

SEXUAL ORIENTATION DISCRIMINATION IN MALTA - THE EMPLOYMENT FRAMEWORK DIRECTIVE AND BEYOND

CHRISTIAN ATTARD
(MALTA GAY RIGHTS MOVEMENT)

Introduction

Malta's accession to the European Union has undoubtedly given a huge impetus to equal opportunities legislation and policies to be introduced locally. In the context of sexual orientation discrimination, it has resulted in the enactment of the first anti-discrimination measures in the field of employment. This was due to Malta's obligations under the European *acquis*, specifically under Directive 2000/78/EC. Whereas the enactment of anti-discrimination legislation is a first step towards ensuring equal treatment, much more needs to be done to achieve this objective in practice. *Government, employers, trade unions and NGOs all have a role to play in ensuring that the anti-discrimination measures are used by those who are most vulnerable.*

The need for equal opportunities measures and policies to be further strengthened is evidenced by various factors. Foremost among them we find the fact itself that the local gay, lesbian and bisexual (LGB) community has slowly started to organise itself into a lobby that pushes for legislative changes in this area. This will inevitably result in a higher degree of visibility and participation of the local LGB community in Maltese society, which will in turn result in more acceptance and consequently in more members of sexual minorities feeling safe enough to 'come out' and live openly as gay, lesbian or bisexual. The end result will be that cases of discrimination will start to be documented and acted upon more frequently than ever before. The local LGB community is increasingly demanding not mere tolerance but full acceptance and equal treatment.

Another factor is the fact that Malta is now a member of the European Union. In the long run we may expect further legislation from Brussels and it therefore makes sense to start getting used to an equal opportunities mentality and to slowly start introducing such

measures of our own initiative and expanding them beyond the field of employment. EU membership, and the potential it presented in terms of providing an impetus for the increased inclusion of the local LGB community was one of the main factors behind the emergence of the local gay and lesbian movement in recent years.

This paper will deal with two questions: first of all it will analyse whether the provisions on sexual orientation discrimination contained in the Directive have been adequately transposed into Maltese law, and secondly, it will delve into the question of how the local equal opportunities measures should be further strengthened and developed, and how it can be ensured that they are made effective in practice. Both questions will be dealt with from the context of sexual orientation as a ground of discrimination.

I. The Implementation in Malta of Council Directive 2000/78/EC

Three legislative instruments have been cited by the Maltese Government as implementing measures for the Directive. These are:

1. The Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta), hereinafter referred to as the 'Act'
2. The Employment and Industrial Relations Interpretation Order (Legal Notice 297 of 2003)
3. The Equal Treatment in Employment Regulations (Legal Notice 461 of 2004), hereinafter referred to as the 'Regulations'

The Malta Gay Rights Movement (MGRM) was actively involved in the process leading up to the enactment or publication of these three instruments through its membership in the International Lesbian and Gay Association, that frequently brought up our concerns with the European Commission, through face-to-face meetings and correspondence with Commission officials in Brussels, meetings with the responsible Ministers and shadow Ministers locally, through the drafting of position papers in relation to the Employment and Industrial Relations Act and the Equality Between Men and Women Act, press releases, lobbying with MEPs, and co-operation with opposition MPs who brought the matter up in Parliament. This last course of action was particularly effective in allowing us to keep abreast of developments whenever the Government was reluctant in consulting or giving information as to future measures that were to be adopted. Research carried out a few years ago among the local LGB community documenting discrimination, harassment and violence against them in most areas of life, including employment, also provided an effective tool in bringing this problem to the attention of the general public. Its findings were in fact quoted numerous times on the local media.

In this part of the paper the adequacy of the above-mentioned legislative framework in transposing the Directive will be analysed, and any shortcomings that remain in its implementation will be identified. The second of the above pieces of legislation, being a mere interpretation order which for all effects and purposes has been superseded by the Regulations, will not be delved into.

Concept of Discrimination

The Directive lays down that discrimination based on religion or belief, disability, age or sexual orientation is to be prohibited in employment and occupation¹. This is mirrored in regulation 1(3) of Legal Notice 461, which makes express reference to sexual orientation as a ground of discrimination. MGRM considers this a positive development, given its position, which it has held ever since the enactment of the Act, that an explicit reference to sexual orientation was necessary in order for the principle of legal certainty to be respected. This also appeared to be the position adopted by the European Commission². Unfortunately it took the Maltese Government three years to acknowledge this, and the result of this reluctance may be still observed in the overall legislative framework in this field, as will be described further below.

