



The European Region
of the International
Lesbian and Gay Association

**After the Framework Directive:
Combating discrimination
outside employment**

POLICY PAPER April 2002



**The European Region of the
International Lesbian and Gay
Association**

Avenue de Tervueren/
Tervurenlaan 94/1
B-1040 Brussels
phone +32 2 732 54 88
fax +32 2 732 51 64
info@ilga-europe.org
www.ilga-europe.org

Bank account # 001-3523388-36
Fortis Bank
avenue de Tervueren 124
B-1150 Brussels
IBAN BE46 0013 5233 8836
BIC (SWIFT): GEBA BEBB36A

ILGA-Europe document # 3/2002

Design & Layout: Christian Högl
(www.creativbox.at)

Printer: Sofadi, Brussels

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After the Framework Directive:
**Combating discrimination
outside employment**

ILGA-EUROPE POLICY PAPER
April 2002

Drafted for the Board of ILGA-Europe by
Mark Bell,
Lecturer in Law, University of Leicester

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Introduction

In November 2000, the Council of the European Union adopted the Framework Directive on Equal Treatment in Employment and Occupation.¹ This Directive, which enters into force on 2 December 2003, forbids discrimination in employment on grounds of religion or belief, age, disability or sexual orientation. ILGA-Europe strongly supported the adoption of the Framework Directive as it represented a first, important step for the European Union in combating the entrenched social and legal discrimination that lesbian, gay, bisexual and transgender (LGBT) people face across the Member States. This paper examines the next steps for the European Union in combating discrimination. In particular, it argues that there is a clear need for the Union to move quickly to complement the measures introduced in the area of employment with further legislation designed to prohibit discrimination in other spheres of life, such as healthcare, education and housing.

EU law regards discrimination against transgender persons on grounds of their gender identity as a form of sex discrimination. This principle was established by the Court of Justice in the 1996 case of *P v S and Cornwall County Council*, where it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of her sex.² ILGA-Europe argued for the addition of ‘gender identity’ as a ground of discrimination in the Charter of Fundamental Rights, in order to make the protection of transgender people more explicit and comprehensive. Whilst this was not adopted in the final text, it is assumed that the prohibition in Article 21(1) of sex discrimination extends to discrimination against transgender persons. Whilst this is the current legal position, in this paper reference is made to discrimination on the ground of gender iden-

The Framework Directive as it represented a first, important step for the EU in combating discrimination against LGBT people.

¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ [2000] L 303/16.

² Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

tity in order to be clear where specific reference is being made to discrimination against transgender persons.

The first part of this paper examines the reasons justifying the adoption of a further Directive. The second section considers the areas that this Directive should cover, with the third section devoted to issues relating to the effective enforcement of anti-discrimination norms. The concluding part of this paper examines the steps that need to be taken to move forward on this new agenda.

1. Why is there a need for another anti-discrimination Directive?

Respect for the principle of equal treatment and combating all forms of discrimination are cornerstones of the EU legal system, now clearly recognised as such in the provisions of the Charter of Fundamental Rights.³ Whilst the Racial Equality and Framework Directives make an important contribution to the realisation of these principles across the Union, the EU legal framework on discrimination remains to be completed. This has already been recognised by the European Council in the 2000 ‘European Social Agenda’:

‘Social cohesion, the rejection of any form of exclusion or discrimination and gender equality are all essential values of the European social model ... growth should benefit all, but for this to be so, proactive measures, especially in problem districts, should be continued and stepped up to deal with the complex nature and multiple facets of exclusion and inequality. Alongside employment policy, social protection has a role to play, but it is also necessary to recognise the importance of other factors

The Charter of Fundamental Rights

³ See the chapter on ‘equality’ and Article 21 in particular.

⁴ Para 23, European Social Agenda [2000] OJ C157/4.

⁵ par. 28, Eur. Ct. HR (Fourth section), *Salgueiro da Silva Mouta v Portugal*, Application 33290/96, 21 December 1999, [2001] 1 Family Court Reporter 653.

