

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Malta

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Executive summary

Implementation of Employment Directive 2000/78/EC

- [1]. 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 2004¹ 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.
- [2]. Legal Notice 461 of 2004 introduced the prohibition of discrimination on the basis of sexual orientation in employment.

Freedom of movement

- [3]. Same-sex partnerships, whether in the form of marriage or of registered partnerships, are not allowed or even recognised under Maltese law. The [Marriage Act]² 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, 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

- [4]. 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 as found in domestic law is based on the 1951 Geneva Convention which 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

¹ Malta/LN 461/2004

² Chapter 255 of the Laws of Malta

persons based their on homosexuality, it may be concluded that that person may be granted refugee status and due protection under Maltese law.

Family reunification

- [5]. 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.

Freedom of assembly

- [6]. Freedom of assembly is protected both under the [Constitution] of Malta³, and also under the [European Convention Act⁴]. 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

- [7]. The [Criminal Code⁵] does not in any manner refer to hate speech, neither in general nor with particular reference to homophobia. Whilst the provisions related to incitement to hatred are restricted and do not cover sexual orientation, the [Press Act⁶] does mention sex which may be deemed to include LGBT persons.

Transgender issues

- [8]. The particular situation of transgender people is not considered under Maltese law and in fact courts have often identified a violation of the right to respect for private life in this regard. Moreover, 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

³ Chapter 1 of the Laws of Malta

⁴ Chapter 319 of the Laws of Malta

⁵ Chapter 9 of the Laws of Malta

⁶ Chapter 248 of the Laws of Malta

however was the decision of the court of first instance and these proceedings are now awaiting a final decision from the [Constitutional Court]⁷. Maltese courts have called upon the State to set up a formal procedure allowing the change in legal status.

Miscellaneous

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

Good practices

- [10]. No good practices were identified.

A. Implementation of Employment Directive 2000/78/EC

- [11]. The Employment and Industrial Relations Act 2002⁸ 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.
- [12]. Subsequently, Legal Notice 461 of 2004⁹ 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, whether direct or indirect which is not justifiable in a democratic society and includes harassment.
- [13]. 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

⁷ This was reported in the media, however the judgment is not readily available as the name of the applicant has been kept unpublished.

⁸ Chapter 452 of the laws of Malta

⁹ <http://docs.justice.gov.mt/lom/Legislation/English/SubLeg/452/95.pdf> - visited on the 15th February 2008

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.

- [14]. The law gives jurisdiction to the Industrial Tribunal established under the Employment and Industrial Relations Act 2002¹⁰ 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 other areas may be brought before the civil courts within four months from the treatment being complained of.¹¹ 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.
- [15]. When discriminatory treatment is alleged, either the person making the allegation or the manager responsible for employment and industrial relations shall have the right to send a written notification to the employer or any person or organisation 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 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.
- [16]. 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

¹⁰ Chapter 452 of the laws of Malta

¹¹ Equal Treatment in Employment Regulations, Subsidiary Legislation 452.95

inference from that fact that it considers just and equitable to draw, including an inference that s/he has committed an unlawful act.

- [17]. 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 party¹².
- [18]. Moreover, a person who alleges such discrimination, shall, within four months of the alleged breach, have a right of action before the competent court of civil jurisdiction requesting 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 act¹³.
- [19]. In the above-mentioned proceedings, it is sufficient for the claimant to present certain facts leading to a presumption that s/he 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.
- [20]. 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.
- [21]. The employer as well as organisations concerned, have a duty to inform their employees or members of the organisation of provisions and measures which are taken or put in place with respect to discriminatory behaviour.
- [22]. 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.
- [23]. 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 the last few weeks, however statistics on the number of NGOs that have so far registered are not available. The only Non Governmental Organisation established in Malta that actually engages in the area of discrimination on the

¹² Legal Notice 461 of 2004 Article 10(1)

¹³ Legal Notice 461 of 2004 Article 10(2)

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.

B. Freedom of movement

Rights granted under the EU Directive.

- [24]. 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 extensive 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.

Restriction of effect of the Directive by virtue of the Maltese definition of marriage in line with the same Directive

- [25]. In Malta, same-sex partners are not traditionally considered family members. Indeed, in a parliamentary debate in 2001¹⁴ it was declared that:
- [26]. ‘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.’
- [27]. There has been no change in this position since then. For a better understand 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.
- [28]. The Marriage Act¹⁵ 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.

¹⁴ Parliamentary Debates, Sitting Number 487 (23.01.2001) Answer to Parliamentary Question given by Hon. Dr T. Borg, Minister for Justice and the Interior

¹⁵ Chapter 255 of the Laws of Malta

- [29]. 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.
- [30]. 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

- [31]. As such, these persons 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 relationships. This right extends to their dependants (that is children under the age of 21 and parents or grandparents wholly maintained by them).