The Directive divides the definition of discrimination into four concepts: direct and indirect discrimination, harassment and instruction to discriminate³. Whereas the Act did not follow this approach, the Regulations remedied the situation by including ‘harassment’ within the definition of ‘discriminatory treatment’. The definitions of the various terms given by the Directive are also mirrored in the Regulations, which give definitions which are almost identical to those given by the Directive.

As for the scope of the Directive, the following concerns need to be pointed out: The Directive clearly covers also self-employment⁴, which neither the Act nor the Regulations make any reference to. More worryingly, the Act excludes, in its definition of the term ‘employee’⁵, work performed in a professional capacity, whereas the Directive clearly does not. One positive aspect of the Regulations however, is that workers’ organizations and professional bodies, as well as employers’ organizations and employment agencies, are finally no longer allowed to discriminate against their members or in the provision of their services, on any of the grounds listed in the Regulations⁶.

The MGRM’s main concern under this heading is that whereas the ban on all forms of harassment was another positive development and was long overdue, as well as the ban on discrimination by trade unions, professional bodies, employers’ associations and employment agencies, it is doubtful whether the legal basis for these regulations, i.e. articles 31 and 48(2) of the Act, was wide enough to justify the publication of the Regulations. This is mainly due to the fact that the said articles empower the Minister to issue regulations with a view to, for example, ‘give better effect’ to the provisions of the Act, or to ‘regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal’ of cases of discrimination, or for the ‘carrying out and giving better effect to’ the provisions of the Act. The regulatory power being so defined, it can hardly be said that it was justified to

¹ Article 1

² During an official visit to Malta in May 2003, Ms. Odile Quentin, Head of DG on Employment and Social Affairs stressed the need for sexual orientation to be mentioned specifically as a ground of discrimination while she was giving comments to the media. She said, “*there still needs to be more precision about anti-discrimination on all grounds, including age, including race, including sexual orientation, and this still needs to be further addressed*” (as reported on Net News, Net TV, 10th May 2003)

³ Article 2

⁴ Article 3(1)(a)

⁵ Article 2

⁶ Regulations 7 and 8.

publish regulations which quite clearly *extend the scope* of the Act by, among other things, creating new offences (such as for example the ban on harassment on all grounds mentioned in the Regulations)⁷ or imposing new legal obligations on persons that were hitherto not covered by the Act (such as employment agencies, trade unions and employer's organizations). MGRM's assessment is therefore that the Minister might have, with regard to some of the Regulations, acted *ultra vires*. Moreover, there is a contradiction between the Act and the Regulations in the sense that the former only bans harassment when it constitutes sexual discrimination whereas the latter extends the ban on harassment also to the other grounds contained in the Directive. This certainly gives rise to confusion. On the other hand, in application of the obligation of national courts to interpret national law in conformity with Community law, the Industrial Tribunal and the Civil Court might interpret articles 31 and 48(2) in a wide sense to justify the publication of the Regulations. The fact that there might be the possibility of criminal sanctions however might cause them to adopt a more cautious approach. It has to be kept in mind that although under the Directive 'harassment' is included within the concept of discrimination, the same does not apply to the Act, and therefore the reference to 'discrimination' in the legal basis refers to this more restricted concept, thereby allowing a narrower range of measures that may be adopted by the Minister.