*such as housing, education, health, information and communication, mobility, security and justice, leisure and culture.*⁴

It is this broader sphere of social policy that is the focus of this paper. The following section provides a number of key reasons that confirm the pressing need for the Union to move beyond the Framework Directive in order to construct an effective anti-discrimination policy framework.

(a) Protecting the fundamental right to equal treatment and non-discrimination

Discrimination against LGBT people is a breach of their fundamental human right to equal treatment and respect for individual dignity. This is recognised in the EU Charter of Fundamental Rights, specifically Article 21(1), which states:

‘Any discrimination based on any ground such as sex ... or sexual orientation shall be prohibited’.

The Charter echoes harmoniously with developments in the Council of Europe. In 1999, the Court of Human Rights confirmed that sexual orientation was a prohibited ground of discrimination in the exercise of all the rights conferred by the European Convention on Human Rights (ECHR).⁵ It must also be noted that the Council of Ministers of the Council of Europe has confirmed that Protocol 12 of the ECHR⁶ includes protection against sexual orientation discrimination.⁷

The Framework Directive implements the right to non-discrimination in the area of employment. Yet, as demonstrated above, the Charter and the ECHR recog-

⁶ Protocol 12 seeks to create an independent and general right to non-discrimination, in contrast to Article 14 of the ECHR, which only forbids discrimination within the scope of rights listed elsewhere in the Convention. Protocol 12 was opened for signature on 4 November 2000. To date, only Georgia has ratified the Protocol, but 26 states have signed it. See further: conventions.coe.int/Treaty/EN/CadreListeTraites.htm

⁷ Par. 4, Reply to Parliamentary Assembly Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe Member States, 765th meeting, 19 September 2001. Available at: cm.coe.int/dec/2001/765/43.htm

nise this as a general right, not confined to any specific area of life. Above all, the Charter indicates the indivisibility of economic and social rights. If the Union is to provide an effective guarantee of equality for all its citizens and residents, it must act to combat discrimination wherever it occurs.

(b) Overlapping and multiple forms of discrimination

Some individuals experience discrimination on more than one ground. To take a simple example, a lesbian might face harassment both because of her gender and her sexual orientation.⁸ In order to be fully effective, anti-discrimination law needs to be able to respond to the needs of the whole person, rather than trying to compartmentalise different aspects of the individual's identity. Unfortunately, the uneven level of protection against discrimination that currently exists in EU law prevents an adequate response to persons experiencing multiple forms of discrimination. For example, EU law as it stands would not permit a landlord to refuse to rent an apartment to an Asian gay man because he was of Asian ethnic origin, but he could be denied the apartment because he was gay. Indeed, a racist landlord could thereby legitimise his or her actions by focusing on another aspect of the individual's identity. An essential element of any strategy to combat multiple discrimination is ensuring that there is an equal level of protection against all forms of discrimination.

It is also evident that combating employment discrimination demands attention to discrimination in associated fields. For example, it is impossible to separate equal treatment for LGBT teachers from the need to combat homophobia and transphobia⁹ in the education system in general. Creating an educational envi-

⁸ For example, *Pearce v The Governing Body of Mayfield School* [2001] Industrial Relations Law Reports 669.

⁹ Hatred by reason of an individual's gender identity.

¹⁰ Recital 11 states 'discrimination based on ... sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular ... free movement of persons.'

¹¹ Law of 21 December 2000 (*Staatsblad* 2001, no 9) on the opening up of marriage for same-sex partners: see further, K Waaldijk, 'Latest news about same-sex marriage in the Netherlands (and what it implies for foreigners)', available at: ruljis.leidenuniv.nl/user/cwaaldijj/www/NHR/news.htm

ronment supportive of equality both for staff and students requires attention to wider issues such as the treatment of homosexuality and gender identity in the curriculum.

