

# **Do LGBTIQ Individuals Enjoy the Same Equal Rights as Heterosexual Individuals at the Workplace?**

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## **Abstract**

This research looks into the legislation that is currently in force in Malta and the European Union regarding employment and the prohibition of discrimination on the grounds of sexual orientation and gender identity. Furthermore, a study through the use of interviews is conducted with organisations that are stakeholders on the subject of equality and non-discrimination for a better picture of the situation in Malta. The research brought out the obstacles faced by LGBTIQ individuals in the workplace but it also reflects on the progress that has been made over time. Some of the prominent themes in the research are the issue of underreporting of instances of discrimination at work and the distinction between the legislation that is progressive and the social aspect that requires further efforts to bring into society the true meaning of equality and non-discrimination.

### **Keywords:**

EQUALITY, NON-DISCRIMINATION, EMPLOYMENT, WORKPLACE, LGBTIQ

*“No pride for some of us without liberation for all of us.”*

*- Marsha P. Johnson*

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## **Table of Statutes**

### Malta

Constitution of Malta.

Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta.

Equal Treatment in Employment Regulations, S.L. 452.95 of the Laws of Malta.

### European Union

Charter of Fundamental Rights of the European Union.

Employment Equality Directive, Council Directive 2000/78/EC.

Treaty on the Functioning of the European Union.

## Table of Cases

C-303/06 S. Coleman v Attridge Law and Steve Law [2008] ECLI:EU:2008/415.

C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd. [1998] ECLI:EU:C:1998:63.

C-507/18 NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford [2020] ECLI:EU:C: 2020:289.

C-356/21 J.K. v TP S.A., joined parties: PTPA [2023] ECLI:EU:C:2023:9.

C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] ECLI:EU:C: 2008:397.

C-587/20 Ligebehandlingsnævnet acting on behalf of A v HK/Danmark and HK/Privat. [2022] ECLI:EU:C: 2022:419.

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## Abbreviations

ARC	Allied Rainbow Communities
CJEU	Court of Justice of the European Union
DIER	Department for Industrial and Employment Relations
EED	Employment Equality Directive
EIRA	Employment and Industrial Relations Act
ETER	Equal Treatment in Employment Regulations
EU	European Union
GWU	General Workers' Union
ILGA-Europe	International Lesbian, Gay, Bisexual, Trans and Intersex Association
LGBT	Lesbian, Gay, Bisexual, Trans
LGBTI	Lesbian, Gay, Bisexual, Trans, Intersex
LGBTIQ	Lesbian, Gay, Bisexual, Trans, Intersex and Queer
MGRM	Malta LGBTIQ Rights Movement, formerly known as Malta Gay Rights Movement
MHSR	Ministry for Home Affairs, Security, Reforms and Equality
MTA	Malta Tourism Authority
NCPE	National Commission for the Promotion of Equality
NGO	Non-Governmental Organisation
SMEs	Small and Medium Enterprises
TFEU	Treaty on the Functioning of the European Union

# **CHAPTER 1: INTRODUCTION**

## **1.1 Background**

Equality and non-discrimination are topics that in recent years have gotten more attention. Some countries have taken the route of empowering minority groups and have been actively working toward an equal and non-discriminatory framework whilst other countries are yet to take a step towards it. The title of this dissertation was chosen to analyse the situation of equality and non-discrimination in the context of employment and LGBTIQ persons. The dissertation will build upon previous research which looked at discrimination in a general context and discrimination in employment between men and women. Therefore, this research will be contributing towards a better understanding and representation of the LGBTIQ community in academia. The use of the word 'queer' will be used interchangeably with 'LGBTIQ' throughout the text.

## **1.2 Research Questions**

There are three main research questions which this dissertation aims to answer:

- a. Does discrimination in employment exist for LGBTIQ identifying individuals?
- b. Does the law protect LGBTIQ employees in Malta? How does it protect them?  
Where does it lack to protect them?
- c. Are LGBTIQ employees treated the same as heterosexual employees?

## **1.3 Methodology**

The dissertation intends to answer the three questions in two qualitative ways. The first way is by analysing the Maltese Legislation and EU Legislation together with some court judgments supplemented by any non-legislative measures taken by Malta and the EU to combat discrimination in employment and promote equality and non-discrimination in the workplace. This part of the research will be conducted using desk research. The second way in which the research questions will be answered will be through semi-

structured interviews conducted with various stakeholders in the field of LGBTIQ matters and employment. The interviews are expected to provide a good overview of Malta's situation in relation to LGBTIQ persons in employment as the organisations involved work closely with the LGBTIQ community. The organisations can identify gaps which they have observed through their work with the LGBTIQ persons and they can advocate for ways in which the gaps in the law may be remedied.

Prior to the conducting of interviews with the organisations involved a consent form was given informing the participating organisations of inter alia the purpose of this research, the audio recording of interviews and their transcription and their right to withdraw from the research. It was emphasised that the organisations have the choice to be named in the final dissertation and also the choice to remain anonymous. To further protect the identity of participants the names of the representatives that spoke on behalf of the organisations will remain anonymous and not be published.

#### **1.4 Limitations**

The study may be limited in some ways because data has not been collected from primary subjects such as persons who have reported instances of discrimination themselves. Furthermore, there may be a sampling bias as multiple organisations were contacted but not all of them participated in the study thus the outcomes may have been altered had more organisations participated.

#### **1.5 Layout**

The layout of this dissertation will follow the reasoning presented in this introduction, Chapter 2 will focus on the legislative aspect delving into the situation in Malta and discussing the Employment and Industrial Relations Act. It will go on to discuss cases of discrimination that have been reported in Malta. After this there will be a discussion of the Employment Equality Directive including its boundaries and also cases that have been decided by European courts on the basis of the Employment Equality Directive. Chapter 3 will move away from the legislative aspect and briefly discuss other initiatives which Malta and the EU have taken to aid in the implementation and respect of the

present legislation. These measures act as a bridge for society to follow what the law has already achieved. Therefore, Chapter 2 and Chapter 3 will cover the desk-research part of the dissertation. In Chapter 4, the second part of the research will be discussed where the focus will be the data collected from the interviews conducted with the participating organisations. The last chapter, Chapter 5, will provide a summary of the findings together with suggestions for further research.

## CHAPTER 2: THE RELEVANT LEGISLATION AND CASE LAW

### 2.1 Introduction

Prior to discussing Chapter 452 of the Laws of Malta it is important to address that by way of Act No. X of 2014 the Constitution of Malta has added to its list of fundamental rights and freedoms anti-discrimination clauses in Article 32 on the grounds of sexual orientation and gender identity. As the Constitution reigns supreme over inconsistency with other laws, per Article 6 of the Constitution of Malta, the presumption now is that if discriminatory clauses are found under the Employment and Industrial Relations Act (EIRA) or any other legislation regulating employment such clauses or provisions may be challenged constitutionally rendering them to be void.

Apart from the Constitution, EU Legislation has had a significant impact on how employment is regulated in Member States especially through the introduction of the EU's Employment Framework Directive. Historically, the Employment and Industrial Relations Act was the first legislative piece that extended the provisions on the prohibition of discrimination to include discrimination, both direct and indirect, on the basis of sexual orientation.<sup>1</sup>

Prior to this prohibition, LGBTIQ rights in Malta were merely non-existent with the only legislation recognising the minority group being that which was introduced in 1973 decriminalising same-sex relations. The non-discrimination provision in the EIRA owes its implementation to the EU Employment Directive 2000/78/EC and was introduced by Legal Notice 461 of 2004, also known as the Equal Treatment in Employment Regulations rather than being written expressly in the EIRA. However, even with this implementation, it failed to include the prohibition of discrimination against

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<sup>1</sup> Christian Attard (Malta Gay Rights Movement), 'Sexual Orientation Discrimination in Malta - The Employment Framework Directive and Beyond' (Working for an Inclusive Society, University of Malta, 15 September 2005) < <http://aei.pitt.edu/6036/> > accessed 21 July 2023 p 225.

transgender individuals. The inclusion of the prohibition of discrimination against transgender individuals in employment came into effect ten years later in 2014.

Today, Malta has come a long way in the implementation of protections and equal rights of LGBTIQ persons beyond employment law. Malta has been ranking first for the seven consecutive years in the ILGA-Europe Rainbow Index out of 49 countries.<sup>2</sup> This chapter will provide an overview of the employment laws that are currently in force and some cases of discrimination in Malta and Europe.

## **2.2 Maltese Legislation**

### **2.2.1 Employment and Industrial Relations Act**

The EIRA is the main legislative act which regulates Maltese employment. The Act gives two important definitions for the purpose of this research, the definition of 'discriminatory treatment' and 'unfair dismissal'.

Discriminatory treatment is defined as 'any distinction, exclusion or restriction which is not justifiable in a democratic society' and it then goes on to list different bases upon which discrimination is not allowed. The provision uses the word 'including' before the list is given which suggests that the list is not exhaustive. Thus, the term 'sexual orientation' is not expressly listed. This was heavily criticised by MGRM back in 2002 as it was argued that the express mention of prohibition of discrimination on the basis of sexual orientation would 'send a clear and unequivocal message that sexual orientation discrimination is unacceptable and intolerable.'<sup>3</sup> However, this was remedied through the Employment and Industrial Relations Interpretation Order which expressly includes sexual orientation as one of the grounds under which discrimination is prohibited:

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<sup>2</sup> Michaela Pia Camilleri , 'Malta ranks first in Europe for LGBTIQ+ rights for 7th time in a row'(Newsbook),12 May 2022, < <https://newsbook.com.mt/en/malta-ranks-first-in-europe-for-lgbtqi-rights-for-7th-time-in-a-row/> > accessed 21 July 2023.

<sup>3</sup> Times of Malta, 'Call for protection against sexual orientation discrimination', (Times of Malta), 8 August 2002,<<https://timesofmalta.com/articles/view/call-for-protection-against-sexual-orientation-discrimination.169459> > accessed 21 July 2023.

