

GRTU RECOMMENDED AMENDMENTS TO
THE HUMAN RIGHTS AND EQUALITY COMMISSION ACT
PROPOSED BY THE WHITE PAPER LAUNCHED BY
THE MINISTRY FOR SOCIAL DIALOGUE, CONSUMER AFFAIRS AND CIVIL LIBERTIES
(MSDC)

Appointment and Composition

4. (1) *The Commission shall be composed of a chairperson who shall be called the Commissioner for Human Rights and Equality and not less than six but **not more than twelve other members who are suited to deal with issues of human rights and equality, and, or legal and administrative issues connected therewith.** One of the members of the Commission shall be the chairperson of the National Commission Persons with Disability. The Commissioner and the other members of the Commission shall, in the performance of their functions under this Act, be officers of Parliament.*

GRTU insists that two member out of the Commission be appointed to represent Employers' interests after a recommendation for such purpose is made by MCESD Employers' Representatives in order to guarantee equity in complaints related to businesses.

GRTU believes that the Act will have a significant impact on the private sector and therefore the private sector must be adequately represented. Since the Commission's role is also to present legislative proposals and

recommendations, including employers representatives will ensure that anything coming out of the Commission will be sensitive to the realities of the private sector, that will in turn ensure faster implementation and reduce the instances of clashes with employers' representatives.

Functions of the Commission

*(iv) to investigate violations or potential violations of human rights or the right to equal treatment and non-discrimination which it decides to take up, either on a complaint being lodged **or on its own**;*

GRTU does not agree on the Commission's powers to act *ex officio* without prior complaints having been lodged before it by an injured party. This provides the Commission with limitless power of action. GRTU wants to avoid any chance of having a Commission that is excessively aggressive in its approach and the persecution of enterprise. Alternatively the *ex officio* powers of the Commission should be limited to recommendations thus limiting the potential for abuse in relation to businesses that may be made aware of a potential breach of the Equality Act.

*(xiv) to co-operate with other organizations such as **trade unions**, nongovernmental organizations and social and professional organizations in order to promote and protect human rights, and the right to equal treatment and non-discrimination;*

This provision excludes Employers representative bodies. GRTU insists that such bodies are specifically included in the Act.

GRTU recommends that another function of the Commission be added to the list of functions listed in Part III of the Act, as follows:

(xvii) "Provide employers with the necessary knowledge and skills that will help them implement the Equality Act. These shall include but will not be limited to training, awareness raising campaigns and other outreach exercises."

Powers of the Commission

(iii) to take decisions requiring the cessation or prevention of any infringement of human rights or of the right to equal treatment and non-discrimination in accordance with the provisions of this Act;

GRTU will not accept that the Commission has such blanket powers that are not contained by any specific legislation. Reference needs to be made to the limitation of action stipulated in the Equality Act in order to avoid potentially detrimental decisions *ultra vires* to the powers given to the Commission by particular legislation.

Evidence

(1) Subject to the provisions of this article, the Commissioner may from time to time **require any person who in his opinion is able to give any information relating to any matter** that is being investigated by the Commission to furnish to him any such information, and to produce any documents or papers or things which in the Commissioner's opinion relate to any such matter as aforesaid and which may be in the possession or under the control of that person. When sending a request for information, the Commissioner shall state the legal basis of the request, specify what information is required and the penalty provided for in sub article 3 for failing to provide the information requested.

The powers of the Commission to request evidence need to be limited to a specific time frame. Businesses cannot be expected to retain all documentation related for instance to ex-employees *ad eternum*. Consequently GRTU recommends that documents older than ten (10) years from the time of the request made by the Commission that are not supplied by the person who receive a request for their production, should not be subject to the penalty provided in sub article 3. Similarly it must be made clear that the Commission may not request sensitive information that is protected by professional or banking secrecy.

Moreover “relating to any matter that is being investigated by the Commission” is too far reaching and should be specifically related to the complaint the Commission is investigating.

