AIDE MEMOIRE

BILL FOR THE ENACTING OF AN EQUALITY ACT

1 INTRODUCTION

The attention of the Association has been drawn to an informal copy of a Bill for the enacting of an Equality Act (hereinafter referred to as the Proposed Equality Act) which purports to call for feedback by 31st January 2016. The said Bill had not been published as a legal publication within the Government Gazette, and the Association was not aware of this initiative until 27th January 2016. Nor is the Association sure whether this is a governmental initiative or whether the proposal is a private initiative of a voluntary organization by the name of Aditus. This notwithstanding the Association wrote to Minister Helena Dalli responsible for [ ] and requested that it be given the opportunity for meaningful consultation.

The Proposed Equality Act aims at extending protection against discrimination on the grounds of:

- 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.

Some of the above grounds, particularly the underlined, may be of particular consequence to insurers.

2 GENDER, MATERNITY AND PREGNANCY

The Proposed Equality Act transposes and reiterates the current legal regime arising from:

- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to goods and services and their supply,
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- Equality for Men and Women Act (CAP 456 of the Laws of Malta)


The Association has no comments to make with regards to the Proposed Equality Act to the extent that the proposed legislation reiterates the current legal in relation to protection against discrimination on the grounds of gender, maternity and pregnancy.

3 AGE AND DISABILITY

The Proposed Equality Act prohibits the engagement in “any discrimination, whether direct or indirect, whether ordinary or intersectional, on the basis of any one or more of the protected characteristics” including age and disability. The Proposed Equality Act makes the following derogation to this principle:

“(e) In relation to banks or financial institutions, nothing in sub-article (1) of this article shall be deemed to constitute discrimination in so far as the conditions under which the facility or the insurance cover is offered or withheld reflect genuine considerations based on the financial risk in the grant of such facilities or of such insurance cover:

Provided that the burden of proving such a genuine consideration shall lie on the person who alleges its existence.”

This same derogation applies to Gender. The proposed Equality Act takes a horizontal approach in the existing legal framework and applies this same derogation to Age and Disability.

While emphasising the importance of the fight against discrimination, the Association disagrees with this cut and paste approach, and this for the following reasons:

(a) Risk factors related to age and disability are used in the provision of insurance and other financial services, to assess the individual risk and to determine premiums and benefits. In certain financial services, persons of different ages are not in a comparable

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1 Article 6
situation for the assessment of risk. Proportionate differences are consequently recognised as not constituting discrimination. Indeed the use of information about age and disability is fundamental for assessing risk, and therefore it brings benefits to consumers of insurance products because:

- it creates a direct link between the premium and the expected insurance benefits, which means that consumers who pay higher premiums are also expected to receive, on average, greater benefits;
- it mitigates the impact of adverse selection, which could otherwise lead to insurance products being limited in scope or availability;
- it encourages competition between insurance companies, which benefits consumers through lower prices and higher levels of cover;
- it leads to innovation, enabling insurance companies to offer a wider range of services to an increasing proportion of the population.

In contrast, without the use of information on age and disability:

- some insurance products would be limited in scope or availability or, in more extreme situations, no longer be available at all, because of the process of adverse selection, which would mean that only the consumers with the highest risk and therefore the highest expectation of an insurance benefit would be interested in purchasing the products;
- there is a risk that average premiums would increase and/or cover would diminish for all consumers, as the additional risk to insurers resulting from the removal of the ability to use risk factors to set their prices creates additional costs; and
- consumer choice would be reduced as insurance companies would not be able to offer some products and there would be less incentive for innovation.

(b) We do not think that local legislation should preempt discussions and decisions which are still being taken at EU level on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. For the time being all member states (including in particular CZ, DK, FR, MT and the UK) have maintained reservations on the proposal, and there is the risk that any unilateral initiative on the part of Malta will lead to inconsistencies and reduce our competitively in relation to other financial services jurisdictions.

(c) We express concern that the inverted onus of proof combined with article 3 (2) of the Proposed Equality Act will create legal uncertainty as to the validity of insurance contracts. Insurers and other financial service providers will not be able to provide insurance cover if there is the risk that their contracts may be considered null and void.
GENERAL COMMENTS ON THE PROPOSED EQUALITY ACT

It is our view that further fine-tuning and clarification is required on some details in the Proposed Equality Act. In particular we would like to make the following drafting suggestions:

(a) Concept of Discrimination (Article 2)

We do not believe that any differentiation which can be justified by objective factors should constitute discrimination. This is recognized in the definition of indirect discrimination with the words: “unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors”. It is proposed that a similar qualification should be inserted to the definition of direct discrimination.

(b) Nullity of any anti-equality provision (Article 3)

Article 3 provides that any provision contrary to the principle of equal treatment shall be null and void. This provision is clearly too broadly worded, and it is therefore proposed that the words “Saving the provisions of this Act,” be inserted in this rule. Otherwise there will clearly be a conflict between the wording of this absolute provision, and other provisions in the Act which allow for some form of justifiable differentiation.

(c) Scope (Article 5)

Article 5 provides that no person, establishment or entity, whether in the private sector or within the public administration, shall discriminate against any other person in relation to insurances. This provision is also too broadly worded. For reasons already stated in (b) above we would propose that the words “Saving the provisions of this Act,” be likewise inserted in this rule.

(d) Disclosure to job applicants (Article 9)

Article 9 (3) provides that a job applicant who is rejected... shall have a right to request from the employer, information in writing regarding the criteria upon which the successful applicant was selected. It is our view that any disclosures to a candidate of the skills, qualities and other characteristics of another individual would breach the basis of confidentiality. For this reason we disagree with this provision.

(e) Right of action (Article 23)

Article 23 (2) allows for the award of moral and non-material damages to a claimant. We consider such non-financial damages to be tantamount to an award for penal damages.
Our legal system has shown caution in providing for such moral damages. Indeed such damages are not even recognized in our Civil Code. There is also a danger that the potential for such damages, in the absence of any real financial prejudice, will encourage unnecessary litigation. For this reason we disagree with this provision.

(f) Collective recourse (Article 23)

Article 23 (3) allows for an association or other legal entity to exercise collective active even if an individual victim has not been identified. It is our view that any collective action should follow the existing legal regime as regulated by the Collective Proceedings Act (CAP 520).

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