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Documents relating to ILGA-Europe can be found at ILGA-Europe's homepage

<http://www.steff.suite.dk/ilgaeur.htm>

An update of the Survey on the Legal Situation for Gays and Lesbians in Europe can be found at

<http://www.steff.suite.dk/survey.htm>

A description of partnership laws and other laws regarding same-sex partners can be found at

<http://www.steff.suite.dk/partner.htm>

DRAFT PROTOCOL BROADENING THE ANTI-DISCRIMINATION PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS PUBLISHED BY COMMITTEE OF MINISTERS

By Nigel Warner and Robert Wintemute

The anti-discrimination provisions set out in Article 14 of the European Convention on Human Rights have always suffered from a major limitation: they apply only in respect of one of the other rights protected by the Convention. Thus, an act of discrimination is not in violation of Article 14 of the Convention unless the act affects or relates to one of the other rights listed in the Convention, such as the right to respect for private and family life, or the right to freedom of expression or association. Many acts of discrimination are not related to one of these "Convention rights", and thus fall outside the protection of the Convention.

For many years now concerns have been expressed at this weakness, particularly in relation to discrimination on grounds of gender or race. In March 1998 the Committee of Ministers of the Council of Europe reacted to reports from its Steering Committee on Equality between Women and Men and from the European Committee on Racism and Employment by instructing the Steering Committee on Human Rights to develop proposals for a Protocol which would broaden the anti-discrimination provisions of the Convention, so that freedom from discrimination would become a free-standing right, rather than being limited to the "Convention rights".

This was a historic development: it would represent the first change to the anti-discrimination provisions of the Convention in the nearly 50 years of its existence, and would count amongst the most important developments of the Convention.

ILGA Europe saw this as an opportunity to update the anti-discrimination provisions in other ways, particularly, by including specific references to "sexual orientation" and "gender identity" in the list of grounds on which discrimination is prohibited. Although these items are not referred to specifically, the list of grounds is not exhaustive, and they are usually considered to be covered by the catch-all phrase "other status". However the Court has never ruled on this. Moreover, their explicit mention in the list of grounds would constitute a symbolic declaration of the greatest importance. Accordingly, ILGA Europe made submissions to the Steering Committee on Human Rights arguing for the express inclusion of the terms "sexual orientation" and "gender identity". ILGA Europe also argued that age and disability should be included in the list of grounds.

The Committee of Ministers of the Council of Europe has now published its preferred version of the Protocol which will amend the rights in Article 14 of the European Convention. Extracts from the draft Protocol and from the accompanying Explanatory Report are included at the end of this article. The full texts can be found at: <http://www.coe.fr/cm/dec/1999/677bis/42.htm>

The draft Protocol will now be reviewed by the Court and by the Parliamentary Assembly before being finally accepted by the Committee of Ministers. Assuming this happens, it would then be for each member state to ratify the Protocol, which would come into force once a certain minimum number of states had ratified it.

There is good news and bad news.

The bad news: the list of prohibited grounds in the draft Protocol includes neither sexual orientation nor gender identity (nor, for that matter, does it include age or disability)

The good news:

1. The draft Protocol, if ratified, will indeed bring about a major strengthening of the anti-discrimination provisions of the Convention, which potentially will be to the benefit of LGBT cases. All discrimination with regard to "rights set forth by law" will require an objective and reasonable justification under Protocol No. 12. "Any right set forth by law" (Article 1(1)) covers at least all discrimination in primary and secondary legislation and therefore (in most countries) discrimination in relation to civil marriage, immigration, adoption, donor insemination, etc. What matters is not that the right the LGBT applicant is seeking is already "set forth by law", but that the right is granted to other (heterosexual or non-transsexual) people by law.

Any public sector rule, practice, policy, or decision that is not seen as "set forth by law" (perhaps the UK armed forces' ban on LGB personnel?) is covered by Article 1(2) of Protocol No. 12, which prohibits discrimination by "any public authority".

So any discrimination has to have an "OBJECTIVE AND REASONABLE" justification for it not to be in violation of the draft protocol. Of course, it will be for the Court to determine what is "objective and reasonable". Its view of this may well differ from ours!

In principle, the draft Protocol applies only to discrimination by governments or government agencies. It does not therefore deal with discrimination by one private party against another. This is like all of the rights in the Convention, which can only be enforced

against the government of a Council of Europe member state. But it will be possible to argue that a government's failure to protect a private party against discrimination by another private party is a violation of the Protocol.

The advantages of the draft Protocol can be summed up as follows:

(A) It will make it easier to establish a case of sexual orientation or gender identity discrimination under the Convention. An LGBT applicant will not need to show how the discrimination affects their right to respect for private and family life under Article 8, and instead will be able to go straight to Protocol No. 12.