LGBT partners of EU citizens who are third country nationals

- [32]. 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 family member from their partner's rights.
- [33]. As far as registered partners are concerned, this would seem to comply with Directive 2004/38/EC¹⁶ since a registered same-sex partnership is not in Malta treated as equivalent to marriage. However, the failure of Malta to recognise as 'spouses' same-sex partners legally married under the laws of another EU Member State constitutes a violation of the requirements of Directive 2004/38/EC.
- [34]. The Immigration Act however fails to completely implement the Directive. Contrary to what is required under Article 3(2) of the Directive, there is no procedure under the Immigration Act to allow for the partner with whom the Union citizen has a durable relationship, duly attested, to have his/her situation examined in order to be granted, where appropriate, a right to entry.
- [35]. In addition, in situations where (a) the third country national has a child and enters into some sort of formal partnership with a Union citizen and (b) the law

¹⁶ Council Directive 2004/38/EC, Article 2(2)

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 would not. This creates the anomaly that while the child would have a right to freely travel into Malta as a dependant, the original parent would not have such a right.

Partners of Maltese citizens

- [36]. With regards to same-sex partners of Maltese citizens intending to exercise their freedom of movement in other Member States, they have the right to entry and residence as long as they can prove a durable relationship. The one issue here is that what amounts to substantive proof of a durable relationship (and the length of time required for a relationship to be considered durable) is not defined and left to each Member State to determine.

C. Asylum and subsidiary protection

- [37]. Maltese law does not specifically provide for refugee and/or subsidiary protection for persons persecuted due to their sexual orientation.
- [38]. However, the law does provide 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 Protocol¹⁷.
- [39]. 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.'
- [40]. 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 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.
- [41]. Having said this, the Refugees Commissioner¹⁸ has, since the creation of that office in 2002, dealt with only one case where an asylum seeker claimed refugee protection because of the applicant's sexual orientation. It was held that the applicant in this case failed to provide convincing evidence of persecution according to the 1951 Geneva Convention. The application was rejected.¹⁹
- [42]. 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.' There has not been any

¹⁷ 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.

¹⁸ Instituted by the Refugees Act

¹⁹ 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.

official document or proceedings identified that establish the perimeters of this definition. However, considering the fact that no recognition is given to same sex partnerships within Maltese law and that such partnership registered abroad would not receive any recognition in terms of Maltese law, then it can be assumed that a request in this respect would not be accepted.

D. Family reunification

- [43]. Maltese law and case-law does not provide in any way for the family reunification of same-sex spouses or of unmarried partners.
- [44]. Maltese law²⁰ 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 Reunification²¹ 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’.
- [45]. The Civil Code does not define what a ‘spouse’ essentially refers to. However, when the Civil Code²² 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.
- [46]. 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.’²³

²⁰ Subsidiary Legislation 217.06 Family Reunification Regulations 05.06.2007 *Legal Notice 150 of 2007*

²¹ Section 4(1) of Subsidiary Legislation 217.06 Family Reunification Regulations – 05.06.2007 *Legal Notice 150 of 2007*

²² Chapter 16 of the Revised Laws of Malta

²³ House of Representatives, Parliamentary Sitting Number 487 during the year 2001,

- [47]. 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.
- [48]. 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.
- [49]. 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.

E. Freedom of assembly

- [50]. This freedom is protected both under the Constitution of Malta²⁴, and also under the European Convention Act²⁵. 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.
- [51]. 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).
- [52]. 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

06.02.2001

²⁴ Article 42 of the Constitution of Malta

²⁵ 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.

F. Criminal law

Criminal Law and Hate Speech related to Homophobia

[53]. 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. 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.

[54]. A similar concept is found within the Press Act²⁶ 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).’

[55]. Yet one is to note that this Act applies only to publications of printed matter and therefore does not control speech in all its forms. Despite this, with the inclusion of the term ‘sex’ one is to understand that publications that threatened, insulted, or exposed to hatred LGBT persons would fall foul of this law.

[56]. While as noted above the concept of marriage has been limited under Maltese public policy to a union between man and woman, when considering issues of discrimination and the right to privacy the term ‘sex’ has not been so limited. This conclusion is based on an interpretation given by the authors keeping in mind the interpretation of the European Court of the protection offered under the European Convention.

²⁶ Chapter 248 of the Laws of Malta

Unlawful Discrimination

[57]. Discrimination is prohibited also on the ground of sex both under the Constitution of Malta²⁷ and the European Convention Act. Yet this does not constitute a criminal offence and merely a violation of one's human rights.

[58]. 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.'

[59]. 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 this would be covered by the said provision.

[60]. 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 hatred²⁸.