(2) Any person summoned as aforesaid who refuses, or without sufficient cause fails, to attend at the time and place mentioned in the summons, or refuses, without sufficient cause to answer or to answer fully and satisfactorily, to the best of his knowledge and belief all questions put to him by the Commissioner, or refuses or fails, without sufficient cause, to produce any document he was required to produce by the Commissioner shall be guilty of an offence and **shall be liable on conviction to a fine (multa) not exceeding one thousand five hundred euro (1,500) or to imprisonment not exceeding three months, or to both such fine and imprisonment:**

The multi stipulated in this Article are simply exorbitant. They exceed any fines stipulated in similar circumstances by other legislation including the Civil Code, the VAT Act and other laws in which the production of evidence is detrimental to proceedings.

GRTU insists that the imposition of a term of imprisonment, irrespective of how long, is abolished and removed in its entirety. This is unacceptable in these circumstances. Moreover GRTU strongly recommends that the imposition of a multa starting at €1,500 is far too high in these circumstances. GRTU recommends that a *scaletta* is introduced whereby a person who is found guilty by the Magistrate presiding over the competent sitting of failing to provide evidence without sufficient cause, may be convicted of a multa of €500 for every first offence, €1,000 for a second offence and €1,500 for every subsequent offence that he is found guilty of in contravention of this Article specifically.

Power to Enter Premises

(3) For the purposes of performing its functions under this Act, and in so far as considered necessary for the performance of its duties, the Commissioner may also **carry out on site investigations**, and for this purpose he may require access to all places other than a dwelling house **without the consent of the occupant**.

GRTU objects to this power being proposed as it infringes on private citizen's constitutional rights. No access may be given to the Commission unless a Search Warrant signed by a Magistrate is obtained a priori and moreover only in the presence of the Police who have executive powers. This may necessitate changes in applicable legislation allowing searches. It is unacceptable that a Commission is given executive powers simply based on a complaint received by the Commission.

Penalties

(1) –Omississ- The Commission may, by decision in writing, impose an additional periodic penalty payment of **not more than five hundred Euro (500) per day** for such time until the infringement is effectively brought to an end.

GRTU objects to this astronomical daily penalty being imposed. This exceeds any other penalty that may be imposed under any Maltese Law. A daily penalty may be imposed however it must reflect the reality of the

Maltese society. Therefore the daily penalty imposed should not exceed those imposed by other legislation *inter alia* the VAT Act (Chapter 406 of the Laws of Malta), which under Article 77 states "...the court shall order the offender to comply with the law within a time sufficient for the purpose, but in any case not exceeding one month, and, in default, the offender shall be liable to the payment of a further fine (multa) of five euro (€5) for every day on which the default continues after the lapse of the time fixed by the Court".

Commitments

*The Commission may, upon a complaint **or on its own initiative**, reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the entity concerned acts contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the entity concerned. (3) Where an entity concerned acts in breach of a decision making a commitment binding in terms of subarticle 1, the Commission may **impose a penalty of not more than five thousand Euro (5,000)** on the entity concerned after giving it the opportunity of being heard.*

GRTU again objects to the Commission being given the arbitrary power to reopen proceedings on its own initiative without a complaint being received. Moreover the imposition of the penalty stipulated in this Article cannot be imposed directly by the Commission but just like the other

instances mentioned in this Act, be ordered by the competent Court after being afforded a fair hearing.

Right of appeal

Any person who is aggrieved by a decision of the Commission in terms of subarticle 1 of article ____, subarticles 1 and 2 of article _____, subarticle 3 of article __ and subarticle 3 of article ____, may appeal to the Court of Appeal (Superior Jurisdiction) as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the registry of that court within twenty calendar days from the date on which that decision has been notified to him.

An appeal being lodged before the Superior Jurisdiction of the Court of Appeal is unnecessary and the GRTU contends that the appeals should be heard by one presiding Judge sitting on the Court of Appeal in its Inferior Jurisdiction. This will also ensure that the time frames proposed in subsection (3) are adhered to.

