

# Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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# Executive summary

## Implementation of Employment Directive 2000/78/EC

The employment directive, and the relevant prohibition of discrimination on the basis of sexual orientation were incorporated into Maltese law through Legal Notice 461 of 2004<sup>1</sup> which covers direct and indirect discrimination as well as harassment in all spheres related to employment including training and promotions. The same legal notice grants powers over such cases to both the Industrial Tribunal and civil courts.

## Freedom of movement

Same-sex partnerships, whether in the form of marriage or of registered partnerships, are not allowed or recognised under Maltese law. The [Marriage Act]<sup>2</sup> does not define ‘marriage’, yet marriage has always been understood under the public policy of Malta to be the permanent union of man and woman for life. This is, an understanding upheld by our courts and which excludes the possibility of same-sex partnerships under Maltese law. To date, proceedings for the recognition of same-sex marriages or partnerships have not been brought before the domestic courts. This legal position has an impact on the treatment of LGBT persons on a number of issues related to freedom of movement.

## Asylum and subsidiary protection

Maltese law provides for the granting of asylum or refugee status to persons in accordance with the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol<sup>3</sup>. It is noteworthy that according to Article 18(d)(iii) of Legal Notice 243 of 3 October 2008, “a particular social group might include a group based on a common characteristic or sexual orientation”.

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<sup>1</sup> Malta/LN 461/2004

<sup>2</sup> Chapter 255 of the Laws of Malta

<sup>3</sup> Chapter 420 of The Laws of Malta, Refugees Act, ACT XX of 2000, as amended by Act VIII of 2004 and Legal Notice 40 of 2005.

## Family reunification

Maltese law and case-law does not provide in any way for the family reunification of same-sex spouses or of unmarried partners. Domestic law requires a formal family connection founded either in consanguinity or marriage. However, unofficial information indicates that same sex partnerships registered outside Malta are at times recognised for purposes of immigration where both persons are EU citizens and where they show the existence of a ‘durable relationship’.

## Freedom of assembly

Freedom of assembly is protected both under the [Constitution] of Malta<sup>4</sup>, and also under the [European Convention Act<sup>5</sup>]. There is no report of any limitation or prohibition that may have been imposed on the organisation of public events by LGBT persons who are predominantly represented in Malta by an NGO named [Malta Gay Rights Movement (MGRM)]. A Gay Pride March has been organised by the MGRM since 2004 without any report of public harassment or opposition to this even if the culture’s reception of this event is one of tolerance rather than acceptance as equal.

## Hate speech and criminal law

The [Criminal Code<sup>6</sup>] does not in any manner refer to hate speech, neither in general nor with particular reference to homophobia. The provisions related to incitement to hatred are restricted and do not cover sexual orientation. On the other hand, the [Press Act<sup>7</sup>] does protect from insult, threats or exposing a person to hatred on the ground of ‘sex’. It is questionable whether the term ‘sex’ as here used would be taken to include sexual orientation.

## Transgender issues

The particular situation of transgender people was not considered under Maltese law until 2004, but courts have often identified a violation of the right to respect for private life in this regard. The adoption by the Parliament of Malta of Act XVIII of 2004 contributed to establishing a procedure for the rectification of acts of birth, and consequently of other official personal documentation, to

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<sup>4</sup> Chapter 1 of the Laws of Malta  
<sup>5</sup> Chapter 319 of the Laws of Malta  
<sup>6</sup> Chapter 9 of the Laws of Malta  
<sup>7</sup> Chapter 248 of the Laws of Malta, section 6

reflect gender reassignment. In 2007, a court held that the union between a transsexual and her male partner did not violate any provision of the Marriage Act and they consequently had the right to marry in Malta. This however was the decision of the court of first instance and an appeal was entered by the Director of Public Registry from this judgment.<sup>8</sup>. Maltese courts have called upon the State to set up a formal procedure allowing the change in legal status.

## Miscellaneous

Issues related to services such as housing, life insurance, banking facilities such as mortgages, social protection and taxation also require consideration to ensure a more holistic approach in the eradication of homophobia.

## Good practices

Good practices found in Malta are not legal in nature but represent initiatives to promote the non-discrimination of LGBTs. One good practice that may be seen as related to the legal aspects of non-discrimination on the ground of sexual orientation is the policy paper on the position of LGBTs within employment that has been published by the General Workers Union.<sup>9</sup>

## A. Implementation of Employment Directive 2000/78/EC

The Employment and Industrial Relations Act 2002<sup>10</sup> in its definition of discriminatory treatment, does not include discrimination on grounds of sexual orientation although it does mention other grounds such as sex and disability.

Subsequently, Legal Notice 461 of 2004<sup>11</sup> was published in order to implement Council Directive 2000/78/EC and introduced the principle of equal treatment in relation to employment in order to combat discriminatory treatment on the grounds of among others, sexual orientation. Discriminatory treatment is defined as any distinction, exclusion, restriction or difference in treatment,

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<sup>8</sup> This was reported in the media, however the judgment is not readily available as the name of the applicant has been kept unpublished.