(c) Removing obstacles to freedom of movement

The Framework Directive recognises that discrimination in the workplace can operate as an obstacle to the free movement of persons.¹⁰ However, individuals moving to another state can experience discrimination in other areas of life, outside the workplace, as a barrier to free movement. For example, if an individual faces discrimination in access to rented accommodation or in receiving a mortgage in certain states, then they will be less likely to move there. These barriers are particularly great for unmarried couples leaving those states where non-marital partnerships are capable of legal recognition. In the Netherlands, same-sex couples can marry since 1 April 2001.¹¹ Laws creating registered partnership (a status conferring most of the rights of marriage) have been adopted in Denmark (1989), Sweden (1995), the Netherlands (1998) and Finland (2001).¹² In a further group of states, laws have been adopted that provide for the legal recognition of same-sex partnerships and a variety of rights, yet falling considerably short of marriage. Such laws have been agreed in France,¹³ Germany,¹⁴ Portugal¹⁵ and in some regions of Spain.¹⁶

Ultimately, part of the solution to such barriers to free movement must be for all states to remove discriminatory barriers in access to marriage and to provide registered partnership laws. States should also introduce a form of mutual recognition for partnerships concluded elsewhere in the Union. Indeed, the Euro-

¹² See generally, R Wintemute and M Andenæs (eds), *Legal recognition of same sex partnerships – a study of national, European and international law* (Oxford: Hart, 2001).

¹³ See further, D Borrillo, 'Le Pacte civil de solidarité: une reconnaissance timide des unions de même sexe' (2001) 3; *Aktuelle juristische Praxis* 299.

¹⁴ Euroletter No 84, November 2000: available at: www.steff.suite.dk/eurolet.htm

¹⁵ Euroletter No 88, May 2001, *ibid*.

¹⁶ F Salas, 'The stable unions law in Catalonia' in R Wintemute and M Andenæs (eds), *Legal recognition of same sex partnerships – a study of national, European and international law* (Oxford: Hart, 2001).

pean Parliament has been recommending states take similar measures since 1994.¹⁷ Whilst there is a clear trend of progress across Europe in this direction, in the shorter term, an important contribution to reducing these obstacles to free movement would be the prohibition of sexual orientation and gender identity discrimination, including discrimination against same-sex partners, in all areas of life.

(d) Promoting social inclusion

The link between poverty and all forms of discrimination is well-established.

The European Social Agenda adopted by the European Council in December 2000 places considerable emphasis on tackling poverty and promoting social inclusion.¹⁸ The link between poverty and all forms of discrimination is well-established. Discrimination marginalises groups in society and denies them equal access to key social goods, such as employment, healthcare, education and housing. Research in Ireland in 1995 confirmed that LGB people were no exceptions in this area. Contrary to popular assumptions of gay affluence based on the notion of the ‘Pink Pound’, the Combat Poverty Agency found evidence that discrimination in education, employment, housing and financial services combined to increase significantly the risk of poverty for LGB people.¹⁹ Moreover, many lesbian women suffered a double disadvantage because of their gender.²⁰ The link between sexual orientation and social inclusion has also been recognised in the National Action Plan to Combat Poverty and Social Inclusion by Germany for 2001.²¹ In the same way that the Framework Directive is an essential complement to the EU’s Employment Strategy, a wider anti-discrimination Directive forms a necessary element of the policy to promote social inclusion.

¹⁷ Resolution on equal rights for homosexuals and lesbians in the EC, [1994] OJ C61/40, par.

¹⁸ Above note 4.

¹⁹ GLEN and NEXUS Research Cooperative, *Poverty – lesbians and gay men. The economic and social effects of discrimination* (Dublin: Combat Poverty Agency, 1995) 88.

²⁰ *Ibid* 3.

²¹ See p. 33, p. 59, available at: europa.eu.int/comm/employment_social/news/2001/jun/napincl2001de_en.pdf

(e) Removing the equality hierarchy

One of the long-standing defects in EU anti-discrimination law has been the unequal level of protection against different forms of discrimination. It was hoped that the inclusive approach adopted in Article 13 EC would reduce the ‘equality hierarchy’ that previously existed, however, the initial legal interventions have only reinforced, not diminished, this phenomenon. Whilst the Framework Directive forbids discrimination in employment on grounds of religion or belief, age, disability and sexual orientation, a separate Directive was adopted in June 2000 dealing with discrimination on grounds of racial or ethnic origin. This has a much broader material scope, prohibiting discrimination in ‘social protection, including social security and health-care, social advantages, education, access to and supply of goods and services which are available to the public, including housing.’²²

