief, disability, age or sexual orientation is to be prohibited in employment and occupation[1]. This is mirrored in regulation 1(3) of Legal Notice 461, which makes express reference to sexual orientation as a ground of discrimination. MGRM considers this a positive development, given its position, which it has held ever since the enactment of the Act, 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[2]. 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 in this field, as will be described further below.

The Directive divides the definition of discrimination into four concepts: direct and indirect discrimination, harassment and instruction to discriminate[3]. Whereas the Act did not follow this approach, the Regulations remedied the situation by including 'harassment' within the definition of 'discriminatory treatment'. 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.

As for the scope of the Directive, the following concerns need to be pointed out: The Directive clearly covers also self-employment[4], which neither the Act nor the Regulations make any reference to. More worryingly, the Act excludes, in its definition of the term 'employee'[5], work performed in a professional capacity, whereas the Directive clearly does not. One positive aspect of the Regulations however, is that workers' organizations and professional bodies, as well as employers' organizations and employment agencies, are finally no longer allowed to discriminate against their members or in the provision of their services, on any of the grounds listed in the Regulations[6].

The MGRM's 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

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[1] Article 1

[2] During an official visit to Malta in May 2003, Ms. Odile Quentin, Head of DG on 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, 10th May 2003)

[3] Article 2

[4] Article 3(1)(a)

[5] Article 2

[6] Regulations 7 and 8.

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)[7] 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). MGRM's assessment is therefore that the Minister might have, 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 refers to this more restricted concept, thereby allowing a narrower range of measures that may be adopted by the Minister.

However, MGRM also notes with satisfaction that 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, for the obligation contained in regulation 3(4)(b) on any persons covered by the Regulations to suppress harassment at their workplaces or within their organizations[8]. Such an obligation provides further motivation for employers to make sure that they abide by their obligation to inform their employees as to their rights under the Regulations. Should an employee not know of their obligation not to harass other employees, and should they proceed to do so, in the event of litigation the employer might be found to have neglected their obligation to inform their workforce about their obligations under the Regulations. This is of particular relevance in the context of sexual orientation. A large number of gay men and lesbians conceal their sexual orientation at work[9]. This might induce others to believe that everyone at the workplace is heterosexual, and that therefore no one would complain if they were to tell a homophobic joke. However, since both the Directive and the Regulations define harassment as acts which might have the 'purpose *or effect*' of violating the dignity of the person, there is no need to prove that the individual in question had the intention of harassing the victim. There isn't even a need to prove that the individual knew that their colleague was gay, lesbian or bisexual. In the light of all of the above, employers would therefore be well advised to start considering the introduction of diversity policies within their workplaces to avoid the potential costs of litigation (see part II of this paper).

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[7] 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.

[8] This would hold however, only in the event that the ban on harassment is not deemed to have been *ultra vires*.

[9] Research carried out locally by the MGRM shows that 76% of respondents concealed their sexual orientation in some or all their jobs. Considering that respondents were all individuals who to some extent were 'out' and who could therefore be contacted by MGRM to participate in the survey, in the wider gay, lesbian and bisexual community this percentage could be higher.

Another serious concern that the MGRM would like to express relates to the exemptions given to employers who have 'an ethos based on religion or religious belief'. Whereas the Directive 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*...' 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 the MGRM's position is that 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 exceptions, 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. In the context of sexual orientation, the specific concerns are that employers with a religious ethos might require their LGB employees not to in any way 'practice' or let other individuals get to know of their sexual orientation.

Remedies and Enforcement

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 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 however is deemed by the MGRM to be inadequate, for a number of reasons. 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. MGRM thus deems this regulation to be 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[10]. 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. This procedure may be useful in assisting victims in subsequently making their case should they choose to resort to legal action. 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.

One final issue of concern to the MGRM 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.

Conclusion

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

II. The Way Forward

Anti-discrimination law on the ground of sexual orientation is a very recent development in our country. The new rights arising from the Regulations still have to be brought to the attention of the local gay, lesbian and bisexual community, and both the MGRM as well as trade unions and employers have a role to play in this respect. MGRM's efforts in this

[10] Regulation 12

regard, given its limited resources, have so far revolved around publicising the Directive through its communication channels and the wider media, and through a seminar organised a few years back which aimed at giving an overview of the new rights given by the Directive. So far it has not been contacted by any individuals who complained of discrimination or harassment at the workplace, probably because much more needs to be done in bringing these new rights to the attention of the local gay and lesbian community. Its role in assisting victims will for some time be limited to providing information and perhaps supporting complaints at the Industrial Tribunal, given the limited resources it has and the difficulty of obtaining funding for these purposes.

In the context of sexual orientation, the desire felt by many gay men, lesbians and bisexuals to be discrete with regard to their sexual orientation and to keep it concealed from their colleagues presents a number of challenges: First of all, such individuals would be reluctant to bring forward complaints and engage in litigation for fear of their sexual orientation becoming widely known. Even those who may not feel the need to hide their sexual orientation may refuse to bring forward a case due to concerns about the possible costs involved as well as a widespread distrust of the local judicial system when it comes to enforcing their rights. Thus at this early stage it is impossible to point out whether the legislation is achieving the desired results.

Of its nature, anti-discrimination legislation on its own will not be effective unless backed up by certain mechanisms that complement it. Any efficient package of anti-discrimination measures in this area must therefore reconcile both the need of some gay men and lesbians to keep their sexual orientation private, as well as safeguard the rights of those who choose to live their lives openly as such.

Various measures may be adopted in order to achieve this goal. First of all, organisations having a legitimate interest in ensuring that the principle of equal treatment is complied with may be granted the right to bring cases in their own name and not merely on behalf of or in support of an aggrieved individual. The Directive, in providing for the latter option, is already an indication of the growing trend in this respect.

Secondly, an emphasis on self-implementation also has certain benefits. By this I mean that employers should begin to introduce diversity policies aimed at building a culture of tolerance, respect and equality within their workplaces. These policies are becoming increasingly popular with employers abroad and are seen in the context of the growing importance of Corporate Social Responsibility. Diversity policies would provide for mechanisms through which gay men, lesbians or bisexuals who feel discriminated against can complain directly to their employers, who will then proceed to investigate the complaint in a confidential manner, especially if so requested by the employee. If the employee refuses to make a formal complaint for fear of their sexual orientation becoming exposed, the employer might then choose to stress once again within his workforce the need for discrimination or harassment not to occur at the workplace.

The business case for providing such mechanisms has already been proven[11] - employers who adopt an inclusive approach in recruiting employees widen their recruitment base and attract a wider range of applicants. The image of the employer is also as a consequence enhanced in the eyes of employees and clients. The resultant benefits would be reduced staff turnover, with the ancillary reduction in costs relating to recruitment and training and a reduction in absenteeism and sick leave taken due to stress. It also would have a positive impact on the morale and productivity of the workers and their sense of loyalty to the organisation. Finally, with the new Regulations, discriminatory practices may result in considerable costs in terms of litigation and liability in damages, and therefore a preventive approach would certainly be preferable. Even if employers are successful in litigation, their reputation may suffer harm within the LGB community. This is specifically why diversity policies are also an effective marketing tool - studies carried out abroad, and there is no reason to believe that this should not also be the case locally, show that a company's reputation is enhanced within minorities when the company actively applies a diversity policy. Abroad, it is not uncommon for companies to actively court the 'pink pound' by advertising in the gay press; research abroad suggests that gay men and lesbians frequently fall within higher income brackets.

Employers may thus choose to mention expressly, when advertising vacant posts, that they are equal opportunities employers and that everyone is welcome to apply irrespective of any personal characteristics such as, for example, sexual orientation. Mentioning sexual orientation explicitly is particularly important given that many LGB individuals still assume that equal opportunity policies are restricted to gender and disability, at least locally. The language used is always an important factor - politically incorrect language has the effect of discouraging prospective applicants. Recruiters should avoid certain stereotypical assumptions such as for example, that LGB individuals are not suitable for certain kinds of jobs, such as those involving contact with children[12].

Thirdly, there is a strong case for setting up an anti-discrimination body that could carry out various functions, such as assisting victims of discrimination, mediating, carrying out research and awareness campaigns and producing codes of conduct and best practice guides. With regard to this last function, there is considerable potential for co-operation between the said body and employers. Research should be both quantitative and qualitative, since quantitative data in the field of sexual orientation is difficult to obtain, due to the majority of gay men and lesbians not declaring their sexual orientation for fear of adverse treatment.