<sup>9</sup> [www.gwu.org.mt](http://www.gwu.org.mt)

<sup>10</sup> Chapter 452 of the laws of Malta, section 2

<sup>11</sup> <http://docs.justice.gov.mt/lom/Legislation/English/SubLeg/452/95.pdf> - visited on the 15<sup>th</sup> February 2008

whether direct or indirect which is not justifiable in a democratic society and includes harassment.

The regulations cover conditions for access to employment, including advertising of opportunities for employment, selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions. Employment covers contracts of service and apprenticeships, as well as the process of recruitment or training of any person with a view to engagement in employment, and in regard to a person already in employment, includes also a promotion to a higher grade or engagement in a different class of employment or appointment to an office or post. They also cover access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining; employment and conditions of employment, including remuneration and dismissals; membership of, and involvement in, any organisation of employees and employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

The law gives jurisdiction to the Industrial Tribunal established under the Employment and Industrial Relations Act 2002<sup>12</sup> to consider allegations of discriminatory treatment at the workplace. The Tribunal is competent to consider allegations of discriminatory treatment on any basis including that of sexual orientation. On the other hand, allegations of discriminatory treatment in employment may also be brought before the civil courts within four months from the treatment being complained of.<sup>13</sup> It is within the discretion of the complainant as to which of these two proceedings to initiate.

Both the Industrial Tribunal and the civil court have the competence to order that the discriminatory treatment is stopped and to order the payment of damages. It is not possible to locate statistics in this respect since none are available from the mentioned bodies. The Industrial Tribunal has been contacted for such statistics, however while being informed that no such statistics are held we were informed that so far only one case has been presented on an allegation of discriminatory treatment on the basis of sexual orientation and that this case is still pending.

When discriminatory treatment is alleged and the complaint has opted to proceed by seeking redress from the Department of Industrial and Employment Relations and subsequently through the Industrial Tribunal, either the person making the allegation or the officer responsible for employment and industrial relations have the right to send a written notification to the employer against whom the allegation is made, regarding the alleged discriminatory treatment. The notification must contain any relevant details and must request a reply. On receiving such notification, the recipient must submit a written reply within ten working days from the date of receipt of such notification, giving the recipient's

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<sup>12</sup> Chapter 452 of the laws of Malta

<sup>13</sup> Equal Treatment in Employment Regulations, Subsidiary Legislation 452.95

version of events and any grounds for disputing the allegations, as well as an explanation of any relevant procedures adopted by the recipient to prevent discriminatory treatment. Such a reply is not needed if, on the date that such a request was made, proceedings had already been initiated on the matter before the Industrial Tribunal or other court<sup>14</sup>.

The above-mentioned correspondence is admissible in proceedings brought before the Industrial Tribunal or other court, and if it appears to the Tribunal or court that the respondent deliberately, and without reasonable excuse, omitted to reply within ten working days of the date of receipt of such notification or that his/her reply was evasive or equivocal, the Tribunal or court may draw any inference from that fact that it considers just and equitable to draw, including an inference that s/he has committed an unlawful act.

When a person claims to have been subjected to discriminatory treatment in relation to his/her employment, on the grounds of sexual orientation, such a person may within four months of the alleged breach, refer the matter to the Industrial Tribunal for redress. The latter may take measures such as cancelling a contract of service, or any clause in a contract or collective agreement which is discriminatory, and may order the payment of reasonable sums of money to the aggrieved party<sup>15</sup>.

Where the complainant has opted to proceed before the civil courts, he/she must institute proceedings within four months of the alleged breach and may request the court to order the defendant to desist from such unlawful act and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act<sup>16</sup>.

In the above-mentioned proceedings, both proceedings before the Industrial Tribunal and before the court of a civil jurisdiction, it is sufficient for the claimant to present certain facts leading to a presumption that he/she suffered discriminatory treatment and it shall become incumbent on the defendant to prove that the treatment complained of did not constitute discrimination, failing which, the Tribunal or court shall uphold the complaint of the claimant.

Any associations, organisations or other legal entities who have a legitimate interest in ensuring that these regulations are complied with, may act either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative procedure.<sup>17</sup>

The regulations impose a duty upon the employer as well as organisations concerned, to inform their employees or members of the organisation of

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<sup>14</sup> Legal Notice 461 of 2004, Article 9

<sup>15</sup> Legal Notice 461 of 2004 Article 10(1)

<sup>16</sup> Legal Notice 461 of 2004 Article 10(2)

<sup>17</sup> Legal Notice 461 of 2004 Article 11

provisions and measures which are taken or put in place with respect to discriminatory behaviour.<sup>18</sup>

Another legal area that may be considered within the ambit of this report is the prohibition of discrimination on the basis of sexual orientation in fields other than employment but which are still important in one's life as a dignified individual. These include access to housing, life and health insurance, granting of home loans and mortgages, and legal provisions related to taxation and social protection schemes.