However, MGRM also notes with satisfaction that with regard to some aspects of the Regulations, the position under Maltese Law has now gone further than the minimum standards set out by the Directive. Such is the case, for example, for the obligation contained in regulation 3(4)(b) on any persons covered by the Regulations to suppress harassment at their workplaces or within their organizations⁸. Such an obligation provides further motivation for employers to make sure that they abide by their obligation to inform their employees as to their rights under the Regulations. Should an employee not know of their obligation not to harass other employees, and should they proceed to do so, in the event of litigation the employer might be found to have neglected their obligation to inform their workforce about their obligations under the Regulations. This is of particular relevance in the context of sexual orientation. A large number of gay men and lesbians conceal their sexual orientation at work⁹. This might induce others to believe that everyone at the workplace is heterosexual, and that therefore no one would complain if they were to tell a homophobic joke. However, since both the Directive and the Regulations define harassment as acts which might have the 'purpose or effect' of violating the dignity of the person, there is no need to prove that the individual in question had the intention of harassing the victim. There isn't even a need to prove that the individual knew that their colleague was gay, lesbian or bisexual. In the light of all of the above, employers would therefore be well advised to start considering the introduction of diversity policies within their workplaces to avoid the potential costs of litigation (see part II of this paper).

⁷ The Act provides for a ban on sexual harassment and also for a more general ban on other forms of harassment, but only where this is based on 'sexual discrimination'. Thus extending this to cover the other grounds may be seen as amounting to a widening of its scope.

⁸ This would hold however, only in the event that the ban on harassment is not deemed to have been *ultra vires*.

⁹ Research carried out locally by the MGRM shows that 76% of respondents concealed their sexual orientation in some or all their jobs. Considering that respondents were all individuals who to some extent were 'out' and who could therefore be contacted by MGRM to participate in the survey, in the wider gay, lesbian and bisexual community this percentage could be higher.

Another serious concern that the MGRM would like to express relates to the exemptions given to employers who have ‘an ethos based on religion or religious belief’. Whereas the Directive does contain such an exemption in article 4(2), it clearly states in that same article that ‘Member States may *maintain* national legislation *in force at the date of adoption of this Directive* or provide for future legislation incorporating *national practices existing at the date of adoption of this Directive...*’ This, also taken in combination with article 8(2) of the Directive, merely lays down that if these employers benefited from such exemptions *prior* to the adoption of the Directive (or in Malta’s case, prior to its accession to the EU), then such exemptions may be retained. The Directive clearly does not permit the introduction of new exemptions not existing prior to the adoption of the Directive. The wording of the Directive suggests that any practices had to have some form of official recognition and that it was specifically churches that benefited from some form of preferential treatment. The mere fact that discrimination took place should not be deemed to constitute such a ‘national practice’. In the local context, no such legislative provisions or well documented and officially recognized practices existed prior to Malta’s accession to the EU, and therefore the MGRM’s position is that regulations 4(2) and (3) go contrary to the Directive. Even if such practices existed prior to the enactment of the Act, when the Act introduced the ban on discrimination it did not provide for any exceptions, and the position remained so until Malta’s accession to the EU. Thus the introduction of exemptions under the Regulations are certainly to be considered as a ‘step backwards’ not allowed under the Directive. In the context of sexual orientation, the specific concerns are that employers with a religious ethos might require their LGB employees not to in any way ‘practice’ or let other individuals get to know of their sexual orientation.

Remedies and Enforcement

A person who deems himself wronged under the Act or the Regulations has the possibility of either lodging a complaint with the Industrial Tribunal, in which case proceedings will be criminal in nature, or they might opt to ask for compensation before a Court of civil jurisdiction. With regard to the former, article 10 of the Directive on the sharing of the burden of proof does not apply. With respect to civil proceedings however, it does. The issue is addressed in regulation 10(3), which however is deemed by the MGRM to be inadequate, for a number of reasons. First of all, this provision does not state clearly that it is not applicable to criminal proceedings. Secondly, it does not reflect the real purpose behind this article of the Directive, which merely requires the plaintiff in civil proceedings to make a *prima facie* case in proving discrimination, and not to go all the way in proving it. As it stands, regulation 10(3) merely restates what is a general principle of Maltese procedural law, as expressed in article 562 of the Code of Organization and Civil Procedure, i.e. that whoever alleges something in a court of law is bound to prove it. MGRM thus deems this regulation to be both superfluous and inadequate in transposing article 10 of the Directive.

The prohibition on victimization contained in article 11 of the Directive was transposed into Maltese law with the enactment of the Act, which prohibits victimization in article 28. The obligation imposed on Member States to disseminate information as to the rights protected under the Directive is on the other hand passed on to employers and to the other

organizations covered by the Regulations¹⁰. Whereas this might be seen as another positive development, it remains to be seen how the authorities will ensure that such an obligation is complied with.