As for the structure that such a body would take, the MGRM is of the opinion that a single framework to tackle all the different grounds of discrimination would be the best option, provided that however, individual assessments of the different issues that arise in the context of each different ground of discrimination are made. Such an approach would ensure that specific grounds of discrimination and the particular issues that arise in their context are not ignored. It also would ensure that as far as possible a consistent approach is

[11] A survey carried out by the European Commission in four different European countries found that diversity policies have both short-term and long-term benefits. For more information see:
http://www.stop-discrimination.info/fileadmin/pdfs/031112_PMCostBenefitLaunch_en_SP.pdf

[12] For more information on such policies, and how employers can co-operate with LGB organisations in implementing equal opportunities legislation, see:
www.stonewall.org.uk/stonewall/diversity_champions/?CFID=762426&CFTOKEN=20666721

adopted in the filed of equal opportunities and that in the case of victims of multiple discrimination, an individual will be able to go to one and the same body. In the local context, so far there are only commissions for the promotion of equality irrespective of disability or gender, but at least a further body to tackle racial discrimination will have to be set up due to Malta's obligations under the Race Directive[13], so it makes sense to amalgamate all these different bodies into one and extend their mandate to cover other grounds, such as sexual orientation.

The Northern Ireland Equality Commission may be taken as a model in this regard. One of its most important functions is to monitor the compliance of designated public bodies with their obligation under article 75 of the Northern Ireland Act (1998) to promote equality of opportunity between persons irrespective of, *inter alia*, sexual orientation. Such mainstreaming obligations, while common, are notorious for remaining unenforced. Under the Northern Ireland Act however, each public authority is required to produce an equality scheme, stating how it plans to carry out this obligation. This is submitted to the Equality Commission for approval, is screened for potential 'adverse impact' and has to be reviewed every five years. Each authority must then carry out equality impact assessments to measure the effectiveness of its scheme. All throughout it is obliged to consult with the relevant actors in the field and has to reply to each submission. The Equality Commission also investigates complaints, gives guidelines and identifies examples of best practice[14]. Such a mainstreaming obligation is also being taken up at the European level, as shown by Article III-118 of the Constitutional Treaty. It therefore makes sense to start considering introducing such mainstreaming obligations on the ground of sexual orientation also in the locally.

Beyond these measures, awareness-raising campaigns are of fundamental importance, especially in the context of sexual orientation where there is a risk of invisibility. Such invisibility causes some to believe that the perceived small number of homosexuals does not warrant considerable efforts in promoting their inclusion. This is also why the local gay movement has followed in the steps of other gay organisations abroad that place an emphasis on an active presence of its members on the media. Such an approach fights common misconceptions and stereotypes about gay men and lesbians and also the idea that one's sexual orientation is something that one should be ashamed of. Media presence is also useful in educating both the general public and the gay and lesbian community itself.

All of these efforts should contribute towards moving from a negative approach of prohibiting discrimination to a more positive and proactive one through which all actors in the field strive to achieve a society where there is real equality of opportunity. In the context of sexual orientation discrimination much more still needs to be done, and despite the Directive and its ban on indirect discrimination, various practices that indirectly discriminate against gay men and lesbians will still be allowed to go on through the exception made by the Directive for benefits dependant on marital status[15]. Most cases of indirect discrimination in fact involve the denial of employment benefits to the partners of gay or lesbian employees, through the restriction of benefits to married couples. While

[13] Council Directive 2000/43/EC
[14] www.equalityni.org
[15] Recital 22

heterosexual couples can freely get married however, the same cannot be said of same-sex couples. If we are serious about achieving real equality we have to make sure that everyone is treated with dignity and that their private and family lives are equally respected. The fact that gay and lesbian people are barred from marriage results in the impossibility of them ever availing themselves of marriage-only benefits. Apart from certain economic and fiscal advantages, one should also here consider leave entitlement for urgent family reasons which, if not in consideration of anything else, should not be denied to gay and lesbian employees and their partners for humane reasons. Equality does not admit of degrees - one is either equal in all respects or they are not equal at all, and thus gay and lesbian partnerships should eventually start to be treated on an equal footing, which does not necessarily require the opening up of marriage for same-sex couples; evidence of long-term cohabitation could suffice in this respect.

Other areas where a culture of equality might be furthered are in our press law and in our criminal law. We already have laws in place that prohibit the incitement of hatred towards racial minorities[16], and in other European countries these laws are being extended to cover incitement to hatred towards other minorities, including sexual minorities. Other possible measures might include aggravations for violent crimes when these are committed due to the victim's sexual orientation. Such crimes have the effect of not merely harming the direct victim but of causing apprehension within a whole community or minority. In our Broadcasting Act and our Press Act we also have provisions on incitement to hatred on various grounds and obligations to ensure that advertising material is not discriminatory[17]. These should be extended to cover sexual orientation.

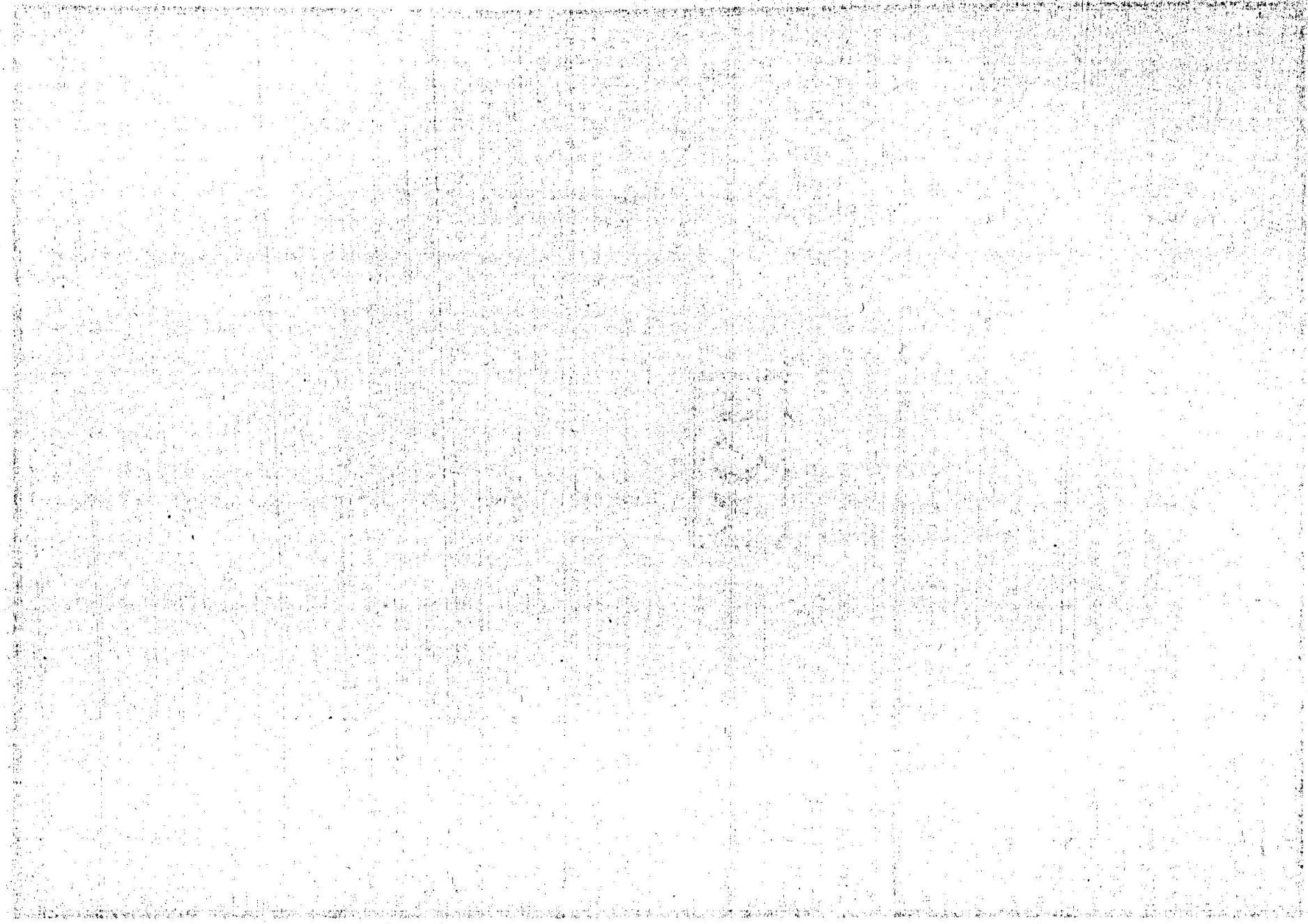
One way in which the anti-discrimination legislation of our country may be built upon is by extending its material scope to cover also discrimination in other areas such as access to goods and services, housing and education. The current 'hierarchy of discrimination' present in the law, with gender and disability discrimination being given more importance, gives the wrong impression in that some categories of persons might be deemed as being more (or less) equal than others. Even at the European level, gender and racial discrimination are, or will soon be, more thoroughly regulated than discrimination on the other article 13 grounds[18]. However, in the context of sexual orientation discrimination, positive action measures beyond campaigns of targeted recruitment, where the employer advertises vacancies in mediums where they are more likely to be seen by gay men, lesbians and bisexuals, are hard to envisage, nor can any clear benefit be identified in them.