*In determining whether any treatment is treatment that is justified in a democratic society, the Industrial Tribunal shall take into account the provisions of any directive and, or regulation issued by the institutions of the European Union relating to discrimination and particularly Council Directive 2000/43/EC of 29th June 2000 and Council Directive 2000/78/EC of 27th November 2000 prohibiting discrimination on the basis of religion or belief, disability, age, sexual orientation, race or ethnic origin.*

Unfair dismissal is defined as ‘a termination which is not made solely on the grounds of redundancy or for good and sufficient cause’ or made on such grounds but is discriminatory. The criteria for unfair dismissal is not clearly defined in the Act and there are no exclusive criteria. However, part (c) makes reference to discrimination which leads to the belief that the grounds for discrimination aforementioned do not amount to good and sufficient cause for dismissal. Unfair dismissal is to be decided on a case-by-case basis by looking at the particular circumstances of the case before the court or tribunal.<sup>4</sup>

Under Title I, Part IV, the EIRA has provisions that offer protection against discrimination in employment. Article 26 prohibits discrimination not only whilst the person is employed but also in the advertisement or offer of employment and the selection of applicants effectively prohibiting discrimination throughout the entire process of employment. It also expressly prohibits less favourable remuneration and less favourable working conditions on the basis of discriminatory treatment. The prohibition of less favourable remunerations is then strengthened by the concept of equal pay for equal work in Article 27.

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<sup>4</sup> BDO, ‘ Unfair Dismissal in terms of Maltese Employment Law’ (BDO Malta) 4 June 2021 < <https://www.bdo.com/mt/en-gb/insights/unfair-dismissal-in-terms-of-maltese-employment-law> > accessed 21 July 2023.

The Act goes on to prohibit victimisation and harassment. Victimisation is prohibited to safeguard the interests of the complainant against the employer. It protects employees who seek redress against alleged breaches of the EIRA or those who disclose information regarding illegal activities carried out by the employer.<sup>5</sup> Harassment is prohibited under Article 29 and is described as ‘any unwelcome act, request or conduct ... which could reasonably be regarded as offensive, humiliating or intimidating to such person’.<sup>6</sup>

### **2.2.2 Equal Treatment in Employment Regulations**

Instead of transcribing the European Union Directives into the EIRA directly, the legislator introduced it as a subsidiary legislation through the Equal Treatment in Employment Regulations (ETER). The Regulations were introduced in 2004 and were last amended in 2014. They enshrined the principle of equal treatment specifically into employment law and they widened the protection of minorities by ‘laying down minimum requirements to combat discriminatory treatment’ and expressly included sexual orientation as one of the grounds under which discrimination is prohibited.<sup>7</sup> This express inclusion of sexual orientation was seen as a positive development in order to achieve legal certainty which MGRM had advocated for as mentioned previously when discussing Chapter 452 of the laws of Malta.<sup>8</sup> Just as the EIRA covers the process of employment from the point of advertising a vacancy to the employment and termination thereof, so do the ETER in Article 1(4).

The ETER provides a wider definition of ‘discriminatory treatment’ and also defines the ‘principle of equal treatment’ under Article 2. In defining the term ‘discriminatory treatment’ the Regulations go so far as specifically broadening the ground of ‘sex’ to encompass transgender individuals who have undergone or intend to undergo gender reassignment. The principle of equal treatment is defined as the absence of direct and

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<sup>5</sup> Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 28.

<sup>6</sup> Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 29.

<sup>7</sup> Equal Treatment in Employment Regulations, S.L. 452.95, Article 1(3).

<sup>8</sup> Christian Attard (Malta Gay Rights Movement), ‘Sexual Orientation Discrimination in Malta - The Employment Framework Directive and Beyond’ (Working for an Inclusive Society, University of Malta, 15 September 2005) < <http://aei.pitt.edu/6036/> > accessed 21 July 2023 p 227.

indirect discrimination for the grounds protected under the Act. Furthermore, Article 3 of the ETER gives a comprehensive view of the concept of discriminatory treatment and provides explanations of direct and indirect discrimination as well as harassment.

Direct discriminatory treatment is one where a person is subjected to unfavourable treatment and it is clearly shown that such treatment was because the person falls under one or more of the categories which are protected under employment law. For instance, a homosexual employee is treated less favourably than a heterosexual employee in comparable situations.

On the other hand, indirect discrimination is *prima facie* less obvious but nevertheless subtly undermines persons falling under the protected categories placing them at a disadvantage while other persons who do not fall within the category of protected minorities are not affected by the 'apparently neutral provision, criterion or practice'.<sup>9</sup>

Furthermore, the provisions under Article 6 allow employers to take positive action to help persons falling under the particular categories, including sexual orientation, in line with the principle of equity as well as the general aim of the EED to create 'a level playing field as regards equality in employment and occupation in the European Union'.<sup>10</sup> Employers are ultimately allowed to facilitate under-represented minorities by providing the resources required to place the minorities at an equal standing with their peers who do not identify with the categories thus are less likely to face disadvantages.

### **2.2.3 The Industrial Tribunal**

The EIRA establishes the Industrial Tribunal under Article 73. The Tribunal serves the purpose of allowing persons affected by breaches of the protection afforded by law to access justice. It has exclusive jurisdiction in the matters outlined in Article 75

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<sup>9</sup> Equal Treatment in Employment Regulations, S.L. 452.95, Article 3(2)(b).

<sup>10</sup> Jan Tymowski, 'The Employment Equality Directive - European Implementation Assessment', (Ex-Post Impact Assessment Unit, European Parliamentary Research Service), January 2016, < [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2016\)536346](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2016)536346) > accessed 9 August 2023 p 7 ; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ 2 303/0016 Recital 37.

particularly unfair dismissals and claims falling under Title I which includes discriminatory treatment. However, there is a prescriptive period of 4 months from the date of the alleged breach as prescribed in Article 30 and Article 75 of the EIRA and Article 10 of the ETER.

An employee or the employee's representative who alleges a breach by their employer may declare in writing the facts of the case and present the declaration to the Registry of the Tribunal before the lapse of the four-month period. The person making the allegation may also avail himself of the right given in Article 9 of the ETER which allows them to send a written notification to their employer or other relevant parties who are subject to the regulations.

The respondent has a ten-day window from receipt of the notification within which they may reply. In the event that a reply is not received or it is deemed evasive or equivocal the tribunal may draw inference from that fact that the respondent has committed an unlawful act, thus, inferring that discrimination or unfair dismissal on the basis of unlawful discrimination has occurred.

#### **2.2.4 Maltese Cases**

Throughout this research, it has been particularly difficult to find a record of cases related to discrimination in employment on the basis of sexual orientation in Malta. The cases discussed under this heading are not cases adjudicated in front of a Court of Law or Tribunal, nor are they decided by a judge or magistrate. Looking back at a report on Malta's social situation regarding discrimination on the grounds of sexual orientation published in 2009, the report did not find any record of formal complaints of discrimination made by LGBT individuals in front of the Industrial Tribunal and Civil Courts.<sup>11</sup> However, this did not mean that discrimination based on sexual orientation in employment did not exist.

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<sup>11</sup>Marcelline Naudi 'The situation concerning homophobia and discrimination on grounds of sexual orientation in Malta', Sociological Country Report 2008, cited in Danish Institute for Human Rights, 'The situation concerning homophobia and discrimination on grounds of sexual orientation in Malta' (Fundamental Rights Agency) March 2009 < [https://fra.europa.eu/sites/default/files/fra\\_uploads/385-fra-hdgso-part2-nr\\_mt.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/385-fra-hdgso-part2-nr_mt.pdf) > p 9.

As a matter of fact, the report simultaneously, through the surveys and interviews conducted by the researcher, found that LGBT identifying individuals have experienced discrimination in the workplace but have failed to report such incidents whilst some others have suspected being discriminated against because of their sexual orientation but could not be sure and therefore did not report it either. Harassment was more prevalent with a total of 39.5% of respondents claiming they were harassed on the basis of their sexual orientation in the workplace.<sup>12</sup>

#### 2.2.4.1 The Open Secret of the Airline Employee

A particular person lodged his complaint with the Office of the Parliamentary Ombudsman in 2009. In a compilation of case law this case was referred to as ‘the open secret of the airline employee’. The complainant alleged that the company discriminated against him on the ground of sexual orientation in the selection process for pilot training. He claimed to be more than qualified for the job he applied for but nevertheless he was rejected. The airline, Air Malta, insisted that it was unaware of the applicant’s sexual orientation and argued that they could not discriminate on the basis of a characteristic they were not aware of. They insisted that the applicant was rejected on the grounds that he was ‘over-confident and at times also nonchalant’ and that he was dressed inappropriately for the interview.<sup>13</sup>

The complainant rebutted the airline’s arguments and insisted that having spent years working with the airline he was convinced that his sexual orientation was not a secret. The Ombudsman recognised that the complainant was well qualified for the position he applied for which made it seem that there was a probable case of discrimination which

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<sup>12</sup> Malta Gay Rights Movement ‘Sexual Orientation Discrimination in Malta: A Report on Discrimination, Harassment, and Violence against Malta’s Gay, Lesbian and Bisexual Community’, 2003 Malta: Union Press cited in Danish Institute for Human Rights, ‘The situation concerning homophobia and discrimination on grounds of sexual orientation in Malta’ (Fundamental Rights Agency) March 2009 < [https://fra.europa.eu/sites/default/files/fra\\_uploads/385-fra-hdgso-part2-nr\\_mt.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/385-fra-hdgso-part2-nr_mt.pdf) > p 9.