²⁷ Article 45 of the Constitution of Malta

²⁸ Criminal Code, Chapter 9 of the Laws of Malta, Section 251D

[61]. 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 harassment. Sections 249 to 251D²⁹ protect everyone from actions that amount to threats, violence and harassment irrespective of the aim for which these actions are carried out.

[62]. Furthermore, it is also interesting to note that discrimination is specifically prohibited under the [Broadcasting Authority Act]³⁰; 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 and that the only protection is found in constitutional measures.

[63]. 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.

[64]. As indicated above, the protection from discrimination for sexual orientation is only specifically found in the field of employment under the [Equality Treatment in Employment Regulations]³¹.

G. Transgender issues

[65]. Maltese law does not take into consideration transgender issues and in fact in case law Maltese courts have with some consistency held that the fact that Maltese law does 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

²⁹ Criminal Code, Chapter 9 of the Laws of Malta, Of Threats, Private Violence and Harassment

³⁰ Chapter 350 of the Laws of Malta

³¹ Subsidiary Legislation 452.95. enacted by Legal Notice 461 of 2004, as amended by Legal Notices 53 and 338 of 2007.

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

- [66]. In these cases, the courts considered whether or not such changes should be clearly marked on the relevant certificate and the final decision was that the changes 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*³², 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*³³ 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*³⁴ 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.
- [67]. 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*³⁵ 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.
- [68]. Moreover, in another case³⁶, 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.
- [69]. 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 antidiscrimination legislation in general. With the development in case law, provided there is an increase in the number of proceedings instituted, this situation could possibly change.

³² Malta/Constitutional Court/79/1995 (14.07.1995)

³³ Malta/First Hall of the Civil Court/689/1999 (24.09.2001)

³⁴ Malta/First Hall of the Civil Court/617/1997 (02.10.2002)

³⁵ Malta/Court of Appeal/1100/1997 (06/12/2002)

³⁶ This was reported in the media, however the judgment is not readily available as the name of the applicant has been kept unpublished.

[70]. 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.

H. Miscellaneous

[71]. Upon consideration of the [Income Tax Act]³⁷ 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 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 simply because of their sexual orientation.

I. Good practices

[72]. No good practices were identified.

³⁷ Chapter 123 of the Laws of Malta

Annex 1 – Case law

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

[73]. 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 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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 3

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 4

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 5

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 1

No case law has been identified in relation to freedom of movement and issues related to homophobia.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter G, Applicability of legislation on trans gender issues, case 1

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter G, Name change and/or sex change of transgender people, relevant case law, case 1

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

Case Title	Raymond Giford known as Rachel Gilford vs Director of Public Registry
Decision Date	9th October, 2001
Reference details	Constitutional Court
Key facts of the case	Raymond sive Rachel Gilford underwent gender reassignment surgery on the 17th October 2000, she sought the amendment of her birth certificate from the Director of the Public Registry. Following this she instituted proceedings before the courts alleging a violation of her right to private life in terms of the Maltese Constitution and also in terms of the European Convention.
Main reasoning/ argumentation	The applicant alleged that the Maltese law gives rise to a violation of Articles 3 and 8 of the Convention and the respective provisions of the Constitution arising from the lack of a formal procedure for the reposition of persons who undergo gender reassignment surgery.
Key legal issues clarified by the case	The court clarified that the term 'sex' should be taken to be reflective of both the biological and psychological sex such should exist concurrently. The court held that upon the applicant's birth, the indication of her sex to be 'male' on the official record of birth, however that same was not reflective of her psychological sex in the circumstances. It consequently found a violation of the right of the applicant to respect for private life and to find a violation of the prohibition from degrading and inhumane treatment and such acts that amount to such acts that are required in this respect.
Results and key consequences or legal implications of the case	The court found in favour of the applicant and ordered the Director of Public Registry to amend the birth certificate both with respect to the indication of 'sex' and also in the indication of name. The court recognised that a procedure ought to be put in place to allow such amendments to be made for 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.

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Annex 2 – Statistics

[74]. 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.

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								

Chapter B, Freedom of movement of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)								
Number of LGBT partners who claimed their right to residence but were denied this right								

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007

Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.								
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation								

Chapter C, Asylum and subsidiary protection, protection of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC								
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner								

Chapter D, LGBT partners benefiting family reunification

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.								
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification								

Chapter E, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc							1	1
Number of demonstrations against tolerance of LGBT people.								

Chapter F, Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)								
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)								
Range of sanctions issued for homophobic hate speech								
Number of non-criminal court cases initiated for homophobic statements								
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the								

plaintiff, even if no sanctions other than symbolic were imposed)								
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Chapter F, Homophobic motivation of crimes as aggravating factor

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing								

Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender								
Number of persons who changed their gender/sex in your country under the applicable legislation								

Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation
 [presentation according to the templates above]