[16] Article 82A of the Criminal Code

[17] Article 6 of the Press Act and the Third Schedule to the Broadcasting Act

[18] Directive 2000/43/EC bans racial discrimination in areas beyond employment. In the context of gender discrimination, as soon as Directive 2004/113/EC comes into force discrimination in access to goods and services will be banned.

AGE



AGE DISCRIMINATION - SOME CURRENT ISSUES

MATTHEW BRINCAT

In the pages that follow, I focus on some of the current practical problems that we could face in our every day practice in relation to age discrimination in connection with employment. I have tried to focus as much as possible on the legal structure or the possible application of the law.

The Provisions and their Implementation in Malta

Prior to May 2004, when Malta became a member of the European Union, the Maltese government began the process by means of which the provisions of various directives, including Council Directive 2000/78[1] which states in paragraph 25 of its preamble that

"the prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce."

The Preamble then continues: "However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited."

Article 1 of the Directive then goes on to clearly state that the purpose of the directive is to lay down a general framework for combatting discrimination on a number of grounds including that af age.

As a result of the implementation exercise, the prohibition of discrimination on the basis of age was therefore indirectly introduced in the definition of 'discrimination' and in the general anti-discrimination provisions found in the Employment and Industrial Relations Act of 2002[2]. These general provisions were then complemented by Article 1(3) and 5 of

[1] Adopted under Article 13 of the Treaty establishing the European Community
[2] Chapter 452 of the Laws of Malta

the Equal Treatment in Employment Regulations of 2004[3] which deal specifically with age disrimination.

Evidently, employers and employees will be quite curious if not eager to understand the scope and purport of these provisions. Although not much publicity has been given to these provisions, their far-reaching scope and the uncertaintainty surrounding their implementation makes these provisions worth noting.

Both the Directive and the Maltese Regulations were in fact drafted in an attempt to curb both direct and indirect discrimination on the grounds of age. Direct discrimination occurs when an adverse decision is made on the basis of a person's age or percieved age. Indirect discrimination happens when a policy or practice applies to everyone but causes disadvantage to a certain group (such as younger or older people) unless there are good reasons for that policy or practice.

A first reading of the principle of non-discrimination therefore begs a number of questions; can an employer decide to advertise for a post quoting an age requirement? What about an age limit? Can an employer provide certain employment benefits which are gained by the employee upon reaching a certain age? Indeed, are the provisions of the Social Security Act on pensionable age illegal in terms of European Law?

The European legislator attempted to answer some of these questions by means of Article 6 of the European Directive entitled 'Justification of differences of treatment on grounds of age'. Article 5 of the Equal Treatment in Employment Regulations is in fact a replica of the provisions of Article 6(1) of the Directive which states,

"differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, 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."

[3] LN 461 of 2004

The above provisions are of course vague and potentially far-reaching. A first reading of the provisions leaves employers, employees and lawyers thinking that employers could do all they like and that these provisions will not really curb their every day practices.

Government is safeguarded further as Paragraphs 13 and 14 of the recitals of the Directive clearly state that the Directive "does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment." And that the Directive "shall be without prejudice to national provisions laying down retirement ages". Moreover, occupational pension scheme provisions are also excluded by means of Article 6(2) of the Directive as long as they are not discriminatory on the basis of sex.

There is however, in this regard, a problem of implementation. Our legislator has decided to replicate the provisions of the Directive which seem to be directed at the Member State and not at the private employer. The wording of Article 6(1) of the Directive is such that it is directed at Member States (including of course Malta) which should "within the context of national law", legislate according to the principles. *It is submitted that simply copying the provisions of the directive and directing the provisions of the Directive to the private employer within the context of the Equal Treatment in Employment Regulations without expanding on, or indeed implementing, these principles is a far too "easy" a way of drafting local legislation.* Such drafting in fact, will undoubtedly lead the way to incorrect interpretations and long-winded debates which could have easily been solved by legislating in a more detailed manner.

Age Discrimination and Dismissal

The practical problems that can crop up and the kind of cases with which the Industrial Tribunal may be faced with regard to age discrimination can be various. The problems will be most evident in the area of dismissal. Will the redundancy criterion of 'last in - first out' which has been present in our law for a number of years be declared illegal because it is potentially discriminatory against younger workers who are less likely to have built up a significant length of service? Perhaps Malta will have to get used to a system which is less protectionist and which is based on numerous, less discriminatory, criteria such as skills, experience and performance.

What about the proviso to Section 36(14) of the Employment and Industrial Relations Act which states that "...an employer can terminate the employment of an employee when the employee reaches retirement age as defined in the Social Security Act."

The provision refers to the national social security system which per se is exempted, but are private employers or indeed the government as an emlpoyer exempted from discriminating against a person by dismissing that person because he or she has reached retirement age? Indeed, the EU Employment Policy over the last few years has invited Member States and

the social partners to develop a policy in order to permit employers to keep older workers rather than legislate in order to make it legitamate to dismiss older workers.[4]

Age Discrimination and Recruitment

Another aspect which will be of vital importance is the recruitment stage of employment. This area will be the most difficult. Can we imagine what would happen if Maltese employers keep using terms such as 'young', 'energetic', 'dynamic', 'mature', 'graduated in the last seven years' or 'a minimum of ten years' experience in their advertisments? Employers will of course argue that these terms are more than legitimate but it will be interesting to see how our courts will interpret these advertisments in the light of EU developments. Interestingly, the European Courts have tended to think twice before declaring that a selection procedure which included an age limit was in fact discriminatory.[5]

Conclusion

The above problems are only but a few of the questions that will begin to cross our minds as the legislation begins to be tested. Unfortunately, the government has implemented this and other legislation without a proper explanation of the intended coverage or scope of these provisions so at the moment we can only look out for decisions of the European Court of Justice for guidance.

[4] On this point, vide written question E-3022/02 by Joke Swiebel (PSE) to the Commission - *Official Journal 110 E , 08/05/2003 P. 0152 - 0153*

[5] Vide Case T-256/01 Norman Pyres v Commission of the EC (15th February 2005)

OVERVIEW OF AGE DISCRIMINATION AND RELATED MATTERS IN MALTA AND THE EU

CARMEL MALLIA
(NATIONAL COUNCIL FOR THE ELDERLY)

1. Comments by Age on the Green Paper

As NGOs, the National Association of Pensioners (N.A.P.) and the National Council for the Elderly are members of AGE - The European Older People's Platform in Brussels. Mr. Lino Mizzi and myself are representatives of the above NGOs and attend meetings in Brussels when possible. In the circumstances I feel that it is appropriate to refer readers to a document drafted by AGE - in close cooperation with the AGE Anti-Discrimination Expert Group to respond to the Green Paper of the European Commission which deals with "Equality and non-discrimination in an enlarged European Union".[1]

2. Policies for Older People

Between the 11th - 13th September 2002, Ministers from Europe, North America, Australia and New Zealand met in Berlin. On the initiative of the German Government, the U.N. Economic Commission for Europe met to discuss guidelines and strategies to implement policies for older people.

The implementation strategy consisted of several commitments which covered:

(a) Economic Aspects of Ageing and the participation of older people in Society;

(b) The fight against exclusion and Ageism;

(c) For a healthy ageing.

The commitments were:

[1] AGE Response to the European Commission's Green Paper, "Equality and non-discrimination in an enlarged European Union" (AGE response to Green Paper FINAL_040831).

a. To mainstream ageing in all policy fields with the aim of bringing societies and economies into harmony with demographic change to achieve a society of all ages;

b. To ensure full integration and participation of older persons in society;

c. To promote equitable and sustainable economic growth in response to population ageing;

d. To adjust social protection systems in response to demographic changes and their social and economic consequences;

e. To enable labour markets to respond to the economic and social consequences of population ageing;

f. To promote life-long learning and adapt the educational system in order to meet the changing economic, social and demographic conditions;

g. To strive to ensure quality of life at all ages and maintain independent living including health and well-being;

h. To mainstream a gender approach in an ageing society;

i. To support families that provide care for older persons and promote inter-generational solidarity among their members.

As regards commitment '(d)' the UN Economic Commission for Europe States committed themselves to promote active labour market policies. Stopping age discrimination in recruitment and employment as priority measures, as well as accommodating employment needs of older people with the aim of raising their participation rates. (Examples - improvements of opportunities for part-time or temporary employment for that age group. Incentive to recruit older workers).

Measures to keep older persons in the labour market such as flexible and gradual retirement formulas, or guaranteeing real access to life-long learning activities are very much encouraged. Early Retirement Schemes go against this Principle.

Throughout the text, the strategy gives a strong focus to the fight against discrimination against older persons, in access to health, employment and participation in society. It also gives a strong focus to multiple discrimination, linking age to the gender perspective or to race and ethnicity of the person.

It is disappointing, however, that the strategy lacks precise commitments on implementation and monitoring of the objectives, including how civil society is to be involved, and one may well doubt the political will of governments to follow up its contents.

