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Documents relating to ILGA -Europe can be found at ILGA -Europe's homepage <http://www.ilga-europe.org/>

## **FINNISH PARLIAMENT APPROVES GAY PARTNERS LAW**

*By Reuters*

Finland's parliament approved in late September a law that giving gay couples the right to register their relationship and obtain some but not all the rights of married couples.

All the other Nordic countries already have similar laws.

The law, expected to be effective in a few months, will make it possible for adults of the same sex to register their relationships officially. But it does not give same-sex partners the right to adopt each other's children.

The legislation, opposed vehemently by conservative Christian groups, stirred a passionate debate before it was adopted the parliament by a vote of 99 for and 84 against.

Fifteen parliamentarians were absent and one cast an empty ballot.

## **HISTORIC STATEMENT BY COUNCIL OF EUROPE REGRETS CONTINUING DISCRIMINATION AGAINST LESBIANS AND GAYS IN EUROPE**

*By ILGA-Europe*

On 21 September 2001 the Committee of Ministers of the Council of Europe issued a statement regretting that discrimination and violence against homosexuals still occur in Europe, and acknowledging that progress in ending discrimination is still needed in member states' domestic law and practice.

The Committee of Ministers is the executive arm of the Council of Europe. Its members consist of the Foreign Ministers of 43 European countries (or their deputies) with a combined population of more than 800 million. This was the first statement in support of lesbian, gay and bisexual rights in its fifty year history.

The statement came in response to a Recommendation on the situation of lesbians and gays in Europe by the Council's Parliamentary Assembly. This had called upon the Committee of Ministers to make 11 specific recommendations to member states, including the repeal of all discriminatory laws, an equal age of consent, anti-discrimination legislation, and registered partnership laws.

In their reply the Committee of Ministers advised their agreement to several of these recommendations, but did not state which. This lack of clarity almost certainly reflects disagreements between

member states on certain of the recommendations, particularly those relating to the age of consent and registered partnership. However, the Committee chose to emphasise the need for measures in the areas of education and professional training "to combat homophobic attitudes in certain specific circles".

The statement concluded that "Homosexuality can still give rise to powerful cultural reactions in some societies or sectors thereof, but this is not a valid reason for governments or parliaments to remain passive. On the contrary, this fact only underlines the need to promote greater tolerance in matters of sexual orientation".

Nico Beger, ILGA-Europe co-delegate to the Council of Europe's NGO forum, commented: "Given the number of countries involved, and the fact that they are at widely differing stages in their acceptance of lesbian, gay, bisexual and transgendered rights, this is a strong statement. For the 11 countries which still have discriminatory laws, agreeing to this statement amounted to an act of self-criticism before the international community. We call upon them to honour their undertakings by repealing these laws immediately."

Her co-delegate, Nigel Warner, added: "Never before have so many governments joined in attacking homophobia. This is a great achievement by the parliamentarians from many countries who worked on this in the Parliamentary Assembly, supported by LGBT organisations and individuals from across Europe".

## **MORE INFORMATION ON DISCRIMINATION BY COUNCIL OF EUROPE MEMBER STATES AGAINST LESBIANS, GAYS AND BISEXUALS**

One member state, Armenia, still makes illegal all same-sex relations between men. 10 other member states still maintain discriminatory laws in the field of sexual relations: Albania, Austria, Bulgaria, Cyprus, Greece, Hungary, Ireland, Portugal, Romania and the United Kingdom. Four territorial entities controlled by the United Kingdom, Gibraltar, Isle of Man, Jersey and Guernsey, also maintain discriminatory laws.

The Parliaments of Estonia and Lithuania have recently repealed discriminatory laws, but these await implementing legislation prior to coming into force.

## **ADOPTION IN THE NETHERLANDS**

[http://www.minjust.nl:8080/A\\_BELEID/FACT/Adoptsam.htm](http://www.minjust.nl:8080/A_BELEID/FACT/Adoptsam.htm)

## CYPRUS CHANGING THE AGE OF CONSENT

*Excerpts from Cyprus Mail.*

The age of consent for homosexuals is to be reduced from 18 to 16 following pressure from Euro MPs, the government spokesman said today....[he] said the government was concerned that Cyprus was coming under fire in Europe over its legal discrepancies between the treatment of homosexuals and heterosexuals.

