

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

Malta

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Contents

Executive summary	1
1 Implementation of Employment Directive 2000/78/EC.....	5
2 Freedom of movement	9
3 Asylum and subsidiary protection.....	11
4 Family reunification.....	13
5 Freedom of assembly.....	15
6 Criminal law	16
6.1 Criminal Law and Hate Speech related to Homophobia	16
6.2 Unlawful Discrimination	17
7 Transgender issues	19
8 Intersex.....	22
9 Miscellaneous.....	23
10 Good practices	25
Annex 1 – Case law	26
Annex 2 – Statistics.....	31

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 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.

Freedom of movement

Same-sex partnerships, whether in the form of marriage or of registered partnerships, were not allowed or recognised under Maltese law until the Civil Unions Bill approved on 14 April 2014.² Although the Marriage Act³ 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 was an understanding which was upheld by our courts and which excluded 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 had an impact on the treatment of LGBT persons on a number of issues related to freedom of movement. . Under Maltese law the spouse of a Maltese citizen who has been married for at least five years and is still living with the Maltese spouse is entitled to freedom of movement. A widow/widower of a Maltese citizen who was still living with the husband or the wife at the time of their death and had been married for at least five years is also entitled to freedom of movement. The Civil Unions Bill puts civil unions at par with marriage, therefore Maltese courts have to recognise civil unions or gay marriage in the same manner as marriage between men and women. This recognition of civil unions or gay marriage has an impact on freedom of movement since same sex partners shall have the right to free movement in the same manner as a spouse.

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.⁴ 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”.⁵ An applicant who applies for international protection on the basis of his/her sexual orientation and/or gender identity may constitute a particular social group and be recognised as a refugee. In the case of such claims, the Office of the Refugee Commissioner assesses thoroughly such a claim on a case by case basis taking into account the particular circumstances of the individual applicant and the

¹ Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*), 5 November 2004, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11229 (14 May 2014) (All hyperlinks were accessed on 14 May 2014)

² Malta, The Civil Unions Act 2014 (*Att tal-2014 dwar l-Unjonijiet Ċivili*), 14 April 2014, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26024&l=1 (14 May 2014)

³ Malta, Marriage Act (*Att dwar iż-Żwieġ*), 12 August 1975 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=1 (14 May 2014)

⁴ Malta, Refugees Act (*Att dwar ir-Rifuġjati*), 1 October 2001 as amended by Act VIII of 2004 and Legal Notice 40 of 2005, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8886 (14 May 2014)

⁵ Malta, Procedural Standards in Examining Applications for Refugee Status Regulations (*Regolamenti tal-2008 dwar l-Istandards ta' Proċedura fl-Eżami ta' l-Applikazzjonijiet għal Status ta' Rifuġjat*) 3 October 2008, available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10663> (14 May 2014)

situation of LGBTI persons in the country of origin. The Office notes that the legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant is examined.⁶ As regards asylum claims, the Office of the Refugee Commissioner notes that there has been an increase in claims based on sexual orientation or gender identity.⁷

Family reunification

Prior to the enactment of the Civil Unions Act, Maltese law and case-law did 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. Despite this, unofficial information indicates that same sex partnerships registered outside Malta were still at times recognised for purposes of immigration where both persons are EU citizens and where they show the existence of a 'durable relationship'. This situation shall change since the introduction of the Civil Unions Act, which legally equates a civil union with marriage. Prior to the introduction of the Civil Unions Act there were applications for family reunification for same sex partners however these applications have not been numerous. Following the enactment of the Civil Unions Act there have been some applications for reunification of same sex partners but here again the numbers are insignificant. Although the Office for Citizenship and Expatriate Affairs does keep records, statistics are not processed.⁸

Freedom of assembly

Freedom of assembly is protected both under the Constitution of Malta,⁹ and also under the European Convention Act.¹⁰ 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. A street party celebrating the passing of the vote on the Civil Unions Act was held outside Parliament. These public celebrations are an indication that Maltese society is becoming more tolerant and acceptant of LGBT persons.

Hate speech and criminal law

The Criminal Code¹¹ refers to hate speech, and covers incitement to hatred against LGBT persons. The Press Act¹² also protects from insult, threats or exposing a person to hatred on the ground of gender, gender identity and sexual orientation. This protection is due to legislative amendments

⁶ Written information submitted upon request, the Office of the Refugee Commissioner by email dated 17 April 2014

⁷ Information submitted upon request by the Commissioner for Refugees, via email dated 8 July 2014

⁸ Information submitted upon request via telephone interview held with the Assistant Director, Department for Citizenship and Expatriate Affairs on 8 July 2014

⁹ Malta, Ecclesiastical Courts (Constitution And Jurisdiction) Law (*Liġi dwar il-Kostituzzjoni u Ġurisduzzjoni tal-Qrati Ekklesjastiċi*) 10 April 1828 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8567&l=1 (14 May 2014)

¹⁰ Malta, European Convention Act (*Att dwar il-Konvenzjoni Ewropea*), 19 August 1987 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8773 (14 May 2014)

¹¹ Malta, Criminal Code (*Kodiċi Kriminali*), 10 June 1854 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574 (14 May 2014)

¹² Malta, Press Act (*Att dwar l-Istampa*), 23 August, 1974 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8743&l=1 (14 May 2014)

which were enacted in 2012 as a result of lobbying from the LGBT NGOs. Although case law on the matter is limited, in the case *Police vs. Alan Gauci* the Court of Criminal Appeal¹³ pronounced itself on the matter when it stated that ‘it is absolutely unacceptable that a person takes the law into his own hands and commits such an exaggerated act due to a frivolous comment...or a gesture which he felt offended by. It is also unacceptable that a crime is excused due to an issue of honour relating to the place from where he comes’.

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 reflect gender reassignment. Following the case of *Joanne Cassar*¹⁴, amendments by means of Act VII of 2013 have been effected to the Civil Code granting the right to transsexuals to marry.¹⁵ Prior to this judgement transgender people could not get married and as a result of this judgement transgender persons have the right to get married.

Miscellaneous

Equality in 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. By means of amendments introduced in 2012 to the Equality for Men and Women Act¹⁶ the remit of the National Commission for the Promotion of Equality was extended to cover sexual orientation in the areas of employment, banks and financial institutions and educational and vocational guidance. By means of this change the National Commission for the Promotion of Equality was designated as the Equality Body for sexual orientation issues since prior to this change there was no equality body for sexual orientation. However to date there is no case law on this matter. By means of Article 4(2)(ii) of the Civil Unions Act, the Marriage Act was amended so that the reference to "born or conceived" in article 20(2) of the Marriage Act shall be construed as also including children adopted by partners in a civil union. The Civil Code was also amended to include references to children adopted by partners in a civil union.