The Racial Equality Directive is a welcome precedent for EU intervention in discrimination outside the employment field. Nonetheless, its adoption without corresponding measures for other grounds of discrimination creates an unacceptable gap in the level of protection afforded to different forms of discrimination.²³ The EU Charter clearly indicates that ‘any’ discrimination on ‘any’ ground should be prohibited.²⁴ This principle is supported by other international human rights standards. In particular, Article 26 of the International Covenant on Civil and Political Rights requires all signatories to ensure that the law guarantees ‘to all persons equal and effective protection against discrimination on any ground’.

Unfortunately, there are already indications that the Union intends to follow a selective approach in the

²² Article 3(1)(e)-(h), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22.

²³ See further, L Waddington and M Bell, ‘More Equal than Others: Distinguishing European Union Equality Directives’ (2001) 38 *Common Market Law Review* 587.

²⁴ Article 21(1).

25 European Social Agenda approved by the Nice European Council meeting on 7, 8 and 9 December 2000, [2001] OJ C157/4.

26 L Waddington, 'Article 13 EC: setting priorities in the proposal for a horizontal employment Directive' (2000) 29 *Industrial Law Journal* 176, 181.

27 'Within three years of the adoption of this Directive, the Council, on a proposal from the Commission and after consulting the European Parliament, shall decide, for all the grounds of discrimination referred to in Article 13 of the EC Treaty, on an extension of the scope to at least those fields defined in Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin', Amendment 35, European Parliament Resolution on the Framework Directive, 5 October 2000.

extension of legislative protection against discrimination in areas outside employment. The European Council has declared its support for the adoption of a Directive combating gender discrimination outside employment by 2003.²⁵ The Commission has also indicated that it will submit a proposal for a Directive combating disability discrimination in areas outside employment by 2003.²⁶ ILGA-Europe welcomes and supports these proposed extensions to the scope of EU anti-discrimination law. In particular, we note the potential for enhanced protection against gender identity discrimination under the aegis of another Gender Equality Directive, given the broad interpretation of 'sex' by the Court of Justice. Nonetheless, we believe that a selective approach will entrench the existing equality hierarchy, as it implies that some grounds of discrimination are regarded as being more important than others. There is no obvious justification why discrimination against women will be forbidden in areas such as housing or healthcare, but not discrimination against lesbian, gay or bisexual people. Furthermore, the proliferation of multiple pieces of discrimination law is confusing, not only for service-providers who must respect the law, but also for citizens who need to be able to understand and exercise their rights with clarity.

The European Parliament has already expressed its desire for the wider material scope of the Racial Equality Directive to be extended to all the grounds found within the Framework Directive.²⁷ ILGA-Europe supports this view. We are concerned, however, that adopting a 'vertical' approach (that is, ground-specific legislation) to the future development of anti-discrimination law will delay or obstruct swift agreement on the extension of protection against sexual orientation/gender identity discrimination. In particular, the

potential difficulty in gaining unanimous agreement in the Council to a Directive solely concerned with sexual orientation issues cannot be ignored.

2. What areas should this Directive cover?

The European Union is a body of limited powers and it can only adopt laws in respect of those subjects that fall within its competences. The legal foundation for any further anti-discrimination Directive will be Article 13 EC:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

It is important to note that the scope of Article 13 EC is constrained to the limits of the powers of the European Community. This implies that not every area where discrimination occurs can be tackled on the basis of Article 13 EC. For example, matters related to policing and the criminal law are normally dealt with at EU level under the aegis of the EU Treaty, a separate legal framework from the EC Treaty. It seems clear that combating discrimination by law enforcement agencies, or in the criminal law, must be pursued through the procedures and instruments provided for in the EU Treaty, rather than those in the EC Treaty.

Nonetheless, if the ban on discrimination is to be fully effective it needs to be as broad as possible. In par-

The legal foundation for any further anti-discrimination Directive will be Article 13 EC.