(B) If the Court imposes an obligation on public authorities not to engage in a particular kind of sexual orientation discrimination (e.g., in employment), it will put pressure on the legislature in each member state to pass legislation extending the obligation to private parties in that member state (to remove the anomaly that protection against discrimination depends on whether the employer is in the public or private sector).

So, if Protocol No. 12 goes through as is, it will still be extremely valuable and lesbian, gay, bisexual and transgendered people should concentrate on ensuring that as many member states as possible ratify it as soon as possible.

2. Although the Protocol itself does not mention sexual orientation, the Explanatory Memorandum does make a reference in paragraph 20, as set out at the end of this article. While this is no substitute for the express inclusion of "sexual orientation" (and "gender identity" for that matter) in the draft Protocol, it is still an important step forward. It would be nice to be able to claim that the presence of the words "sexual orientation" in the text of the Explanatory Memorandum was the result of ILGA Europe lobbying. However, it is rumoured that the words were already included before we made our submission. At least we may have helped to keep them there.

THE PROTOCOL (MAIN SECTIONS)

Draft Protocol No. 12

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;"

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of non discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

Article 1 - General prohibition of discrimination

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

EXTRACT FROM EXPLANATORY REPORT

20. The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as including explicitly certain additional non-discrimination grounds (for example, disability, sexual orientation, age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared to the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision.

BELGIUMS NEW GOVERNMENT COALITION PROMISES LEGAL BREAKTHROUGH

By Remko van Kol

The remarkable defeat in the recent held elections for SP/PS and CVP/PSC, the traditionally strong social democrat and christian democrat parties, is hoped to have a positive effect on the legal situation for glbs. In previous governments, particularly due to the resistance by the christian democrats, no serious progress could be found on these issues. The new federal government coalition of liberals, social democrats and greens, recently issued the text of their Policy Agreement. In this important settlement of joint policy goals for the government, the following passage was agreed to by the three parties:

"to the Parliament, a general anti-discrimination bill will be proposed, that has as it's goal to prevent any [unjustified] discrimination, more in particular on account of sexual disposition. At the same time, a full-fledged legal partnership arrangement will be developed. The law of 23-11-98 that holds the introduction of legal cohabitation, must be executed immediately." For the anti-discrimination bill, a good proposal has already been developed last year in a working group of the parliament's Senate, that then found the support of representatives of both coalition and opposition parties in the new situation. For the legal cohabitation, the promises don't go as far as the opening of civil marriage to same sex partners, but are hoped to settle at least an equal treatment for all those living together unmarried.

On the flemish level, the minister of equal opportunities, promised to develop an overall equal opportunities policy for gays and lesbians.

NEWS FROM THE NETHERLANDS

By Kees Waldijk

The Committee of Ministers of the Council of Europe have finally proposed a text for a Twelfth Protocol to the European Convention on Human Rights. This Autumn the text will be debated in the Parliamentary Assembly. The Protocol would give a far more comprehensive protection against discrimination on any ground, than so far provided for by Article 14 of the Convention.

Sexual orientation does not figure in the text, but it gets a mention in paragraph 20 of the Explanatory Report, as you can see at:

<http://www.coe.fr/cm/dec/1999/677bis/42.htm>

Astrid Mattijssen and Nancy Maxwell informed me, that the article they wrote, together with Charlene Smith, on lesbian and gay parenthood and adoption in the USA and The Netherlands has just been published

in the Electronic Journal of Comparative Law. "Legal Protections for All of the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions" is now available at <http://law.kub.nl/ejcl> Click on "Current Issue Vol 3.1" and follow the directions to download the article.

Robert Peden of the New Zealand Ministry of Justice informed me that their same sex couples and the law report, and a more detailed background paper, is now available on the Ministry's website at <http://www.justice.govt.nz>.

AUSTRIA: CRIMINAL PERSECUTION OF GAY MEN AT NEW PEAK

By Helmuth Graupner

According to the Criminal Statistics for 1998 last year 35 convictions under the antigay statute Art. 209 CC (which stipulates a special supplemental minimum age limit of 18 for gay men additional to the general age limit of 14, which covers all kinds of sexual relations alike: gay, lesbian, heterosexual), become final.

Since the vote on the abolishment of Art. 209 CC in the Austrian parliament on 27th November 1996 (which led to a tied vote) criminal persecution of gay men in Austria keeps on intensifying (cf. also Euroletter 69). While between 1991 and 1996 the number of convictions amounted to 14 to 20 per year this number increased to 26 in 1997 and now, with 35 final convictions, again reached the number of the eighties.

Convictions under Art. 209 CC are based on consensual homosexual contact with young men between 14 and 18; sexual relations completely legal if they were heterosexual or lesbian.