Till only a few months ago, registration of NGOs was not an issue in Malta and there was no system for registration. This has only come into effect in December 2007 with the enactment of the Voluntary Organisations Act.<sup>19</sup> It seems that about three hundred NGOs have so far registered yet this is only an indication given by the list of NGOs indicated on the website of the Ministry for Education, Employment and the Family<sup>20</sup>. The main Non Governmental Organisation established in Malta that actually engages in the area of discrimination on the ground of sexual orientation is the Malta Gay Rights Movement (MGRM). This NGO works exclusively in this field and is very active in projects related to LGBT persons.<sup>21</sup>

## B. Freedom of movement

As a Member State of the European Union and party to the Schengen Agreement, Malta is obliged, in terms of Directive 2004/38/EC, to grant rights of entry, residence and movement to EU citizens and to third country nationals given the right of entry or residence in any Member State. Family members of these persons are then granted the right to enter in Malta under certain conditions.

In Malta, same-sex partners are not traditionally considered family members. Indeed, in a parliamentary debate in 2001<sup>22</sup> it was declared that:

‘There is no intention to give recognition to this type of marriage [same-sex] in Malta and this since it is incompatible with the Marriage Act in Malta that allows marriage only between persons of the opposite sex.’

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<sup>18</sup> Legal Notice 461 of 2004 Article 12

<sup>19</sup> Chapter 492 of the Laws of Malta

<sup>20</sup> <http://www.msp.gov.mt/services/subpages/content.asp?id=2074>

<sup>21</sup> Another group that is sometimes mentioned is the DRACHMA group, being a Christian LGBT organisation. <http://drachmalgbt.blogspot.com/search/label/Informational>

<sup>22</sup> Parliamentary Debates, Sitting Number 487 (23.01.2001) Answer to Parliamentary Question given by Hon. Dr T. Borg, Minister for Justice and the Interior

There has been no formal change in this position since then. For a better understanding of this situation, it is best also to give a summary of the position in Malta in relation to the recognition of same-sex partnerships.

The Marriage Act<sup>23</sup> does not define ‘marriage’, yet marriage has always been understood in Malta to be the permanent union of man and woman for life. Against this background therefore it can be anticipated that the courts of Malta would probably not recognise a same-sex marriage or partnership.

This conclusion is based on the definition of marriage that the courts have adopted in case law, which does not relate to the recognition of same-sex marriages. To date, proceedings for recognition of same-sex marriages or partnerships have not been brought before the domestic courts. Such non-recognition of same-sex partnerships may be considered to constitute discrimination.

In so far as Directive 2004/38/EC is concerned, the situation pertaining to Malta and to its citizens may thus be summarised as follows.

LGBT partners of EU citizens who are themselves EU citizens are themselves given an automatic and full right of free movement into the country, including the right to enter, reside and work as a consequence of their own citizenship of an EU Member State rather than on the basis of their relationship, partnership or marriage. In this case, therefore, the Department of Immigration may refuse to recognise a partner of an LGBT person who already enjoys free movement in Malta for example for reasons of employment. In this case, the ‘partner’ would only be given movement on the basis of his/her EU citizenship rather than on the basis of his/her relationship. This right would then extend to their dependants (that is children under the age of 21 and parents or grandparents wholly maintained by them).

Yet it has been unofficially said that partners in a same-sex union are recognised as such for purposes of immigration if both persons are EU citizens. At times, however, they are required to prove that there exists between them a ‘durable relationship’. This may be shown by the presentation of for example documentation indicating joint residence. However, where one is speaking of a couple in a same-sex union where one of the couple is Maltese, it seems that the non Maltese partner would not obtain movement and residence in Malta on the basis of their relationship, but only on the basis of his/her EU citizenship where this exists. This position seems to be the result of an unwritten policy.

The same cannot be said of persons who do not themselves (through their nationality of an EU Member State) have the right to freedom of movement into Malta. LGBT partners who are not EU citizens will not be able to benefit as a

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<sup>23</sup> Chapter 255 of the Laws of Malta

family member from their partner's rights. Moreover, it seems that there is no policy that is applied in this regard or that attempts to recognise this same sex union where one of the couple is a third country national. The Free Movement of European Union Nationals and their Family Members Order 2007<sup>24</sup> provides for the transposition of Council Directive 2004/38/EC. In this Order, family member is defined as meaning: "family member" means : (a) the spouse, provided it does not include a party to a marriage of convenience; (b) the direct descendants who are under the age of 21 or are dependants, and those of the spouse; (c) the dependent direct relatives in the ascending line and those of the spouse. While "other family member" means: (a) a person who, irrespective of his nationality, in the country from which he has come, is a dependant or a member of the household of the Union citizen having the primary right of residence, or (b) a person who, for serious health reasons, strictly requires personal care by the Union citizen, or (c) the partner with whom the Union citizen has a durable relationship unless such relationship is in conflict with the public policy of Malta. In this manner persons in a same sex relationship could be considered to be included in this definition provided a durable relationship is proved. However it is not known whether recognition of that durable relationship would be considered as being in conflict with the public policy of Malta. So far, national law does not recognise same sex partnerships and the legislator has emphasised that according to public policy, marriage under national law is only recognised between heterosexual couple.