The law needs an in-built flexibility to avoid the creation of any potential 'loopholes'.

ticular, it is difficult to predict the many diverse situations in which discrimination can arise, and the law needs an in-built flexibility to avoid the creation of any potential 'loopholes'. An example of how an open-ended ban on discrimination can be reconciled with the limited powers of the Community is already to be found in the EC Treaty. Article 12 EC states that 'within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' Applying this approach to a future anti-discrimination Directive, it should provide for a general prohibition on all forms of discrimination outside employment, insofar as these fall within the limits of the powers of the Community.

²⁸ Admittedly, in some cases, same-sex couples may benefit from the non-recognition of their relationships for the purposes of social welfare entitlements. For example, in the UK, certain benefits may be reduced based on the level of income of the partner. Consequently, non-recognition of one's partner can actually increase personal entitlements. See Northern Ireland Human Rights Commission, *Enhancing the rights of lesbian, gay and bisexual people in Northern Ireland* (Belfast: NIHRC, 2001) 71.

²⁹ J Mee and K Ronayne, *Partnership rights of same sex couples* (Dublin: Equality Authority, 2000) 21.

Alongside this open-ended ban on discrimination, in the interests of clarity, it will be useful to provide a non-exhaustive list of areas where discrimination is specifically prohibited. Naturally, the Racial Equality Directive provides a relevant example of the types of areas that need to be tackled. In the following sections, each of the areas covered by the Racial Equality Directive are considered for their relevance to issues of sexual orientation and/or gender identity.

(a) Social protection, including social security and healthcare

(i) social security

The principal difficulties experienced by LGBT people in relation to social security lie in the non-recognition of their partners and other family members, and the consequent denial of benefits.²⁸ Particularly important in this context is the treatment of unmarried couples by

state pension schemes. Frequently, benefits such as ‘survivor’s pensions’ – that is, a pension provided upon the death of a partner – are only available to married couples.²⁹ The need to address this situation is reinforced by Article 3(3) of the Framework Directive, which excludes from its scope ‘payments of any kind made by state schemes or similar, including state social security or social protection schemes’. Alternatively problems can be experienced in areas such as social assistance with family funeral expenses. Removing discrimination in the area of social security must also be linked to ending discrimination in the taxation system against unmarried couples. For example, inheritance taxes often penalise persons in a non-marital relationship by requiring the payment of tax on inheritance, where married couples would be otherwise exempt.³⁰

(ii) Healthcare

Discrimination in healthcare occurs in a number of different contexts. First, discrimination can take place in respect of specific individual patients. This problem has been recently highlighted in surveys of LGB people in several applicant states. The findings included the following information:

- ▼ *13% of respondents in Romania had experienced discrimination within healthcare institutions;*³¹
- ▼ *10% of respondents in Poland had experienced discrimination in the healthcare system;*³²
- ▼ *7.6% of respondents in Slovenia had experienced discrimination in health care services.*³³

The individual experiences of discrimination included homophobic statements or actions by healthcare workers and the continued linking of sexual orientation

³⁰ Ibid 37.

³¹ ACCEPT, *Sexual orientation discrimination in Romania – a survey of violence, harassment and discrimination against Romania’s lesbian, gay, bisexual and transgender community* (Bucharest: ACCEPT, 2001) 24.

³² Lambda Warszawa Association, *Report on discrimination on grounds of sexual orientation in Poland* (Warsaw: Lambda Warszawa Association, 2001) 20.

³³ ŠKUC-LL, *Sexual orientation discrimination in Slovenia* (Ljubljana: ŠKUC-LL, 2001) 16.

with a psychiatric disorder. Discriminatory attitudes amongst psychologists has been identified as a recurrent problem in Hungary,³⁴ and 7% of all respondents in Slovenia had been advised to undergo psychiatric treatment because of their homosexuality.³⁵ This reflects evidence from some applicant states of the inappropriate treatment of homosexuality in the training of medical professionals, including psychologists.³⁶ Although there is less empirical evidence on the situation in the existing EU states, it cannot be assumed that similar difficulties do not exist. Lack of awareness on the part of healthcare professionals is also a common barrier to transgender people being able to access healthcare without fear of discrimination.

