

MEA views on proposed Equality Act 2015 and the Human Rights and Equality Commission Act

MCESD Meeting
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THE EQUALITY ACT 2015

MALTA EMPLOYERS' ASSOCIATION

Art 45 (3) of Maltese Constitution

the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Article 2 of the EIRA – wider definition which includes a non-exhaustive list "discriminatory treatment" means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association;

Article 2 of the proposed Equality Act "Direct discrimination" – where a person is treated less favourably than another person is, has been or would be treated in a comparable situation, on the basis of one of the characteristics laid down under this Act

"protected characteristics" shall be age; belief, creed or religion; disability; family responsibilities; family or marital status; gender expression or gender identity; HIV status ; maternity; pregnancy; race, colour or ethnic origin; sex or sex characteristics; and sexual orientation;

“reasonable accommodation” refers to alterations not imposing a disproportionate or unjustifiable burden, where needed in a particular case, to ensure the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms; The European Union only recognises the obligation of reasonable accommodation when it comes to the ground of disability. Examples of reasonable accommodation of other grounds?

Definition of 'Advertisement'

Para. 2 Definitions:.....

'.....including disseminating information about a vacancy for work or the provision of a service *by word of mouth from person to person*'

Para2: Definition of Age

“Age” refers to a persons real or *perceived* duration of life to date

Para 2: Definition of Belief, Creed or Religion

“belief, creed or religion” refers to any religious or philosophical belief and a reference to such belief, creed or religion shall include a reference to a lack thereof.

Para 2: Definition of Gender Expression

Gender expression refers to each person's manifestation of their gender identity, and, or the one that is perceived by others.

Para 2: Definition of Gender Identity

A person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance, or functions by medical, surgical, or other means) and other expressions of gender including name, dress, speech and mannerisms.

Para 2 Definition of Pregnancy

‘the state of a person who has within the ovary or womb an implanted embryo which gradually becomes developed in the latter receptacle’

Para 2 Definition of Protected Characteristics

....shall be age, belief, creed, or religion, disability, family responsibilities, family or marital status, gender expression or gender identity, HIV status, maternity, pregnancy, race, colour or ethnic origin, sex or sex characteristics and sexual orientation’.

Para 2 Definition of Race, Colour or Ethnic origin

Race, colour or ethnic origin” shall include ...colour, nationality, language, *cultural background* and ethnic and national origins.

Para 2 Definition of Sex Characteristics

“Sex characteristics” refers to chromosomal, gonadal, anatomical features of a person, which include primary characteristics such as reproductive organs, genitalia, and or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts, and/or stature

Para 2 Definition of Victim

Introduction of mental and emotional harm

MALTA EMPLOYERS' ASSOCIATION

Para 6 (2) Indirect Discrimination

Indirect discrimination may be proved by any means of evidence including *statistical evidence*.

Para 6(3) Exemptions

A law which focuses on prevention of discrimination proceeds to arbitrarily list discriminatory actions, but declares them to be deemed not to constitute discrimination.

e.g. 'Positive action' in board appointments.

Para 7 Advertising

.... which might reasonably be understood as indicating *an intention* to discriminate

Does this imply that a Commissioner will prosecute an employer on the basis of a perceived/alleged intention to discriminate, without any actual offense committed?

Para 8. 2 (b) How lawful is it to impose a pro-active task on an employer (government) of promoting diversity?

Para 9 (3)

A rejected job applicant will have *right to written information* on criteria upon which the successful applicant was selected.

Para 21 Public Administration and Equality Duty



20 (1) (d)

How legitimate is it to insert in a Law pro-active duties, on an Employer (Govt.), like “foster good relations” between persons who share a relevant protected characteristic and persons who do not share it.

Comment: If anything, law should refer to work relations, not good relations.

20 (3) (c)

Encourage persons who share a relevant protected characteristic to participate in Public life or in any other activity in which participation by such persons is disproportionately low.

Para 22 (4) Duties of Employer

Why should it be a “duty” of an Employer to bring this Act to the attention of his/her employees?

Since when do citizens have no obligation to take their own initiative to learn about a law?

Para 23 (2) Right of Action

Encourages an over and above legal compensation for “moral or non-material damages” – and this as a dissuasive measure.

Comment: an employer should not be given a punishment of a certain gravity to dissuade others from offending. Punishment should only reflect the seriousness of offense committed.

Para 23 (3) Right of Action

Any association, organisation or other legal entity having a *legitimate interest* in ensuring that the provisions of this act are complied with may engage in any judicial act or administrative procedure provided for the enforcement of obligations under this act, *even if an individual victim has not been identified*, but there is nonetheless evidence of discriminatory practices by a particular person falling within the scope of this act.

Para 24 Burden of proof

(24) Employer is guilty on “basis of facts from which it may be presumed ...

Employer has to prove that he/she did not commit breach.

Para 25 Sanctions

(25) Sanctions

€ 5000

6 months Prison

OR BOTH

Para 26 Responsibility in cases of Partnerships, Directors etc

Directors, managers, partners, secretaries shall be deemed guilty of the offense unless they prove that the offense was committed without their knowledge and that they exercised all due diligence to prevent the commission of the offense.

THE EQUALITY ACT 2015;

- * Leaves out completely the aspect of inversion of proceedings where allegations made result untrue or vexatious or frivolous

The Human Rights and Equality Commission Act

THE HUMAN RIGHTS AND EQUALITY COMMISSION ACT

APPOINTMENT & COMPOSITION

4 (1) members who are suited to deal with issues of human rights and equality ...