Good practices

Over recent years the NGO and civil society lobby has brought about substantial changes in legislation, including the criminalisation of harassment based on sexual orientation and the introduction of civil unions. Following cases of harassment on LGBT persons the NGO and civil society put pressure on Government to introduce hate crime provisions in the Criminal Code.¹⁷

¹³ Court of Criminal Appeal Mr. Justice Michael Mallia; Reference: 472/2012; 4 July 2013

¹⁴ Application no. [36982/11](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111018#{), *Joanne Cassar* against Malta, lodged on 1 June 2011, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111018#{"itemid":\["001-111018"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111018#{) (15 April 2014)

¹⁵ Malta, The Civil Code (Amendment) Act (*Att tal-2013 biex jemenda l-Kodiċi Ċivili*), 12 July 2013, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=25080&l=1 (14 May 2014)

¹⁶ Malta, Equality for Men and Women Act (*Att dwar l-Ugwaljanza għall-Irgiel u n-Nisa*) as amended by Legal Notice 427 of 2007; and Acts IV of 2009 and IX of 2012, 9 December 2003, available at www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1 (14 May 2014)

¹⁷ *Times of Malta* (2012), ‘Hamrun demonstration calls for broader hate crime law’, 26 January 2012, available at: www.timesofmalta.com/articles/view/20120126/local/lesbians.404020 (14 May 2014)

Furthermore the Malta Gay Rights Movement also lobbied with Government for the introduction of an equality body, the introduction of civil union and for gay adoption.¹⁸ 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.¹⁹

Times of Malta (2012), 'Minister, gay movement to meet over hate crime', 26 January 2012, available at: www.timesofmalta.com/articles/view/20120129/local/Minister-gay-movement-to-meet-over-hate-crime.404259 (14 May 2014)

¹⁸ The page referring to news on the website of MGRM, which can be accessed on <http://www.maltgayrights.org/localnews.php> (14 May 2014) has the history of all lobbying carried out by MGRM and the effect of this lobbying.

¹⁹ www.gwu.org.mt (14 May 2014)

1 Implementation of Employment Directive 2000/78/EC

The Employment and Industrial Relations Act 2002²⁰ 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 2004²¹ 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.

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 2002²² 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.²³ 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, but we were informed that no such statistics are held, however all Industrial Tribunal decisions are accessible online²⁴. There were two decisions

²⁰ Malta, Employment And Industrial Relations Act (*Att dwar l-Impiegi u r-Relazzjonijiet Industrijali*), 2 December 2002 and subsequent amendments, Section 2, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8918&l=1 (14 May 2014)

²¹ Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*) 5 November 2004

²² Malta, Employment And Industrial Relations Act (*Att dwar l-Impiegi u r-Relazzjonijiet Industrijali*), 2 December 2002 and subsequent amendments

²³ Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*), 5 November 2004

²⁴ Industrial Tribunal decisions can be accessed on http://industrialrelations.gov.mt/industryportal/industrial_relations/industrial_tribunal/rulings/2014.aspx (14 May 2014)

relating to allegations of sexual orientation discrimination in 2010 however the Chairperson in both cases held that there was no unfair dismissal on the basis of sexual discrimination²⁵. No court cases have been instituted in relation to allegations relating to sexual orientation discrimination²⁶. In 2012 no complaints in relation to sexual orientation discrimination were made to the National Commission for the Promotion of Equality²⁷.

In accordance with Article 9 of Subsidiary Legislation 452.9, when discriminatory treatment is alleged and the complainant 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 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.²⁸

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.

According to Article 10 of Subsidiary Legislation 452.95, 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 in accordance with Article 30 of the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta.²⁹ 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.³⁰

According to Article 10 of Subsidiary Legislation 452.95, where the complainant has opted to proceed before the civil courts, he/she must institute proceedings within four months of the alleged

²⁵ Paula Attard vs. Bingo Limited and Priscilla Gauci vs. Bingo Limited both decided on 2 July 2010 by Chairman Dr. Joseph Bonnici available on the Industrial and Employment relations website:
http://industrialrelations.gov.mt/industryportal/industrial_relations/industrial_tribunal/rulings/trib_dec_2010.aspx

²⁶ All judgments can be accessed on <http://www.justiceservices.gov.mt/courtservices/Judgements/default.aspx> (14 May 2014)

²⁷ Malta, National Commission for the Promotion of Equality (2013), *National Commission for the Promotion of Equality Annual Report 2012*, Malta, National Commission for the Promotion of Equality, 2012, page 27, available at http://msdc.gov.mt/en/NCPE/Documents/Our_Publications_and_Resources/Annual_Reports/annual_report_2012_en.pdf (14 May 2014)

²⁸ Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*), 5 November 2004, Article 9

²⁹ Malta, Employment and Industrial Relations Act (*Att dwar l-Impiegi u r-Relazzjonijiet Industrijali*), 5 November 2004, as amended by Acts IX of 2003, III of 2004 and XIX of 2006; Legal Notice 427 of 2007; Acts V of 2009, V of 2011 and XVI of 2012; and Legal Notice 426 of 2012

³⁰ Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*), 5 November 2004, Article 10 (1)

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.³¹

According to Article 10 of Subsidiary Legislation 452.95, 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.

Article 11 of Subsidiary Legislation 452.95 provides that 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.³² To date no such associations have instituted legal proceedings on behalf of individuals

Article 12 of the regulations impose a duty upon the employer as well as organisations concerned, 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.³³

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.

The National Commission for the Promotion of Equality (NCPE) established by virtue of Chapter 456 of the Laws of Malta – Equality for Men and Women Act, safeguards equality on the grounds of gender and family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity in employment, education as well as in banks and financial institutions. NCPE is responsible for policy, monitoring the implementation of national policies in relation to equality, to work towards the elimination of discrimination, to carry out general investigations with a view to determine whether the provisions of this Act are being complied with, to investigate complaints of a more particular or individual character to determine whether the provisions of this Act are being contravened with respect to the complainant and, where deemed appropriate, to mediate with regard to such complaints. Legal Notice 85 of 2007, the Equal Treatment of Persons Order, extended NCPE's remit to include the promotion of equality on the grounds of race/ethnic origin in the access to and supply of goods and services. Moreover, NCPE is also responsible for enhancing equality between genders in the access to and supply of goods and services, as established by Legal Notice 181 of 2008 – Access to Goods and Services and their Supply (Equal Treatment) Regulations, 2008. Hence, NCPE also works to combat direct and indirect discrimination as well as sexual harassment on the grounds of gender in the access to and supply of goods and services. Amendments effected to the Act in 2012 have led to the widening of its remit in 2012, and thus NCPE now covers discrimination based on gender identity, religion, age, sexual orientation,

³¹ Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*), 5 November 2004, Article 10 (2)

³² Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*), 5 November 2004, Article 11

³³ Malta, Equal Treatment in Employment Regulations (*Regolamenti tal-2004 dwar Trattament Ugwali fl-Impiegi*), 5 November 2004, Article 12

and race/ethnic origin in employment as well as access to vocational/ professional training or banks and financial institutions. This extension of remit was added to the already existing remit of discrimination based on race/ethnic origin and gender in the provision of goods and services and gender including family responsibilities in employment as well as access to vocational/ professional training or banks and financial institutions.