In addition, in situations where (a) the third country national has a child and enters into a formal partnership with a Union citizen and (b) the law regulating this partnership considers children of the partners to form part of a single family unit, the child would be allowed free entry, though the partner may not. This creates the anomaly that while the child would have a right to freely travel into Malta as a dependant, the parent would not have such a right. The dependence on an informal policy for granting entry and movement within Malta on the basis of a same sex partnership between EU citizens and EU citizens with third country nationals gives rise to lack of clarity and administrative obstacles for those wishing to exercise such right of entry.

## [1]. Asylum and subsidiary protection

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<sup>24</sup> Legal Notice 191 of 2007;  
<http://www.doi.gov.mt/EN/legalnotices/2007/07/LN%20191.pdf>

Maltese law provides for the granting of asylum or refugee status to persons in accordance with the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol<sup>25</sup>. It is noteworthy that according to Article 18(d)(iii) of Legal Notice 243 of 3 October 2008, “a particular social group might include a group based on a common characteristic or sexual orientation”.

According to Maltese law, a refugee is a person who fulfils the requirements of Article 1(A) of the 1951 UN Refugee Convention Relating to the Status of Refugees. This is a person who: ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.’

Although persecution on the basis of one’s sexual orientation is not listed in the qualifications enabling a person to be eligible for refugees status, the list of protected reasons is based on the 1951 Geneva Convention and consequently does include the broad ground of persecution due to ‘membership of a particular social group’. Therefore, if it can be proved that a person is being persecuted due to his/her membership of a social group of persons based their on homosexuality, it may be concluded that that person may be granted refugee status and due protection under Maltese law.

Having said this, the Refugees Commissioner<sup>26</sup> has, since the creation of that office in 2002, dealt with only one case where an asylum seeker claimed refugee protection because of his sexual orientation. It was held that the applicant in this case failed to provide convincing evidence of persecution according to the 1951 Geneva Convention and consequently the application was rejected.<sup>27</sup>

The definition of dependent family members in the Refugees Act is slightly different from that in Council Directive 2004/83/EC. In article 2 of the said Act, dependent members of the family are defined as ‘the spouse of the refugee, provided the marriage is subsisting on the date of the refugee's application, and such children of the refugee who on the date of the refugee's application are under the age of eighteen years and are not married.’ This difference arises from the lack of recognition given to same sex partnerships or relationships by Malta and also to the lack of recognition given to cohabiting couples.

Despite this, the definition of family member included in the national law may be deemed not to constitute an incorrect transposition of the Directive, since the

<sup>25</sup> Chapter 420 of The Laws of Malta, Refugees Act, ACT XX of 2000, as amended by Act VIII of 2004 and Legal Notice 40 of 2005.

<sup>26</sup> Instituted by the Refugees Act

<sup>27</sup> This information was obtained from the Commissioner for Refugees. However sight of the case proceedings or of the judgment itself was not obtained. In this respect, therefore while we are aware of the allegation no reporting can be made as to the full circumstances in which this allegation was made.

definition of ‘family member’ provided for in the Directive provides for a limitation and that is recognition of unmarried partners may be given where the legislation or practice of that Member State treats unmarried couples in a way comparable to married couples under its law relating to aliens.

## C. Family reunification

Maltese law and case-law does not provide in any way for the family reunification of same-sex spouses or of unmarried partners.

Maltese law<sup>28</sup> defines ‘family reunification’ as ‘the entry into, and residence in, Malta by family members of a third country national residing lawfully in Malta in order to preserve the family unit, whether the family relationship arose before or after the resident’s entry’. The Legal Notice on Family Reunification<sup>29</sup> defines ‘family members’ as constituting: a ‘spouse who shall be twenty-one years of age or over; and/or the unmarried minor children of the third country national and of his spouse, including children adopted in a manner recognized by Maltese law; and/or the unmarried minor children, including adopted children, of the third-country national or his/her spouse, with lawful custody thereof’.

The Civil Code does not define what a ‘spouse’ essentially refers to. However, when the Civil Code<sup>30</sup> talks about rights and obligations between spouses, it mentions ‘husband and wife’. This terminology is used with regard to moral and material support, maintenance of children, succession rights and property rights. Maltese public policy defines marriage as limited to a relationship between a man and a woman. Consequently the reunification of persons connected through a same-sex partnership is *prima facie* excluded.

The *raison d’être* described above was also highlighted by the present legislature, in particular by the Minister for Justice and Home Affairs, who answered as follows to a Parliamentary Question raised in Parliament:

*‘Same-sex marriage is recognized only by a few countries. There is no intention to give recognition to this type of marriage in Malta and this since it is incompatible with the law of Marriage in Malta that allows marriage only between persons of the opposite sex.’<sup>31</sup>*

<sup>28</sup> Subsidiary Legislation 217.06 Family Reunification Regulations 05.06.2007 *Legal Notice 150 of 2007*

<sup>29</sup> Section 4(1) of Subsidiary Legislation 217.06 Family Reunification Regulations – 05.06.2007 *Legal Notice 150 of 2007*

<sup>30</sup> Chapter 16 of the Revised Laws of Malta

<sup>31</sup> House of Representatives, Parliamentary Sitting Number 487 during the year 2001, 06.02.2001

To date, there is no public information as to whether the relevant authorities have received applications by third-country nationals living in Malta for reunification with their partner or spouse of the same sex, nor of any application seeking the recognition and/or registration of a same-sex marriage celebrated abroad.