<sup>13</sup> Neil Falzon and Adrian Mallia, ‘Compilation of Case Law - Research Report’(NCPE) as part of the project VS/2010/0569 - Think Equal, December 2011 < [https://ncpe.gov.mt/en/Documents/Our\\_Publications\\_and\\_Resources/Research/Vs\\_2010/case\\_law\\_1.pdf](https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Research/Vs_2010/case_law_1.pdf) > accessed 9 August 2023 Case No. 20 p 32.

shifted the burden of proof on Air Malta. The airline had to show that they have in fact not acted in a discriminatory manner.

However, upon the airline giving its side of the case, the Ombudsman found it difficult to conclude whether the panel conducting the interviews were aware of the complainant's sexual orientation or not and in light of the conflicting versions of events together with the challenge brought about by the 'hidden nature of a person's sexual orientation', the Ombudsman decided against accepting the complaint as a prima facie case of discrimination was not proven.<sup>14</sup>

#### 2.2.4.2 Church Schools and Gay Teachers

The Malta Union of Teachers as a trade union dealt with the case of four teachers employed in Church Schools who identified as homosexuals. The case was reported back in 2007, however, the Union had stated that it had intervened in order to safeguard the four teachers from having their job terminated after the schools were subjected to pressure from parents over the previous five years. The issue at the time of reporting was never brought up in State Schools.<sup>15</sup>

This may reflect the conflict of the ethos of Church Schools that follow Catholic beliefs and the life of LGBTIQ individuals, whereas in State Schools there is no such ethos.<sup>16</sup> Although it is true that there may be a conflict between the beliefs of the Church and homosexuality, it is also true that 'sexuality is a private matter' and 'should not be a factor in [teachers'] employment'.<sup>17</sup> However, the Malta Union of Teachers also commented that although schools may not discriminate against gay teachers as it is

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<sup>14</sup> Ibid p 34.

<sup>15</sup> James Debono, 'MUT stops Church from firing gay teachers', (MaltaToday), 18 July 2007, < <http://archive.maltatoday.com.mt/midweek/2007/07/18/t3.html> > accessed 15 August 2023.

<sup>16</sup> Under Chapter 2.3.2 of this Dissertation, one will find reference to ethos-based organisations who may to a certain point discriminate on the basis of a fundamental value of the ethos-based organisation.

<sup>17</sup> James Debono, 'MUT stops Church from firing gay teachers', (MaltaToday), 18 July 2007, < <http://archive.maltatoday.com.mt/midweek/2007/07/18/t3.html> > accessed 15 August 2023.

contrary to guidelines and also law, teachers who are open about their sexuality with students 'is bound to provoke an ethical discussion'.<sup>18</sup>

The conflict between the ethos of Church Schools and the sexual orientation of teachers was brought back to light in the media once again in 2014 where it was reported that a document by the Maltese archdiocese on new employment terms was being discussed. These employment terms allegedly included that prospective employees and promotions within Church Schools had to be practising Catholics and furthermore, that employees must self-report substantive life-choices that go against the teachings of Catholicism.<sup>19</sup>

Today, the situation seems to have progressed for the better as the Archdiocese of Malta has been awarded the Equality Mark twice by the National Commission for Promotion of Equality (NCPE).<sup>20</sup> Although the Equality Mark is used mainly as a marker of equality between men and women one may also interpret this as a step closer towards the inclusion and acceptance of LGBTIQ individuals in employment, more specifically LGBTIQ identifying teachers working in Church Schools.

It remains a question whether the same teachers are allowed to disclose their sexual orientation with their students the same way that heterosexual teachers are allowed in Church Schools. Teachers can be viewed as role models to students. Allowing teachers to be open about their sexual orientation and gender identity in a proper and professional manner may aid harbouring an open, safe and welcoming space for LGBTIQ students.<sup>21</sup> This would contribute to the overall push towards equality and not only in employment but in the realm of education.

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<sup>18</sup> Ibid.

<sup>19</sup> Times of Malta, 'MUT, humanists protest over proposed Church School teachers' condition, Curia reacts', (Times of Malta), 9 December 2014 < <https://timesofmalta.com/articles/view/mut-humanists-protest-over-proposed-church-school-teachers-conditions.547582> > accessed 15 August 2023.

<sup>20</sup> Archdiocese of Malta, 'The Archdiocese of Malta is rewarded the NCPE Equality Mark once again', (Archdiocese of Malta), 22 February 2023 < <https://church.mt/the-archdiocese-of-malta-is-rewarded-the-ncpe-equality-mark-once-again/> > accessed 15 August 2023.

<sup>21</sup> Ryan George Sciberras, 'Their True Colours: Delving into the experience of gay and lesbian educators', Mapping the Rainbow Volume II (Ministry for Equality, Research and Innovation, 2021) p 88 - 99 <

## 2.3 Employment Equality Directive/ Council Directive 2000/78

### 2.3.1 Discrimination in Employment under EU Law

According to the European Industrial Relations Dictionary:

*Discrimination may be defined as different treatment of individuals or groups based on arbitrary ascriptive or acquired criteria such as sex, race, religion, age, marital or parental status, disability, sexual orientation, political opinions, socio-economic background, and trade union membership and activities.*

The concept of discrimination was introduced in EU law through the TFEU by the present Article 19 which states that the organs of the EU ‘may take appropriate action to combat discrimination ... sexual orientation.’ It also featured in the Charter of Fundamental Rights of the European Union under Non-Discrimination in Article 21 which established a general prohibition of any discrimination, inter alia discrimination on the basis of sexual orientation.

The applicability of non-discrimination in the sphere of employment law under EU Law started off in the 1970s with the introduction of the principle of equal pay for men and women that is enshrined in Article 157 of the TFEU. This was the first step in the direction of establishing a general framework for equal treatment in employment.<sup>22</sup> However, it was not until Council Directive 2000/78/EC that discrimination on the grounds of sexual orientation amongst other grounds was prohibited in employment and occupation. Today, this legislative piece is better known as the Employment Equality Directive (EED).

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<https://humanrights.gov.mt/en/Documents/Mapping%20the%20Rainbow%20Vol%20II.pdf> > accessed 15 August 2023

<sup>22</sup>Eurofound, ‘European Industrial Relations Dictionary’ 20 September 2011, < <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/discrimination> > accessed 9 August 2023.

### 2.3.2 Types of Discrimination under the Employment Equality Directive

There are four types of discrimination which are prohibited under Article 2 of the EED: direct discrimination, indirect discrimination, harassment and instruction to discriminate.<sup>23</sup>

Under the EED direct discrimination is when a person is treated less favourably than others in a comparable situation. There are no exceptions made for direct discrimination which means it is not formally allowed for any reason. The EED instead allows for 'different treatment' that is based on genuine occupational requirements, ethos-based organisations and age. Sexual orientation is a personal trait which does not add or reduce the value that a person contributes to the workplace. Thus, it would be difficult to prove that a genuine occupational requirement which treats people of different sexual orientation differently falls under the realm of justified different treatment. However, when one discusses ethos-based organisations the answer is not as straightforward. One would encounter a conflict of different rights and freedoms. The fourth type of discrimination, instruction to discriminate, is considered to be direct discrimination.<sup>24</sup>

Indirect discrimination is when a provision, criterion or practice which seems neutral puts a certain group of people at disadvantage compared to others. However, these provisions may be justified if it is proven that they have a legitimate aim and the means used were appropriate and necessary. There need not be proof of intent to discriminate, it would be sufficient to show that the provision is likely to create a discriminatory effect for it to be rendered discriminatory.<sup>25</sup>

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<sup>23</sup> Jan Tymowski, 'The Employment Equality Directive - European Implementation Assessment', (Ex-Post Impact Assessment Unit, European Parliamentary Research Service), January 2016, < [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2016\)536346](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2016)536346) > accessed 9 August 2023 p 10-11

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

Harassment is described as ‘an unwanted conduct ... with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’.<sup>26</sup> Although harassment is prohibited, as the European Implementation Assessment correctly points out, the EED does not set out rules or criteria which must be satisfied in order to determine whether the conduct is harassment nor does it give a clear answer on whether employers are subject to responsibility for harassment by other employees and third parties leaving a gap that must be filled either by national law or through jurisprudence.<sup>27</sup>

The Maltese legislator has transcribed the four types of discrimination found under the EED onto Maltese law and all four types of discrimination are protected according to the minimum requirements.

### **2.3.3 Who does the Employment Equality Directive protect?**

The Directive’s aim is to combat discrimination on ‘the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’<sup>28</sup> Thus, it distinctly aims to protect persons that have one or more of the characteristics mentioned from discrimination in employment. However, limiting the protection from discrimination to only the people with these characteristics would mean that some conduct could escape the regulatory objective.

The CJEU had given its interpretation of the prohibition of discrimination in employment in *S. Coleman v Attridge Law and Steve Law* to also prohibit discrimination by

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<sup>26</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ 2 303/0016 Article 2(3).

<sup>27</sup> Jan Tymowski, ‘The Employment Equality Directive - European Implementation Assessment’, (Ex-Post Impact Assessment Unit, European Parliamentary Research Service), January 2016, < [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2016\)536346](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2016)536346) > accessed 9 August 2023 p 10-11

<sup>28</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ 2 303/0016 Article 1.

association.<sup>29</sup> The Coleman case was about discrimination on the grounds of disability of Coleman's child. The Court held that the protection extends to Coleman by association and if it is shown that the discrimination and harassment are a result of her child's disability this would constitute direct discrimination. Potentially the Coleman case could be used as rationale for discrimination on other grounds too such as the ground of sexual orientation by association.<sup>30</sup>

There is also discrimination which can be based on assumption rather than fact. However in many EU Member States including Malta, discrimination based on assumption is not expressly stipulated or prohibited in their national law, thereby as the European Implementation Assessment pointed out it may only be clarified by future judicial interpretation, which up to now there has not been any Maltese jurisprudence that delved into this issue.<sup>31</sup>

The EED as well as the EIRA prohibit victimisation. Victimisation is defined by Eurofound in the European Industrial Relations Dictionary as a form of discrimination against persons involved in a complaint, which could be directed towards the complainant and also witnesses.<sup>32</sup> These persons are usually treated in a discriminatory manner and suffer negative consequences as a retaliation for lodging a complaint or being a witness to discriminatory behaviour.<sup>33</sup>

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<sup>29</sup> C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECLI:EU:2008/415.