Until 2007 registration of NGOs was not an issue in Malta and there was no system for registration. The Voluntary Organisations Act was brought into effect in in November 2007.³⁴ Voluntary Organisations are not legally obliged to enrol with the Office of the Commissioner for Voluntary Organisations, though enrolment is important and beneficial since through registration organisations qualify for a number of benefits which are not otherwise available to them. In the first place, the certificate issued by this office certifies the organisation officially as a bona fide 'voluntary'. Registered Voluntary Organisations can be accessed on the website of the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties.³⁵ 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.³⁶ Other NGOs working in this field include Drachma³⁷ and We Are.³⁸

³⁴ Malta, Voluntary Organisations Act (*Att dwar l-Organizzazzjonijiet Volontarji*), 11 December 2007 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8958&l=1 (14 May 2014)

³⁵ http://msdc.gov.mt/en/vo_home/Pages/vo_list.aspx (15 April 2014)

³⁶ Another group that is sometimes mentioned is the DRACHMA group, being a Christian LGBT organisation. <http://drachmalgbt.blogspot.com/search/label/Informational> (15 April 2014)

³⁷ <http://drachmalgbt.blogspot.com/> (15 April 2014)

³⁸ www.weare.org.mt/ (15 April 2014)

2 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 were not traditionally considered family members. Indeed, in a parliamentary debate in 2001³⁹ 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.’

With the change in Government in March 2013 there has been a considerable change in this position. For the first time, a Ministry having the responsibility for Civil Liberties was set up. Furthermore, a Bill proposing a Civil Union Act was presented in Parliament in October 2013.

This Bill was approved by Parliament on 14 April 2014 and on 17 April 2014 the Civil Unions Act⁴⁰ was published.

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.

Prior to the enactment of the Civil Unions Act LGBT partners of EU citizens who are themselves EU citizens were 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. With the introduction of the Civil Unions Act, LGBT persons who have contracted civil unions or marriage in another Member State shall be granted free movement on the basis of their relationship, partnership or marriage. This right would then extend to their dependants (that is children under the age of 21 and parents or grandparents wholly maintained by them).

The situation pre 2014 was that it was unofficially said that partners in a same-sex union were recognised as such for purposes of immigration if both persons are EU citizens. At times, however, they were 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.

The Civil Unions Act does not provide for an amendment to the Free Movement of European Union Nationals and their Family Members Order 2007 and only provides for an amendment to the Marriage Act, the Civil Code and the Criminal Code. However Article 4 of the Civil Unions Act provides that “*a civil union, once registered, shall mutatis mutandis have the corresponding effects and consequences in law of civil marriage contracted under the [Marriage] Act*”.⁴¹

³⁹ Parliamentary Debates, Sitting Number 487 (23.01.2001) Answer to Parliamentary Question given by Hon. Dr T. Borg, Minister for Justice and the Interior

⁴⁰ Malta, Civil Unions Act 2014, 2014 (*Att tal-2014 dwar l-Unjonijiet Ċivili*), 17 April 2014, available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12172&l=1> (9 July 2014)

⁴¹ Malta, Civil Unions Act 2014, 2014 (*Att tal-2014 dwar l-Unjonijiet Ċivili*), 17 April 2014, available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12172&l=1> (9 July 2014)

The Free Movement of European Union Nationals and their Family Members Order 2007⁴² provides for the transposition of Council Directive 2004/38/EC and regulates free movement for European Union citizens. 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. Due to the introduction of the Civil Unions Act which has put civil unions at par with marriage the definition of spouse shall be extended to refer to same sex partners as well, provided that such union or marriage has been contracted in a state which is recognised by Maltese legislation. The said Order grants free movement to family members of EU citizens even if such family members are third country nationals. As already stated Article 4 of the Civil Unions Act puts any civil union at par with marriage contracted under the Marriage Act and thus this provision automatically provides for free movement to same sex partners of any EU citizen.

According to Article 4 of the Immigration Act (Chapter 217 of the Laws of Malta)⁴³ the spouse of a Maltese citizen is exempt from the provisions of the Act therefore such person has a right to free movement. Although no amendments have been effected to Chapter 217 by virtue of Article 4 of the Civil Unions Act, a same sex partner of a Maltese citizen is entitled to freedom of movement in the same manner as a spouse of a Maltese citizen. Furthermore, Article 8 of the Civil Unions Act states that where a same sex couple, one of whom is a citizen of Malta, has contracted a marriage or a union of equivalent status before the coming into force of this Act, in a country outside Malta and either of the persons in the couple is a citizen of a country which is not a Member State of the European Union, the legal residence of the said third country national in Malta shall be deemed to have commenced as from the official date of the marriage or of the union of equivalent status.

⁴² Malta, Free Movement Of European Union Nationals And Their Family Members Order (*Ordni tal-2007 dwar il-Moviment Liberu ta' Cittadini ta' l-Unjoni Ewropea u tal-Membri tal-Familji tagħhom*), 20 July 2007, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11755&l=1 (14 May 2014)

⁴³ Malta, Immigration Act, 21 September 1970, available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8722&l=1> (14 May 2014)

3 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.⁴⁴ It is noteworthy that according to Article 18(d)(iii) of the Procedural Standards in Examining Applications for Refugee Status Regulations⁴⁵, “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. The Office of the Refugee Commissioner notes that an applicant who applies for international protection on the basis of his/her sexual orientation and/or gender identity may constitute a particular social group and be recognised as a refugee. The Office assesses thoroughly such a claim on a case by case basis taking into account the particular circumstances of the individual applicant and the situation of LGBTI persons in the country of origin. The Office notes that the legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant is examined.⁴⁶

The Refugee Commissioner⁴⁷ had, since the creation of that office in 2002 until 2010, 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.⁴⁸

It has been noted by the Office of the Refugee Commissioner that in the last few years the number of persons who apply for international protection on the basis of their sexual orientation has been on the increase. Since 2010, the Office had four applicants recognised as refugees on the basis of their actual or perceived sexual orientation and/or gender identity.⁴⁹

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

⁴⁴ Malta Refugees Act (*Att dwar ir-Rifugjati*), 1 October 2001 as amended by Act VIII of 2004 and Legal Notice 40 of 2005

⁴⁵ Malta, Procedural Standards in Examining Applications for Refugee Status Regulations (*Regolamenti tal-2008 dwar l-Istandards ta’ Proċedura fl-Eżami ta’ l-Applikazzjonijiet għal Status ta’ Rifugjat*), 3 October, 2008

⁴⁶ Written information submitted upon request by the Office for Refugee Commissioner, email dated 17 April 2014

⁴⁷ Malta, Refugees Act (*Att dwar ir-Rifugjati*), 1 October 2001

⁴⁸ 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.