The Attorney General has prepared a letter to the House of Representatives appealing for its assistance in bringing about "swift change" to align Cypriot laws regarding homosexuality to those of other EU countries.

The changes would include reducing the age of consent and equalizing penalties for sexual offenses.

Some members of the European parliament have opposed the accession of Cyprus in recent votes because of its laws on sexual conduct. Especially vocal was Louwies van der Laan a Dutch member.

Cyprus decriminalized homosexuality in 1998, five years after gay activist Alecos Modinos won his battle in the European Court of Human Rights. However, it took another two years to get the offensive language describing gay sexual relations as "unnatural licentiousness" out of the new laws.

While the orthodox church in Cyprus is vehemently opposed to any liberalization of the law, lawmakers are determined that Cyprus will be qualified to enter the EU at the beginning of 2003 come hell or high water. Thus, everything from ripping up entire cities at breakneck speed to install public sewage plants to changing the law regarding homosexuality ends up getting approved with virtually no debate in the legislature.

The law here guards the special privileges of several ethnic communities, among them that of the Armenians. The row over giving a permit to a Syrian skilled in cooking Armenian food to work in a private Armenian school rather than finding a Cypriot has caused far more furor and gotten more coverage.

### COMMENT FROM ALEXANDER MODINOS

*By Jean Christou, Cyprus Mail*

GAY RIGHTS activist Alecos Modinos yesterday welcomed the government's decision to move ahead with plans to harmonise the island's laws on homosexuality with those of the EU.

"I am very pleased," the Nicosia architect said. " It

was about time. As a matter of fact we are a bit late. This could have been done a long time ago when they revised the law, and I hope now they will not drag their feet again."

The government spokesman said on Monday that the Attorney-general was preparing a letter for parliament asking for its co-operation in bringing about a swift change in the law to iron out remaining legislative inequalities between homosexuals and heterosexuals.

The changes are set to include a reduction in the age of consent from 18 to 16 and some amendments to criminal law to ensure that the sentences for sexual crimes are the same for homosexuals and heterosexuals.

Cyprus has come under heavy pressure from the European parliament to bring its human rights provisions up to scratch. Several Euro MP's warned they would oppose the island's accession until the changes were made.

"The government should study the whole subject of homosexuality, not change the law just because they have to otherwise we wont get into the EU. This does not help at all. They should know it's a human right and change the law because it's a human right, not, and I stress not, because it is a duty," Modinos said.

" There is no excuse any more to pretend it's because the bible says it is a deadly sin."

Modinos said that instead of continuously amending the law to comply with EU directives, the government should simply have abolished the 1885 law, which set out homosexuality as a criminal offence.

"Why don't they just abolish it right away and keep the same criminal law that is valid for heterosexual people for homosexual people as well, so that the law would punish people the same way, irrespective of sexual orientation," he said.

The government's move is likely to cause an uproar in the Church, which strongly condemns homosexuality.

"I hope the Church will realise that homosexuality is a social problem and affects the whole society of Cyprus," Modinos said. " I have no problem with my sexuality. The problem begins when society, the Church and the law treat me differently just because of my sexual orientation. I believe it's time the Church woke up and asked theologians to study the problem that is created by non-acceptance of the Church and to see that it is a social problem that not only affects the homosexual population but their families and close friends. And this is a big problem

in Cypriot society."

In 1993, Modinos won a battle at the European Court of Human Rights, forcing Cyprus to decriminalise homosexuality. The law was finally changed in 1998, but it took another two years to have deliberately offensive terms describing homosexual relations as "unnatural licentiousness" removed from the new legislation, again only under threat from Europe.

## **BILL TO INTRODUCE CIVIL PARTNERSHIP REGISTERS IN ENGLAND AND WALES**

*By Stonewall*

Jane Griffiths, Labour MP for Reading East, will seek leave of the House of Commons to introduce the Relationships (Civil Registration) Bill that will allow any couple living together to register their relationship.