3. Politics and Ageing

The Political response to ageing is not yet complete or consistent across Europe. At E.U. level, discussions and debates were carried out in the 1999 Communication, "Toward a Europe for all Ages" released to coincide with the International Year of Older Persons.

Four key areas of policy for action across the European Union were identified. As an EU Member State, Malta should follow and take concrete measures according to the needs of our elderly people on:

(i) *Employment* - To reverse the decline in economic participation amongst the older population to ensure that the productive potential of the population is fully mobilized (e.g. Increase the employment rate of workers over 50 years of age. Abolish early Retirement Schemes).

(ii) *Social Protection* - To ensure that the pensions and retirement benefits system are adequate and sustainable. It is not the appropriate time to discuss this issue at this stage as discussion on the Reform of Pensions is still taking place. However, the total absence of a reference to a reform of the Members of Parliament Pension Act and of the Pensions Ordinance is deplorable. It has to be pointed out that Service Pensions awarded to members of Parliament are revised annually according to the current salary of the post occupied. This is the case where only parliamentarians enjoy an uncapped pension. All other pensioners do not enjoy this privilege. In fact under the Pensions Ordinance the pension is computed on the salary earned on retirement and no revisions are carried out thereafter. Pensions that fall under Social Security Act are capped up to Lm 6750 plus cost of living (2/3).

(iii) *Health* - To promote healthy ageing and reduce morbidity to ensure that later life is active and fulfilling and that costs to the health care system are minimised and affordable. Discrimination against older people in health and care services must be addressed.

(iv) *Anti-Discrimination and Inclusion* - To ensure that people of all ages are treated equally as citizens and that their voices are heard and aspirations are met. In the area of discrimination progress was registered through both legislative action and the development of an action programme. The Framework Directive on equal treatment in employment and occupation and the Directive against racial and ethnic discrimination were transposed into national Law by 2nd December 2003 and 19th July 2003 respectively. As regards age and disability member states requested an extension up to December 2006. It has to be pointed out that the member states' approaches to age discrimination so far vary widely. Some governments argue that combating age discrimination could be culturally and legally difficult. It is clear that in some cases these arguments reflect lack of political will. *Sadly enough, member states can use Article 6 of the Directive to identify a range of exemptions which will limit protection for older people.*

4. Social Security

The White Paper on Pensions Reform[2] is considered as an exercise to "ensure adequate and sustainable pensions to existing pensioners as well as future beneficiaries. This means that on retirement a person is entitled to receive a pension that "guarantees a decent standard of living". At this early stage it has to be stated that our Pension Scheme was quite good and the problem of unsustainability emerged due to certain anomalies and loopholes of abuse brought about by various administrations (political decisions). It appears, though undeclared, that the current practice of the annual Re-assessment of pensions on current salaries paid is being abolished. Pensioners may get the full Price Retail Index increase. The freezing of the Maximum Pensionable Income at Lm 6750 as declared in the white paper is also a handicap for existing and future pensioners.

4.1 Unsustainability of Pensions

Major factors contributing to the unsustainability of the Two Thirds Pension Scheme are:

a) The discretion given to the Director to take action against defaulters from paying Social Security Contribution;

b) The proper interpretation of the average of two averages provisions of pension would have eliminated the award of full rate of pension to those with 11 years of unpaid contribution;

c) The 30 years qualifying period for full rate of pension;

d) The vote-catching amendments to the Social Security Act by the two political parties;

e) The ultra generous pension benefits approved by organizations administered by Government-appointed Boards of Directors;

f) The award of Invalidity Pension to young and healthy persons. There are more than 8,000 receiving this pension.

4.2 Proposals for Adequate and Sustainable Pensions

The European policy coordination according to the Open Method of co-ordination of Pensions covers five key areas namely:

a) To ensure that older people have a right to a decent level of pensions, and not just the prevention of outright poverty;

b) To guarantee that the first pillar pensions are indexed so as to ensure that pensioners keep up with the advances in society's prosperity;

[2] www.pensions.gov.mt

c) To ensure that individuals are able to obtain a high income replacement rate on retirement;

d) To give equal rights to women, eliminate gender discrimination in the pension system and labour market;

e) To allow and encourage older people to continue working for longer, outlaw age discrimination and promote life-long learning.

4.3. Second Pillar Pension

It has to be said straight away that in principle this pension will help to ensure a decent standard of living on retirement. However, persons with an income to Lm 6,000 per year cannot afford to participate in this scheme due to financial constraints. Moreover this scheme may be rejected by the social partners due to economic problems. There is also a flaw in the scheme because it failed to bring forward a "new idea" where it should have promoted three separate requirements, that is, pensions, welfare and health. In fact, in Europe as well as locally the real financial problem is in the health sector. As people are living longer, the cost of benefits in this sector is increasing disproportionately with every additional year of life.

5. The Role of NGOs

As regards the issues and rights of the elderly, the National Association of Pensioners as well as the National Council for the Elderly - (both NGOs) as members of AGE are kept informed about legislation and proceedings that emanate from Brussels. Our involvement now is not only on Social Protection and Social Inclusion but also taking part to combat Age Discrimination in all areas. *The Government should with immediate effect involve NGOs more, allowing them to play a leading role and participate in today's changes.* From words we should pass to action and enforcement through proper legislation and funding. NGOs need funds to operate and to train their members. They should have the know-how to raise public awareness on discrimination issues. *When and where it is possible they should have the power to defend the rights of victims of discrimination both in Courts and other tribunals.* NGOs task and duty is to improve the image of older people in an ageing society, to address their needs under the Social Protection Umbrella and above all to stop discrimination on the grounds of age.

6. Conclusion

As a final tribute to the elderly in society I wish to conclude this contribution towards the Civil Society Project with a quote by Kofi Annan, Secretary General of the United Nations while speaking to the 2nd U.N. World Assembly on Ageing on the 8th April 2002. He said:

"We need to recognize that, as more people are better education, live longer, and stay healthy longer, older persons can and do make greater contributions to society than ever before. By promoting their active participation in society and development, we can ensure that their invaluable gifts and experience are put to good use. Older persons who can work,

and want to, should have the opportunity to do so; and all people should have the opportunity to continue learning throughout life.

By creating support networks and enabling environments, we can engage the wider community in strengthening solidarity between generations, and in combating abuse, violence, disrespect and discrimination against older people".

YOUNG PEOPLE AND WORKPLACE DISCRIMINATION

JEAN-PAUL DE LUCCA

Introduction: Who is the (Potential) Young Worker?

One is likely to encounter a slight variation in the definition of a 'young person' from one country to another. The National Youth Policy of Malta defines a young person as someone aged between 14 and 30.[1] The policy document was drafted by a team of researchers and youth-workers[2] together with representatives of the National Youth Council, as the officially recognised representative body of young people, following consultation with various youth organisations. The document states that in the field of employment, the State should follow a policy that, inter alia:-

[8.2] safeguards young people from the threats of exploitation, such as employment below the legally-consented age, wages and benefits which do not ensure a decent standard of living, harassment, and disregard for the Health and Safety Act;

[8.6] ensures that employers do not discriminate in any manner in their methods of recruitment and job advancement.

Within the broad definition of 'young people', one can identify three distinct sub-categories which correspond to the 14-16, 16-18 and 18+ age brackets respectively. For the purposes of employment, Maltese law defines a 'young person' as any person who is under eighteen years of age[3] and within this definition it distinguishes between a 'child', who is a person under sixteen years of age or the age established as the school leaving age by virtue of the Education Act, and an 'adolescent', defined as a person who is between sixteen and eighteen years of age.[4] The Young Persons (Employment) Regulations lay down the conditions under which young people under the age of eighteen can be employed with the view of regulating such work and ensuring that employers guarantee that young people have working conditions that suit their age and that they are protected against economic

[1] The National Youth Policy of Malta (NYP). *Youth Information Handbook* (Ministry of Youth and the Arts: 2004).
[2] The term "youth-workers" should not be confused with young workers. In Malta, a youth-worker is generally a person who has followed a course of studies within the Youth and Community Studies Programme at the University of Malta and who is professionally engaged in work with young people.
[3] Legal Notice (L.N.) 440 of 2003. Young Persons (Employment) Regulations, 2(1).
[4] These definitions are in line with the EU directive (94/33/EC) on the protection of young people at work.

exploitation and against any work which is likely to harm their safety, health or physical, mental, moral or social development or to jeopardise their education.[5]

Even though the Employment and Industrial Relations Act does not apply the term 'young people' to those between the age of eighteen and thirty, one should take into consideration the definition of a young person according to the National Youth Policy and the specific reference it makes to the safeguarding of all young people against discriminatory measures. Notwithstanding the difference between the use of the term in the law and the definition of a young person in the National Youth Policy, this paper seeks to highlight some issues related to workplace discrimination against young people in general. There is not much to discuss with regard to discrimination against young people under eighteen insofar as both Maltese and European law safeguard them against exploitation and overtly discriminatory practices. It is indeed far more problematic to delineate and exemplify instances of discrimination against young workers who, according to our laws, do not fall within the category of 'young people' but who are subjected to discriminatory acts primarily because of their age. A substantial part of this discussion, therefore, concerns discrimination on the grounds of age. Moreover, at times, some young people suffer double discrimination when they are discriminated against not only on the basis of their age but also because of their gender, disability, ethnicity or other causes. There are instances where young women and young disabled persons are defended against acts of discrimination not because they are young but because they are women or disabled. One must therefore try to articulate what is meant by age discrimination and what challenges this presents to lawmakers, policy and decision-makers as well as young people themselves, the organisations that represent them and/or work with them, and civil society as a whole.