⁴⁹ Written information submitted upon request by the Office for Refugee Commissioner, email dated 17 April 2014

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. It is not yet known whether the introduction of civil unions in Malta shall affect this Article since the Civil Unions Act does not refer to an amendment to the Refugees Act.

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 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.

It is not known whether phallometric testing has ever been used in establishing the credibility of asylum claims based on sexual orientation.

As regards asylum claims, the Office of the Refugee Commissioner noticed the following trends: (a) an increase in the claims based on sexual orientation/gender identity in applications lodged by west African Third Country Nationals; (b) sporadic cases of Third Country Nationals from eastern sub-Saharan countries who base their claim for asylum on sexual orientation/gender identity; and (c) an increase in the number of Iranian asylum-seekers who claim asylum on their sexual orientation/sexual identity.⁵⁰

⁵⁰ Information submitted upon request by the Commissioner for Refugees, via email dated 8 July 2014

4 Family reunification

Prior to the introduction of the Civil Unions Act, Maltese law and case-law did not provide in any way for the family reunification of same-sex spouses or of unmarried partners.

Maltese law⁵¹ 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 Reunification⁵² 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 Code⁵³ 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.

Legal Notice 191 of 2007⁵⁴ introduced the notion of a partner with whom a European Union citizen has a durable relationship unless such relationship is in conflict with the public policy of Malta.

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 previous 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.’*⁵⁵³¹

⁵¹ Malta, Family Reunification Regulations (*Regolamenti tal-2007 dwar ir-Riunifikazzjoni tal-Familji*) 5 June 2007, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9561&l=1 (14 May 2014)

⁵² Malta, Family Reunification Regulations (*Regolamenti tal-2007 dwar ir-Riunifikazzjoni tal-Familji*), 5 June 2007, Section 4(1)

⁵³ Malta, Civil Code (*Kodiċi Ċivili*), 11 February 1870 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580 (14 May 2014)

⁵⁴ Malta, Free Movement of European Union Nationals and their Family

Members Order 2007 (*Ordni ta’ l-2007 dwar il-Moviment Liberu ta’ Ċittadini ta’ l-Unjoni Ewropea u tal-Membri tal-Familji Tagħhom*), 20 July 2007, available at:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=19536&l=1> (9 July 2014)

This provision was however held to be discriminatory and an amendment effected in 2011 by means of Legal Notice 329 of 2011⁵⁶ deleted any reference to the relationship being in conflict with the public policy of Malta.

With the introduction of the Civil Unions Act, by means of Article 4 which puts a civil union at par with marriage, civil unions contracted between same sex partners as well as civil unions contracted between a man and a woman shall be considered as marriage for the purposes of the Marriage Act. This definition shall impact on the definition of spouse for family reunification purposes.

Legal Notice 209 of 2014 entitled Unions of Equivalent Status to Civil Unions Regulations 2014, published in the Government Gazette on 20 June 2014, contains a list of those civil unions which are unions of equivalent status to civil unions as provided in the Civil Unions Act. However, according to a public statement made by the Malta Gay Rights Movement on July 2014, it is not yet possible to register civil partnerships contracted abroad since there is still subsidiary legislation that needs to go through parliament for the current registration forms to be amended to cater for same-sex couples. This amendment should be in force within the next few weeks.⁵⁷

Prior to the introduction of the Civil Unions Act there were applications for family reunification for same sex partners however these applications have not been numerous. Following the enactment of the Civil Unions Act there have been some applications for reunification of same sex partners but here again the numbers are insignificant. Although the Office for Citizenship and Expatriate Affairs does keep records, statistics are not processed.⁵⁸

⁵⁶ Malta, European Union Nationals and their Family Members

(Amendment) Order, 2011 (*Ordni tal-2011 li jemenda l-Ordni dwar il-Moviment Liberu ta' Cittadini tal-Unjoni Ewropea u tal-Membri tal-Familji tagħhom*), 12 August 2011, available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=22467&l=1> (9 July 2014)

⁵⁷ Malta, *Unions of Equivalent Status to Civil Unions Regulations, 2014 (Regolamenti tal-2014 dwar Unjonijiet ta' Stat Ekwivalenti għall-Unjonijiet Ċivili)*, 20 June 2014, available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12200&l=1> (9 July 2014)

⁵⁸ Information submitted upon request via telephone interview held with the Assistant Director, Department for Citizenship and Expatriate Affairs on 8 July 2014

5 Freedom of assembly

This freedom is protected both under the Constitution of Malta,⁵⁹ and also under the European Convention Act.⁶⁰ 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. Gay Pride Marches have been regularly attended with an increased number of politicians attending such events. A street party held after the vote on the Civil Unions Act on 14 April 2014 was very well attended⁶¹. The Gay Pride March held on 6 July 2007 was 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 explained as being allegedly due to the fact that people are still afraid of exposing themselves in broad daylight and with media coverage. The Gay Pride March was held annually with 2008⁶² being marked by lack of representation from the Nationalist Party (which was the party in Government at the time) politicians. In 2009, 2010, 2011 and 2012 the Gay Pride was attended by the three political parties and attendance was approximately of 150 persons.⁶³ The 2013 Gay Pride was characterised by an marked increased number of persons attending the Pride.⁶⁴ Police presence at Pride Events is to ensure public order and such police presence is found during any public event.⁶⁵

⁵⁹ Malta, Constitution of Malta (*Kostituzzjoni ta' Malta*), 21 September 1964, Article 42, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566 (14 May 2014)

⁶⁰ Malta, European Convention Act (*Att dwar il-Konvenzjoni Ewropea*), 19 August 1987 and subsequent amendments
⁶¹ *Times of Malta* (2014), 'Same sex unions approved - Celebrations in Valletta - Opposition abstains because of adoptions', 14 April 2014, available at: www.timesofmalta.com/articles/view/20140414/local/same-sex-unions-approved-celebrations-in-valletta-opposition-abstains-because-of-adoptions.514992 (14 May 2014)

⁶² Malta Gay News Library, available at: <http://patrickattard.blogspot.com/2008/07/2008-gay-pride-images.html> (14 May 2014)

⁶³ *Times of Malta* (2009), 'Gay Pride parade held in Valletta', 18 July 2009, available at: www.timesofmalta.com/articles/view/20090718/local/gay-pride-parade-held-in-valletta.265576 (14 May 2014)
Times of Malta (2012) 'Video: Colourful Gay Pride parade in Sliema', 30 June 2012, available at: <http://www.timesofmalta.com/articles/view/20120630/local/gay-pride-parade-in-sliema.426617> (14 May 2014)

⁶⁴ *Times of Malta* (2013), 'Updated: Hundreds attend Malta's Gay Pride Parade in Valletta', 22 June 2013, available at: www.timesofmalta.com/articles/view/20130622/local/in-support-of-gay-rights.474918 (14 May 2014)

⁶⁵ Verbal information submitted upon request by the Head of Legal Office, Executive Police on 12 May 2014

6 Criminal law

6.1 Criminal Law and Hate Speech related to Homophobia

The Criminal Code refers to hate speech. This is regulated in Section 82A of the Criminal Code.⁶⁶ Following amendments introduced in 2012 the concept of incitement to hatred was extended to cover incitement to hatred against LGBT persons. Article 82A of the Criminal Code states that:

'(1) Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.

