



The Malta Chamber of Commerce, Enterprise and Industry reactions and proposed amendments to the Equality and the Commission of Human Rights and Equality Bills

Further to the comprehensive feedback submitted during the public consultation process and the subsequent consultation meetings throughout 2016 and 2017, the Malta Chamber of Commerce, Enterprise and Industry elaborates hereunder the reactions and feedback on the updated version of the Equality Act and the Human Rights and Equality Commission Act as provided by the Ministry for European Affairs and Equality on the 6th March 2018.

The Chamber is pleased to note a number of changes which it had proposed were included in the bill. This notwithstanding, the Chamber must show its disappointment that the main issues do not seem to have been addressed and the Chamber's past comments have been once again ignored by the recent revision. These are of primary importance if the bill is to be meaningful in its practical application and not only in the principles it seeks to address.

Hereunder is the Malta Chamber's comprehensive feedback on the two bills.

The Equality Act		
Article	Current Text	Malta Chamber Proposed Amendment
5	<p>Discrimination in Employment</p> <p>e) Instructions to discriminate, which shall refer to situations where a person who has the delegated authority to act on behalf of an employer is instructed by his employer, contractor, and, or superior to perform any action which is deemed to constitute discrimination under this Act:</p> <p>Provided that such action shall be deemed to have also been made by the employer, contractor, and, or superior who instructed that person to perform such discriminatory act;</p>	<p>The provisions dealing with equality and non-discrimination in employment should be amalgamated into one act instead of having the same provisions in both EIRA and the new act.</p>
7	<p>Application: Banking and Financial Services and Insurance.</p>	<p>The European Union Guidelines on the application of Council Directive 2004/113/EC to Insurance, outline that insurance products need to be offered unisex to all consumers. The Guidelines are specific to the insurance sector. These provisions should be dealt with under the respective law dealing with insurances. The term financial services include also insurance and banking products.</p> <p>The <i>Test-Achats</i> ruling only addresses the use of the gender factor in a context where the respective situations of men and women were found comparable by the legislature. It does not affect the use of other risk-rating factors, such as age and disability, which is currently not regulated at EU level. This needs be carefully addressed in the proposed Bill.</p>
11-13	<p>Insurances</p>	<p>The proposed Articles should be regulated by the MFSA, so as to ensure that all individuals have access to the various financial services products.</p>

<p>18</p>	<p>Equal Pay for equal work</p> <p>Employees in the same class of employment are entitled to the same rate of pay for work of equal value:</p> <p>Provided that an employer or a union of employers or a union of workers may agree on different salary scales, annual increments and other conditions of employment that are different for those workers who are employed at different times, where such salary scales have a maximum that is achieved within a specified period of time as a result of negotiations for a collective agreement;</p> <p>Provided further that any distinction between classes of employment based on treatment which is not accordance with the provisions of this Act or any other law shall be null and of no effect.</p>	<p>The provisions dealing with equality and non-discrimination in employment should be amalgamated into one act instead of having the same provisions in both the EIRA and the new act.</p>
<p>21</p>	<p>Spouses of Self Employed Persons</p> <p>(2) Spouses, civil union partners and contractual cohabittees of self-employed workers not being employees or partners, who participate in the activities of the selfemployed workers and perform the same or ancillary tasks as their spouse, civil union partner, or contractual cohabitee shall be entitled to receive from their spouse, civil union partner, or contractual cohabitee a fair compensation for their activity commensurate to the value of their contribution:</p> <p>Provided that this subarticle shall not apply where the system of community of acquests or community of the</p>	<p>The Malta Chamber suggests deletion of this clause. Directive 2006/54 stipulates that discrimination on the ground of sex is prohibited in occupational social schemes and the calculation of benefits, including supplementary benefits due in respect of a spouse or dependents, and the conditions governing the duration and retention of entitlement to benefits. This provision goes beyond what is expressed in Directive 2010/41 on Self-employed workers: equal treatment between men and women.</p>