CONCLUDING NOTES

(A) *Transition*

GRTU strongly advises that due to the potential impact the Act may have following its introduction, that a set of transitory provisions be included in the CAT thus softening the impact of its introduction and allowing time for

awareness campaigns to be launched thus allowing the community to familiarize itself with the Commissions powers' and the effects of the Equality Act.

(B) To teach, not to castigate

The nature of the Act and the Commission's role need to be perceived by society as being primarily focused on teaching the community and society at large about the effects of discrimination in a modern culture, before scolding and castigating individuals who may fall foul of the Act's dispositions.

Consequently GRTU recommends that apart from the transitory provisions advised above, the Commission's prerogatives be specifically defined as being those of educating, instructing and promoting the anti-discrimination measures being introduced, prior to proceeding with the scolding and castigating of the uninitiated.

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Definitions.

*“advertisement” refers to any form of advertisement, whether to the public or not and whether in a newspaper, magazine or other publication, on television or radio or on the internet or other means of electronic communication, or by display of a notice, poster, billboard, trailer or flyer or by any other means, **including disseminating information about a vacancy for work or the provision of a service by word of mouth from person to person**, and references to the publishing or display of advertisements shall be construed accordingly;*

GRTU objects to the definition of advertisement as including the dissemination of information about a vacancy by word of mouth. This can lead to abusive action taken against businesses as well as being virtually impossible to defend oneself from any allegations or complaints that may be made. In an insular society like ours one cannot undermine the freedom of discussion between individuals regarding social matters such as vacancies or work related topics. Otherwise GRTU will seek to educate and implement the definition of advertisement excluding word of mouth as explained herein.

*“employer” shall be taken **to include a person who has a right to make decisions on the employer's behalf;***

This definition is unacceptable. The Act must respect statutory frameworks regarding legal and judicial responsibilities including those related to

employment. An employee that may have a more senior post than a complainant cannot ever be considered an employer. GRTU contends that the definition should reflect the existing definition established in Chapter 452 of the Laws of Malta (THE EMPLOYMENT AND INDUSTRIAL RELATIONS ACT), which stipulates the following:

"employer" includes a partnership, company, association or other body of persons, whether vested with legal personality or not;

Therefore this definition should also be adopted in the Equality Act in lieu of the proposed definition in the white paper.

*"employment" refers to any gainful activity **including self-employment** and includes the process of recruitment, promotion and transfer to another post, access to vocational or professional training, the duration of the employment or its extension or termination, as well as apprenticeships as defined by Article 29 of the Employment and Training Services Act;*

The inclusion of self employed individuals in the definition of employment is absolutely unacceptable and will create substantial conflict with existing legislation and will moreover serve as a potential platform for the freedoms enjoyed by self employed individuals to be undermined. GRTU once again contends that the definition adopted in the Equality Act should reflect the existing definition established in Chapter 452 of the Laws of Malta (THE EMPLOYMENT AND INDUSTRIAL RELATIONS ACT) which stipulates the following:

"self-employed persons" means all persons pursuing a gainful activity on their own account;

Therefore this definition should also be adopted in the Equality Act in lieu of the proposed definition in the white paper.

"employment agency" refers to a person, an association of persons, organisation or institution related to the purpose of finding employment for workers or for supplying workers to employers, and includes guidance on

careers and other services related to employment but excludes educational establishments;

Once again GRTU objects to different definitions being introduced by the Act from already established definitions. An employment agency is defined by the EMPLOYMENT AGENCIES REGULATIONS (Legal Notice 127 of 1995 as amended) which stipulates the following:

"employment agency" or "employment business" means any activity carried out in Malta for the recruitment of persons for employment in Malta or outside Malta;

Therefore this definition should also be adopted in the Equality Act in leau of the proposed definition in the white paper.