'(2) For the purposes of the foregoing subarticle "violence or hatred" means violence or hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion.'

A similar concept is found within the Press Act⁶⁷ 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 gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion, disability as defined in article 2 of the Equal Opportunities (Persons with Disability) Act, shall be liable on conviction to imprisonment for a term not exceeding three months and to a fine (multa).'

There are no statistics and case law is very limited to identify any trends committed with a homophobic or transphobic motivation. In the case *Police vs. Alan Gauci* the Court of Criminal Appeal⁶⁸ decided that 'it is absolutely unacceptable that a person takes the law into his own hands and commits such an exaggerated act due to a frivolous comment...or a gesture which he felt offended by. It is also unacceptable that a crime is excused due to an issue of honour relating to the place from where he comes'. Alan Gauci had run over Jeremy Lalic as the latter had called him 'gay' in a bar in Mellieha. The Court of Magistrates in the first instance had found him guilty however only imposed a conditional discharge due to the fact that this court declared that the accused had been provoked by the victim calling him gay and in a village like Mellieha such insults were not acceptable.

⁶⁶ Malta, Criminal Code (*Kodiċi Kriminali*), 10 June 1854 and subsequent amendments

⁶⁷ Malta, Press Act (*Att dwar l-Istampa*), 23rd August, 1974 and subsequent amendments

⁶⁸ Court of Criminal Appeal Mr. Justice Michael Mallia; Reference: 472/2012; 4 July 2013

6.2 Unlawful Discrimination

Discrimination is prohibited on the ground of sex both under the Constitution of Malta⁶⁹ and the European Convention Act. Yet this does not constitute a criminal offence and merely a violation of one's human rights. A Private Member's Bill⁷⁰ was presented in Parliament in 2013 to introduce prohibition of discrimination on the ground of sexual orientation. During parliamentary debates, Minister Helena Dalli, Minister for Social Dialogue and Civil Liberties argued that this prohibition should also extend to discrimination on grounds of gender identity.⁷¹ This amendment to the Constitution of Malta was approved by an absolute majority in a Parliamentary vote taken on 14 April 2014.

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 –

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

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

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

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.

Criminal law provide for aggravation when offences are committed as a result of homophobia. Article 251 D was amended in 2012 to state as follows:

The punishments established in the foregoing provisions of this sub-title shall be increased by one to two degrees when the offence is aggravated or motivated on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic

⁶⁹ Malta, Constitution of Malta (*Kostituzzjoni ta' Malta*), 21 September 1964

⁷⁰ Malta, A Bill entitled An Act to amend the Constitution of Malta (*Abbozz ta' Liġi msejjaħ Att biex jemenda l-Kostituzzjoni ta' Malta*), 2013, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=25558&l=1 (14 May 2014)

⁷¹ Dalli, H. (2013), 'Gender identity also matters', *Times of Malta*, 28 October 2013, available at: www.timesofmalta.com/articles/view/20131028/opinion/Gender-identity-also-matters.492252 (14 May 2014)

origin, religion or belief or political or other opinion within the meaning of sub-articles (3) to (6), both inclusive, of article 222A.⁷²

Furthermore, LGBT persons may be said to receive further protection in terms of the Criminal Code is for that aspect of discrimination that emanates from incitement to hatred and harassment. Section 82A states as follows:

'Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.

(2) For the purposes of the foregoing subarticle "violence or hatred" means violence or hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion'.

Sections 249 to 251D⁷³ 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;⁷⁴ 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; ...'

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.

⁷² Malta, Criminal Code (*Kodiċi Kriminali*), 10 June 1854 and subsequent amendments, Section 251D

⁷³ Malta, Criminal Code (*Kodiċi Kriminali*), 10 June 1854 and subsequent amendments
Of Threats, Private Violence and Harassment

⁷⁴ Malta, Broadcasting Act (*Att dwar ix-Xandir*), available at:
www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8820&l=1 (14 May 2014)

7 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 judgments⁷⁵, 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*⁷⁶ 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*⁷⁷ 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*⁷⁸ 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*⁷⁹ 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,⁸⁰ 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 2004⁸¹ contributed to establishing a procedure for the rectification of acts of birth, and consequently of other official personal documentation, to reflect gender reassignment.

⁷⁵ Ellul Joseph k/a Tracy vs. Avukat Generali, 618/97 VDG, Constitutional Court decided on 2 November 2011

⁷⁶ Malta/Constitutional Court/79/1995 (14 July 1995)

⁷⁷ Malta/First Hall of the Civil Court/689/1999 (24 September 2001)

⁷⁸ Malta/First Hall of the Civil Court/617/1997 (02 October 2002)

⁷⁹ Malta/Court of Appeal/1100/1997 (06 December 2002)

⁸⁰ This was reported in the media, however the judgment is not readily available as the name of the applicant has been kept unpublished.

⁸¹ Malta, HAn Act to further amend the Civil Code (*Att li jkompli jemenda l-Kodiċi Ċivili*), 30 December 2004, available at: www.doi-archived.gov.mt/en/parliamentacts/2004/ACTXVIII.pdf (14 May 2014)

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 Falzon, N. (2010) 'A Proposed Gender Identity Act for Malta', Malta Gay Rights Movement, December 2010.

Article 257A(1) of the Civil Code states the requirements at law for a change in sex and it states that it shall be lawful for any unmarried person domiciled in Malta to bring an action for an annotation regarding the particulars relating to sex which have been assigned to him or her in the act of birth.⁸² In order to allow such change the Court needs to be satisfied that the person has in fact, undergone an irreversible sex change from that indicated in the act of birth or has otherwise always belonged to such other sex.

The adoption by the Parliament of Malta of Act VII of 2013⁸³ has made amendments to reflect the principles of the person's right to secrecy. Article 257C of the Civil Code states that the annotations in an act of birth, referred to in article 257B, shall be effective as from the day when the Director of Public Registry shall enter such modification in the act of birth.