Another positive development introduced by the Regulations was the introduction of the right to request a report from the employer in cases where discrimination occurs. This procedure may be useful in assisting victims in subsequently making their case should they choose to resort to legal action. The specific reference to ‘organizations having a legitimate interest’ in regulation 11, and the fact that they have been granted legal standing in assisting victims of discrimination is both welcome and in conformity with the Directive.

One final issue of concern to the MGRM is a direct consequence of the rules on quantification of damages under Maltese law. The Directive makes it clear in article 17 that sanctions that are to be applied on a breach of the principle of equal treatment must be ‘effective, proportionate and dissuasive’. Whereas in criminal proceedings this requirement may be said to have been respected, the same cannot be said in all cases when compensation is sought in civil proceedings, due to the prohibition of the award of non-material damages under Maltese law. A problem may arise for example, where the discrimination occurred in relation to access to employment, where material damages beyond the cost of getting to the place where the interview took place may be hard to envisage.

Conclusion

Whereas the publication of the Regulations is definitely a step forward in a full and proper implementation of the Directive, the MGRM is of the opinion that the overall legal framework currently in place fails to satisfy the principle of legal certainty. This is due to mainly to the following reasons:

- The existing legal framework consists of three legal instruments which in some cases contradict each other. This approach is both fragmented and incoherent.
- Protection from discrimination across the different grounds is regulated differently. Some grounds are included in the Act, whereas others are covered by the Regulations. This enshrines in the law the so-called ‘hierarchy of discrimination’ and while it creates confusion as to the degree of protection given to different categories of persons, it also gives the mistaken impression that some groups are worthy of more protection than others.
- As stated above, the publication of some of the regulations might be deemed as not justified taking into consideration the legal basis under which they were issued. This creates confusion as to their legality.

II. The Way Forward

Anti-discrimination law on the ground of sexual orientation is a very recent development in our country. The new rights arising from the Regulations still have to be brought to the attention of the local gay, lesbian and bisexual community, and both the MGRM as well as

¹⁰ Regulation 12

trade unions and employers have a role to play in this respect. MGRM's efforts in this regard, given its limited resources, have so far revolved around publicising the Directive through its communication channels and the wider media, and through a seminar organised a few years back which aimed at giving an overview of the new rights given by the Directive. So far it has not been contacted by any individuals who complained of discrimination or harassment at the workplace, probably because much more needs to be done in bringing these new rights to the attention of the local gay and lesbian community. Its role in assisting victims will for some time be limited to providing information and perhaps supporting complaints at the Industrial Tribunal, given the limited resources it has and the difficulty of obtaining funding for these purposes.

In the context of sexual orientation, the desire felt by many gay men, lesbians and bisexuals to be discrete with regard to their sexual orientation and to keep it concealed from their colleagues presents a number of challenges: First of all, such individuals would be reluctant to bring forward complaints and engage in litigation for fear of their sexual orientation becoming widely known. Even those who may not feel the need to hide their sexual orientation may refuse to bring forward a case due to concerns about the possible costs involved as well as a widespread distrust of the local judicial system when it comes to enforcing their rights. Thus at this early stage it is impossible to point out whether the legislation is achieving the desired results.

Of its nature, anti-discrimination legislation on its own will not be effective unless backed up by certain mechanisms that complement it. Any efficient package of anti-discrimination measures in this area must therefore reconcile both the need of some gay men and lesbians to keep their sexual orientation private, as well as safeguard the rights of those who choose to live their lives openly as such.

Various measures may be adopted in order to achieve this goal. First of all, organisations having a legitimate interest in ensuring that the principle of equal treatment is complied with may be granted the right to bring cases in their own name and not merely on behalf of or in support of an aggrieved individual. The Directive, in providing for the latter option, is already an indication of the growing trend in this respect.

Secondly, an emphasis on self-implementation also has certain benefits. By this I mean that employers should begin to introduce diversity policies aimed at building a culture of tolerance, respect and equality within their workplaces. These policies are becoming increasingly popular with employers abroad and are seen in the context of the growing importance of Corporate Social Responsibility. Diversity policies would provide for mechanisms through which gay men, lesbians or bisexuals who feel discriminated against can complain directly to their employers, who will then proceed to investigate the complaint in a confidential manner, especially if so requested by the employee. If the employee refuses to make a formal complaint for fear of their sexual orientation becoming exposed, the employer might then choose to stress once again within his workforce the need for discrimination or harassment not to occur at the workplace.