Before moving on to discuss why young people can be at a disadvantage because of their age, and therefore be subject to unjustified discrimination, let us have a quick (and limited) look at the wider picture of recent developments in EU policy and legislation which are relevant to the subject under discussion.

Framing Anti-Discrimination Within the Wider Context of European Policy

It is worth noting that Malta's National Youth Policy calls upon the State to ensure that young people are not discriminated against because of their age. Malta's Youth Policy shares many characteristics with similar policies around the world and with the European Commission's White Paper entitled "A New Impetus for European Youth" (2001). When dealing with discrimination against young people, youth policies, due to their very nature, tend to highlight forms of discrimination against specific categories of disadvantaged young people (e.g. young females, disabled, homosexuals and members of ethnic minorities) and propose positive action to remedy the vulnerability of these groups. Indeed, the Commission's White Paper clearly shows that in the consultations that led to its publication, young people themselves demanded that the anti-discrimination clause in the Amsterdam Treaty (Article 13) be applied rigorously and that European institutions take the necessary measures to fight discrimination based on sex, racial or ethnic origin, religion or belief,

[5] ibid., 1(2)(d)

disability, age or sexual orientation. The White Paper calls for action plans aimed at mobilising people so as to change practices and attitudes.[6]

This emphasis on discrimination against certain categories of young people, which is all too good, should in no way overshadow the fact that all young people can be victims of discrimination because of their age. The implications of such discrimination would go against the wide-ranging objectives of the European Union, especially social cohesion. Both the Maltese Youth Policy and the Commission's White Paper promote a cross-sectoral youth policy which takes into account the needs of young people in other areas, including employment. Both documents conclude that employment is a means for the better integration of young people and views work as a prerequisite for social inclusion. It is clear, therefore, that discrimination against young people at their workplace is detrimental to their social integration and to their general well-being based on autonomy, justice and non-discrimination, which is another point the White Paper seeks to highlight. The White Paper also tries to frame the needs and expectations of young people within the wider framework of the objectives of the Lisbon Strategy. In its communication to the Spring European Council 2005 regarding the Lisbon Strategy, the European Commission called for urgent action because, it said, "we still need a vision for society which can integrate both the ageing and the young".[7] During the same European Council held in March 2005, member states adopted the proposal put forward by France, Germany, Spain and Sweden in October 2005, which suggested that a European Youth Pact should be drawn up and included in the context of the Lisbon Strategy. The proposal calls for action in various policy areas to ensure that young people are given the tools to succeed, since this success is pivotal for the economic growth resulting in Europe becoming the leading knowledge-based economy. The European Youth Pact gives special attention to youth unemployment and social and professional integration. In the light of these special considerations, the safeguarding of young people against discrimination on the basis of age in job selection and progression acquires even greater significance.

The Lisbon Strategy itself, together with the development of other strategies and action programmes (e.g. the EU's Social Agenda and the programme for social inclusion) were boosted by the introduction into the Treaties (and later into the draft European Constitution) of titles on employment and social issues. This inevitably led to increased Community action in the field of employment and social inclusion.

The EU Council Directive 2000/78/EC aimed at creating a general framework for equal treatment in employment & vocational training and guidance. It was specifically designed as an instrument to combat discrimination at workplaces on grounds of age, sexual orientation, disability and religion or belief. The framework outlined in the directive tries to guarantee minimum standards for fighting discrimination in all member states. The preamble shows how important this measure is for the attainment of "a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons"[8] in line

[6] White Paper on European Youth, 53.
[7] Communication to the Spring European Council "Working together for growth and jobs. A new start for the Lisbon Strategy" (2005), 5.
[8] Directive 2000/78/EC.

with the objectives of the EC Treaty. The Directive encouraged governments to introduce anti-discrimination legislation and policy in two phases. 2003 was set as the deadline for enacting legislation against discrimination based on sexual orientation and religion. Since age discrimination was seen as a more complex issue, the Directive set 2006 as the deadline for the enactment of anti-discrimination laws and policies with the view of implementing the directive's provisions on age.

Besides the Employment Directive and other directives aimed at outlawing discrimination, the European Union established an action programme with the precise aim of dealing with discrimination over the period 2001-2006. This action programme is designed to provide financial support for activities intended to fight discrimination on the grounds mentioned in the Directive, which include age discrimination.

Focusing on Age Discrimination

The complexity of the question of age discrimination, which, as we have seen, is felt to such an extent as to lead to the prescription of a longer period for the implementation of the age provision in the Employment Directive, contrasts with the simple answer to the question "why are young people at a disadvantage?" The answer, which I hope is simple but not simplistic, is that young people can be at a disadvantage because of the very fact that they are young. One should not mistake this ex definitione answer for lack of potential or ability, since that would risk sounding unnecessarily patronising; a characteristic which does very little to ensure that young people exploit their potential and develop their capabilities to the full and to make sure that they are not discriminated against. The implication of the above statement is that notwithstanding the widely held views (whether real or perceived) that young people have many opportunities in front of them and that modern social and educational systems offer, at least in general, adequate means for the realisation of young people's potential, young age can still put people at a disadvantage in particular situations, such as employment. The reality of this disadvantage and the possibility of its negative effects are evidenced in the very fact that age is generally included as a form of discrimination.

My earlier remark that discrimination against young people tends to be sidelined when compared to more publicised, and perhaps more common, forms of discrimination such as those against women and disabled people also applies in the specific case of age discrimination. Age discrimination, especially in employment, is often seen as an issue for older people. There remains a general perception that discrimination on the basis of age happens only in the case of older people who are closer to retirement. This narrow perception and bias is usually reflected in policies. One can generally observe that in the field of employment the main issue regarding young people is unemployment, which is indeed a pressing problem for young people in Malta and across Europe.[9] However, everyday experience also shows that age counts against young people seeking jobs or promotion or the way they are treated at work. Age discrimination at the younger end, which refers to unfair treatment because one is too young, not only contributes to the problem of unemployment but clearly emerges as a separate problem altogether.

[9] It is statistically proven that the recurrent trend in unemployment figures sees the highest levels of unemployment in the 16-25 age bracket. The second highest rate of unemployment is registered in the 25-34 age bracket.

One of the reasons why age discrimination is not as forcefully advocated as discrimination on the grounds of gender or disability may well be the fact that while the latter forms of discrimination are always unacceptable, there are instances where discrimination on the grounds of age is justifiable. This is confirmed in Article 6(1)(a) of Directive 2000/78/EC, where it is recognises that differences of treatment based on age can sometimes be justified, and where Member States are allowed to make provisions for differences of treatment on grounds of age which "shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary." Such instances, therefore, are to be applied in exceptional circumstances and only if they are proved to be justifiable. The rule remains, as the Directive asserts, that any direct or indirect discrimination based on age should be prohibited. The Directive, in fact, clearly states that "the prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce." It is therefore important to distinguish between differences in treatment which are justified, and discrimination, which is never justifiable and should always be prohibited. This prohibition is based on the ethical principle that an employer cannot treat employees in an improper manner. Age discrimination can be seen as unethical and, therefore, as being in conflict with this principle.

Age Discrimination in Malta

In Malta, two key legal instruments do not make any explicit reference to age discrimination in their provisions on discrimination. Article 45 of the Constitution of Malta defines 'discriminatory' 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."[10]

Likewise, under the Employment and Industrial Relations Act[11], 'discriminatory treatment' means "any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association".[12]

The picture that emerges shows that there are a number of laws which set out at what age one can do something and which protect younger people (under 18) and their rights. The regulations mentioned in the introductions set a minimum age for entry into employment and impose restrictions on the kind of work people under the age of eighteen can perform. These uncontroversial measures are actually a justified form of different treatment on the

[10] Article 45(3)
[11] Cap. 452 of the Laws of Malta
[12] Article 2(2)

grounds of age. Discrimination on such grounds, on the other hand, is in violation of the universally-recognised right to work.