This Article also clarifies that the annotation in the indication of the sex in the act of birth shall in no way affect the family relationships which exist at the date when such modification is recorded and any other obligations arising out of parenthood or any other cause.

Furthermore, Article 251 (2) of the Civil Code states that an extract of certificates⁸⁴ shall contain all the corrections and annotations made in relation to such certificate. In the case of transgender persons, such extract shall refer to their acquired sex. This Article also gives the right to the said person to demand that a full certificate of their act of birth showing the particulars resulting from the annotations be issued to them so however that there shall be indicated on such certificate that annotations have been made upon it by virtue of a judgement or a decree of a court without the details of the said annotations being specified.

Within seven days from receipt of a request made for the issue of a birth certificate drawn up in accordance with this proviso the Director of the Public Registry shall cease to furnish any information contained in the register or any copy of the register about the original act of birth of the person making the said request except insofar as provided in this proviso.

Information about or copy of the original act of birth may be only be given with the consent of the person to whom the certificate refers or when there is no such consent, upon an order of the Court of Voluntary Jurisdiction or of another Court taking cognizance of a cause where the necessity of the presentation of that certificate or information arises, where the Court is satisfied that the issuing of the said certificate or information is necessary to defend or safeguard a right or a legitimate interest of the person making the demand which, after taking into consideration all relevant circumstances, the court considers should prevail over the right to privacy of the person to whom the certificate refers.

Act VII of 2013 furthermore clarified the position in relation to the right of transgender persons to marry. By means of this Act, Article 257C (2) of the Civil Code now reads:

⁸² Malta, Civil Code (*Kodiċi Ċivili*), 11 February 1870 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580 (9 July 2014)

⁸³ Malta, An Act to further amend the Civil Code (*Att tal-2013 biex jemenda l-Kodiċi Ċivili*), 12 July 2013
The Act amends Article 257B by introducing a proviso stating that the annotations shall contain a reference to the judgement or court decree without giving details of the annotations and also amends Article 257C so that the capacity of the person to exercise the right to marry is that of the acquired sex.

⁸⁴ An extract of certificates is an abridged copy of a registered act, in this case the birth certificate.

"(2) Without prejudice to the other provisions of this article, as from the said day the person in respect of whom a declaration is made under article 257B shall be considered for all civil purposes, including with regard to the capacity of that person to exercise the right to marry, as belonging to the acquired sex indicated in the Register."

The Equality Legislation has been amended in 2012 to include discrimination on the basis of gender identity. The designated equality body, the National Commission for the Promotion of Equality is the equality body responsible for discrimination based on gender identity.

Discrimination of transgender people is dealt with as discrimination on gender identity. All legislation including Criminal Code provisions and the Press Act refer to discrimination on gender identity in the same manner as discrimination on other grounds.

With respect to change of names and change of gender/sex, presently this is only possible once gender reassignment surgery has been carried out, however this situation shall likely be changed once the Gender Identity Bill comes into force. This Bill however is still in the very early stages of Parliamentary discussion. Presently a change in name is only legally possible once an irreversible sex change has occurred. Article 257A states that it shall be lawful for any unmarried person domiciled in Malta to bring an action for an annotation regarding the particulars relating to sex which have been assigned to him or her in the act of birth. Before delivering judgement, the Court shall appoint experts to verify whether the person who has brought the action has, in fact, undergone an irreversible sex change from that indicated in the act of birth or has otherwise always belonged to such other sex. Article 257 B refers to the change in name and states that the court may also order an annotation in the name or names of the plaintiff if it has allowed the request. The only requirement in legislation presently refers to an irreversible sex change and no reference is made to any other requirements for change in sex.

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.⁸⁵

⁸⁵ Baldacchino, R., Grech, C., Calleja, G. (Ed.) (2008), *Inclusion of transgender individuals into the labour market. A research study*. Malta Gay Rights Movement, July 2008, available at: <http://www.maltgayrights.org/cms/pdfs/Trans%20Research%20Study.pdf> (14 May 2014)

8 Intersex

Intersex people are not specified under national non-discrimination legislation and/or in legal cases/jurisprudence and/ or in non-discrimination policies and nor is the ground of intersex. Intersex discrimination is not covered under national non-discrimination policies.

As things stand registration for a birth certificate does not allow a child to be of undetermined gender - it has to be registered as a male or a female. The government is considering amending this to allow for intersex at registration⁸⁶.

Doctors are obliged to provide the best care according to current, evidence-based information. Children are assessed by a multidisciplinary team. All information is thoroughly discussed with the parents and with the child when he or she are of an age that allows them to understand these issues.

It is pointed out that the word "intersex" is no longer used in any context in medicine. The proper term is now "disorder of sex development" (DSD). Certain DSDs can be life-threatening in the short term if not treated properly (e.g. virilising congenital adrenal hyperplasia can be associated with severe adrenocortical insufficiency). Other DSDs can be associated with the development of malignancies in abnormally-formed gonads in the longer term. High consideration is given to parents' wishes after informed discussions. The over-arching philosophy is to preserve health and life, as in any other medical or surgical condition.

All interventions, whether medical or surgical and whether investigative or therapeutic, are strictly performed after fully informed consent has been given. The main parties are the parents or legal guardians, who are always involved. As far as possible, children are also involved in the decision and their opinion is considered in all decisions. The legal age of consent in Malta is 18 years. The parents or legal guardians have the right to consent on a child's behalf if he or she is less than 18 years of age. However, because of the possible long-term implications of any intervention, medical doctors try to involve the patients themselves as much as possible.⁸⁷

⁸⁶ Written information submitted upon request by Ms. Marthese Johnson, Private Secretary, Parliamentary Secretary for Health on the 9th July 2014

⁸⁷ Written information submitted upon request by Ms. Marthese Johnson, Private Secretary, Parliamentary Secretary for Health on 9 July 2014

9 Miscellaneous

Upon consideration of the Income Tax Act⁸⁸ 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’. This situation shall change with the recent introduction of the Civil Unions Act which provides for recognition of same sex unions. Article 4 of the Civil Unions Act provides that civil unions are at par with marriage therefore the introduction of this Act shall also impact on the Income Tax Act. Furthermore, Article 9 of the same Act states that in situations where the rights and obligations of civil partners are unclear, every effort shall be made to ensure that the determination of such rights and obligations is such that equates them to those enjoyed by spouses.

National legislation does not include a specific Act of Parliament on the protection of minors, or 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.

By means of amendments introduced in 2012 to the Equality for Men and Women Act⁸⁹ the remit of the National Commission for the Promotion of Equality was extended to cover sexual orientation in the areas of employment, banks and financial institutions and educational and vocational guidance. The definition of discrimination in Article 2 was extended to cover discrimination on sexual orientation and on gender identity, therefore the protection from discrimination in the aforementioned areas was extended to cover discrimination on the grounds of sexual orientation and gender identity. Furthermore, the National Commission for the Promotion of Equality was designated as an equality body for LGBT issues as well.