The Bill, which Stonewall is supporting, would give legal status to registered relationships in respect of:

inheritance tax: if an unmarried partner dies, the surviving partner must pay the full rate of inheritance tax on property that they jointly own;

intestacy: if an unmarried partner dies without a will, the surviving partner has no claim on the estate which passes automatically to the nearest blood relative (or, in the absence of a nearest relative, to the Crown);

housing succession: same-sex partners in council or social housing have no right to succeed to the tenancies of homes they share if one partner dies;

occupational pensions: most occupational pension schemes, particularly in the public sector, make no provision for the unmarried partners of their employees, be they heterosexual, lesbian or gay;

next of kin: unmarried partners are not recognised as next of kin and have no say in the treatment of a partner who becomes ill, whatever the length of their relationship;

registration of death: unmarried partners are not even allowed to register their partner's death in their capacity as "partner". Unlike "spouse" or "relative", they are merely considered "present at death";

compensation in fatal accidents: if a same-sex partner is killed in a fatal accident, they have not right to claim compensation whereas married and unmarried heterosexual partners do.

The Relationships (Civil Registration) Bill would also equalise the treatment of same-sex couples in social security regulations. At present, lesbian and gay couples are treated more favourably because their relationship is not recognised.

Angela Mason, executive director of Stonewall, said:

"This is really a case of the law catching up with the realities of peoples' lives. This Bill is not proposing gay marriage, but it will stop much of the discrimination against same-sex couples - discrimination which is often very distressing and certainly unfair."

### NOTES

1. The Bill will be introduced under the Ten Minute Rule procedure at 3:30pm on Wednesday 24 October. The Commons will vote on whether Jane Griffiths MP should be given leave to introduce the Bill.

2. Later this year, Liberal Democrat peer Lord Lester of Herne Hill will introduce a civil partnerships bill to the House of Lords.

3. In September 2001, and with wide media support, the Greater London Authority became the first public body to introduce a civil partnership register.

4. For copies of a detailed briefing explaining the provisions of the Bill, and a summary of those countries which have introduced similar legislation, please contact Debbie Gupta or Mark Day at Stonewall.

## **'SEXUAL PREFERENCE' IN RESOLUTION FROM COMMITTEE OF MINISTERS IN THE COUNCIL OF EUROPE**

Last October the Committee of Ministers in the Council of Europe adopted Recommendation Rec(2000)21 to member states on the freedom of exercise of the profession of lawyer.

The resolution contains this article:

"Legal education, entry into and continued exercise of the legal profession should not be denied in particular by reason of sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability."

The full text can be found at this web-site: <http://cm.coe.int/ta/rec/2000/2000r21.htm>

## **GERMANY - SOCIAL EXCLUSION REPORT**

By Cathal Kelly

The report "Federal Republic of Germany National Action Plan to Combat Poverty and Social Exclusion (NAPincl) 2001 - 2003" has some very useful information we can use as precedents. It is available at

[http://europa.eu.int/comm/employment\\_social/news/2001/jun/napincl2001de\\_en.pdf](http://europa.eu.int/comm/employment_social/news/2001/jun/napincl2001de_en.pdf)

Links to the full set of reports is at [http://europa.eu.int/comm/employment\\_social/news/2001/jun/napsincl2001\\_en.html](http://europa.eu.int/comm/employment_social/news/2001/jun/napsincl2001_en.html)

Page 32 of the German report has the following section:

2. c) Measures to maintain solidarity within the family in all its forms

1. Families with children

a) Situation in Germany

b) Aims and initiatives 2001-2003

2. Cohabitation by persons of the same sex

a) Situation in Germany

The right of two people of the same sex to live together is enshrined in Article 2(1) GG (general freedom of action). Up to now, there has been no legal framework applying to same-sex cohabiting couples. Marriage as a legal union between a man and a woman which enjoys the special protection of the law under Article 6 GG is not an option available to these couples. Homosexuals still face discrimination because they are in many respects not accepted within society.

The German Government attaches importance to providing a solid legal framework for same-sex couples, and to helping stop discrimination against homosexuals, encourage respect for other lifestyles and promote stable personal relationships.

b) Aims and initiatives 2001-2003

As from 1 August 2001, the Same-Sex Cohabitation (Ending of Discrimination) Act (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartner-schaften) will create a new legal institution enshrined in family law whereby same-sex couples will be given the opportunity to enter into partnerships for life with reciprocal rights and obligations (e.g. obligation to support each other, right of inheritance).

As well as action at federal level, the Länder have also introduced initiatives to fight discrimination in the areas of the family, school, youth welfare and employment in particular (see Annex on best practice in Schleswig-Holstein).