<sup>30</sup> Jan Tymowski, 'The Employment Equality Directive - European Implementation Assessment', (Ex-Post Impact Assessment Unit, European Parliamentary Research Service), January 2016, < [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2016\)536346](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2016)536346) > accessed 9 August 2023 p 15

<sup>31</sup> Ibid.

<sup>32</sup> Eurofound, 'European Industrial Relations Dictionary' 11 March 2007, < <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/victimisation> > accessed 9 August 2023

<sup>33</sup> Jan Tymowski, 'The Employment Equality Directive - European Implementation Assessment', (Ex-Post Impact Assessment Unit, European Parliamentary Research Service), January 2016, < [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2016\)536346](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2016)536346) > accessed 9 August 2023 p 15

## 2.3.4 European Union Case Law

### 2.3.4.1 Grant v. South-West Trains

The introduction of the Employment Equality Directive was an important step in the recognition of LGBTIQ rights at a supranational organisational level especially after the decision given in 1998 in the case of Grant v. South-West Trains where the Court had held that an employer's refusal of allowing travel concession to a homosexual employee in a same-sex stable relationship was not tantamount to discrimination under the principle of equal pay even though other employees in heterosexual stable relationships outside of marriage were allowed these travel concessions.<sup>34</sup> The issue with the Grant Case was that it was based upon Article 119 of the Treaty of Rome ; equal pay for men and women, therefore, sexual orientation was not within the scope of the aforementioned article. Grant attempted to widen the scope of the article by using discrimination based on sex to extend its meaning to include sexual orientation. The judgment summary stated the following:

*... in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex, and an employer is not therefore required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. It is for the legislature alone to adopt, if appropriate, measures which may affect that position.*

At the time of the Grant judgment, Article 13 (today Article 19 TFEU) existed however, it could not be used in this case as it did not confer EU competence. Today, the outcome of this judgment could be different as discrimination on the grounds of sexual orientation can be challenged on the basis of the Employment Equality Directive where

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<sup>34</sup> Case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.* [1998] ECLI:EU:C:1998:63

the EU now has competence in discrimination on the grounds of sexual orientation and cases like Grant's may seek redress at an EU level under Articles 1 and 2 of the EED.<sup>35</sup>

#### 2.3.4.2 NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford

There are instances where the Court is faced with an issue of a conflict of rights and freedoms. In the case of NH v. Associazione Avvocatura per i diritti LGBT there was a conflict of rights between freedom of expression, freedom to choose occupation and the right to engage in work as well as the right to non-discrimination.<sup>36</sup> The facts of the case were that a lawyer had made a statement on a radio programme that he would not want to work with or hire a homosexual person.

The Court had to determine whether the statements fell under the scope of Article 3(1) of the EED and also whether the Directive allowed an association whose objective was to protect LGBT persons judicially.

The Court rules that Article 3 of the Directive had to be interpreted widely to include statements made on a radio programme against recruitment of persons with a particular sexual orientation, regardless of whether there is an ongoing or planned recruitment procedure, 'provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical.'<sup>37</sup>

In order to determine whether a link is hypothetical or not the Advocate General in his opinion on the case formulated a non-exhaustive list of three criteria.<sup>38</sup> The first criterion is related to the person making the statement, one must ask whether the person that made the statement is a potential employer, or if he is a person of decisive influence in the recruitment process of a potential employer or lastly if he is perceived to be capable of exerting decisive influence. The second criterion is related to the statement itself, was the statement made related to the conditions for access to employment or to

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<sup>35</sup> Ibid.

<sup>36</sup> Charter of Fundamental Rights of the European Union [2012] OJ 1 326/391 Articles 11, 15 and 21.

<sup>37</sup> C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* [2020] ECLI:EU:C:2020:289

<sup>38</sup> C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* [2020] ECLI:EU:C:2020:289 , Opinion of AG Sharpston paras 54-56.

occupation with the employer as defined in the first criterion? If yes, one must establish the employer's intention to discriminate based on the grounds of prohibited discrimination listed in the Directive. The last criterion that must be considered is the context where the statements were made. In this case the public broadcasting of the statement was considered.<sup>39</sup> The Advocate General also observed that these statements create a hindrance to the prospective job applicants that belong to protected groups as they discourage them from applying for jobs provided by the employer making these statements.<sup>40</sup> Reference was made to another case, *Feryn*, which related to discrimination based on racial and ethnic origin which is also a protected ground under the Directive were the Advocate General on the case stated in his opinion that :

*In any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not. ... To ignore that as an act of discrimination would be to ignore the social reality that such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue*

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One can make various observations by looking at this case. Firstly, although freedom of expression is a fundamental right in a democratic society it is not an absolute right, in the sense that it does not give rise to the right to impinge on other persons' rights and freedoms. Particularly, freedom of expression is not a licence to discriminate against persons who fall under one of the protected categories. Secondly, any potential

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<sup>39</sup> Court of Justice of the European Union Press Release No 48/20 'Homophobic statements constitute discrimination in employment and occupation when they are made by a person who has or may be perceived as having a decisive influence on an employer's recruitment policy'(Luxemburg, 23 April 2020) < <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200048en.pdf> > accessed 9 August 2023.

<sup>40</sup> C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* [2020] ECLI:EU:C:2020:289 , Opinion of AG Sharpston paras 54-56.

<sup>41</sup> C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECLI:EU:C: 2008:397, Opinion of AG Poiares Maduro para 15.

employer making public statements must observe the laws laid down in the Directive even when it seems as if the employer is speaking of a hypothetical situation, the discriminatory remarks automatically have the effect of '*enunciat[ing] a discriminatory recruitment policy*.'<sup>42</sup> The Directive only limits freedom of expression in the context of employment and occupation, thus it does not create an adverse infringement of the freedom of expression.

#### 2.3.4.3 J.K. v TP S.A.

The case of J.K vs TP S.A. presents another conflict of rights and freedoms, particularly the freedom to contract and the principle of equal treatment in employment that conveys the right of non-discrimination. JK was a self-employed worker who was contracted to work on a self-employed basis with TP as an editor for features on a Polish public television channel. They had been contracting work between them for around seven years on this basis. The claimant had never revealed his sexual orientation, but in 2017 he uploaded a *YouTube* video with his same-sex partner where they promoted the acceptance of same-sex couples. It was a few days after this event when the channel decided on cancelling the contract of work they had just entered into, ultimately terminating the work relationship between J.K. and TP S.A.

The Court delved into the extent of the applicability of the Directive for self-employed persons and whether it has the effect of inhibiting national legislation from enacting laws that allow discrimination on the basis of the freedom of contracting parties. The Advocate General in her opinion delved into the meaning of self-employment under the Directive by analysing the recitals which suggest that the Directive's aim is to protect all persons participating in society by providing their work.<sup>43</sup>

Furthermore, the Opinion quoted another judgment that said that 'the directive seeks to eliminate, on grounds relating to social and public interests, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through

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<sup>42</sup> C-507/18 NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford [2020] ECLI:EU:C: 2020:289, Opinion of AG Sharpston para 62.

<sup>43</sup> C- 356/21 J.K. v TP S.A., *joined parties: PTPA* [2023] ECLI:EU:C:2023:9, Opinion of AG Ćapeta para 53

work, irrespective of the legal form in which it is provided.<sup>44</sup> Additionally, the principle of equal treatment also means that there must be equal opportunities to work thus, one must not be limited from engaging in such opportunities of work on the basis of their sexual orientation.<sup>45</sup> Thus concluding that self-employment, even if it is in the form of providing a service as J.K. was, is within the scope of the Directive. Therefore, Article 3 of the Directive applies in this case.

On the matter that national legislation may introduce measures which exclude the applicability of the Directive in the pursuit of protecting the rights of others, the Advocate General explained that this clause in the directive allowing for such measures to be introduced must be interpreted strictly and only allowed where and when it is necessary. Similarly, to the finding in Case C-507/18, the Advocate General concluded that the Directive does not impinge on the freedom to contract in a disproportionate manner.

Therefore, the Polish law allowing discrimination on the basis of sexual orientation in a contract does not fit within the values that the European Union holds nor does it respect the legislative measures taken by the Directive to protect persons that fit into certain characteristics from discrimination in their right to work. Allowing discrimination on the basis of sexual orientation to occur in the name of freedom to contract is a breach of Article 3 of the Directive and hinders the Directive of its practical effect.<sup>46</sup> The Court agreed with the Advocate General's opinion and ruled that:

*Article 3(1)(a) and (c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that*

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<sup>44</sup> C-587/20 *Ligebehandlingsnævnet acting on behalf of A v HK/Danmark and HK/Privat*. [2022] ECLI:EU:C:2022:419

<sup>45</sup> C- 356/21 *J.K. v TP S.A., joined parties: PTPA* [2023] ECLI:EU:C:2023:9, Opinion of AG Ćapeta para 72.

<sup>46</sup> C- 356/21 *J.K. v TP S.A., joined parties: PTPA* [2023] ECLI:EU:C:2023:9 para 77

*directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.*

## **2.4 Conclusion**

The current legislation in force seems to provide adequate protection from discriminatory treatment vis-a-vis the employer and employee relationship. The provisions currently bind employers, organisations such as trade unions and employment agencies in carrying out recruitment and treating employees in a non-discriminatory and fair manner. However, it does not provide for the accountability of employees between themselves. Thus, although employees forming part of the LGBTIQ community are protected from discrimination on the grounds of sexual orientation and gender reassignment from their employers, there is no formal requirement enshrined in employment law that requires employers to provide a remedy for instances of discrimination against their employees from their fellow colleagues.