	<p>residue under separate administration subsists between the spouses or civil union partners:</p> <p>Provided further that this subarticle shall not apply where the obligations arising from a contract of cohabitation registered in terms of the Cohabitation Act already provide for measures which give the cohabitee of the self-employed worker fair compensation for their activity, or where such contract establishes a community of acquests of the cohabitees.</p>	
27	<p>Right of Action before the First Hall, Civil Court</p> <p>(1) Without Prejudice to the provisions of the the Employment and Industrial Relations Act, the Human Rights and Equality Commission Act and any other applicable law, any person, who alleges that any other person, establishment or entity has committed in that person’s regard any act which is deemed to be unlawful under this act may, by application first filed before the first Hall of the Civil Court request the Court to order the defendant to desist from such unlawful acts and or to order the payment of damages suffered as a direct result of such unlawful act:</p> <p>Provided that nothing in this subarticle shall prevent the Commission, following the termination of an investigation, from filing an application before the Court requesting the Court to order the defendant to comply with the Commission’s decision.</p>	<p>In case of a discrimination claim by the employee, there should be one forum for discussion on these matters. It is the Chamber’s preference that the Industrial Tribunal deals with such matters as the specialised forum dealing with employment matters.</p> <p>Under ‘Right of Action’ the revised draft still states that in a case of any unlawful action in terms of the Bill, the person who alleges the occurrence of such an action will be entitled to take up the matter in the Maltese Civil Courts.</p> <p>The Malta Chamber believes that the aim of the law is to ensure that if an individual is aggrieved by the act of another person, especially in the context of an employment relationship, it is important that the remedy granted by the law is one which is accessible and efficient for both parties and that the case is heard by persons familiar with the ins and outs of employment.</p> <p>The current design of the bill does not achieve the desired results in that the Civil Courts entail the payment of court fees and usually decide cases brought before them in not less than approximately 3-5 years. Court proceedings are also very formal and a lawyer needs to be engaged to assist the complainant. The Chamber therefore proposes that the law is changed so that in an employment related case the remedy in terms of the Bill should be the existing Industrial Tribunal. In the Tribunal, the Chairpersons are lawyers who are</p>

	<p>(2) In any such action the plaintiff shall over and above and in addition to such damages and costs as may have</p>	<p>knowledgeable on employment matters, decisions are usually handed down within a maximum of 14 months and employees do not have to pay in order to access such a tribunal. Moreover, employees may be assisted by unions, NGOs and other organisations and not necessarily by lawyers. Employers, in our view, will also benefit from this choice of fora because the industrial tribunal is one they can relate to.</p> <p>Statistics of how many employees opened cases in front of the Civil Court to enforce the Equality for Men and Women Act highlight the issues raised above.</p> <p>Moreover, it has to be noted that with the Bill as it stands, an employer may be subjected to two law suits on the exact same case in two different courts (The Civil Court for the Equality Act and the Industrial Tribunal for the EIRA) as a result of the numerous replicated provisions in both the EIRA and the draft Equality Bill.</p> <p>Particular reference in this instance is made to several sections of the draft. These contain provisions that are by and large also contained in the EIRA as supplemented by Legal Notices under the employment act itself.</p> <p>Having two channels of remedy for the same provisions of law found in two separate acts creates uncertainty and overlap, not to mention situations where employees' cases are stalled because another court is already hearing their case. In case of an alleged breach in the right for equal pay for example, should the employee be in a position where he has the option of opening two separate and distinct claims which could have different outcomes? Why must an employer be subjected to two separate suits for one alleged omission?</p> <p>The Malta Chamber of Commerce, Enterprise and Industry therefore suggests that all remedies under the Equality Bill relating to employment matters should refer directly to the Industrial Tribunal as a Tribunal of choice.</p> <p>The Malta Chamber suggests deletion of these clauses.</p>
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	<p>been actually incurred be entitled to recover by way of compensation such sum of money as the competent court in its discretion may consider reasonable taking into account all the circumstances of the case, including any non-pecuniary damages suffered by the plaintiff:</p> <p>Provided that such compensation for non-pecuniary damages shall be dissuasive and proportionate to the damage suffered, and shall in no case exceed the sum of ten thousand Euro (EUR 10,000).</p> <p>(3) Without prejudice to the provisions of the Code of Civil Organisation and Civil Procedure and any other relevant law, any registered association, organisation or legal entity having a juridical interest in ensuring that the provisions of this Act are complied with may engage themselves either on behalf of, or in support of the applicant, with the applicant's consent, in any judicial or administrative procedure provided for the enforcement of obligations under this Act.</p> <p>(4) Without prejudice to the provisions of the Code of Civil Organisation and Civil Procedure and any other relevant law, nothing in this article shall prevent any person having a juridical interest from joining in and becoming a party to intervene as third party intervener in the suit, even when the action has been filed by the Commission.</p> <p>(5) Without prejudice to the provisions of the Code of Organization and Civil Procedure, indirect discrimination may be proved by any means of evidence, including relevant, accurate and statistical evidence based on actuarial principles.</p>	
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29	<p>Actions to be made within 2 years before the Human Rights and Equality Commission</p>	<p>In the case of employment discrimination, the Malta Chamber feels that that two years is too long of a period and this should be reduced further.</p> <p>In the case of the Industrial Tribunal, the referral must be presented in the Registry of the Tribunal at the Maltese Law Courts within four months from the effective date of the alleged breach.</p>
30	<p>Burden of proof</p> <p>(1) In any proceedings under articles 27 and 28, it shall be sufficient for the plaintiff to establish before the Court or before the Commission those facts from which it may be reasonably presumed that the victim has been discriminated against on the basis of one or more of the protected characteristics.</p> <p>(2) It shall be incumbent on the defendant to prove that there has been no breach of the principle of equal treatment, or that such less favourable treatment was justified in accordance with the provisions of this Act and the Court or other competent authority shall uphold the complaint if the defendant fails to prove that the unlawful act was not committed.</p> <p>(3) This article shall not apply in criminal proceedings or where the Commission is investigating a case which it has commenced ex officio.</p>	<p>The Chamber is of the belief that shifting the burden of proof upon the defendant in the case of employment cases will result in numerous instances of trials by dissatisfied present or former employees who will resolve to the civil court for pecuniary damages. Given that the definition of discrimination is so broad it will close to impossible in certain instances for the defendant to prove that discrimination or abuse of human rights has not indeed occurred.</p> <p>The Chamber therefore suggests that the onus of proving that there was a discriminatory act at the place of work is put on the plaintiff rather than the defendant.</p>
<p>BILL TO PROVIDE FOR THE ESTABLISHMENT OF A HUMAN RIGHTS AND EQUALITY COMMISSION</p>		
4	<p>Composition of the Commission</p>	<p>The Malta chamber suggests that this clause is amended to include a direct mention to an employer’s representative and trade union’s representative as part of the Commission. This will ensure a balanced approach when dealing with</p>