Although there is no case law or statistics available in this respect, yet when one considers that the definition of a marriage in the Maltese system is one which necessarily demands a male and female, then one could conclude that it is likely that the authorities will not automatically give recognition to such a marriage even if lawfully contracted abroad.

Neither does national law recognise registered partnerships or cohabitation and there is no regulation in this respect. In this respect, therefore one may also conclude that it is likely that the authorities will not automatically give recognition to such relationships.

## D. Freedom of assembly

This freedom is protected both under the Constitution of Malta<sup>32</sup>, and also under the European Convention Act<sup>33</sup>. The latter Act ensures that the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms may be directly invoked before the Maltese courts. Consequently any ban on homophobic demonstrations would run counter to the rights as protected therein.

There is no legal provision that prohibits homophobic demonstrations. Neither is there any report of incidents that indicate the imposition of limitations or prohibition on the organisation of public events by LGBT persons who are predominantly represented in Malta by the NGO named Malta Gay Rights Movement (MGRM).

A Gay Pride March has been organised by the MGRM since 2004 without any report of public harassment or opposition to this even if the culture's reception of this is one of tolerance rather than acceptance as equal. The Gay Pride March last held on 6 July 2007 is reported by the press to have been attended by about 50 people. This event was supported by other NGOs, and attended by local singers, British MEP David Bowles and representatives from three political parties. Following this event, MGRM reported that the Gay Pride Party had been much better attended (around 1,000 people) than the march, and this was

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<sup>32</sup> Article 42 of the Constitution of Malta

<sup>33</sup> Chapter 319 of the Laws of Malta

explained as being allegedly due to the fact that people are still afraid of exposing themselves in broad daylight and with media coverage.

## E. Criminal law

### Criminal Law and Hate Speech related to Homophobia

The Criminal Code does not in any manner refer to hate speech, neither in general nor with particular reference to homophobia. In fact, the only concept that may come close to the concept of hate speech and which is found in our law is the concept of ‘incitement to hatred’. This is regulated in Section 82A of the Criminal Code<sup>34</sup>. Yet the application of this section is limited to racial hatred only and nothing in this section could indicate that the incitement to hatred against an LGBT person would be taken into account under this offence.

A similar concept is found within the Press Act<sup>35</sup> which provides in Section 6 as follows:

*‘Whosoever, by any means mentioned in Article 3, shall threaten, insult, or expose to hatred, persecution or contempt, a person or group of persons because of their race, creed, colour, nationality, sex, disability as defined in Article 2 of the Equal Opportunities (Persons with Disability) Act, or national or ethnic origin shall be liable on conviction to imprisonment for a term not exceeding three months and to a fine (multa).’*

In considering the Press Act one is to note that this Act applies only to publications of printed matter and therefore does not control speech in all its forms. Having clarified this, it is dubious whether the term ‘sex’ here referred to would be taken to include sexual orientation or whether it would be restricted to male and female by a court of law. There is no case-law that may provide any indication, yet it seems that it is only those courts having the jurisdiction to consider human rights complaints that have so far taken the term ‘sex’ to include sexual orientation.

There is no indication that any informal or formal guidelines or policies are in place to address this legal lacuna.

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<sup>34</sup> Chapter 9 of the Laws of Malta  
<sup>35</sup> Chapter 248 of the Laws of Malta

## Unlawful Discrimination

Discrimination is prohibited on the ground of sex both under the Constitution of Malta<sup>36</sup> and the European Convention Act. Yet this does not constitute a criminal offence and merely a violation of one's human rights.

The only discrimination that is specifically regulated by the Criminal Code is that exercised by a public official. Section 139A of the Criminal Code provides:

*'Any public officer or servant or any other person acting in an official capacity who intentionally inflicts on a person severe pain or suffering, whether physical or mental –*

*(a) for the purpose of obtaining from him or a third person information or a confession; or*

*(b) for the purpose of punishing him for an act he or a third person has committed or is suspected of having committed; or*

*(c) for the purpose of intimidating him or a third person or of coercing him or a third person to do, or to omit to do, any act; or*

*(d) for any reason based on discrimination of any kind,*

*shall, on conviction, be liable to imprisonment for a term from five to nine years.'*

Consequently, although the concept of discrimination is introduced in this provision, it is not the discrimination per se that constitutes the offences but treatment constituting torture or cruel, inhuman or degrading treatment. Having said this, should there be a situation whereby a public official performs such acts on a person simply because of the person's sexual identity, then there is nothing in the provision of the law to indicate that this would not be covered by the said provision.