Lastly, although the legislation as stated above seems adequate, it remains apparent that formal reporting of cases of discrimination in Malta remains close to none. This could potentially be a positive thing, in that LGBTIQ persons do not feel discriminated against based on their sexual orientation and gender identity in their work and therefore, complaints are not lodged. On the other hand, it could potentially be a negative thing as it could reflect a reluctance to formally report discriminatory practices in employment. This uncertainty is meant to be clarified through the interviews conducted with organisations found under Chapter 4 of this dissertation.

## CHAPTER 3: STRATEGIES AND ACTION PLANS

### 3.1 Introduction

The EU as well as Malta have come up with several strategies and action plans throughout the years in order to create a framework to combat discrimination towards LGBTIQ persons. These plans usually cover several different areas, one of which is employment and occupation and provide a list of measures which countries aim to introduce within a certain period of time. Usually after the period of time elapses a new strategy reflecting on the improvements that have been achieved and outlining the next steps is published. Malta's most recent plan is the 'LGBTIQ Equality Strategy and Action Plan 2023-2027' whilst the EU's first and most recent plan is the 'European Commission's LGBTIQ Equality Strategy 2020-2025'. This chapter will look into both strategies.

### 3.2 LGBTIQ Equality Strategy and Action Plan 2023-2027

The recent 'LGBTIQ Equality Strategy and Action Plan 2023-2027' was preceded by the 'LGBTIQ Equality Strategy and Action Plan 2018-2022'. Amongst the measures pertaining to employment mentioned for the years 2018 to 2022 there were adoption of public service guidelines on sex and gender, a proposed national survey on LGBTIQ realities including discrimination, the goal for the public service to be a model employer for LGBTIQ employees, further dialogue with organisations and trade unions on the rights of LGBTIQ employees, targeted outreach to vulnerable LGBTIQ persons who are seeking employment, cooperation with the police force to adopt gender neutral uniforms and review their training programme to provide adequate training on the response to reports lodged by LGBTIQ victims and creating a referral system for victim support services.<sup>47</sup> One of the campaigns, 'Trans Worker – Same Work', was essential in shedding light on the issues that transgender persons face in employment and in promoting inclusive employment practices.

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<sup>47</sup> Human Rights and Integration Directorate, *LGBTIQ Equality Strategy and Action Plan 2018-2022*, < <https://humanrights.gov.mt/en/Documents/Publications/LGBTIQ%20Equality%20Strategy%20and%20Action%20Plan%202018%20-%202022.pdf> > accessed 18 August 2023.

The 'LGBTIQ Equality Strategy and Action Plan 2023-2027' reflects briefly on the above mentioned measures most of which were implemented such as the measures outlined above regarding the police force and a targeted outreach to trans-persons in employment as well as their employers. In fact it was reported that an approximate eighty percent of the planned measures were successfully implemented.<sup>48</sup>

The current Action Plan presents measures that are targeting ten areas. Under Area 01 there is a list of seven measures relating to employment and service provision. These measures build upon the initiatives taken in the previous years. The measures are not legislative, however, they play a very important role in that they accompany the legislative framework currently in place in a sociological context. They aid society in respecting and implementing the principles of equality and non-discrimination enshrined in the law in society's day-to-day life by providing tools such as guidelines and awareness campaigns amongst other things. The burden of providing these tools is split amongst different bodies, thus such planning allows each body to act on specified measures ultimately helping achieve cohesiveness and cooperation across the various areas in which equality and non-discrimination require attention. The current seven measures are the responsibility of the Ministry for Home Affairs, Security, Reforms and Equality (MHSR), the National Commission for the Promotion of Equality (NCPE) and the Malta Tourism Authority (MTA).<sup>49</sup>

The first initiative targets the public administration and relates to the continuance of training provisions as well as the updating of Government Guidelines on LGBTIQ matters through the MHSR. The second measure is a plan to initiate awareness campaigns and provide training to the private sector and those providing Employee Assistance Programmes by the MHSR and NCPE. The third initiative is for the MHSR and NCPE to set up events targeted for small, medium and micro enterprises with the purpose of raising awareness on LGBTIQ issues as well as act as an aid for these enterprises to adopt

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<sup>48</sup> Human Rights Directorate, *LGBTIQ Equality Strategy and Action Plan 2023-2027*, p 11,16 < <https://humanrights.gov.mt/en/Documents/LGBTIQ%20Equality%20Strategy%20and%20Action%20Plan%202023%20%E2%80%93%202027%20EN.pdf> > accessed 18 August 2023.

<sup>49</sup> Ibid.

LGBTIQ-friendly practices which in turn helps in fighting against discrimination and harassment in the workplace through preventative measures.<sup>50</sup>

The fourth measure taken on by the MHSR is to encourage more local organisations to become signatories to the EU Platform of Diversity Charters. This provides organisations with a platform from which they can exchange good practices and policies for inclusivity and diversity. Measures like this one strengthen cooperation and harmonisation in employment by creating a space for organisations and business to share tools and act in solidarity against discrimination.<sup>51</sup>

The fifth initiative is very relevant to the research of this dissertation. It outlines the aim to enhance awareness about employment rights most especially the right of equal treatment together with encouragement to report instances of harassment and discrimination on the basis of sexual orientation and gender identity in employment. As part of this initiative, there is the aim to make support services and reporting avenues more accessible through signposts. This initiative will be led by the MHSR and NCPE, and its implementation is expected to greatly contribute towards extinguishing the problem of underreporting which has been highlighted throughout this dissertation.<sup>52</sup>

The sixth measure aims to set up a committee of LGBTIQ+ business owners and leaders which will act as a space of support and discussion. The MHSR will be responsible for providing support to the Chamber of SMEs and the Chamber of Commerce in the committee set-up, whilst the committee itself will be acting as an advisory body for the private sector on LGBTIQ+ issues most particularly inclusion. The last measure focuses on the tourism sector led by the MTA to promote Malta as an 'LGBTIQ+ friendly destination' together with providing training and creating policies and standards for service providers that are inclusive of LGBTIQ+ persons.<sup>53</sup>

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<sup>50</sup> Human Rights Directorate, *LGBTIQ Equality Strategy and Action Plan 2023-2027*, p 25-27 < <https://humanrights.gov.mt/en/Documents/LGBTIQ%20Equality%20Strategy%20and%20Action%20Plan%202023%20%E2%80%93%202027%20EN.pdf> > accessed 18 August 2023.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

### **3.3 European Commission's LGBTIQ Equality Strategy 2020-2025**

Prior to the promulgation of the Strategy, the European Commission had presented a policy framework 'List of actions to advance LGBTI equality' intended for the years 2015 to 2019 which focused on fighting discrimination. The basis of the current Strategy circles around equality and non-discrimination as fundamental rights and intrinsic values of the EU. Although the proposed actions seem broad and do not necessarily focus on employment there are aspects of them which are very relevant to LGBTIQ persons in the workplace.

The Strategy is driving for equal opportunities that are complemented by a society that is accepting and welcoming. It also points out flaws that are in the system that are hindering LGBTIQ persons from truly becoming equal to persons that do not identify as part of the community such as the increased risk of poverty, an increasing rate of discrimination towards LGBT persons and fear of the police that were worsened by COVID-19 as well as increased hostility and attacks towards LGBTIQ persons in certain EU States. Reflecting upon this reality, the Strategy takes an interesting approach by implementing four pillars, each of which set out targeted actions for a successful implementation of the Strategy.<sup>54</sup>

The first three pillars are centred around the EU itself and outlines a set of improvements which the Commission aims to accomplish within the EU States. The first pillar consists of actions aimed to tackle discrimination against LGBTIQ persons whilst the second pillar focuses on ensuring their safety. The third pillar's actions target the establishment of a society that is inclusive of LGBTIQ persons. The last pillar is centred around the EU being a leader on the call for equality for LGBTIQ persons across the globe.

The only key action that the Commission has set targeting employment directly is under the first pillar of tackling discrimination. The Commission is set to propose new

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<sup>54</sup> European Commission, 'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Union of Equality: LGBTIQ Equality Strategy 2020-2025' COM (2020) 698 final, p 5.

legislation upon the findings of the implementation assessment of the Employment Equality Directive.<sup>55</sup> It aims to make the role of equality bodies across the EU stronger under the EED. However, even though this is the only direct measure the Strategy has for employment in relation to LGBTIQ equality and non-discrimination, there are other highlights that are particularly striking which surround the socio economic wellbeing of LGBTIQ persons. For instance, it acknowledges that LGBTIQ children and families suffer in their educational and employment prospects because of the stigma that surrounds LGBTIQ matters that often makes them a target of bullying and discrimination. There are also comments about the further hindrance that transgender persons find when they try to access the labour market and how such hindrances also exist for persons in employment who require gender reassignment. The Strategy also mentions that there is an issue of underreporting, not only in employment but across all areas in which discrimination occurs that correlates to fear of the police.<sup>56</sup>

These barriers that exist in employment are not to be taken lightly especially when there are other factors that must be considered for LGBTIQ persons such as instances where there is a lack of acceptance from their families. Such issues would push LGBTIQ persons to become financially independent to be able to detach themselves from the unsafe situations they face at home. Thus, employment would be a very important step towards this. Other times the situation can be far worse and LGBTIQ persons find themselves homeless. The Strategy quotes a study by ILGA Europe which found that around 25-40% of homeless persons identify as LGBTIQ.<sup>57</sup>

In light of these realities, the Strategy focuses heavily on intersectionality, issues experienced by transgender, non-binary and other gender non-confirming persons and the matter of mutual recognition. Intersectionality in lay terms is when a person has more than one factor which can create a disadvantage such as a person that identifies

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<sup>55</sup> Further reference to the Implementation Assessment can be found under 'Chapter 2. 3 Employment Equality Directive' of this dissertation.

<sup>56</sup> European Commission, 'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Union of Equality: LGBTIQ Equality Strategy 2020-2025' COM (2020) 698 final, p 4-13.