		employment matters and would ensure that both employees and employers are represented.
Part III – 13-14	Functions of the Commission: Powers of the Commission:	<p>The Malta Chamber is of the understanding that clause 13 did not include reasonable suspicion as a criterion for investigating ex-officio and any potential human rights violation because this is listed under clause 15 (Commission to request Board to initiate investigations) of the same bill. The Chamber requires further clarification in this respect.</p> <p>Before conducting an investigation, the Commission must draw up terms of reference and give the person being investigated the opportunity to make representations.</p> <p>This comment also applies to the powers of the Commission on investigation.</p>
Part III - 14	Powers of the commission to impose fines.	The Malta Chamber suggests amendments so that the Commission can impose administrative penalties which are <u>reasonable and proportionate</u>.
Part III - 14	The power of the commission to publish its findings.	The Malta Chamber suggests that the Commission may not state or imply in its published report that a specified or identifiable person has committed an unlawful act. Nor can the report make reference to a person's activities.
Part IV - 25	Power to enter premises	<p>This is an excessive power given to the Board upholding civil rights and not undertaking criminal proceedings.</p> <p>The Chamber suggests the removal of this clause.</p>
Part IV - 29	Complaints to be submitted within two years The Board shall not act upon any complaint unless it is made by not later than two years from the day upon	In the case of employment discrimination, the Malta Chamber feels that that two years is too long of a period and this should be reduced further.

	<p>which the complainant first had knowledge of the matters detailed in the complaint:</p> <p>Provided that the Board may in any case request the Commission to give its consent to conduct an investigation pursuant to a complaint not made within that period if it considers that there are special circumstances which make it proper to do so or if it considers that the investigation of the complaint is in the general interest, or relating to a particularly vulnerable group or minority.</p>	<p>In the case of the Industrial Tribunal, the referral must be presented in the Registry of the Tribunal at the Maltese Law Courts within four months from the effective date of the alleged breach.</p>
<p>Part IV - 34</p>	<p>Where evidence requested is not given</p> <p>(1) The Board may request, by means of an application before the Civil Court, First Hall, that any person, natural or legal, as the case may be, summoned in accordance with article 33 who:</p> <p>(a) fails without sufficient cause to attend at the time and place mentioned in the summons;</p> <p>(b) fails without sufficient cause to answer or to answer fully and satisfactorily, to the best of his knowledge and belief all questions asked by the Board; or</p> <p>(c) fails without sufficient cause to produce any document, paper or thing he was required to produce, be ordered by such Court to comply with the summons issued to them by the Board in accordance with article 33 or give any other order which it may consider appropriate and required according to the specific circumstances of the case.</p> <p>(2) No person, natural or legal, as the case may be, summoned by the Board may be compelled to answer</p>	<p>The fines and punishment of imprisonment for not appearing before the Board are not made clear in this clause. We are suggesting that if a person does not attend the sitting the Commission may impose an administrative fine in the region of 50 euros.</p> <p>The Malta Chamber suggests that if an individual who does not attend the sittings without a good cause, the Commission may proceed to issue a decision without hearing the said individual.</p>