Neither does criminal law provide for aggravation when offences are committed as a result of homophobia. Such aggravation is only found in the Criminal Code for those offences committed as a result of racial or religious hatred<sup>37</sup>.

The only protection that LGBT persons may be said to receive in terms of the Criminal Code is for that aspect of discrimination that emanates from

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<sup>36</sup> Article 45 of the Constitution of Malta

<sup>37</sup> Criminal Code, Chapter 9 of the Laws of Malta, Section 251D

harassment. Sections 249 to 251D<sup>38</sup> protect everyone from actions that amount to threats, violence and harassment irrespective of the aim for which these actions are carried out.

However when one considers discrimination on the ground of sexual orientation in the field of employment, Legal Notice 461 of 2004 proscribes the discrimination of persons on the ground of sexual orientation to the extent that the violation of any of the provisions of these regulations is an offence that, upon conviction, is punishable with a fine (multa) not exceeding Euro 2,329.37 or to imprisonment for a period not exceeding 6 months, or to both the fine and imprisonment. There is no official information to indicate whether there has been any prosecution in this respect so far.

Furthermore, it is also interesting to note that discrimination is specifically prohibited under the [Broadcasting Authority Act]<sup>39</sup>; more specifically under the Third Schedule to the Act which sets out a Code for advertisements. Its first article provides:

*‘Advertising and teleshopping shall not:*

*(a) prejudice respect for human dignity;*

*(b) include any discrimination on grounds of race, sex or nationality; ...’*

In view of the above, one may conclude that ordinary law does not offer any specific protection against homophobia, except for constitutional proceedings and also through civil and criminal proceedings where the complaint relates to discrimination on the ground of sexual orientation in employment.

There are no available statistics that one could report in relation to complaints or criminal proceedings having been taken against a person committing a crime in relation to homophobia.

## F. Transgender issues

Prior to 2004, Maltese law did not take into consideration transgender issues. Maltese courts have with some consistency held that the fact that Maltese law did not formally provide a procedure for the change in legal status of transgender persons constitutes a violation of the right to respect for private life as protected under Article 8(1) of the European Convention. In such judgments,

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<sup>38</sup> Criminal Code, Chapter 9 of the Laws of Malta, Of Threats, Private Violence and Harassment

<sup>39</sup> Chapter 350 of the Laws of Malta

the courts have ordered the Director of the Public Registry to effect changes on the birth certificate of the transgender person (see below).

In these cases, the courts considered whether or not such changes should be clearly marked on the relevant certificate and the latest decision was that the reason for the changes to one's name and sex should be marked on the formal certificate but not on the publicly accessible informal certificate. In an early judgment delivered in the case of *Lawrence sive Roxanne Cassar vs Honourable Prime Minister*<sup>40</sup>, the Constitutional Court held that the birth certificate under Maltese law reflects the position of an individual at the time of birth, and unless there are errors, no alteration may be permitted on such a document. This situation however changed in future judgments including that of *Francis sive Mandy Zammit vs. AG and Director of Public Registry*<sup>41</sup> where the court held that the fact that Maltese law did not provide for the particular circumstances of transsexuals constituted a violation of Article 8 of the European Convention of Human Rights. The same decision ordered the registrar to make the necessary alterations on the relevant certificates. The same conclusion was reached in the case of *George Camilleri sive Yana Camilleri Vs The Attorney General and the Director of Public Registry*<sup>42</sup> where, besides agreeing with the previous judgment the court held that the situation did not amount to a violation of article 3 of the Convention and article 36 of the Constitution.

It is interesting to note that in these cases the court ordered that an annotation be made on the certificate that the change was made following a court order. In the case of *Paul sive Kathleen Schembri vs the Director of the Public Registry*<sup>43</sup> the court held that the annotation should include only that the amendment was made by virtue of the court order and should not go into the details of the gender re-assignment surgery.

Moreover, in another case<sup>44</sup>, the right of a transsexual to marry was upheld by the court of first instance which stated that the marriage between a 'female' registered so after gender reassignment surgery and a male does not run counter to the definition of marriage within the Maltese legal system.

The adoption by the Parliament of Malta of Act XVIII of 2004<sup>45</sup> contributed to establishing a procedure for the rectification of acts of birth, and consequently of other official personal documentation, to reflect gender reassignment.

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<sup>40</sup> Malta/Constitutional Court/79/1995 (14.07.1995)

<sup>41</sup> Malta/First Hall of the Civil Court/689/1999 (24.09.2001)

<sup>42</sup> Malta/First Hall of the Civil Court/617/1997 (02.10.2002)

<sup>43</sup> Malta/Court of Appeal/1100/1997 (06/12/2002)

<sup>44</sup> This was reported in the media, however the judgment is not readily available as the name of the applicant has been kept unpublished.