Page 59 of the report has the following as an example of good practice:

11. Schleswig-Holstein (Objective 2 c) (2. Cohabitation by persons of the same sex)

Anti-discrimination programme: Gleichgeschlechtliche Lebensweisen (Same-sex cohabitation)

In many places, people are socially excluded because of their sexual orientation, and their ability to participate in society is severely restricted. As early as in 1994, the European Parliament called on the

Member States to take appropriate measures to safeguard the equal rights of lesbians and homosexuals within the European Union.

In the context of the deliberation process at European and national level, the government of the Land of Schleswig-Holstein in October 1997 created an administrative portfolio for this area, made funding available and developed anti-discrimination programmes intended to fight social exclusion and ensure that lesbians and homosexuals are able to participate in society.

The programme encompasses an examination of statutory provisions and regulations to check for any discrimination on the grounds of sexual orientation, as well as measures to overcome existing discrimination, focusing in particular on the family, school, youth welfare and employment.

All these measures take account of differences in men's and women's circumstances: their different age-groups, where they live (e.g. town or country) and other attendant social conditions (e.g. disability, income).

The Land government has summarised its measures in a report (LT-Drs. 15/373), which was debated by the Schleswig-Holstein regional parliament on 26 January 2001.

Specific measures include:

- inclusion of this issue in relevant discussions (youth welfare, school, employment);
- subject-specific round tables (e.g. youth welfare);
- training strategy for multipliers in education-related fields;
- publications from the Land government, including an Internet website on this subject;
- promoting information and counselling for various target groups.

The programme is being evaluated and constantly improved upon within the framework of an "operational effectiveness dialogue" with the partners involved (public authorities and NGOs). With this aim in view, a European-level conference will be held in March 2002 entitled Difference Troubles - Erfahrungen mit Diskriminierung und mit Strategien zu ihrer Überwindung im Ostseeraum (Difference troubles - Experience of discrimination and strategic responses in the Baltic region) at which details of the know-how among the States taking part will be systematically collated and evaluated to see whether it can be applied in other countries.

These contributions will include the experience gained from the Schleswig-Holstein anti-discrimination programme.

## NEW BOOK ON SAME-SEX PARTNERSHIPS

By Robert Wintemute

"Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law", edited by Robert Wintemute and Mads Andenaes, was published by Hart Publishing, Oxford, on 22 October 2001. The book is based on the conference held at the Centre of European Law, King's College London, on 1-3 July 1999. It covers legal developments under the European Convention on Human Rights, European Community law, and the national laws of thirteen European countries (Austria, Belgium, Denmark, France, Germany, Hungary, Ireland, Italy, the Netherlands, Spain, Sweden, Switzerland, and the United Kingdom). It also has chapters on the USA, Canada, Brazil, Australia, New Zealand, South Africa, Israel, India, China and Japan, as well as United Nations human rights law. To order a copy, see <http://www.isbs.com> (USA and Canada) or <http://www.hartpub.co.uk> (elsewhere) (ISBN 1-84113-138-5).

## IMPLEMENTING THE FRAMEWORK DIRECTIVE

By ILGA-Europe

### A GUIDE FOR LGBT ORGANISATIONS IN THE EU MEMBER STATES AND THE ACCESSION COUNTRIES

#### PURPOSE

The purpose of this guide is to help LGBT activist organisations in the EU Member States and the accession countries ensure that

- the Framework Directive is properly and fully implemented at the national level with regard to sexual orientation discrimination
- any additional opportunities for strengthening anti-discrimination laws and processes arising during the implementation of the Framework Directive are seized.

This guide is intended for activists rather than legal experts. The objective is to give them sufficient information to:

- Be aware of the key issues to look out for
- Engage in informed dialogue with government officials, other human rights NGOs, trade unions and lawyers
- Understand when to get further advice, and where from.

LGBT organisations will have very different levels of experience of this type of activity. This guide therefore seeks to help both the experienced and the inexperienced.

For a comprehensive and authoritative review of

the Framework Directive, with much detailed and valuable discussion of the issues outlined below, please see the chapter entitled "Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union" by Mark Bell in *Legal recognition of same-sex partnerships -- a study of national, European and international law*, (Wintemute, R and Andenaes, M (eds)) (Hart Publishing). Much of the material in this guide is drawn from this chapter, with the kind permission of the author.