The Civil Unions Act apart from introducing civil unions also introduced the possibility of gay adoptions. By means of Article 4(2)(ii) of the Civil Unions Act, the Marriage Act was amended so that the reference to "born or conceived" in article 20(2) of the Marriage Act shall be construed as also including children adopted by partners in a civil union.⁹⁰ Furthermore Article 100 B (1) of the Civil Code states that children adopted jointly by partners to a civil union contracted between persons of the same sex under the Civil Unions Act, or recognised by the said Act shall, notwithstanding the other provisions of this Code or of any other law, be recognised for all intents and purposes of law as having parents of the same sex and all rights and obligations of parents towards their children and of children towards their parents shall apply to such children and parents. Article 100 B(2) states that whenever a law or administrative measure requires a person to declare the name or other particulars of the mother or the father, a person adopted jointly by partners in a

⁸⁸ Malta, Income Tax Act (*Att dwar it-Taxxa fuq l-‘Income’*), and subsequent amendments, 1 January 1949, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8658 (14 May 2014)

⁸⁹ Malta, Equality for Men and Women Act (*Att dwar l-Ugwaljanza għall-Irġiel u n-Nisa*), 9 December 2003 as amended by Legal Notice 427 of 2007; and Acts IV of 2009 and IX of 2012

⁹⁰ Malta, Civil Unions Act 2014, 2014 (*Att tal-2014 dwar l-Unjonijiet Ċivili*), 17 April 2014, available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12172&l=1> (9 July 2014)

civil union as referred to in sub-article (1) shall be entitled to declare the names or other particulars of the two partners in the said civil union instead of the said particulars of the mother or the father.⁹¹

⁹¹ Malta, Civil Code (*Kodiċi Ċivili*), 11 February 1870 and subsequent amendments, available at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580 (9 July 2014)

10 Good practices

In 2010, the Malta Gay Rights Movement presented a Gender Identity Bill which was tabled in Parliament by MP Evarist Bartolo. Following homophobic attacks occurring in 2012, civil society pressure led to the legislative amendments to the Criminal Code and the Press Act, criminalising incitement to hatred based on gender identity and sexual orientation and prohibiting hate speech based on discrimination on gender identity and sexual orientation. This also led to amendments in the Equality for Men and Women Act and extended the remit of the National Commission for the Promotion of Equality to become an equality body for LGBT issues. These good practices are innovative for Malta being a traditionally Catholic country and which always refused to introduce rights for the LGBT community. Most of the good practices which are identified refer to legislative changes therefore there is no measurable output or long term impact identified as yet. Furthermore, no review and assessment of these measures has been identified. The design and drafting of these new provisions have been made together with NGOs and civil society. These provisions can be transferred to other Member States in the event that these issues are not already dealt with under their legislation.

A good practice that may be seen as connected to the Legal Notice which transposed Directive 2000/78/EC is a policy paper that has been published by one of the major trade unions in Malta. General Workers' Union⁹² 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:-

- 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.

The good practices identified in this section do not refer to any good practices which go above EU standards. It is to be noted that in the particular situation of Malta whereby the introduction of civil unions and gay adoption was a major breakthrough in LGBT rights.

⁹² www.gwu.org.mt (14 May 2014)

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.justiceservices.gov.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. Decisions of the Industrial Tribunal can be accessed on http://industrialrelations.gov.mt/industryportal/industrial_relations/industrial_tribunal/rulings/2014.aspx

Neither do either of these bodies have statistics to identify the number of complaints received in relation to claims on discriminatory treatment. According to the information available publicly no complaints have been submitted to the National Commission for the Promotion of Equality.

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

Decision date	4 July 2013
Reference details	Police vs. Alan Gauci Court of Criminal Appeal Mr. Justice Michael Mallia Reference: 472/2012
Key facts of the case (max. 500 chars ⁹³)	This is an appeal from a case decided on 3 October 2012. Alan Gauci had run over Jeremy Lalic as the latter had called him 'gay' in a bar in Mellieha. The Court of Magistrates in the first instance had found him guilty however only imposed a conditional discharge due to the fact that this court declared that the accused had been provoked by the victim calling him gay and in a village like Mellieha such insults were not acceptable.
Main reasoning/argumentation (max. 500 chars)	The Attorney General appealed this judgement stating that the part where the accused was considered as having been provoked should be revoked and that punishment should be increased.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court examined the concept of sudden passion in the light of provocation and legitimate defence, which were the points of defence used by the accused.

⁹³Characters, excluding space

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

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 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.
Main reasoning/ Argumentation	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.
Key legal issues clarified by the case	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.
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 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.

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 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.
Main reasoning/ Argumentation	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.
Key legal issues clarified by the case	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.
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 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.

Decision date	23 May 2011
Reference details	Joanne Cassar versus Director of the Public Registry
Key facts of the case (max. 500 chars)	On 30 November 2010 the Maltese Constitutional Court had found that the right of a transgender woman to marry violated Article 12 of the European Court of Human Rights (ECHR). This judgement was overturned on 23 May 2011 on appeal. The case was initiated in September 2006 when Ms Cassar and her ex-partner applied for marriage banns. The Marriage Registrar refused to issue the banns. This decision was revoked on appeal because the court ruled that Ms Cassar could never be considered as a 'woman' by the Marriage Act.
Main reasoning/argumentation (max. 500 chars)	The court felt that changes to the birth certificate was intended to protect Cassar's right to privacy, but did not give her the right to marry. The court argued that the Marriage Registrar had interpreted the law correctly, that although the details on her identification papers were changed to show that she was a woman, the Public Registry does not consider her as one, and will not allow a marriage to take place between a transgendered person who has undergone surgery.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Transgendered persons will be considered by Maltese legislation as males. This type of legislation will underline that Maltese law will not condone same sex marriages.

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.

Table 1: Requirements for rectification of the recorded sex or name on official documents

	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment/ physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/ automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation)
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are used by medical

											committees established under the Law on Health Care
DE	✓		✓		✓	✓					Small solution: only name change
DE	✓		✓	✓	✓	✓	✓	✗ court decision law			Big solution: rectification of recorded sex
DK	✓	✓				✓	✓	?			Rectification of recorded sex
DK			✓			✓					Change of name
EE	✓	✓				✓	✓	?			
EL					✓	✓	✓	?			
ES			✓	✓		✓					
FI	✓	✓	✓			✓	✓	✓			Name change possible upon simple notification, also before legal recognition of gender reassignment
FR			✓	✓	✓	✓	✓	✓			Requirements set by case law, legal and medical

										procedures uneven throughout the country
HU						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1 January 2011 a marriage can be transformed into a registered partnership
IE									✓ (name change possible by Deed Poll and under Passports Act 2008)	Further changes expected following court case <i>Lydia Foy</i> (2007)
IT			✓	✓	✓	✓	✓	✓		
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.