Even though there are no laws which protect young people from discrimination because of their age, there might be other provisions that can be applied to prevent age discrimination in certain sectors, including employment. For example, there is a widely upheld principle that a person should be appointed to any given post on the grounds of objective criteria, such as competence and merit. Age is normally not considered to be an objective criterion and it should not determine a person's chances of employment. However, it is indeed a shortcoming that in the Constitution and in the Employment and Industrial Relations Act, Maltese law falls short of including age in its definitions of the expressions 'discriminatory' and 'discriminatory treatment'.

Possible Instances of Workplace Discrimination

Advertising

It is unlawful, under Article 26 of the Employment and Industrial Relations Act, for an employer to advertise or offer employment or when advertising opportunities of work, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment. While the Equality for Men and Women Act[13] and Equal Opportunities (Persons with Disability) Act[14] rightly strengthen this provision in the case of discrimination on the grounds of sex and disability respectively, the fact that the Employment and Industrial Relations Act falls short of including age as a form of discriminatory treatment renders it difficult to determine if and when an employer advertising a post is acting discriminately against young job seekers.

One often comes across job advertisements carrying the phrase "experience required". Even though there are cases where it is justifiable to require experience as a precondition for employment, this justification has to be objective and necessary for the proper fulfilment of the post being advertised. The experience of many young people shows that it sometimes happens that experience is listed as a prerequisite simply because the employer is unwilling to offer training to prospective employees. In some other cases, the experience requirement is deliberately included because the employee would not want to employ a young person. Other young people report that during interviews, some employers dismiss their application simply on the grounds of their age. Such an approach is manifestly discriminatory unless the employer shows that the difference in treatment of young job seekers is based on objective criteria.

Moreover, just as it is good practice for employers not to require different qualifications from males and females, it should be equally standard practice that calls for applications are to be open to people of any age provided that they satisfy the required qualifications. A person should be assessed according to his/her personal capability and not on grounds of age, and it should not normally be assumed that young people cannot perform certain kinds of work because of their age.

[13] Chapter 456 of the Laws of Malta
[14] Chapter 413 of the Laws of Malta

Wages and Working Hours

There may be instances were a young person is paid so-called "junior-rates" for performing exactly the same work as an older employee at exactly the same level. This obviously excludes differences in pay scale on the basis of seniority, years of service and other conditions of employment which are usually included in collective agreements. "Junior-rates" can be seen as outright discriminatory and in direct conflict with the principle of equal pay for equal work, which is enshrined in the United Nations Universal Declaration of Human Rights[15] and in Maltese law and European directives. Article 27 of the Employment and Industrial Relation Act, for instance, states that "[E]mployees in the same class of employment are entitled to the same rate of remuneration for work of equal value."

Besides equal pay, young workers should enjoy the same working conditions and benefits as well as social security rights. Other practices and working conditions such as long and irregular hours for less pay are also problems young people tend to face. Legal Notice 440/2003 regulates to some extent the cumulative number of hours and time when young people under the age of sixteen and eighteen respectively can work. In more general terms, the Employment Act specifies the parameters for working hours in relation to employees over 18. Notwithstanding existing legislation, this kind of discrimination appears quite often, more notably in certain industries.

In the professional sector, too, it is quite common for employers to expect their younger employees to work longer hours without receiving over-time benefits. Young people often lack the self-confidence to speak to their employees regarding their legal rights (provided they are sufficiently aware of them in the first place) especially if their contract of employment provides for probationary period. .

Even if the aforementioned legal instruments protect the employment conditions of young people under the age of eighteen, one ought to address the disastrous working conditions of those who, for instance, work long hours on beaches in the scorching sun during the summer months and other types of seasonal employment. The total disregard of the sections relative to working hours in the abovementioned Young Persons (Employment) Regulations is sometimes rampant and damaging to the well-being of young employees. Experience shows that at times some of these young people do not mind working extra hours in order to earn some extra money. However, they should be made aware of the risks they are running and of the legal obligations of their employers.

Casual and Part-Time Employment

Young workers in casual employment often complain that they receive a lower rate of pay and that they are not entitled to certain or all employment benefits. Even though recent Maltese legislation sought to address abuses of casual employment, the trend of offering employment on a casual basis has persisted among certain employers (especially small enterprises). Casual employment is dangerous as it does not offer any job security, which may in turn lead to other forms of discrimination such as blackmailing. Furthermore, this

[15] Article 23(2)

kind of employment limits the freedom of the young employee to file a charge of discrimination or oppose discriminatory practices.

Discrimination of part-time workers can take various forms. Here again, the law states that part-time employees should normally expect to be granted the same rates and working conditions as full-time employees. One must also distinguish between people who wish to work on a part-time basis and others who work according to this arrangement in the absence of full-time opportunities or the willingness of the employer to create full-time posts. The problems faced by the latter category are often similar to those of casual employees.

Trial Work

Some employers offer jobs to young people subject to a trial or probationary period, during which the employer "tests" the young employee without compensation. While probationary periods are in some cases justifiable, expecting someone to work without giving him/her adequate compensation, for whichever period of time, is outrightly discriminatory. All work performed should be paid for. Although there are cases where employers eventually employ these people (after having received a few weeks of work for free) there are cases of blatant abuse where the employer does not employ the young person. This practice should be looked at closely and any malpractice should be curbed.

Bullying

Harassment on the grounds of age tends to be very widespread and can take the form of verbal abuse by insult, threats, intimidation, and unfair criticism. The offenders in this case can be older colleagues or, worse still, the employer/s or direct superior/s themselves. It is very hard for young people to speak up in such cases, many times because of the realistic fear of losing their job or being stopped from advancing in their careers. Bullying can also take the form of blaming young workers when things go wrong out of no fault of their own and when they are made to bear the brunt of their employer/s, direct superior/s or older co-workers. It is interesting to note that the first Irish decision on age-based harassment concerned a young female manager who was consistently ridiculed in front of other staff by an older (male) colleague as a "young, fooling girl".[16]

Traineeships and Apprenticeships

Traineeships can be a double-edged solution to the problems of unemployment and the lack of experience of young job seekers. On the one hand, they help young people gain the much needed and called-for experience and they are therefore highly desirable practices. Employers are often encouraged to offer such schemes, and rightly so. On the other hand, one has to ensure that such schemes are not used as a form of cheap labour. Training should be regulated and formalised within recognised frameworks, which include a proper agreement on the training content and on adequate supervision and remuneration for the work carried out. In most cases, problems do not arise when young trainees or apprentices

[16] Quoted in Madeleine Reid, "The prohibition of age discrimination in employment: issues arising in practice" Paper presented at the Academy of European Law Conference *"The Race and Framework Employment Directives"*, March 2003.

do their placements through agencies such as Employment and Training Corporation (ETC), but ad hoc arrangements risk increasing the possibilities of malpractice and abuse.

Health and Safety

Employers are obliged to guarantee the required standards of health and safety at the workplace. This issue can be addressed across all industries but especially in the manufacturing, construction and leisure industries. The abovementioned example of young people working long hours at the beach can be cited as a case were employers do not always guarantee adequate health and safety standards. Young people may not be sufficiently aware of the importance of Health and Safety regulations and many are not given the necessary instructions or, where required, protective gear.

Ignorance of the Law and Legal Rights

A common feature in cases of discrimination is that young employees do not know their legal rights and do not appreciate having legal rights. This is why they are sometimes coerced into working illegally (without a work permit) or without being granted certain rights such as sick leave, vacation leave and so on.

The need for proper education becomes paramount at this point. In addition to this, employers should be required to visibly and adequately advise all employees of their rights in an appropriate manner.

Conclusion: Fighting Discrimination and Promoting Equality in a Holistic Manner

Very often, the most pressing issues in relation to young people and employment revolve around the creation of jobs in order to lower the level of unemployment among young people. Positive action includes the adoption of specific measures to prevent or compensate for disadvantages young people suffer because of the fact that they are just entering the workforce. Curbing discriminatory practices should form part of any strategy aimed at ensuring the availability of more job opportunities for young people.

It should be recalled once more that young people who potentially suffer a double disadvantage (e.g. because they are women or disabled) are safeguarded against discrimination under other legal provisions and regulations. Basing itself on the principle of intergenerational solidarity and justice, this paper sought to point towards the need to raise the awareness of discrimination taking place against young people for the sole reason that they are young. The conclusions, which are meant to provide some food for thought and possibly a few proposals for concrete action following further discussion, can be divided into a number of categories. Each category calls for action in various spheres but any action will not achieve much unless there is an adequate level of interrelatedness and interdependency between the various areas. The aim, therefore, is to bring age discrimination (especially in the area of employment) to the forefront and seek to find solutions for redress against discrimination in a holistic manner. These areas can be delineated as follows:

Legislation

It seems that Maltese laws are not in full conformity with European Directives (even though direct effect is applied) when it comes to the inclusion of discrimination on the grounds of age in its provisions against discrimination. Domestic civil and labour laws in particular should explicitly prohibit age discrimination, while allowing different treatment as an exception in a defined number of cases when the distinction can be objectively justified.