"gender identity" refers to each 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 and, or functions by medical, surgical or other means) and other expressions of gender, including name, **dress**, speech and **mannerisms**;

GRTU agrees with this definition however a degree of discretion needs to be allowed to an employer in relation to dress and mannerisms at the workplace. Whilst fully respecting gender identity, respect to the work place ethos needs to be a person's prerogative and consequently the Act cannot allow for abuse of work environment protocol by claiming freedom of dress or mannerisms. Therefore the GRTU proposes that in addition to the above definition, the following is added:

"including name, dress, speech and mannerisms, provided that appropriate work place demeanour and deportment are respected."

Employment

9. (3) *A job applicant who is rejected, or an employee who is rejected from accessing promotion or training opportunities, shall have a right to request from the employer, information in writing regarding the criteria upon which the successful applicant was selected.*

Employments relations are entirely regulated by Chapter 452 of the Laws of Malta (THE EMPLOYMENT AND INDUSTRIAL RELATIONS ACT) consequently the GRTU feels that job applicants and/or employees should be regulated by the said Act and its subsidiary regulations.

Spouses of self-employed.

14. (1) *Spouses of self employed workers not being employees or partners, who participate in the activities of the self employed workers and perform the same or ancillary tasks as their spouse shall be entitled to receive from their spouse a fair compensation for their activity commensurate to the value of their contribution. (2) The provisions of subarticle (1) shall not apply where the system of community of acquests or community of the residue under separate administration subsists between the spouses.*

GRTU requests more elucidation on this proposed article as it seems to be contradictory. Spouses are persons who are civilly or religiously married. Consequently they are either regulated by the regime of the community of acquests or that of the separation of estates, both of which are exempted by subarticle (2). Consequently it is unclear which individuals subarticle (1) is referring to.

Persons responsible for any workplace, educational establishment or vocational training.

19. (1) Persons responsible for any workplace, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, shall not permit other persons who have a right to be present in, or to avail themselves of any facility, goods or service provided at that place, to suffer sexual harassment at that place.

(2) It shall be a defence for persons responsible as aforesaid to prove that they took such steps as are reasonably practicable to prevent such sexual harassment.

(3) The failure by any person responsible for any establishment and, or entity to fulfil his obligation to suppress harassment as provided under sub-article (2) of article 6 of this Act shall, for the purposes of sub-article (1) of this article, constitute discrimination.

The steps referred to in subarticle (2) need to be clearly defined in order to allow a viable defence and consequently curb potential abuse of this Article against employers.

(2) It shall be a defence for persons responsible as aforesaid to prove that they took such steps as are reasonably practicable in the context of their respective workplace, educational establishment, entity providing vocational training or guidance or establishment, to prevent such sexual harassment.

Consequently subarticle (3) should also be amended as follows:

(3) The failure by any person responsible for any establishment and, or entity to fulfil his obligation to suppress harassment as provided under sub-article (2) of article 6 of this Act shall, for the purposes of sub-article (1) of this article, constitute discrimination, unless reasonably practicable steps are shown to have been taken as stipulated in subarticle (2).

Duties of Employer.

22. (1) *It shall be the duty of the employer to **take effective measures** to prevent all forms of discrimination, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.*

What constitute 'effective measures'? GRTU cannot accept such vague obligations being imposed on Employers. Effective measures need to be defined so as to provide clear parameters for Employers to become aware of their commitments.

*(2) It shall be the duty of the employer upon the request **of any person claiming to have been discriminated against or sexually harassed** or, or upon a request made by the Commissioner acting upon a complaint or otherwise, to provide **such person** or the Commissioner, as the case may be, within ten working days of such a request with a report on the allegation made or the procedures used by the employers in the matter alleged to constitute such discrimination or sexual harassment.*

GRTU cannot accept that persons claiming to have been discriminated without lodging a complaint with the Commission may proceed to take their own action. Such requests must also be notified in terms of law. Moreover the timeframe is simply untenable. Consequently GRTU proposes the following amended subarticle (2):

It shall be the duty of the employer upon the request made by the Commissioner acting upon a complaint by any person claiming to have been discriminated against or sexually harassed, to provide the Commissioner, within twenty (20) working days from the notification of such a request, with a report on the allegation made or the procedures used by the employers in the matter alleged to constitute such discrimination or sexual harassment.