The business case for providing such mechanisms has already been proven¹¹ - employers who adopt an inclusive approach in recruiting employees widen their recruitment base and attract a wider range of applicants. The image of the employer is also as a consequence enhanced in the eyes of employees and clients. The resultant benefits would be reduced staff turnover, with the ancillary reduction in costs relating to recruitment and training and a reduction in absenteeism and sick leave taken due to stress. It also would have a positive impact on the morale and productivity of the workers and their sense of loyalty to the organisation. Finally, with the new Regulations, discriminatory practices may result in considerable costs in terms of litigation and liability in damages, and therefore a preventive approach would certainly be preferable. Even if employers are successful in litigation, their reputation may suffer harm within the LGB community. This is specifically why diversity policies are also an effective marketing tool - studies carried out abroad, and there is no reason to believe that this should not also be the case locally, show that a company's reputation is enhanced within minorities when the company actively applies a diversity policy. Abroad, it is not uncommon for companies to actively court the 'pink pound' by advertising in the gay press; research abroad suggests that gay men and lesbians frequently fall within higher income brackets.

Employers may thus choose to mention expressly, when advertising vacant posts, that they are equal opportunities employers and that everyone is welcome to apply irrespective of any personal characteristics such as, for example, sexual orientation. Mentioning sexual orientation explicitly is particularly important given that many LGB individuals still assume that equal opportunity policies are restricted to gender and disability, at least locally. The language used is always an important factor - politically incorrect language has the effect of discouraging prospective applicants. Recruiters should avoid certain stereotypical assumptions such as for example, that LGB individuals are not suitable for certain kinds of jobs, such as those involving contact with children¹².

Thirdly, there is a strong case for setting up an anti-discrimination body that could carry out various functions, such as assisting victims of discrimination, mediating, carrying out research and awareness campaigns and producing codes of conduct and best practice guides. With regard to this last function, there is considerable potential for co-operation between the said body and employers. Research should be both quantitative and qualitative, since quantitative data in the field of sexual orientation is difficult to obtain, due to the majority of gay men and lesbians not declaring their sexual orientation for fear of adverse treatment.

As for the structure that such a body would take, the MGRM is of the opinion that a single framework to tackle all the different grounds of discrimination would be the best option, provided that however, individual assessments of the different issues that arise in the context of each different ground of discrimination are made. Such an approach would ensure that specific grounds of discrimination and the particular issues that arise in their context are not ignored. It also would ensure that as far as possible a consistent approach is

¹¹ A survey carried out by the European Commission in four different European countries found that diversity policies have both short-term and long-term benefits. For more information see:

http://www.stop-discrimination.info/fileadmin/pdfs/031112_PMCostBenefitLaunch_en_SP.pdf

¹² For more information on such policies, and how employers can co-operate with LGB organisations in implementing equal opportunities legislation, see:

www.stonewall.org.uk/stonewall/diversity_champions/?CFID=762426&CFTOKEN=20666721

adopted in the field of equal opportunities and that in the case of victims of multiple discrimination, an individual will be able to go to one and the same body. In the local context, so far there are only commissions for the promotion of equality irrespective of disability or gender, but at least a further body to tackle racial discrimination will have to be set up due to Malta's obligations under the Race Directive¹³, so it makes sense to amalgamate all these different bodies into one and extend their mandate to cover other grounds, such as sexual orientation.

The Northern Ireland Equality Commission may be taken as a model in this regard. One of its most important functions is to monitor the compliance of designated public bodies with their obligation under article 75 of the Northern Ireland Act (1998) to promote equality of opportunity between persons irrespective of, *inter alia*, sexual orientation. Such mainstreaming obligations, while common, are notorious for remaining unenforced. Under the Northern Ireland Act however, each public authority is required to produce an equality scheme, stating how it plans to carry out this obligation. This is submitted to the Equality Commission for approval, is screened for potential 'adverse impact' and has to be reviewed every five years. Each authority must then carry out equality impact assessments to measure the effectiveness of its scheme. All throughout it is obliged to consult with the relevant actors in the field and has to reply to each submission. The Equality Commission also investigates complaints, gives guidelines and identifies examples of best practice¹⁴. Such a mainstreaming obligation is also being taken up at the European level, as shown by Article III-118 of the Constitutional Treaty. It therefore makes sense to start considering introducing such mainstreaming obligations on the ground of sexual orientation also in the locally.