<sup>45</sup> An Act to further amend the Civil Code, Cap. 16. The Act introduces Articles 257A to 257D, with the general description Action for an annotation in the indication of sex particulars appearing in an act of birth. See further Neil Falzon,

In the light of these cases, one can conclude that while discrimination of transgender people is not addressed specifically yet this discrimination would be incorporated under the basis of ‘sex’ in the context of national legislation that transposes the EU Equality Directives on gender discrimination. This however, would only be through the effect of the judgments of the European Court of Justice. The equality legislation<sup>46</sup> does not specifically speak of transgender persons and consequently there is no formal provision of protection from discrimination for transgender persons. However, one expects the designated equality body, the National Commission for the Promotion of Equality for Men and Women<sup>47</sup>, and also national courts to interpret such protection in line with the judgments of the European Court of Justice.

Consequently, since issues related to transgender persons have been taken by our courts, as described above, to fall within discrimination on the grounds of ‘sex’, one could conclude that the protections above indicated will be applied in the same manner. Yet for changes in the legal framework to be effected, action is required through Parliament before whom the judgments of the national courts on this issue have been tabled.

State healthcare provides only hormonal treatment to transgender persons and does not provide any other treatment or operation required. In this respect therefore, a trans person needs to finance his/her own access to diagnosis, treatment other than hormonal treatment, and also to a gender reassignment surgery. Moreover, transgendered persons are in generally considered as suffering from a disorder. The national mental health system actually considers gender dysphoria as the mental disorder giving rise to a person being transgender.<sup>48</sup>

## G. Miscellaneous

Upon consideration of the [Income Tax Act]<sup>49</sup> it becomes apparent that persons in a same-sex relationship or union do not receive the benefits that heterosexual spouses receive. While Section 2 of the said Act defines ‘married couple’ as referring ‘to two spouses who contracted marriage in accordance with the legal

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‘A Proposed Gender Identity Act for Malta’, Malta Gay Rights Movement, December 2010.

<sup>46</sup> Equality for Men and Women Act, Chapter 456 of the Laws of Malta;  
[www.mjha.gov.mt](http://www.mjha.gov.mt)

<sup>47</sup> NCPE, [www.equality.gov.mt](http://www.equality.gov.mt)

<sup>48</sup> ‘Inclusion of transgender individuals into the labour market. A research study’. Authored by Ruth Baldacchino, Charmaine Grech and Edited by Gabriella Calleja; published in July 2008 by the Malta Gay Rights Movement;  
[www.maltgayrights.org](http://www.maltgayrights.org)

<sup>49</sup> Chapter 123 of the Laws of Malta.

provisions of the country where the marriage was executed'; the term 'married individual' is taken to refer 'to a male individual who has a wife or a female individual who has a husband, living with him or with her respectively, as the case may be;' while at the same time the term 'person' includes – '(b) a responsible spouse in accordance with article 49;'. The lack of recognition of same-sex marriages celebrated abroad even by Maltese persons who return and continue to live together in Malta, together with the definition of marriage as being that between a male and female places persons in same-sex unions in such a position whereby they are not treated in a like manner to heterosexual couples on the basis of their sexual orientation.

National legislation does not include a specific Act of Parliament on the protection of minors, nor a Children's Act providing recognition of their rights. Protection of Minors through criminal offences is generally found in the Criminal Code which does not indicate similar examples of institutional homophobia as that presented in Lithuanian legislation. Neither does the law on adoption or family law seem to indicate examples of direct institutional homophobia. It is not known whether phallometric testing has ever been used in establishing the credibility of asylum claims based on sexual orientation.

## H. Good practices

It is not possible to identify a good practice that directly relates to the legal framework or the position at law of LGBTs. The only national legislation that specifically protects LGBTs is Legal Notice 461 of 2004 that transposed Directive 2000/78/EC and therefore only prohibits discrimination on the ground of sexual orientation in the field of employment.

However a good practice that may be seen as connected to this Legal Notice is a policy paper that has been published by one of the major trade unions in Malta. General Workers' Union<sup>50</sup> published a policy paper called "Twemmin" specifically undertaking to promote the equal treatment of LGBTs within employment and to protect LGBTs from discriminatory treatment within employment.

The policy paper sets out a strategy which includes the setting up of a working group, which has as one of its aims the organisation of a national conference. There is no information as to the resources or timeframe for implementation that have been pledged to this project. The initiative was set up and is to be implemented with the participation of LGBT members and in particular with the assistance of MGRM.

The following are a few of the aims indicated in the strategy document:-

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<sup>50</sup> [www.gwu.org.mt](http://www.gwu.org.mt)

- ensuring that the rights of LGBT employees are protected
- organising a national conference to discuss the obstacles and difficulties that LGBT employees face at the workplace and to discuss issues related to LGBT employees
- raise awareness and spread information on good practices and guidelines and raise national awareness
- to train member employees and shop steward in LGBT issues
- to publish the policy document thereby making it known that GWU was taking a positive action to combat discrimination at the workplace
- to participate in other activities organised by the LGBT community appoint a coordinator whose main role is to promote the interests of LGBT employees and to work towards implementing the policy paper.