Education

Education has a pivotal role in the fight against all forms of discrimination. Developing trends seem to highlight more than ever the need to facilitate the school-to-work transition in such a way as to better equip school-leavers to move into the working world. This transition requires preparation on a number of aspects, including the relation between curricula and employment requirements. Helping young people to become more aware of their rights and to get to know how to deal with cases of age discrimination should form an integral part of the educational system.

Youth Policy

Youth policies across Europe, including Malta's Youth Policy, should continue highlighting anti-discrimination against particularly vulnerable groups of young people. However, they should also place some emphasis on anti-discrimination of young people in general because of their age. By its very nature, then, the youth policy should ensure that such issues are taken up in other areas, such as education and employment. The youth policy should also serve as a means to 'youth-proof' policies in other sectors which have a direct or indirect impact on young people.

Civil Society

Young people and their associations, especially their representative organisations, form an integral part of civil society and should therefore mobilise the rest of civil society, which is usually at the forefront of the fight against any form of discrimination, to pay more attention to discrimination based on age. Youth organisations and other civil society organisations which have a constituted youth section should carry out advocacy work aimed at accentuating and addressing the problem of age discrimination, especially (though not exclusively) in the field of employment.

Trade Unions

Most trade unions across Europe seem to have embarked on membership campaigns targeted at young people. This is partly a response to the fact that young people in particular have little interest in joining a union (although they may well change their minds as they grow older). Such campaigns have registered varied levels of success but the fact that unions are seeking to recruit young people is indeed a positive thing. This should hopefully mean that issues relating to young workers, including age discrimination, will emerge more clearly in trade union agendas and that young people will have the backing of movements

which have traditionally been very powerful in fighting workplace discrimination on other grounds. The need is felt for greater sensitivity from trade unions' administrations, which should ideally include young people too.

Structures

The functioning of adequate structures to address age discrimination largely depends on the legal definition of discrimination and the inclusion of age in such definitions. Structures such as industrial tribunals, the ombudsman, and the law courts themselves would be in a better position to pass judgement on cases of age discrimination should this be explicitly provided for in the law. Moreover, what needs better legal definition also requires structures within an institutional set-up to deal with it. As has already been pointed out, other areas of discrimination such as gender and disability have already been taken up by means of legislation and institutions. The Equality between Men and Women Act provided for the setting up of the National Commission for the Promotion of Equality for Men and Women. Likewise, the Equal Opportunities (Persons with Disability Act) provided for the setting up of the National Commission Persons with Disability. In order to address discrimination based on age or any other grounds, one need not necessarily pass a new law or create a completely different structure. One might instead consider the extension of existing instruments and structures by including age and other forms of discrimination within their remit. Another possibility is that of including within the existing institutional framework, or creating as a separate entity, an equality office or commission with the authority to provide a more effective level of protection to people who are subject to discrimination on the grounds of age, sexual orientation, religion or belief and so on. Such entities should also be given the possibility to engage in proceedings either on behalf or in support of any victim of discrimination according to the prescribed procedure before adjudicating bodies, including administrative tribunals and the law courts. The law should provide for the setting up (or the extension) of an entity or authority that should actively promote equality of opportunity between persons of different ages.

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NGOs IN MALTA

VOLUNTARY ORGANISATIONS: VITAL CONTRIBUTORS

KAY GRETCHEN

Voluntary organisations' vital contributions are widely recognized. There are many forms of these organisations, which are accompanied by a plethora of acronyms that hinder clear discussion. Some of these organisations strive to benefit the public in some way. These organisations, frequently called NGOs, receive support and encouragement for their public service from governments and supra-national bodies. Indeed, EU institutions involve non-governmental organisations at all levels of policy-making and delivery. In contrast, the Government of Malta has made disappointing progress in developing a legal framework, appears not to value the voluntary sector's expertise and hinders voluntary organisations' access to valuable information due to its means of presentation and dissemination. In addition, it has designated a number of government bodies, primarily in the social sector, as "non-governmental organisations." Its purpose for doing so may be perfectly legitimate, but government-controlled non-governmental organisations competing with the independent ones would not be in the country's interest. Whereas a clear communication program and dialogue could stimulate the voluntary sector's capacity-building process, the combination of competition from the Government and its current relationship with the voluntary sector is likely to have the opposite effect. However, all stakeholders, including the voluntary organisations, need to nourish the heart of Maltese civil society by exercising patience and persistence, for sustainable health.

The voluntary sector is the heart of civil society. Regardless of size, form or purpose, voluntary organisations provide independent views of politics, culture, leisure and all activities of life in which humans engage. They also provide the important means for individuals to influence their own lives and the conditions of society at large. As Putnam has convincingly argued, societies with a history of forming associations have a stronger civic culture, the trust from which tends to result in more effective democratic institutions and healthier economies.[1] Recent trends in the voluntary sector have translated into a direct impact on economic health. The following extract from Douglas Rutzen's presentation to an NGO conference in Malta illustrates this: "non-profit organisations provide 4% of total

[1] Putnam, RD. 1993. *Making Democracy Work: Civic Traditions in Modern Italy.* Princeton University Press: Princeton.

employment in Europe, 8.3 % of employment in Ireland, 9% of total employment in the service industry, 1 of 7 new jobs in France and 1 of 8 new jobs in Germany"[2] Indeed, he also noted in an interview that due to this economic impact, finance ministries in the new Central and Eastern European EU Member States are often the strongest advocates in their countries of positive legal and fiscal frameworks for voluntary organisations and foundations.[3]

The multiplicity of forms, terms and their acronyms and definitions of these organisations presents a confusing picture, which renders agreement on terminology and definition difficult. Multi-purpose forms that seek both public and private benefits, such as an artists' association that gives art lessons to poor children; single purpose forms that restrict themselves to either public or private benefit, for example charitable foundations and book clubs, respectively; and *ad hoc* groups with little or no structure are a few of the main categories of organizational forms. One term that is often used is 'civil society organisations' (CSOs), which are often defined as all non-state organizations besides the family, may more accurately be seen as those which represent and promote shared private interests in the public arena.[4] Trade unions, chambers of commerce, neighbourhood associations, youth clubs and advocacy groups are just a few examples from the broad range of organisations included. The term 'voluntary organisations' is almost as broad, but emphasizes the choice to associate for a common purpose and some donation of one's time and labour-at least of the board members or organizers. Another common term, non-profit/not-for-profit organisation (NPO), refers to a key characteristic of civil society organizations: surplus income is not used for personal gain, but for the common purpose of the organisation. This does not exclude economic activities that result in profits, paying employees' salaries, or monetary support of individuals. It means, however, that generation of profits is not the purpose of the organization, but the means of realizing its goals. It also means that the profits are not distributed to board members, officers, or members. As mentioned above, there are single-purpose organizations, such as public benefit organizations (PBOs), private benefit organizations (PVOs), charities and foundations. Most associations (i.e. member-based) are multi-purpose organizations. The most difficult term to define is 'non-governmental organisation' (NGO), as it is used so freely as a short-hand. The problem lies in its vagueness. Not only does its collection of characteristics vary widely among users, but also which specific characteristics are being alluded to is rarely specified, at least in popular discourse. Unless where noted otherwise, this paper follows the Commission's description as used in its Discussion Paper, "The Commission and Non-Governmental Organisations: Building A Stronger Partnership":

- NGOs are not created to generate personal profit....
- NGOs are voluntary....
- NGOs are distinguished from informal or ad hoc groups by having some degree of formal or institutional existence...

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[2] Rutzen, D. Presentation to the seminar "The Challenges of NGO Legislation". Malta, 1 March, 2005.

[3] Macdonald, V. NGOs 'an engine of economic development'. *The Times* [Malta]. 1 March, 2005.

[4] Scott, SJ. (2003, September). From Benin to Baltimore: Civil Society and Its Limits. *The International Journal of Not-for-Profit Law* [Online] 6:1. International Center for Not-for-Profit Law Retrieved 23 June, 2005 from the World Wide Web: http://www.icnl.org/JOURNAL/vol6iss1/ar_scottprint.htm

- NGOs are independent, in particular of government and other public authorities and of political parties or commercial organisations
- NGOs are not self-serving in aims and related values. Their aim is to act in the public arena at large, on concerns and issues related to the well-being of people, specific groups of people or society as a whole. They are not pursuing the commercial or professional interests of their members.[5]

All types of voluntary organisations enrich their societies in many ways, and as seen above, are encouraged and supported in their endeavours in return by governments through enactment of legal frameworks. Those organizations that provide public benefits receive further support through fiscal benefits such as tax exemptions, incentives for philanthropy, grants, and permission for fundraising through public collections.[6] Governments and supra-national bodies further demonstrate their appreciation of these publicly-beneficial organisations through including them in the policy-making and delivery process. They should at least be consulted at all stages of drafting legislation and regulation that affects them, according to the conclusions of a Council of Europe multilateral meeting.[7] Many of the European Union institutions actively involve NGOs in the institutions' decision-making process, to improve its effectiveness and to relay information back to the local level. The Commission extends this to policy delivery. Hundreds of NGOs in Europe and throughout the world receive over € 1,000 million per year to support their projects.[8] Admittedly, the institutions are not perfect partners: labyrinthine policy processes, Byzantine bureaucracy and minimum standards of representativeness/expertise for the NGOs make it difficult for organisations to navigate their way to being part of the policy-shaping or delivery process.