Beyond these measures, awareness-raising campaigns are of fundamental importance, especially in the context of sexual orientation where there is a risk of invisibility. Such invisibility causes some to believe that the perceived small number of homosexuals does not warrant considerable efforts in promoting their inclusion. This is also why the local gay movement has followed in the steps of other gay organisations abroad that place an emphasis on an active presence of its members on the media. Such an approach fights common misconceptions and stereotypes about gay men and lesbians and also the idea that one's sexual orientation is something that one should be ashamed of. Media presence is also useful in educating both the general public and the gay and lesbian community itself.

All of these efforts should contribute towards moving from a negative approach of prohibiting discrimination to a more positive and proactive one through which all actors in the field strive to achieve a society where there is real equality of opportunity. In the context of sexual orientation discrimination much more still needs to be done, and despite the Directive and its ban on indirect discrimination, various practices that indirectly discriminate against gay men and lesbians will still be allowed to go on through the exception made by the Directive for benefits dependant on marital status¹⁵. Most cases of indirect discrimination in fact involve the denial of employment benefits to the partners of gay or lesbian employees, through the restriction of benefits to married couples. While

¹³ Council Directive 2000/43/EC

¹⁴ www.equalityni.org

¹⁵ Recital 22

heterosexual couples can freely get married however, the same cannot be said of same-sex couples. If we are serious about achieving real equality we have to make sure that everyone is treated with dignity and that their private and family lives are equally respected. The fact that gay and lesbian people are barred from marriage results in the impossibility of them ever availing themselves of marriage-only benefits. Apart from certain economic and fiscal advantages, one should also here consider leave entitlement for urgent family reasons which, if not in consideration of anything else, should not be denied to gay and lesbian employees and their partners for humane reasons. Equality does not admit of degrees - one is either equal in all respects or they are not equal at all, and thus gay and lesbian partnerships should eventually start to be treated on an equal footing, which does not necessarily require the opening up of marriage for same-sex couples; evidence of long-term cohabitation could suffice in this respect.

Other areas where a culture of equality might be furthered are in our press law and in our criminal law. We already have laws in place that prohibit the incitement of hatred towards racial minorities¹⁶, and in other European countries these laws are being extended to cover incitement to hatred towards other minorities, including sexual minorities. Other possible measures might include aggravations for violent crimes when these are committed due to the victim's sexual orientation. Such crimes have the effect of not merely harming the direct victim but of causing apprehension within a whole community or minority. In our Broadcasting Act and our Press Act we also have provisions on incitement to hatred on various grounds and obligations to ensure that advertising material is not discriminatory¹⁷. These should be extended to cover sexual orientation.

One way in which the anti-discrimination legislation of our country may be built upon is by extending its material scope to cover also discrimination in other areas such as access to goods and services, housing and education. The current 'hierarchy of discrimination' present in the law, with gender and disability discrimination being given more importance, gives the wrong impression in that some categories of persons might be deemed as being more (or less) equal than others. Even at the European level, gender and racial discrimination are, or will soon be, more thoroughly regulated than discrimination on the other article 13 grounds¹⁸. However, in the context of sexual orientation discrimination, positive action measures beyond campaigns of targeted recruitment, where the employer advertises vacancies in mediums where they are more likely to be seen by gay men, lesbians and bisexuals, are hard to envisage, nor can any clear benefit be identified in them.

¹⁶ Article 82A of the Criminal Code

¹⁷ Article 6 of the Press Act and the Third Schedule to the Broadcasting Act

¹⁸ Directive 2000/43/EC bans racial discrimination in areas beyond employment. In the context of gender discrimination, as soon as Directive 2004/113/EC comes into force discrimination in access to goods and services will be banned.