

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

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SECTION A

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

1. Directive 75/117/EEC - Equal Pay

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION B

1. Council Directive 76/207 - Equal Treatment

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

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

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

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

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

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

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

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

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

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

Section 26(2)(a) of EIRA does provide that ‘discriminatory treatment shall include ‘the engaging or selection of a person who is less qualified than a person of the opposite sex, *unless the employer can prove* that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience’. This then is a specific application of the principle of reversal of burden of proof.

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

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

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

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

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

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

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

This Directive was sought to be transposed into Maltese Law by the Protection of Maternity (Employment) Regulations of 5th January 2004 (Legal Notice 439 of 2003 as amended by Legal Notice 3 of 2004), made under the Employment and Industrial Relations Act (EIRA). These came into force on that date. They speak of ‘maintaining employment rights’, ‘facilitating’ (rather than ‘encouraging’) improvements in the health and safety of pregnant employees, those who have recently given birth and breastfeeding employees. ‘Employee’ is not defined and therefore has the meaning as prescribed in the EIRA, wherein ‘employee’ is defined as “any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service”.

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

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

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

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

2. Directive 96/34 - Parental Leave

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

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

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

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

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

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

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

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

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

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

SECTION D: The Maltese Gender Equality Body

Introduction

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

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

Composition

Article 11 of the Act provided for the setting up of a Commission to be chaired by a Commissioner for the Promotion of equality and six other members, at least three of whom were to be women. All the members are appointed by the Prime Minister from among such persons as the Prime Minister considered to be best suited to deal with issues of equality for men and women, and, or, administrative issues connected therewith. The term of appointment is of two years renewable. Appointments may be terminated by the Prime Minister if he is satisfied that a member has failed to attend meetings for six months, or a member is an undischarged bankrupt or has made an arrangement with creditors or is guilty of an offence against the person, or that a member is incapable of carrying out his or her duties.

Independence

Apart from matters of appointment and dismissal (on stated grounds) as above, the Commission is clearly intended by the law to act autonomously. It is declared to have a legal personality separate from that of the Government. Its judicial representation vests in the Commissioner. However, the Commission may appoint one or more of its members or any other person to appear in its name and on its behalf in judicial proceedings and on any act, contract, agreement or document whatsoever (Article 12 (2) of the Act). Article 13 provides for the appointment of an Executive Director who shall administer the Commission in accordance with the policies established by the Commission and such instructions as may be given by the Commissioner. The terms of appointment are fixed by the Commissioner “with the concurrence of the Minister (responsible for equality)”. It is anticipated in the Act that the Executive Director may be a public officer seconded from Government (Article 13(2)).

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

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

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

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

Functioning

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

General Purpose and Objective

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

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

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

Funding

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

Role and Functions

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

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

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

Any Proposals to Change the Body

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

Any Problems in Relation to Functioning and Significant Results Achieved

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

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

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

SECTION E: Putting Rights into Practice

1. Description of National Procedures for the Enforcement of Rights

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

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

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

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

2. Time Limits

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

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

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

3. Sanctions

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

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

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

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

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

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

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

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

Otherwise as far as time limits are concerned, claims before the industrial tribunal under EIRA are time-barred after four months. There is no stipulated time-limit under the EMW Act. Actions in contract before the ordinary courts are time-barred after five years. The problem is that Article 75, “notwithstanding any other law”, gives the Industrial Tribunal ‘exclusive’ jurisdiction over all cases of unfair dismissal and all cases falling within its jurisdiction in virtue of Title I of the EIRA or any regulations made thereunder, and this includes Articles 26 et seq. on discrimination in employment. Yet Article 30 (4), as stated above, provides that any action taken by the complainant before the tribunal shall be without prejudice to any ‘further’ action that such complainant may be entitled to take under ‘any other applicable law’ and Article 19(1) EMWA appears to enshrine the right to seize the civil courts. There appears to be a contradiction here, on which there has as yet been no guidance by the courts. However, the likely interpretation is given above.

A further point is that where the law creates a criminal offence the maximum penalty is often set at a fine of Lm1000. Again, as with the level of compensation awards in practice, there is a feeling among practitioners that a maximum penalty of Lm1000 is too low to provide any real deterrent. However, it would take a deep analysis of the caselaw as it happens, something not yet scientifically done, to establish the proper deterrent in each case.

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

5. Number of Cases

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

6. Trends in Types of Redress Awarded in Practice

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

7. Publication of the Outcomes of Cases

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

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

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

Awareness

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

Cultural Factors

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

Conclusion

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

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

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

1. The Equality for Men and Women Act

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

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

2. Employment and Industrial Relations Act

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

3. The Constitution

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

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

4. Background and the Current Scene in Outline

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

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

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

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

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

Some Sources

Annual Report 2004, National Commission for the Promotion of Equality for Men and Women. ISBN 99909-89-13-3. Year of publication, 2005.

NCPE Website: www.equality.gov.mt

NCPE e-mail address: gender.equality@gov.mt

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

1. Exclusions

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

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

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

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

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

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

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

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

Article 26 of the EIRA makes unlawful discriminatory treatment in advertising or offering employment or employment opportunities or when selecting for employment, or in employment conditions, and it is provided in subarticle (2) that discriminatory treatment includes the engaging or selection of a person who is less qualified than a person of the opposite sex *unless* the employer can prove that the action was based on *acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience*. The proviso is vague, although the burden of proof is put on the employer. There have not as yet been any reported cases under this heading.

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

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

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

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

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

The Constitution of Malta

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

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

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

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

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

So Article 2(4) of the EMW Act provides that there shall not be discrimination within the meaning of that Act in so far as relates to ‘provisions’ that grant special protection to women ‘during childbirth or pregnancy’. Note that the provision refers to ‘childbirth’ and not ‘maternity’ which is wider. Indeed, the ECJ has at times adopted a wide interpretation even of ‘maternity’ for the purposes of the Directive (Cf. re rights, including those of men, on adoption, *Commission v. Italy* Case 163/82 [1983] ECR 3273 and e.g. *Hofmann v. Barmer Ersatzkasse* Case 184/83 [1984] ECR 3047 re ‘motherhood’). So the EMW Act appears to limit the scope of exclusion to pregnancy and childbirth (leaving it for the courts to follow ECJ case law on the interpretation of ‘maternity’ if the ECJ adopted a wide interpretation). While later ECJ judgments make it clearer that there needs to be close relation to child-bearing, there might be some ongoing doubt as to interpretation in this connection. A further question might be raised by the use of the word ‘particularly’ in the Directive, a word omitted from article 2(4) of the EMW Act but offering scope to the ECJ in the interpretation of the Directive. While Article 2 (4) clearly envisages that such measures may be adopted, there has as yet been no enactment of ‘provisions granting special protection’ going beyond the implementation of Directive 92/85 via the Protection of Maternity (Employment) Regulations (Legal Notice 439 of 2003).

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

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

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

CONCLUSION

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