The text of the Framework Directive is published at:

[http://europa.eu.int/comm/employment\\_social/fundamri/legln\\_en.htm](http://europa.eu.int/comm/employment_social/fundamri/legln_en.htm)

## PART 1 - GENERAL INTRODUCTION

### 1.1 Background

On 27 Nov 2000 the Council of Ministers of the European Union adopted a Directive "establishing a general framework for equal treatment in employment and occupation" ("The Framework Directive"). This obliges the Member States to

- introduce comprehensive legislation prohibiting discrimination at the workplace on the grounds of
  - religion or belief, disability, age or **sexual orientation** (Article 1)<sup>1</sup>
  - by 2nd December 2003

Countries that wish to join the European Union will also be obliged to implement this legislation prior to their accession.

As many as 28 governments will therefore be obliged to meet the requirements of the Framework Directive. (Eight of the existing Member States and two of the accession countries already have legislation in this field. The extent to which they are required to amend their legislation to implement the Directive will depend on how far their existing legislation meets its requirements).

### IN SHORT, THE FRAMEWORK DIRECTIVE PRESENTS A UNIQUE OPPORTUNITY TO CAMPAIGN FOR COMPREHENSIVE PROTECTION FROM SEXUAL ORIENTATION

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<sup>1</sup> Discrimination against transgendered persons on the ground of their gender identity has been ruled by the European Court of Justice to be a form of sex discrimination (Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143, and is therefore already prohibited under European Union law by Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] OJ L 39/40.

## DISCRIMINATION.

The Framework Directive is part of a wider package of anti-discrimination measures, which includes a Directive "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin" (the "Race Directive"). This prohibits discrimination not just in the field of employment, but in other areas such as the provision of goods and services, social protection, education and access to goods and services.

Anti-discrimination legislation in the field of gender equality is also on the European Union's agenda at the present time, with the Commission's proposed Directive on the Equal Treatment for Women and Men in Employment. The purpose of this draft Directive is to modernise the provisions of a 25-year old Directive on this subject (Directive 76/207/EEC), taking account of the case law of the European Court of Justice, as well as of new concepts in the Framework and Race Directives referred to above.

Governments may well choose to prepare the national legislation implementing these Directives at the same time.

1.2 Why is it important for LGBT organisations to get involved?

There are several reasons:

(i) In theory, governments have no option but to implement European Union directives in full. In practice, governments sometimes seek to get away with partial implementation, or to delay implementation.

Introducing employment protection for lesbian, gay and bisexual people is likely to be particularly unpopular in some countries. So their governments may try either to water down provisions of the Directive that are particularly important to LGB people<sup>2</sup>, or to introduce additional provisions which undermine the objective of the Directive.

(ii) The Directive sets **minimum** standards of protection for national governments to introduce. There are important areas where the levels of protection could be better. There is every reason for LGBT groups to try to persuade their governments to implement these higher standards.

(iii) The Directive is of course limited to protection

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<sup>2</sup> For example, in July 2001, Jan Figel, Slovakia's Minister in charge of EU accession negotiations, commented in a discussion about sexual orientation discrimination that implementation of the Framework Directive was a "medium-term priority", and that it was not necessary "to take over the directive word by word".

in employment. However, LGBT organisations can use the opportunity of its implementation to argue for the scope of their national legislation to be extended to cover other areas of potential discrimination, for example in the provision of goods and services, education etc.

(iv) Anti-discrimination legislation is of little value if those who experience discrimination do not know of it. LGBT organisations have a crucial role to play in raising awareness of the legislation within their community. They can also play an important part in raising the awareness of employers and trade unions.

## PART 2 – DETAILED AREAS OF CONCERN

### 2.1 Scope of the Directive

The Directive is very comprehensive in its coverage of employment related issues. In particular, it covers (Article 3.1):

Recruitment  
Promotion  
Working conditions, including importantly, pay  
Dismissals  
Vocational training and guidance  
Membership of an organisation of workers of employers

Moreover, it applies in both public and private sectors.

It is especially important for LGB people that it covers pay. Existing EU Law on gender discrimination has established that "pay" should be defined broadly, extending to employee benefits such as free travel allowances, and contracted-out occupational pension schemes.