	<p>any question which tends to expose him to any criminal prosecution, and every such person shall, in respect of any evidence given by him before the Board, be entitled to the same privileges to which a witness giving evidence before a court of law is entitled.</p>	
<p>Part IV - 37</p>	<p>Decisions of the Board</p>	<p>The decision to make the commitments binding should only apply after an appeal. The Malta Chamber suggests deletion of this clause.</p>
<p>Part IV - 39</p>	<p>Penalties</p> <p>(1) Where the decision of the Board is ignored and no appropriate action is taken by the party concerned within the parameters and time fixed by the Board's decision, the Board may in the decision order the payment of a penalty for noncompliance with the decision:</p> <p>Provided that such penalty shall in no case exceed the sum of twenty thousand Euro (20,000).</p> <p>(2) Without prejudice to the previous sub-article, the Board may also impose an additional periodic penalty payment of not more than five hundred Euro (500) per day for such time until the infringement is effectively brought to an end.</p> <p>(3) When considering the penalty due in all cases where an infringement in terms of this Act has occurred, the Board shall take into account matters of proportionality.</p>	<p>The penalties are excessive and are not proportionate to the objective this Bill is trying to achieve. The penalties should be in the region of 500-1,500 Euros rather than the maximum of 20,000 euros. The per diem penalty of 500 per day is excessive and unreasonable. The per diem penalty should be suspended until the case become final by the Court of Appeal.</p> <p>In addition to this, there is uncertainty since the Equality Act already prescribes penalties for breach of law. Employers should not be subject to multiple penalties. We suggest deletion of the clause on penalties in the Equality Act and have a single redress mechanism in the Act for the establishment of the Human Right and Equality Commission.</p>

	<p>(4) In all cases, the penalties imposed by the Board in its decision shall be due only when the case becomes <i>res judicata</i>.</p> <p>(5) Failure by the party concerned to pay damages to complainant in terms of article 38(1) of this Act shall not be subject to the payment of any penalty. Provided that notwithstanding the provisions of this sub-article interest at the highest rate permissible shall accrue as from the date when the decision becomes a <i>res judicata</i>.</p>	
<p>Part IV - 40</p>	<p>Interim Measures</p>	<p>This article is excessive and the penalty is excessive. The Chamber is further concerned with the fact that the interim measures are not well defined in the law. The Malta Chamber suggests deletion of this clause.</p>
<p>Part IV - 42</p>	<p>Right of Appeal</p> <p>(1) Any person, natural or legal, as the case may be, who is aggrieved by a decision of the Board may appeal to the Court of Appeal (Superior Jurisdiction) as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the Registry of that Court within twenty days from the date on which that decision has been notified to them.</p> <p>(2) A copy of the appeal application shall be served on the Commissioner who may file a written reply within twenty days from the date of service.</p>	<p>The appeal is not an adequate remedy because at that stage of the proceedings the employer is not in a position to submit evidence.</p> <p>The clause should be amended so that where the Commission is of the view that the recommendations are not implemented the commission shall have a right to file proceedings before the Industrial Tribunal and an appeal shall be possible from the decision of the Tribunal in line with Chapter 452.</p>

	<p>(3) The Court of Appeal shall set down the cause for hearing within a reasonable time and shall cause notice of such date to be served to the parties.</p> <p>(4) After appointing the application for hearing, the Court of Appeal shall decide the application on its merits after hearing the submissions of all parties, within the shortest time possible but not any later than four months from the day when the appeal had been filed and the parties have been duly notified.</p> <p>(5) Pending the decision of the Court of Appeal, the recovery of the penalties imposed by the Commission shall be suspended.</p>	
<p>Part V – 45</p>	<p>Officers of the Commission</p> <p>(1) The Commission may appoint such officers and employees as necessary in order to fully perform its functions and duties under this Act.</p> <p>(2) The power to appoint includes the approval to the number of persons that may be appointed under this article whether generally or in respect of any specific duties or classes of duties, their salaries and conditions of appointment in accordance with law.</p>	<p>The officers of the commission need to be independent people knowledgeable in Union Law and Equality. If the Government of Malta and Government entities are to be regulated by the Equality Bill the Commission needs to be independent from government. (similar to the ombudsman’s office).</p>
<p>Part V - 46</p>	<p>Detailing of public officers for duty with the Commission</p>	<p>See comment above.</p>