<sup>57</sup> Ibid.

as a homosexual and also has a disability. The European Institute for Gender Equality defines 'intersectional discrimination' as 'discrimination that takes place on the basis of several personal grounds or characteristics/identities, which operate and interact with each other at the same time in such a way as to be inseparable.'<sup>58</sup> The matter of mutual recognition relates mostly to rainbow families who have their marriage and children recognised legally in a Member State but then they are not recognised in other Member States where same-sex marriage may not be allowed or same-sex couples are not legally recognised as parents to their children as they are in the other Member State which impinges upon the freedoms that the EU offers such as freedom of movement.<sup>59</sup> Therefore, the Commission recognises these barriers and wishes to eradicate them through cooperation within the EU with the measures that are laid out in the Strategy.

A progress report on the implementation of this Strategy has been published in 2023. A number of achievements have been made amongst which were proposals for Directives submitted by the Commission in relation to the measures found in the Strategy as well as the publication of various reports. The Commission has proposed a pay transparency directive and two other directives on the strengthening of the role of equality bodies. One of the published reports looked into the factors that hinder persons from reporting discrimination and it was found that cases of discrimination were usually left unreported due to 'fear of retaliation, low and diverging levels of compensation, lack of evidence, and insufficient awareness of rights and support mechanisms.'<sup>60</sup>

An LGBTIQ Equality Subgroup was created for governmental experts to work with civil society and international organisations in furtherance of the implementation of the Strategy. The Subgroup has already met a number of times and worked on guidelines to

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<sup>58</sup> European Institute for Gender Equality, 'Intersectional Discrimination' (2016) < <https://eige.europa.eu/publications-resources/thesaurus/terms/1395> > accessed 27 August 2023.

<sup>59</sup> European Commission, 'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Union of Equality: LGBTIQ Equality Strategy 2020-2025' COM (2020) 698 final, p 16-18.

<sup>60</sup> Directorate-General for Justice and Consumers, 'Progress Report on the Implementation of the LGBTIQ Equality Strategy 2020-2025', ( Publications Office of the European Union, 2023) doi:10.2838/638612 < [https://commission.europa.eu/system/files/2023-04/JUST\\_LGBTIQ%20Strategy\\_Progress%20Report\\_FINAL\\_WEB.pdf](https://commission.europa.eu/system/files/2023-04/JUST_LGBTIQ%20Strategy_Progress%20Report_FINAL_WEB.pdf) > accessed 27 August 2023 p 9.

enhance LGBTIQ equality through the use of strategies and action plans in Member States. Malta is part of this Subgroup and the Progress Report has recognised the strides it has made in its legislation in furtherance of protecting and supporting LGBTIQ persons. The Commission held workshops for the Diversity Charters aforementioned under Malta's Action Plan that focused on trans and intersex inclusion. Similar to the Diversity Charters the Subgroup also works on exchanging best practices on the rights and protection of LGBTIQ individuals. Another measure that was implemented was allowing the use of the European Social Fund for authorities in Member States to fund initiatives that strengthen the participation of trans and intersex persons in employment. The Commission is also working with some Member States through EU funded projects such as the LGBTIQ Work Equality Alliance.<sup>61</sup>

Apart from the abovementioned actions the Commission has taken the approach of leading by example. It has initiated actions internally for the EU Institutions and their employees by creating a Diversity and Inclusion Office and also an association for LGBTIQ employees within the EU institutions called 'Égalité'. The Commission set out measures for human resources that plan on providing targeted counselling, legal and administrative support to LGBTIQ employees within the institutions. Other initiatives included the promotion of gender-neutral and inclusive language.<sup>62</sup>

### **3.4 Conclusion**

In analysing the above strategies and actions plans one can see that Malta's goals align with those of the EU. The strategies are measures which aid the legislator in creating a society that truly reflects the spirit of the legislative measure taken. It is positive to see Malta has become a model for other EU countries in the realm of LGBTIQ rights and that it remains proactive in fulfilling its duty to uphold the rights and protections that LGBTIQ individuals should enjoy. Although it is disheartening to find that certain inequalities

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<sup>61</sup> Directorate-General for Justice and Consumers, 'Progress Report on the Implementation of the LGBTIQ Equality Strategy 2020-2025', ( Publications Office of the European Union, 2023) doi:10.2838/638612 < [https://commission.europa.eu/system/files/2023-04/JUST\\_LGBTIQ%20Strategy\\_Progress%20Report\\_FINAL\\_WEB.pdf](https://commission.europa.eu/system/files/2023-04/JUST_LGBTIQ%20Strategy_Progress%20Report_FINAL_WEB.pdf) > accessed 27 August 2023 p 12 -13.

<sup>62</sup> Ibid.

and discrimination exist and that they are often not reported, the Institutions seem to be aware of these gaps and have the intention to remove these lacunae through innovative ways that go beyond legislative measures.

## CHAPTER 4: INTERVIEWS

### 4.1 Introduction

This Chapter will be discussing the interviews conducted with five organisations based in Malta that work in the field of employment, with LGBTIQ persons or in areas related to discrimination. Interviews were conducted to collect qualitative data from stakeholders in employment and LGBTIQ rights to be able to provide answers to the three research questions:

- a. Does discrimination in employment exist for LGBTIQ identifying individuals?
- b. Does the law protect LGBTIQ employees in Malta? How does it protect them?  
Where does it lack to protect them?
- c. Are LGBTIQ employees treated the same as heterosexual employees?

The hypotheses for the above questions in this research is firstly, that discrimination in employment still exists against LGBTIQ persons. Secondly, that the law does afford protection against discrimination for LGBTIQ persons in Malta through the provisions under the EIRA and other subsidiary legislation. Thirdly, despite the legislative measures in place LGBTIQ employees nonetheless are treated differently to their heterosexual counterparts.

Each organisation was given a common set of ten questions. These questions may be found under Appendix 1.<sup>63</sup> Initially the study was set to approach non-governmental organisations however, during the research it was found that other organisations involved in this area would aid in providing more information due to the nature of their organisation. This also improved the research by showing different perspectives which has aided the research in eliminating biases. The five organisations were Malta LGBTIQ Rights Movement (MGRM), National Commission for the Promotion of Equality (NCPE),

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<sup>63</sup> Appendix 1 - Interview Questions

LGTBIQ+ Gozo, Allied Rainbow Communities (ARC) and, the General Workers' Union (GWU). The interview questions were set in English but participants were encouraged to speak in the language they felt comfortable with for their answers. <sup>64</sup>After covering the ten pre-set questions, the interviewees were given the opportunity to add any contributions they deemed relevant to the study which were not previously mentioned.

## **4.2 Findings and Analysis**

### **4.2.1 Question 1**

All the organisations agree that the law is very comprehensive and it protects LGBTIQ individuals at the workplace, however, ARC reiterated that there is always room for improvement. ARC and GWU explained how issues arise due to lack of enforcement of the law and not the law itself. The NCPE, MGRM and LGBTI+ Gozo explained that lacunae are not necessarily in the law but rather they are found within society. LGBTI+ Gozo particularly mentioned micro-aggressions, the use of language and stigmatisation towards LGBTIQ persons. Therefore, more effort should be put into educating the general public about LGBTIQ issues such as in the use of language particularly slur words and pronouns. This would be beneficial in the workplace too as incorrect use of language is one of the pertaining issues which queer persons face in employment. The NCPE also expressed that as time passes and the current legislation has been put into practice in the sense that cases are filed and the law is interpreted by a court or tribunal one would be able to assess better if the law is adequate or not.

### **4.2.2 Question 2**

The organisations agree that legal advancements have been made and that they contributed positively to how LGBTIQ individuals are treated at work. Most notably, the introduction of same-sex marriages brought about changes in the area of employment too. The GWU expressed how today same-sex couples now have the same choices which heterosexual couples have, ultimately meaning that if they choose to get married they can enjoy certain employment benefits such as bereavement leave and birth leave which

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<sup>64</sup> MGRM, LGBTI+ Gozo and ARC are NGOs. NCPE is a governmental organisation. GWU is a trade union.

married heterosexual couples have been given for a long time. Another observation made by MGRM was that stereotypical queer persons are seen more often in the workplace today.

Organisations seem to agree that the general legislative progression brought about more openness and more representation in the workplace. It also aided in creating a society that is more understanding according to the NCPE and LGTBIQ+ Gozo. LGTBI+ Gozo also mentioned that the first Gozo Pride being held in 2022 together with an increase in businesses asking for training from the organisation is evidence of more understanding.

Nevertheless, although positive change has been observed it does not mean that discrimination has been eliminated and societal change is a process that is still ongoing as explained in Question 1. The NCPE stated that 'stigma and prejudice are still present in Maltese society' together with stereotypes. It was also said that there are differences between sectors like in the arts there seems to be a higher acceptance and openness of LGTBIQ persons. This question brought to light the interconnectedness between employment and other aspects of life. As LGTBI+ Gozo said 'the LGBT person in the workplace doesn't exist within a vacuum', the workplace is a place of social interactions with colleagues and creating a welcoming environment at work is key in ensuring that LGTBIQ persons have positive interactions in the workplace.

### **4.2.3 Question 3**

Each organisation suggested different strategies for enhancing the working conditions and overall inclusivity of the workplace. However, the different recommendations all have the common goal of creating more awareness, integration and support for LGTBIQ employees.

MGRM particularly mentioned that non-binary persons usually find it more difficult to obtain employment and suggested that more awareness should be raised on this and that 'Imbilli għandek persuna bil-makeup ma jfissirx li mhux kwalifikati jew li mhux ħa

jagħmlu xogħol sew.’<sup>65</sup> The organisation also stressed on the importance of visibility such as stickers or badges within the human resources to show that everyone is welcome and they are safe to talk to. Another recommendation was gender-neutral bathrooms.