2.1.1 However there are 2 concerns:

- Article 3.3 reads: "This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes".
- Moreover, paragraph 22 of the preamble states: "This Directive is without prejudice to national laws on marital status and the benefits dependent on thereon".

Possible implications:

- Article 3(3) principally indicates that the scope of the Directive does not extend to social security benefits, e.g. unemployment assistance or non-contributory pensions. However, on a very broad reading of Article 3(3), a state might argue that it includes also state schemes providing occupational pensions or other benefits,

which would particularly affect persons working in the public sector.

- LGBT organisations should argue that their government go beyond the Directive, and ensure that there is no discrimination against same-sex partners or their families in the provision of all types of social welfare benefit. They should also argue for legislation to prohibit discrimination on the grounds of marital status or sexual orientation in occupational pension schemes, including where these are provided or regulated by the State.
- Paragraph 22 of the preamble will provide a strong defence against a claim of discrimination where an employer provides benefits to workers which extend to married partners, but not to unmarried partners (either same-sex or opposite-sex). For example, some employers provide free health insurance schemes that extend to married partners of workers. However, paragraph 22 will not provide a defence to direct sexual orientation discrimination where an employer provides benefits in respect of unmarried opposite-sex partners, but not unmarried same-sex partners.
- LGBT organisations should argue that their government make it clear in their implementing legislation that discrimination against same-sex partners or their families in the provision of any workplace benefits is unlawful.

## 2.2 Definition of discrimination (Article 2)

2.2.1 The Directive divides discrimination into four elements, direct discrimination, indirect discrimination, harassment, and instruction to discriminate.

**Direct discrimination** is taken to occur "where one person is treated less favourably than another ... in a comparable situation"

**Indirect discrimination** is taken to occur "where an apparently neutral provision, criterion or practice would put persons having a ..... particular sexual orientation at a particular disadvantage compared with other persons ....."

e.g. if an employer provides extra holidays only for workers with children, this may indirectly discriminate against LGB individuals who may be less likely than heterosexual workers to have children.

e.g. as discussed above, if an employer provides certain benefits in respect of married partners, but not unmarried partners, this will place LGB individuals at a particular disadvantage. However, it must be borne in mind that indirect discrimination (unlike direct discrimination) remains capable of

objective justification where the court or tribunal is satisfied that the practice is appropriate and necessary and serves a legitimate aim.

**Harassment** is defined as "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".

Research into sexual orientation discrimination shows that harassment at the workplace is a significant problem for LGB people. This definition would cover homophobic remarks or jokes, and would cover harassment by employers, other employees or by customers.

**Instruction to discriminate** would cover, for example, instructions given to employment agencies.

### 2.2.2 Areas of concern

There are two possible areas of concern relating to harassment:

(i) The Directive gives no indication of the standard to be used in determining whether a given action creates a hostile environment. Such standards are often defined in legislation by reference to the perspective of a "reasonable person". However, with homophobia so prevalent, the perspective of a "reasonable person" may be too weak a standard. An alternative standard could be "the perspective of the victim". However it is unlikely this would be accepted. A compromise would be "the perception of a reasonable person possessing the characteristics of the victim".

LGBT organisations are encouraged to argue for the latter standard.

(ii) The Directive does not expressly make an employer liable for harassment caused by other employees or customers. This gives homophobic employers the option of ignoring or tacitly encouraging harassment. There are many practical steps that employers can take to create an atmosphere in which harassment is unacceptable and is minimised.

LGBT organisations should argue that their national legislation place employers under an obligation to take all reasonable steps to prevent harassment at work. The nature of the steps could be set out in non-binding guidelines. These could cover, for example, the treatment of harassment in employee codes of conduct, in training materials for management and staff, and in the establishment of a "confidential counsellor" at the workplace to whom complaints of harassment can be addressed.

### 2.3 Exceptions



2.3.1 Anti-discrimination legislation often creates exceptions permitting discrimination in specific circumstances. There are two main examples in the Framework Directive which apply to sexual orientation:

i. Positive action (Article 7)

Positive action schemes aimed at ensuring full equality are permitted by the Directive.

ii. Genuine occupational requirements (Article 4)

Where a particular characteristic is genuinely required to perform a particular job, Article 4.1 permits discrimination. Under this article:

"Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 [i.e. religion or belief, age, disability, sexual orientation] shall not constitute discrimination where, **by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement**, provided that the objective is legitimate and the requirement is proportionate."