*(4) It shall be the duty of the employer or any person or organisation to whom the provisions of this Act apply, to use **appropriate means** to bring the provisions of this Act as well as of any measure taken to further the aim*

of these regulations to the attention of his employees, or of the organisation's members, as the case may be, or to any other persons who may be affected by the actions of the employer or the organisation concerned.

This subarticle is also unacceptable. What constitute 'appropriate means'? Banners? Posters? Training? Tuition? It is far too easy for an Employer to be found guilty of an offence under this article since no definition or benchmark of what "appropriate means" is. Unless it is qualified, the "failures" of an Employer will be endless, since it is evident that whatever "means" may be deemed appropriate to an Employer will never be deemed appropriate for a complainant. The degree of diligence that needs to be the standard applicable in such circumstances should be that of **bonus pater familias** as defined by contemporary jurisprudence.

Right of action.

*23. (1) Without prejudice to the provisions of the Employment and Industrial Relations Act, the Human Rights and Equality Commission Act and any other relevant law, a person who alleges that any other person has committed in his or her regard any act which under any of the provisions of this Act is unlawful, shall have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful acts and, or, **to order the payment of compensation for such damage suffered through such unlawful act.***

The following needs to be added to this subarticle:

"to order the payment of compensation for such damage suffered through such unlawful act computed in accordance with the provisions of the Civil Code"

*(2) In any such action as is provided in sub-article (1) or (2) of this article the plaintiff shall, over and above and in addition to such damages and costs as may have been actually suffered and be due according to law, be entitled to recover by way of compensation such sum of money as the court in its discretion may consider reasonable taking into account all the circumstances of the case, including any **moral or non-material damages** suffered by the plaintiff, and as the court on the trial of the cause shall award and assess in order to ensure that such compensation payable is dissuasive and proportionate to the damage suffered by the injured party.*

This subarticle is introducing an entirely new concept under Maltese Law: that of moral damages. Consequently it cannot be unregulated and inserted into a subarticle without being catered for specifically in a provision detailing how the damages are computed and calculated. It is unacceptable to introduce the concept of moral and non material damages without a specific legislative framework that will allow the competent Court to fairly calculate, as well as the defendant to reasonably anticipate, with such damages may be. Such an open disposition may ruin legitimate businesses even after a single episode of alleged discrimination or harassment.

*25. Persons who act in breach of any of the provisions of this Act shall be guilty of an offence against this article and shall, on conviction, be liable a fine (multa) of not more than five thousand (5000) Euros, or to **imprisonment for a period not exceeding six months, or to both such fine and imprisonment.***

This is entirely unacceptable and goes against the spirit of decriminalisation that the State has adopted in recent years. GRTU strongly objects to the imposition of imprisonment that absolutely must be removed. Should the multa not be paid, interests and penalties need to be imposed, similar to those established in fiscal legislation, but never imprisonment. GRTU insists on reviewing such amendment to the White Paper a priori it reaches any further stages.

Responsibility in cases of partnerships etc.

26. Where an offence against the provisions of this Act is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.

This Article needs to be changed since it presupposes responsibility of individuals involved in a legal entity beyond the parameters established by the Inland Revenue Department as well at the Malta Financial Services Authority (MFSA). The following amendment needs to be adopted:

Where an offence against the provisions of this Act is committed by a company, partnership, association or other juridical entity, every person who, at the time of the commission of the offence, was a director, partner or other similar officer of such legal entity is liable to the sanctions stipulated in this Act unless he proves that the offence was committed without his knowledge and that he exercised all due diligence of a *bonus pater familias* to prevent the commission of the offence.