Where do Employers feature?

Where is the practical input concerning the world of work?

(Similar to Industrial Tribunal)

FUNCTIONS & POWERS OF THE COMMISSION

(Part III)

(iv) Commission does not need victims or reports but may initiate and move on its own initiative on anything.

(v) To ensure the prevention ...

This may give rise to abuse and persecution of employers

(vi) Commission to provide independent assistance ... to victims
so why persist with Burden of Proof against Employer?

(xiii) To contribute in the formulation of programmes and take part in their execution in schools, Universities and educational establishments.

POWERS OF COMMISSION

(ii) Right of Commission to obtain documents?

Documents “obtained” / confiscated during “forced” visits to work establishments.

(vii) Impose fines, periodic penalty payments or any other penalty in accordance with Act provisions

What does periodic mean??

What does any other penalty mean? Prison?

COMPLAINTS

- (4) Any Association may lodge a complaint on behalf, or in support, of a person
- (5) Any organisation may lodge a complaint (of general concern) despite it is not directly concerned.

(No Victim needed)

WITHDRAWAL OF COMPLAINT

(1) Even after a complainant withdraws his complaint the Commission on whatever evidence that might have turned up can still proceed with case.

REFUSAL TO INVESTIGATE

- (4) Whilst stating that the Commission will not investigate any complaint on the subject matter of which proceedings are pending in a court or other tribunal and shall suspend the investigation if any interested person shall file a demand before any court or other tribunal on the subject matter of the investigation the Commission may decide to proceed in respect of problems of general interest contained in the complaint.

That means that an employer will be investigated simultaneously in 2 tribunals?

REFUSAL TO INVESTIGATE

(4) Whilst stating that complaint have to be lodged within 1 year of offence the Commission may decide to ignore this restriction.

EVIDENCE

- (1) The commissioner will order an employer or whoever else to give information, documents, papers which in the opinion of Commissioner are required.
- (2) The Commissioner will summon an employer, witnesses or whoever else and under oath demand evidence or documents
- (3) If summoned persons (employer) do not attend, do not answer fully or satisfactory all questions, do not produce documents will become liable to € 1,500 fine + 3 months improvement

POWER TO ENTER PREMISES

(2) Commissioner will have power to enter premises without notice.

Will enter commercial premises without the consent of the occupant / employer

DELEGATION OF FUNCTIONS

(1) Commissioner may delegate her powers to any person holding any office under her.

FINDING & TERMINATION OF AN INFRINGEMENT OF THE RIGHT TO EQUAL TREATMENT & NON DISCRIMINATION

- (1) The Commission may act against an Employer if in its opinion an infringement is going to occur (Preventive action on a presumption)

PENALTIES

- (1) The Commission can impose € 5000 penalty if employer fails to adopt required measures + € 500 per day for infringement continuation

INTERIM MEASURES

- (1) At its discretion Commission (prima facie) may order interim measures to protect possible harm.
- (2) Interim measures may persist over time
- (3) Employer will be fined € 5000 if non compliance occurred

COMMITMENTS

If the offender (preventive or actual offence) prior to a decision of the Commission, gives a rectifying commitments which will solve the issue the commissioner will make the commitment binding.

Non observance of the commitment attracts up to € 5000 fine

RIGHT OF APPEAL

An employer aggrieved by a decision of the Commission may appeal to the Court of Appeal (Superior Jurisdiction)

PRESENTATION CONCLUSION

IN the contents and wording, the drafters of these bills have betrayed an intense feeling of aggravation.

It is erroneous to allow a wronged party undue involvement in the drafting of a victimisation and discrimination prevention law. This is not conducive to the creation of a just law that allows a judge to objectively and fairly interpret and apply.

So it is not very judicious to assign the legislative task to “victims”, the result will surely not be a balanced piece of legislation.

A defective law prejudices a correct administration of justice.

Currently an aggrieved employee with a complaint will find redress by referring to the EIRA, the industrial tribunal, so many WROs and the direct assistance and support of the Director of Labour.

This setup would become obsolete if all matters concerning equality and discrimination in respect of employment are shifted under the proposed Equality Act 2015 and the Human Rights & Equality Comm. Act.

A wronged employee will be sharing this new setup with complaining citizens, migrants and assorted other litigants.

The Malta Employers' Association has no reason to doubt the good intentions of the Minister to promote and guarantee respect towards equality and the suppression of discrimination in employment and places of work. There is absolutely no doubt that focused tweaking of legislation will help to ensure the achievement of the objectives the Minister has set. However these 2 bills as presented, are anything but a serene approach to legislation, and the orientation of the bills leads

towards a punitive approach versus employers as a category. The bills seriously threaten the rights of employers, denying them basic legal guarantees, disturb their entitlement to a reassuring legal framework that will allow them to adequately and serenely fulfil their important role of providers of work.

In conclusion apart from drawing attention to the serious shortcomings in these Bills and highlighting erroneous precedents, that they set, the MEA's fundamental stand is that employers should remain subject only to EIRA on all matters concerning employment, discrimination and equality in the sphere of work. On this basis, and not on the basis of these Bills the MEA has no problem to continue supporting the Minister so that in the world of work discrimination and equality transgressions diminish and hopefully cease.