2.3.2 Exceptions of this type are not uncommon in anti-discrimination legislation. Unfortunately the Framework Directive goes beyond this general exception, and in Article 4.2 introduces a specific exception relating to religion or belief.

There were strong differences of opinion during the drafting of this Article between those few Member States whose national laws or practices already allow religious institutions to discriminate, and those whose national laws or practices do not. The final text is both complex and unclear.

In essence, what the Article says is that: belonging to a particular religion may be a "genuine occupational requirement" for a job in a religious organisation, "having regard to the organisation's ethos".

2.3.3 The effect of this can be illustrated by looking at three different jobs in a school with a "religious ethos":

A religious teacher: in this case, Article 4.2 would allow the school to argue that the teacher must be a member of their faith/denomination, and therefore to discriminate against individuals who were not a member of their faith.

A mathematics teacher: in this case, the situation is unclear. The school authorities could not argue that it was a "genuine occupational requirement" for the mathematics teacher to be a member of their

faith/denomination. However, they could argue that this teacher will also have responsibilities for the general welfare of students. This could involve personal counselling or advice, and therefore require a member of their faith/denomination.

A cleaner: in this case it is clear that the school authorities could not insist on a member of their faith/denomination filling this position.

2.3.4 The examples described above deal only with the way in which organisations with a "religious ethos" may be allowed to discriminate against individuals who are not members of their religion/denomination. Article 4.2 does not allow these organisations to discriminate against LGB people who are members of their religion/denomination.

BUT: Article 4.2 includes an additional provision: organisations with a "religious ethos" can "*require individuals working for them to act in good faith and with loyalty to the organisation's ethos*".

This provision is not defined: but some organisations with a "religious ethos" are likely to see this as allowing them to require LGB employees to conceal their sexual orientation at the workplace, and perhaps even modify their private life in some way.

2.3.5 There is one further important provision relating to Article 4.2: it may ONLY be implemented by member states which already had national legislation or practices of this type in existence at the date of adoption of the Directive.

**2.3.6** LGBT organisations are advised to take the following actions:

Those in countries that did not have a religious exception of the type defined in Article 4.2 in their national legislation or practices at the date of adoption of the Directive (November 2000) should check to ensure that their government's proposals do NOT include such an exception.

**Those in countries which did have such religious exceptions in, their national legislation or practices at the date of adoption of the Directive should:**

- a. **Oppose the implementation of Article 4.2 in their national legislation** (their government is under no obligation to implement this article)
- a.b. If unsuccessful, scrutinise government proposals carefully, and seek to ensure that**

➤ **religious exceptions are tightly defined, covering only teachers of religion and officers of the relig-**

**ion, and not allowing organisations to refuse applicants purely on the basis of their sexual orientation**

- **the provisions allowing religious institutions to require individuals working for them "to act in good faith and with loyalty to the organisation's ethos" are either not implemented, or are tightly defined, so that, for example, LGB employees retain the right to be open about their sexual orientation at the workplace.**

One further point: while it should be clear where a country has *legislation* permitting religious exceptions, this may be much less clear in the case of mere *practices*. Where a national government decides to implement religious exceptions on the basis of an existing practice, **LGBT organisations should scrutinise these closely to ensure that these practices genuinely existed in a coherent and documented form.**

## 2.4 Enforcement

2.4.1 Organisations with a legitimate interest in ensuring that the provisions of the Directive are complied with may act legally on behalf of a victim of discrimination. This will allow LGBT organisations and trades unions to play an active role on behalf of victims of discrimination. (Article 9.2)

However, under the Directive, these organisations may only act 'on behalf or in support of' individual victims of discrimination, and not in their own name. LGBT organisations could only bring a case in their own name if the discrimination was against their own organisation, rather than an individual member of that organisation. This is particularly unfortunate in the case of sexual orientation discrimination, where victims are often unwilling to take action because this may lead to their sexual orientation becoming publicly known.

LGBT organisations should propose that "legitimate interest organisations" be permitted to take cases in their own name.