In stark contrast, the Government of Malta apparently has little appreciation for the value of the independent voluntary sector. To date, it has made disappointing progress in developing a legal framework, despite numerous appeals by the voluntary sector to do so. The only answer is that a White Paper and legislation is 'imminent'. In January of 2004, a group of 20 NGOs formed a working group to push the process forward. By June, the group, now called the Non-Governmental Organisation Legislation Working Group (NGOLWG)[9], had produced a Memorandum of Proposals for NGO Legislation and submitted it to the responsible Minister, that for the Family and Social Solidarity.[10] Each meeting and communication was initiated by the NGOLWG. Each time the group was assured that many

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[5] European Union Commission, presented by President Prodi and Vice-President Kinnock (2000). Discussion Paper. THE COMMISSION AND NON-GOVERNMENTAL ORGANISATIONS: BUILDING A STRONGER PARTNERSHIP [Online text file]. European Union, 3-4. Retrieved 18 June, 2005 from http://europa.eu.int/comm/development/body/theme/ngo/ngo_useful-docs_en.htm

[6] Rutzen, *op. cit*

[7] Council of Europe. (1998). The Legal Status of Non-Governmental Organisations and Their Role in a Pluralistic Democracy: Guidelines to promote the development and strengthening of NGOs in Europe. Report of conclusions of the multilateral meeting *The legal status of NGOs and their role in a pluralist society,* organised by the Council of Europe in cooperation with the Japan Foundation. Strasbourg: Author. Retrieved 24 March from the World Wide Web: http://www.coe.int/T/E/NGO/public/Convention_124/_Meeting_reports/The_legal_staus_of_non-governmental_organisations_and_their_role_in_a_pluralist_democracy.asp

[8] European Commission, *op.cit.*

[9] However, the Group now realizes that 'NGO legislation' is a misnomer and the more common legal terminology refers to associations and foundations.

[10] This Memorandum is available at: http://www.geocities.com/inizjamed/ngosinmalta.htm#PARTNERSHIP%20FOR%20A%20HEALTHY%20VOLUNTARY%20SECTOR.

of its points were 'taken on board' in the White Paper and draft legislation, but was not allowed to verify this for itself by looking at either document. As there are currently no fiscal benefits for organisations pursuing purposes beneficial to the public, other than tax exemptions rarely ceded to organisations' own taxes, and then only on a basis of Ministerial (Finance) discretion, such benefits are not likely to be a part of the framework. Anecdotal evidence suggests that the tax regime is regressive and inconsistently applied. Some organisations are apparently taxed on gross income, others on net income. The basis for interpreting the rules is difficult to ascertain. Unsurprisingly, non-compliance with the system is rumoured to be significant. It should be noted that tax collection problems with all sectors of society feature regularly in the Maltese media. Legal and fiscal frameworks that support and facilitate voluntary organisations' development will undoubtedly take some time, as well as patience and persistence on all sides.

The information channels regarding EU funding opportunities for NGOs are filled with obstacles: poor presentation, complex procedures, and false assumptions about information networks. Application and instruction materials are often in lengthy manuals that are difficult to access. For instance, the key documents for the Structural Funds are over 100 pages each, making it difficult and expensive to access online, as few NGOs can afford broadband connections. Furthermore, they are "zipped" for which not all organizations have the software to enable viewing. There are not clear, condensed explanations available on the website of the Managing Authority's website, nor are the projects already in progress clearly labelled. Instead, they appear in a table marked simply "measure 1.1" and so on, without any indication that these do refer to projects. Indeed, on the Ministry for Rural Affairs and the Environment website, no mention is made at all of projects or the means for NGOs to participate. On the website of the Ministry for the Family and Social Solidarity, navigation is easier, and there is a link to more information about the related Structural Funds, but on the page for each project, only the team leader, a government entity, is given, not the NGO partners, or their parts of the project. Including this information would inspire and guide other organisations in planning to participate. The steps for application are either not indicated all, or not clearly outlined, on any of the websites. Online application is evidently not an option. The lengthy time needed to navigate the bureaucratic maze in person is bound to be a daunting prospect for many volunteers who must take time off from their jobs to do so. The Government relies on a constituted body, the Malta Council for Economic and Social Development, to disseminate information about the Structural Funds and related matters to the rest of civic society. However, no mention at all is made on this body's website of Structural Funds, ongoing projects, or ways in which NGOs can apply or participate. Furthermore, the few NGOs who are selected to participate in this body have not set up a system of passing on information to other NGOs. It would be unrealistic to expect them to do so, however, as there is not a culture of information-sharing in Malta, but quite the reverse.[11] The NGO community in Malta also needs to cultivate new patterns of collaboration if the civic society body is not to suffer from angina!

Some Governmental institutions display an utter lack of understanding of the nature of non-governmental organisations. The website of the Ministry for the Family and Social Solidarity (MFSS) includes a list of non-governmental organisations, all of which are

[11] See Gretchen, K. (2003). Managing the Impersonal in a Personalized Public Service. *Public Administration and Development* 23, 197-209. John Wiley and Sons: West Sussex.

Government entities. Nineteen are services of the Ministry's welfare agency, Appogg, eight are services of Sedqa, the Ministry's addictive behaviours rehabilitation agency, and three are units within the Department of the Elderly and Community Services, which is in the Ministry of Health, The Elderly and Community. Some of these entities are not even quasi-non-governmental organisations (QUANGOS), let alone independent non-governmental organisations.

Especially worrying is that the MFSS is responsible for legislation and regulation pertaining to voluntary organisations. Additionally, if these units designated as NGOs will be competing with independent NGOs for public support, the latter will find sustainability all the more difficult.

Transparency, accountability, improvement in organisational skills and collaboration will enhance the effectiveness and the public image of Maltese voluntary organisations, of all forms and purposes. The Government can aid this process of capacity-building by enacting positive legal and fiscal frameworks, by making information easily accessible, by following the Commission's example of involving NGOs, and not just the social partners, in all stages of policy-making and delivery and by not monopolising the voluntary sector. The voluntary organisations can help themselves by becoming aware of changing trends in the global voluntary community, and building cross-sectoral networks with other organisations within and beyond Malta. The public at large can also lend their support by taking interest in the development of the sector, upholding the Maltese tradition of generosity, and by holding both organisations and the Government accountable for their actions and use of public funds. The transition to a civil society characterised by trust and collaboration is bound to be slow and often frustrating. Is the alternative, maintaining the status quo, viable?

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The European Documentation and Research Centre of the University of Malta was designated a Jean Monnet European Centre of Excellence in October 2004. Contemporaneously, it won a grant under the Jean Monnet Project to work on a range of issues connected to citizenship, civil society and generally Malta's transition into its new role as a Member State of the European Union. One facet of this new role is Malta's role as a Member State in the Mediterranean. The Project will also turn to this aspect in due course. It was decided that in the first year the focus should be on Malta's own experience and the theme chosen was that of Anti-Discrimination, Inclusion and Equality in Malta in light of the Acquis Communautaire.

The methodology adopted for the production of the series of studies comprising this Report was to set up groups of academic/practitioner experts and NGO experts to set the research priorities and agenda and then conduct the studies. While the experts would work separately and even produce their studies separately, group meetings were held in order to cross-fertilise ideas and approaches. Priority themes emerged in this way and certain issues became focal: the scope or coverage of the relevant legislation; the interpretation of key provisions in the relevant EC Directives, with particular reference to definitional clauses; the nature and scope of remedies and provision for enforcement; the scope for positive action; the relative treatment of the various grounds of discrimination and the question of the "hierarchy of discrimination"; the monitoring, policy-formulation, advisory, enforcement and other roles of Equality Bodies; the role of non-governmental organizations in the fight against discrimination. The studies in this Report address all these issues. The task was to examine the Maltese experience of implementing the acquis across the grounds of discrimination, learning lessons from the examination of law and practice in context. The aim was to give a whole picture of the field as it has evolved in Malta over the last few years since membership became an ever closer prospect and then a reality, and taking us up to May of 2005. This Report presents the fruits of this collaborative venture in which some forty experts participated, and presents twenty-one studies offering an overall picture for the first time of the 'state of play' on the theme of the fight against Discrimination and Exclusion. It explores the great advances that have been made while highlighting issues yet to be fully addressed or resolved. The picture can never be complete, but this Report can form the basis for full discussion in a Conference to be held in September 2005 and a valuable basis for continuing study and action.

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