The NCPE referred to a study they conducted in November 2022 ‘A Qualitative Research Study on LGBTI+ Discrimination’ in which they issued two recommendations for the field of employment. The first recommendation is for employers to adopt equality and sexual harassment policies together with regular training which should include employees. Secondly, they recommend that workplaces should have a more transparent and structured recruitment process by implementing a written recruitment strategy that embodies the principle of equal treatment.

LGBTI+ Gozo recommended that workplaces should push towards holding persons accountable for micro-aggressions and hate speech at work by even implementing consequences for the perpetrators of such comments. The organisation believes such implementation of consequences will aid LGBTIQ persons at work to speak up and feel safer as they know that their concerns will not be left unheard.

ARC recommended that collective agreements should have inclusion policies within them and that companies can also act by creating Pride Teams within the company that can be a point of contact for their employees. It is good to note that GWU as a trade union have a discrimination policy in their collective agreements. However, this suggestion by ARC may reflect that not all trade unions and collective agreements have such a policy imbedded within them.

The GWU insisted on a better communication strategy to citizens such as a campaign of information regarding the rights and duties of employers and employees. They expressed that some mistakes are often made due to lack of awareness or ignorance of

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<sup>65</sup> Translation: ‘Just because a person wears makeup, it does not mean that they are not qualified or that they will not do their job properly.’

the law and such campaign would aid the general population to learn the applicable law in employment.

#### **4.2.4 Question 4**

All the participants agreed that underreporting persists to this day. MGRM, LGBTI+ Gozo, ARC and GWU all agreed that there is a fear of reporting and also a lack of awareness on the process of reporting discrimination at work. The NGOs attributed this fear to fear of the authorities such as police, the fear of being 'outed' and the fear that the report will not result in any action being taken leading the victims of discrimination to question 'Is it worth it?'

Similarly, the GWU agreed that the fear stems from Malta being a small country where 'everyone knows everyone' and persons feel that everyone would know about the case. They also said that many face 'minimisation', where when they report an issue to their superior or human resources they are faced with questions that raise doubt and a fear of not being taken seriously ultimately discouraging them from filing official complaints.

The NCPE suspects that NGOs do not direct persons who experience discrimination at work to contacting them resulting in the complaint not reaching them. Although the NGOs have said made references in their interviews of instances where they have referred persons to the NCPE thus, persons might be being directed towards the right entity but eventually they do not take action. The NCPE also suspects that some individuals may think they do not have enough proof to prove their case, and for this they have expressed that individuals may not have the power to ask for certain evidence from their employer but the NCPE itself does have the authorisation to ask for certain documents even if their decisions are not lawfully binding they have a certain authoritative status which usually is respected and used for 'lobby[ing] change and justice'.

The organisations were asked about how the issue of underreporting may be overcome and they made some recommendations. The NCPE said that they currently do not have the power to enforce their decisions, thus they are currently pushing towards being

given a stronger mandate. MGRM and ARC made similar statements, the former recommended a clear queer-inclusive point of contact such as someone in human resources and the latter recommended that employers institute a system of 'allies at work' which for instance may be a number of team managers who can wear queer friendly lanyards that include their pronouns conveying they are safe to approach with discrimination reports. The GWU said that from their end they try to thoroughly explain the discrimination clauses in their collective agreement and encourage individuals to use them if and when they need to.

#### **4.2.5 Question 5**

When asked about the remedies under the EIRA, the NGOs were not as familiar with them as the NCPE and Trade Union were. Upon further information on the remedies, some of the NGOs said that the prescriptive period could be increased from the current 4 months for all the grounds of discrimination and harassment to give people more time to report the problem and proceed with filing a case before the Industrial Tribunal.

The NCPE and GWU were well read on the EIRA and the remedies it provides. They both emphasised on the fact that the burden of proof is on the employer to show that they have not acted in a discriminatory manner and how this is advantageous for the victim reporting the discriminatory act. The NCPE suspects that not many people know about the shift in the burden of proof in these cases. Furthermore, the NCPE mentioned how harassment is punishable by a fine and also imprisonment.

The NCPE expressed that when they find that a criminal offence has taken place such as harassment they file a report with the police but the process after this usually takes time and in some cases are not followed through. They do not have power over this because then it is in the hands of the authorities. In light of this the NCPE tries to work on policies as preventative measures with companies.

The GWU on the other hand brought to attention that under the EIRA the Industrial Tribunal should take 28 days to decide a case however, they find that most cases can take up to a year to be decided. The GWU recommended that there be either a new

employment related court or tribunal that handles certain types of cases to diminish the workload of the Industrial Tribunal or an expansion of the current Industrial Tribunal for a more efficient handling of cases.

On the other hand, LGBTI+ Gozo suggested that, within the context that cases of discrimination and harassment are underreported due to fear, creating an entity that can speak on behalf of the victims so that the victims can remain anonymous and not have their name publicly stated in decisions can help victims eliminate the fear of being 'outed'

#### **4.2.6 Question 6**

Amongst the participants there seems to be an agreement that LGBTIQ individuals need not accommodations that help them in their job or career per se to level the playing field. Identifying with a different sexual orientation or gender identity should not create obstacles for the person in their work. Therefore, the positive action as described in Article 6 of the ETER may be more beneficial for other minorities. However, in terms of positive action which companies may take to foster diversity, inclusion and acceptance the participants had knowledge of employers who did take some positive action in the workplace.

ARC commented on how sometimes the best inclusion at the workplace is that the LGBTIQ person is not seen or treated differently and the use of gender neutral language is normalised. This 'normalisation' was also brought out by the GWU where it was emphasised that work should be a business exchange that does not look at the sexual orientation or gender identity of the person but nevertheless have the human aspect of respect towards diversity.

The NCPE spoke about their 'Equality Mark' which encompasses equality between men and women as well as sexual harassment policies that also apply to and protect LGBTIQ persons. An approximate 130 companies employing around thirty-thousand people have obtained this 'Equality Mark'.

MGRM mentioned workplaces where pride is celebrated or even diversity day especially in the iGaming industry. The three NGOs also said that some businesses approach them to give training sessions on LGBTIQ matters. LGBTI+ Gozo in particular mentioned how more businesses seem to be asking for training sessions on the subject which shows that there is a willingness to learn. Apart from this they also said that more businesses are open to giving sponsorships and funds to the organisation

#### **4.2.7 Question 7**

This question brought out how the five organisations each have a different approach but ultimately they all aid in raising awareness and implementing inclusive practices for LGBTIQ employees. This also speaks to the different roles that they play in society.

The NCPE uses social media platforms to raise awareness on equality, provides training for companies on subjects like harassment and, they provide free tools on their websites amongst which one can find templates of harassment policies that anyone can use and implement in their business.

The GWU is limited to employees that are part of the trade union however, for unionised employees they have a collective agreement with comprehensive discrimination clauses, as well as 'social diversity and inclusivity' as part of their core values. The GWU will also be participating in Europride 2023 with a conference called 'id-Drittijiet LGBTI+ fid-Dinja l-Ġdida tax-Xogħol'.<sup>66</sup>

ARC has participated in various panels and provide training on 'Equality at the Workplace Awareness' when requested. MGRM and LGBTI+ Gozo also provide training and workshops. LGBTI+ Gozo also said that providing these training sessions as an NGO can sometimes be hard as they do not have enough people to be able to go to every training that is requested.

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<sup>66</sup> Translation: The rights of LGBTIQ+ in the new world of work

#### **4.2.8 Question 8**

Only MGRM and NCPE have been involved in cases where LGBTIQ persons experienced discrimination at work. However, the other three organisations still gave an answer of how they would handle the case if they were to be approached with one. MGRM refer the victims to the NCPE but they also offer them free psychosocial support. The NCPE had 1 case in 2021 which was withdrawn and another case in 2022 that is still ongoing. The decisions of the NCPE are not publicly available as opposed to the decisions of the Industrial Tribunal that are available for the public.

LGBTI+ Gozo said that they would connect the person to a queer-friendly lawyer, provide counselling services and also help the person find new job opportunities in queer-friendly spaces if they wish. The organisation also expressed that if it fit for the situation they might also use public media to create awareness of the discrimination and that it will not be tolerated. ARC would assist the person in filing a report and refer them to MGRM's Rainbow Support Service.

The GWU mentioned that currently there is a tight labour market and that most employers cannot afford to make mistakes at the expense of the employees such as discrimination. However, should the case arise they offer free legal, psychology, counselling and psychiatrist services. Should the discrimination become detrimental to one's wellbeing they also offer an evaluation of their mental wellbeing. All the services are paid by the Union itself.

#### **4.2.9 Question 9**

All the participants said that they were never approached with cases of discrimination based on assumption.

#### **4.2.10 Question 10**

##### 4.2.10.1 Self-Employment

The NCPE said that there was no research on this and no cases therefore could not give an informed opinion. The GWU said that self-employment is more reliant on the price and quality of the services offered and therefore, there should not be more risk. The NGOs agreed that there might a higher risk for self-employed workers mainly because it is a less secure job, does not have protection from trade unions and DIER and, there is usually no one they can report to within the workplace itself.

#### 4.2.10.2 Discrimination Based on Association

None of the participants ever had a case of discrimination based on association. LGBTI+ Gozo added to their statement that it could be that for instance a family member would who is being discriminated against based on association would not reach out for their services.

#### 4.2.10.3 Freedom of Speech and Discrimination in Employment

The NCPE mentioned that usually what they encounter is job advertisements that may be discriminatory but they are usually based on gender. They contact the advertiser and usually they find that they comply and change it. The GWU has not encountered it.

The NGOs have encountered it but not in relation to employment. ARC said they usually contact the perpetrator to remove discriminatory posts and report it. MGRM stated that the authorities should have more power to act against these acts of public discrimination without the need of a person personally reporting the issue. LGBTI+ Gozo added that public statements of discrimination are harmful and add on to the stigma that queer persons face and in the face of it the organisations get together to write a joint press release.