2.4.2 Establishment of independent organisations to assist victims

A common feature of anti-discrimination legislation is the establishment of an independent body to assist victims of discrimination. The Race Directive

requires that such a body be established in the case of racial discrimination, and the Commission's proposed Equal Treatment Directive requires the same for victims of gender discrimination. (See paragraph 1.1 for background on these directives)

It is a major weakness of the Framework Directive that it does NOT impose a similar obligation in respect of discrimination on the grounds of religion or belief, age, disability or sexual orientation.

LGBT organisations should argue that their national legislation include provision for an organisation to assist victims of discrimination on the grounds of religion or belief, age, disability or sexual orientation.

## 2.5 Sanctions

2.5.1 Under the Directive, penalties for those who discriminate must be "effective" (Article 17). This is not further defined. However, existing case law from the Court of Justice on sex discrimination indicates that the Court will insist that any remedies must be adequate and provide a real deterrent effect. In particular, the Court has clarified that where a State chooses to penalise discrimination in employment by means of financial compensation, setting a maximum limit on the amount of compensation available for a finding of unlawful discrimination is not consistent with the need to guarantee effective remedies.

LGBT organisations should review their government's proposal, and try to ensure that penalties are strong enough to constitute a genuine deterrent.

# PART 3 – PERSUADING YOUR GOVERNMENT TO TAKE ACCOUNT OF YOUR CONCERNS

## 3.1 Lobbying the government

In both the existing member states and the accession countries governments will be at very different stages in the process of introducing the legislation.

In general, there will be three stages at which you can try to influence the implementation of the Directive:

- (i) If your government has not yet published a proposal, you should make a written submission to the officials at the relevant ministry, proposing that they take account of the issues outlined in Part 2 above.
- [\(ii\)](#) If your government has already pub-

lished a proposal, there may well be a consultation period, before the proposal is revised and introduced into your parliament. You can use this opportunity to submit written proposals.

[\(iii\)](#) Finally, you can ask Members of Parliament to propose amendments to improve the legislation.

The extent to which you are able to undertake these activities will depend very much on the resources available to you. It will certainly be an advantage, although not absolutely essential, to have the support of an experienced lawyer. If you are unable to find someone to help, ILGA -Europe may be able to locate a lawyer in your country with the assistance of other international human rights organisations. Alternatively, if you have difficulties with a particular issue, we may be able to get help from one of the lawyers who regularly advise us.

### **3.2 Forming alliances**

Almost all the recommendations in Part 2 of these guidelines will also be of benefit to NGOs representing people discriminated against on the basis of age or disability. Humanist and secular organisations are also likely to take a particular interest in opposing any implementation of Article 4.2. The effectiveness of your campaign will be greatly enhanced if you can form a common platform with such organisations.

Trades unions could also prove valuable campaigning partners. In some countries they have been pressing for the implementation of anti-discrimination legislation. Moreover, they have a key role to play after implementation to enable workers to use the provisions of the new legislation. Article 13 of the Framework Directive specifically requires member states to promote the dialogue between employers and unions, with a view to fostering equal treatment.

Finally, as mentioned in the Introduction, directives are also being implemented in the fields of race and gender equality. These provide further opportunities for building alliances, particularly as governments may choose to implement all three directives simultaneously.

### **3.3 Making use of the European Commission**

The European Commission has a role in ensuring the proper and effective implementation of Directives. If your government is failing to implement the Directive properly, it may be possible to persuade the Commission to take this up with your government. Consult ILGA -Europe about this.

### **3.4 European networking**

Finally, it may well be that the experience of organisations in one country are of value to organisations in other countries. So please pass your experiences on to ILGA -Europe, so that we can circulate them.

## **PART 4 - ACTIONS TO TAKE ONCE THE LEGISLATION IS IMPLEMENTED**

Once your national legislation is implemented, there will be three potential areas of activity:

- a. Challenging partial or inadequate implementation at the European Court of Justice
- [a.b.](#) Informing the Commission of partial or inadequate implementation (ultimately the Commission can bring legal proceedings against the State concerned to require them to change their laws in line with the Directive).
- [a.c.](#) Publicising the benefits of the new legislation within the LGBT community
- [a.d.](#) Contributing to regular reviews by the Commission of the application of the Directive at national level. The first of these reviews takes place in 2006, and then every five years thereafter. The Commission is obliged to take account of NGO viewpoints. (Article 19)

ILGA -Europe will provide more advice and guidance in these areas in the future.