# Annex 1 – Case law

## **Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1**

No case law can be reported in this respect. Following verification from the official database of case law found on the Ministry of Justice website at [www.mjha.go.mt](http://www.mjha.go.mt) no cases in this respect were found. Furthermore, after making enquiries at the secretariat of the Industrial Tribunal, we were informed that no such complaints have so far been determined and that there is only one case pending judgment. Neither do either of these bodies have statistics to identify the number of complaints received in relation to claims on discriminatory treatment.

## **Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 1**

Information about the only proceeding that was brought before the Refugees Commission was obtained from the Commissioner for Refugees. However sight of the case proceedings or of the judgment itself was not obtained. In this respect, therefore while we are aware of the allegation no reporting can be made as to the full circumstances in which this allegation was made.

## **Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC, case 1**

No case law was identified through the court's database of cases. Furthermore, proceedings pending before the Refugees Commission are not available for viewing.

## **Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC, case 1**

No case law was identified through the court's database of cases.

## **Chapter E, Freedom of assembly, case 1**

Case law in relation to freedom of assembly as connected to homophobia is not available. The database of courts' case law has been consulted.

## **Chapter F, Hate speech, case 1**

Case law in relation to hate speech against LGBT persons is not available. The case law database has been consulted for this purpose.

**Chapter F, Hate crimes, case 1**

Case law in relation to hate crimes against LGBT persons is not available. The case law database has been consulted for this purpose.

**Chapter G, Applicability of legislation on trans gender issues, case 1****Chapter G, Name change and/or sex change of transgender people, relevant case law, case 1**

<b>Case Title</b>	Lawrence sive Roxanne Cassar versus Honourable Prime Minister
<b>Decision Date</b>	14th July, 1995
<b>Reference details</b>	Constitutional Court
<b>Key facts of the case</b>	Lawrence sive Roxanne Cassar, was born on the 24th April, 1968 and registered as a male. The applicant underwent gender reassignment surgery and sought the change to be reflected in her public status certificate. This was refused by the Director of Public Registry. The applicant instituted proceedings before the courts seeking that her official documents be amended to reflect her current mental and physical state. She alleged a violation of her rights under Article 38 of the Constitution of Malta and Article 8 of the European Convention.
<b>Main reasoning/ argumentation</b>	The applicant argued that the fact that her official documents indicate her as 'male' and include the name 'Lawrence' is a cause of serious physiological difficulties and causes her to suffer disrespect in everyday circumstances such as travel, the process of banking transactions and the search for employment. She argued that the lack of a procedure that would allow her birth certificate to be amended to reflect her sex gives rise to a violation of her right to respect for private life.
<b>Key legal issues clarified by the case</b>	The local court agreed with the European Case B vs France, because of the various similarities between the two cases, that the current situation which 'B' was exposed to did constitute a violation to her right of privacy. It also agreed that our law does provide in Sections 253 and 257 of our Civil Code a system of corrections or cancellation of acts registered in our Public Registry.
<b>Results and key consequences or legal implications of the case</b>	The court found in favour of the applicant and after declaring a violation of the respective articles of the Constitution and of the European Convention, it ordered the Director of the Public Registry to make reference to change the indication of sex on the applicant's birth certificate and to enter an annotation in the margin of the mentioned certificate to refer to its decision.

<b>Case Title</b>	Raymond Giford known as Rachel Gilford vs Director of Public Registry
<b>Decision Date</b>	9th October, 2001
<b>Reference details</b>	Constitutional Court
<b>Key facts of the case</b>	Raymond sive Rachel Gilford underwent gender reassignment surgery on the 17th June 1993. Following this surgery she sought the amendment of her birth certificate from the Director of the Public Registry, who rejected her request. Following this she instituted proceedings before the courts alleging a violation of her right to respect of private life both in terms of the Maltese Constitution and also in terms of the European Convention.
<b>Main reasoning/ argumentation</b>	The applicant alleged that the Maltese law gives rise to a violation of Articles 3 and 8 of the European Convention and the respective provisions of the Constitution arising from the lack of a formal procedure recognising and regulating the position of persons who undergo gender reassignment surgery.
<b>Key legal issues clarified by the case</b>	The court clarified that the term 'sex' should be taken to be reflective of both the physical and mental elements and such should exist concurrently. The court held that upon the applicant's birth, the State was correct in indicating the applicant's sex to be 'male' on the official record of birth, however that same record should reflect a change in circumstances. It consequently found a violation of the right of the applicant to respect for private life. The court did not find a violation of the prohibition from degrading and inhumane treatment and stated that the circumstances do not amount to such acts that are required in this respect.
<b>Results and key consequences or legal implications of the case</b>	The court found in favour of the applicant and ordered the Director of Public Registry to affect an amendment in the birth certificate both with respect to the indication of 'sex' and also in the indication of name. The court further recognised that a procedure ought to be put in place to allow such amendments and to give recognition to transgender persons.

**Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation, case 1**

No such case law has been identified.

## Annex 2 – Statistics

No statistics can be reported. Verifications for such statistics were made with the National Statistics Office, the Immigration Office and the Industrial Tribunal. There does not seem to be any statistics that identify applications made in relation to this basis. This applies for statistics on each of the following chapters.