#### **4.2.11 Additional Comments**

The GWU described the workplace as non-homogenous and therefore, there must be tolerance and respect of each other's values no matter the social group or minority which the worker identifies with.

ARC expressed that they would like to see 'employee representatives' groups' not just for sexual orientation and gender identity but also culture, religion and so on. The organisation also advocated for mental health first aiders and support systems within the workplace.

MGRM brought up an interesting matter that transgender individuals that undergo gender reassignment or gender affirmation surgery are entitled to take the time off work as sick leave. However, employers often ask these persons to use their vacation leave instead because they see it as a cosmetic procedure. The organisation has contacted DIER which confirmed that they are entitled to it as sick leave, which the GWU also confirmed during the interview.

### **4.3 Conclusion**

The interviews reflected the situation in Malta vis-à-vis LGBTIQ individuals and employment. On most questions there seemed to be a coherence in the organisations' answers and ultimately all the participating organisations have the goal of contributing to an equal and non-discriminative environment in the workplace and also society in general. There were a few notions that were very prominent throughout the interviews such as stereotypes, visibility and awareness.

Reflecting upon the interviews, a push of further cooperation between the different stakeholders could be an efficient solution towards tackling discrimination and promoting equality in more working environments. For instance, it seemed apparent that NGOs struggle more with having enough people within the organisation to cater for training requests. It would be beneficial if the organisations between themselves liaison and were one organisation cannot provide training the others can provide it in their stead.

There are already efforts of cooperation between the organisations through initiatives under the NCPE like the Consultative Council which all the participating organisations in this research are a part of. Another way of reaching more workplaces could be for the

organisations to approach companies and offer training directly or advertise workshops directed at workplaces rather than waiting for companies to request it. Although this runs the risk of rejection it can also reach companies that wish to have training on LGBTIQ matters but did not know where to find it.

The distinction on the awareness of employment law and the remedies it provides between the NCPE and the GWU as opposed to the NGOs shows that as a society we need more educational tools to teach what the law consists of and what it means. A simple initiative such as information sheets or leaflets highlighting the relevant provisions and what they mean as to the rights and duties surrounding employment in more simple terms can be beneficial to distribute them to the NGOs but also in various workplaces and civic centres for the public to access. This transparency about the law would aid in promoting the utilisation of the legislation that goes with the spirit of the law to serve justice in a democratic society.

There should be more awareness not only about the legislation but also about the process of reporting to entities like the NCPE, more people should know that their decisions are not public as this could encourage persons who are concerned about confidentiality and 'outing' themselves to come forward about discrimination they experience in the workplace and also in other places.

The interviews also reflected how the Strategies and Action Plans that Malta and the EU have written up are very relevant in today's society and show that legislators are aware of the issues holding back the LGBTIQ community and are being proactive about them.<sup>67</sup> For instance, the need for equality bodies to be given a stronger mandate is a goal of the EU which the NCPE is also pushing for.

The legislator can provide a mediation tool that can provide a safe space for discussion and reaching an agreement between employees and their employers. This can be used as an alternative to the Industrial Tribunal which would help minimise two problems.

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<sup>67</sup> See Chapter 3.

Firstly, the problem that the Industrial Tribunal faces in having too many cases resulting in delays of decisions. Secondly, more persons are likely to speak up about discrimination in the workplace because the process will be less intimidating. The DIER currently offers mediation for trade disputes therefore, there is already a form of mediation taking place in employment matters.

## **CHAPTER 5: CONCLUSION**

### **5.1 Summary of Findings**

This section will answer the three research questions upon reflection of the desk-research and also the research carried out through interviews.

#### **5.1.1 Does discrimination in employment exist for LGBTIQ identifying individuals?**

For most people employment is not a choice but a necessity that is required to be able to earn a living and also contribute to society. As quoted in Chapter 4.2. queer persons in employment do not exist in a vacuum. Discrimination in employment may happen less by employers today than it used to before due to the legislative progress made in LGBTIQ rights. However, one may still find instances of discrimination in employment by colleagues or clients. Thus, discrimination still exists but the situation has improved and is expected to improve further through new initiatives that are being taken that are aimed at creating a wave of societal change.

#### **5.1.2 Does the law protect LGBTIQ employees in Malta? How does it protect them? Where does it lack to protect them?**

The legislation seems adequate, but the only true way to assess its effectiveness is if it is used. Creating bigger awareness about the rights that exist to challenge discrimination and providing more resources for the LGBTIQ community in the workplace would increase the likelihood of formal complaints and reports on the occurrence of discrimination. Such increased awareness and resources may aid in having individuals report cases of discrimination against them who would otherwise shrug it off, ultimately leading to more cases being lodged which in turn provides the legislator with jurisprudence that can help in assessing the adequacy of the current employment and discrimination laws. One cannot improve on what he has not yet tested.

### **5.1.3 Are LGBTIQ employees treated the same as heterosexual employees?**

On paper LGBTIQ employees should be treated the same as heterosexual employees however, in practice there are instances of discrimination which need to be eliminated for true equal treatment in employment to exist. It is positive that the issues that were highlighted by organisations in the interviews brought out certain themes that are currently being tackled through the Malta LGBTIQ+ Equality Strategy and Action Plan 2023-2027. This is further more evidence of the gaps that exist but also a recognition of their negative impact on the LGBTIQ+ community. It is also a good mirror of the reality that the law and society do not always progress together and therefore, progress in one aspect requires effort in the other for a harmonious outcome of an equal and just society.

## **5.2 Suggestions for Further Research**

This research provided quite a good outlook on the situation of LGBTIQ individuals in the workplace in Malta and also delved into some EU matters. However, there were limitations in the study such as the word limit and the number of organisations that took part in it which left certain gaps in this area of study that should be looked into further to get a more comprehensive image of the reality of LGBTIQ persons in employment.

Firstly, a comparative law approach to the subject may help identify more gaps in the law by looking within the EU Member States but also outside of the EU to see what other countries' policies are regarding equality and non-discrimination in employment. Another approach could be to research the correlation between education and employment of LGBTIQ persons. How much does education effect the prospects of LGBTIQ persons in employment? Is the education system in Malta inclusive of LGBTIQ students?

There could also be a build on this dissertation by conducting surveys or interviews with individuals from the LGBTIQ community themselves. This can have an inter-disciplinary approach intertwining not only the legal perspective of the subject but also the social

and psychological elements. Another element that may be further researched is the element of intersectionality in relation to discrimination in employment.

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## Appendix 1 - Interview Questions

1. As an organisation do you think the law protects LGBTIQ individuals at work or are there any lacunae?
  - a. If there are lacunae, could you explain the lacunae in more detail?
2. Over the last couple of years, many legal advancements have been made to secure fundamental protections and civil rights for LGBTIQ individuals. As an organisation, have you noticed any positive changes in how LGBTIQ individuals are treated at work due to these legal advancements?
  - a. If yes, can you mention some of them?
3. What recommendations or strategies would you suggest for enhancing the working conditions and overall inclusivity for LGBTIQ individuals within various workplaces?
4. In previous surveys and studies it has been observed that instances of workplace discrimination against LGBTIQ individuals have been experienced nonetheless, a significant number of these incidents appear to have gone unreported. From the perspective of your organisation, do you perceive underreporting to persist in the present day?
  - a. If so, what factors contribute to its continuation?
  - b. Does your organisation have any recommendations to aid in eliminating underreporting of discriminatory incidents at the workplace?
5. Does the organisation believe that the remedies provided by law (Employment and Industrial Relations Act) are favourable towards employees experiencing discrimination and provide them with a likelihood of a positive outcome?
6. Article 6 of the Equal Treatment in Employment Regulations allows employers to take positive action to help persons falling under the particular protected categories, including sexual orientation. The law allows this so that employers can create '*a level playing field as regards equality in employment and occupation in the European Union.*' Do you have any knowledge of positive action that has been taken by employers to create a level playing field for people of a different sexual orientation or gender identity?

7. How does your organisation collaborate with employers and businesses to raise awareness and implement inclusive practices for LGBTIQ employees?
8. Has your organisation been involved in cases where LGBTIQ persons experienced discrimination at work? Were they resolved? If so, how were they resolved?
9. Some EU States have expressly recognised discrimination based on assumption. [Discrimination based on assumption is when for example Person A has been treated unfavourably by his employer B because B has assumed that A is homosexual when in fact A is not a homosexual.]
  - a. From your experience, have there been cases of discrimination based on assumption in Malta? What were the remedies used?
10. There have been several European Cases where the European Courts adjudicated or gave their opinion on cases of alleged discrimination in employment faced by LGBTIQ individuals on the basis of their sexual orientation or gender identity.
  - a. In J.K. v TP S.A. (C-356/21) | 12.01.2023, there was a conflict between the freedom to contract and the right of non-discrimination on the basis of sexual orientation. The case related to a self-employed worker who contracted work with the company for 7 years. The company cut ties with the worker after he made a YouTube video with his same-sex partner. The court concluded that freedom to contract cannot be a reason to refuse to conclude a contract with a self-employed worker.

Do you think that self-employed workers in Malta run the risk of being discriminated against as in the case above more than other employed workers?

- b. In *S.Coleman v Attridge and Steve Law (C-303-06) 2008*, the case was based on discrimination based on disability; however, it was not the claimant herself who had the disability but her child. The court held that the right to non-discrimination extends to persons by association, therefore through the court's reasoning the Directive 2000/78 not only

protects persons who fall under one of the protected grounds but also those that are discriminated against based on association.

Have you had reports of discrimination based on association? Was it recognised as a form of discrimination?

- c. In *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford* Case C-507/18, there was a person that made public statements on a radio show that he would not employ LGBT persons within his company. The case was filed by an association of lawyers that represent LGBTI individuals.

Does your organisation encounter similar situations? How did or how would your organisation react to safeguard the rights of LGBT individuals at work in a similar situation?