LU										No provisions in force, praxis varies.
LV						✓	✓	Change of name possible after gender reassignment		Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.
MT	✓	✓	✓	✓	✓	✓	✓		X (, divorce only possible upon request of either spouse follow	Requirements unclear, decided by Courts on an ad hoc basis

								four years of de facto separation		
NL	✓	✓	✓	✓	✓	✓	✓			According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or psychological point of view. Changes are underway, forced sterilisation might be removed.
PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice
PT	✓		✓	✓	✓	✓	✓			Case-by-case decisions by courts, new act expected
RO				✓	✓	✓	✓			
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board

SI										No formalities for change of name
SK						✓		?		Change of name granted simply upon application accompanied by a confirmation by the medical facility.
UK										Change of name requires no formalities
UK	✓	✓	✓			✓		✓		Rectification of the recorded sex

Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates the conditions for legal recognition of gender reassignment.

☐ applies; ?=doubt; ☐=removed; change since 2008

Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies

Country Code	Material scope			Equality body	Comments
	Employment or occupation	Some areas of RED ⁹⁴	All areas of RED		
AT		✓		✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓		New anti-discrimination legislation adopted
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	
ES			✓		
FI		✓			

⁹⁴ Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. Directive 2000/43/EC (Racial Equality Directive) covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Country Code	Material scope			Equality body	Comments
	Employment or	Some areas of RED ⁹⁴	All areas of RE		
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT			✓	✓	The National Commission for the Promotion of Equality had its remit extended to cover discrimination on grounds of sexual orientation in 2012.
NL		✓		✓	
PL	✓				
PT	✓				
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	

Country Code	Material scope			Equality body	Comments
	Employment only	Some areas of RED ⁹⁴	All areas of RED		
UK			✓	✓	The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality (Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force October 2010.
TOTAL	9	7	11	20	

Note: ✓ = Applies; ? = doubt; x = removed; **change since 2008**

Table 3: Discrimination on grounds of gender reassignment or identity in national legislation

Country Cod	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or <i>travaux préparatoires</i>
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to ‘gender identification’.
DE			✓	Constitutional amendment proposal by opposition (‘sexual identity’)
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to ‘other issues related to gender’.
EL			✓	
ES			✓	The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity.

Country Cod	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	Following the settlement between Government and Joanne Cassar who instituted proceedings in front of the European Court of Human Rights, following a national judgement which denied the right to marry, in April 2013 Government signed a settlement with Ms. Cassar acknowledging her right to marry. ⁹⁵ Ms. Cassar had undergone gender reassignment surgery. As a

⁹⁵ Borg, A. (2013) Settlement between Joanne Cassar and government signed, in The Malta Independent, 16 April 2013, available at: <http://www.independent.com.mt/articles/2013-04-16/news/settlement-between-joanne-cassar-and-government-signed-1402109962/>

Country Cod	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
				result of this, Act VII of 2013 was adopted by Parliament and amended the Civil Code. ⁹⁶
NL	✓			Case law and opinions of the Equal Treatment Commission
PL			✓	
PT			✓	
RO			✓	
SE	✓	✓		Discrimination on grounds of gender reassignment is still considered ‘sex’ discrimination. The new ground ‘transgender identity or expression’ now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the ‘gender reassignment’ protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under “medical supervision”

⁹⁶ Malta, House of Representatives (2013), Act VII of 2013, the Civil Code (Amendment) Act, 2013, available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=25080&l=1>

Country Cod	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
				and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.
TOTAL	10	3	15	

Note: ✓ = applicable; positive development since 2008

Table 4: Criminal law provisions on ‘incitement to hatred’ and ‘aggravating circumstances’ covering explicitly sexual orientation

Country Codes	Criminal offence to incite to hatred violence or discrimination grounds of sexual orientation	Aggravating circumstances	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category ‘group of people’, but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		
EL		✓	Article 23 of Law 3719/2008 provides for an aggravating circumstance in cases of hate crime based on sexual orientation.

Country Codes	Criminal offence to incite to hatred violence or discrimination grounds of sexual orientation	Aggravating circumstances	Comments
ES	✓	✓	
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category 'comparable group'. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category 'groups of society'. Penal Code was amended to include hate motivated crimes against 'certain groups of society'. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT	✓	✓	Article 82A of the Criminal Code was amended in 2012 to include incitement to hatred based on gender identity and sexual orientation.

Country Codes	Criminal offence to incite to hatred violence or discrimination grounds of sexual orientation	Aggravating circumstance	Comments
NL	✓	✓	The 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.
PL			General provisions could extend to LGBT people
PT	✓	✓	
RO	✓	✓	Art. 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article 369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation. Homophobic intent is only considered an aggravating circumstance in the case of murder.
SK			LGBT people could fall under the category 'group of people'
UK (N-Ireland)	✓	✓	
UK (England & Wales)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23.03.2010. It applies to Scotland as well.

Country Codes	Criminal offence to incite to hatred or violence or discrimination on grounds of sexual orientation	Aggravating circumstances	Comments
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ☐ applicable; positive development since 2008

Table 5 - Definition of ‘family member’ for the purposes of free movement, asylum and family reunification

Count Code	Free movement		Family Reunification		Asylum		Comments
	spous	partn	spou	partn	spou	partn	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of ‘family member’ includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of ‘family member’ includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DK	✓	✓	✓	✓	✓	✓	

⁹⁷ In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a ‘durable relationship’ may be proven for the purposes of Art. 3 (2) of the Free Movement Directive.

Count Code	Free movement		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
EE							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
EL							
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations to this law have not been adopted, thus the meaning of the requirement that the 'affective relationship' be 'duly attested' remains to be clarified. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [del derecho de asilo y de la protección subsidiaria] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU acquis, confirms the notion that a family member includes the de facto partner having an affective relationship similar to marriage.
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities' discretion, which may require additional conditions. No information available on refugees.
HU		✓		✓		?	Entry and residence rights for free movement are also granted for the unmarried <i>de facto</i> partner, subject to conditions.
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses.

Count Code	Free movement		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
IT							
LT							
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.
LV		✓					Article 3.4 of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile.
MT	✓		✓	✓	✓		Present legislation makes reference only to spouse and the existence of a durable relationship in the case of family reunification. Situation likely to change with the introduction of the Civil Unions Act.
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓		✓		Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners

Count Code	Free movement		Family Reunification		Asylum		Comments
	spous	part	spou	part	spou	part	
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	
TOTA	8	15	8	13	8	12	

Note: ☐ applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.