The family members of LGBT patients may also experience discrimination if they are not recognised by the law or by healthcare professionals as part of the patient's family or 'next-of-kin'.³⁷ This can impact upon visitation rights,³⁸ but also access to information and involvement in treatment decisions. This is important both for the patient, so that they are not left isolated, and for the partner, where the patient is not able to take decisions for herself or himself. The problems experienced in this area frequently concern unmarried partners, but may also include parental rights. If a parent is not recognised as having a legal responsibility for the child, then this can create barriers to participating in healthcare decision-making in relation to any children.

Reproductive technologies are a further area where many LGBT individuals face discrimination. Laws regulating access to assisted insemination vary considerably within Europe. Assisted insemination for single women has been prohibited in Austria since 1992,³⁹ and Denmark decided in 1997 to forbid assisted insem-

34 par. I.5.37, Háttér Society for Gays and Lesbians in Hungary and Labrisz Lesbian Association, *Report on the Discrimination of Lesbians, Gay Men and Bisexuals in Hungary* (Budapest, 2001). All the above four reports are available from www.ilga-europe.org

35 ŠKUC-LL, above note 33.

36 T Greif, 'Slovenia' in ILGA-Europe, *Equality for lesbians and gay men – a relevant issue in the EU accession process* (Brussels: ILGA-Europe) 73; M Molnárová, 'Slovakia' in ILGA-Europe, *Equality for lesbians and gay men – a relevant issue in the EU accession process* (Brussels: ILGA-Europe) 68.

37 Mobility International, ILGA-Europe and UNITED for Intercultural Action, *Stepping Stones and Roadblocks – project report*, p. 8. Available at: www.ilga-europe.org

ination by doctors for lesbians in public hospitals or private clinics.⁴⁰

Whilst the examples above relate to the treatment of individuals, other forms of discrimination in healthcare are more systemic. In particular, resource allocation by healthcare providers can institutionalise discriminatory patterns in the delivery of healthcare. Health issues particularly related to LGBT people may not be given equal priority. For example, the provision of gender reassignment surgery is an area where there is evidence of overt discrimination in the allocation of health resources. For example, *ex parte A and others*⁴¹ concerned a legal challenge to the policy of the North West Lancashire Health Authority in England, which designated gender reassignment as a procedure in the same category as tattoo removal or face lifts, and hence imposed an almost total exclusion on the allocation of public health funding for gender reassignment surgery in that region. Even where gender reassignment is permitted, in some states this is accompanied by requirements for sterilisation of the individual, even though there is no health-related reason why this should take place.

These forms of discrimination are unlikely to be effectively challenged simply through the provision of an individual right to non-discrimination in healthcare. For example, in Hungary, although it is estimated that 84% of persons who are recorded as HIV positive are gay men, most health promotion campaigns have excluded any discussion of homosexuality.⁴² Individual litigation is particularly unsuited to challenging discrimination in the system of resource allocation where the consequences may only be evident in terms of less healthcare initiatives for LGBT persons, rather than the denial of treatment to a specific individual. This demonstrates

Health issues particularly related to LGBT people may not be given equal priority.

³⁸ K Krickler, 'Austria' in ILGA-Europe (eds), *Equality for lesbians and gay men – a relevant issue in the civil and social dialogue* (Brussels: ILGA-Europe, 1998) 32.

³⁹ *Ibid.*

⁴⁰ S Jensen, 'La reconnaissance des préférences sexuelles: le modèle scandinave' in D Borrillo (ed), *Homosexualités et droit* (Paris: PUF, 1998) 264.

⁴¹ *R v North West Lancashire Health Authority, ex parte A and others* [2000] 1 Weekly Law Reports 977.

⁴² B Sándor, 'Hungary' in ILGA-Europe, *Equality for lesbians and gay men – a relevant issue in the EU accession process* (Brussels: ILGA-Europe) 32.

the need for an enforcement strategy that is not confined to facilitating individual complaints, but which also provides mechanisms for investigating patterns of inequality.

(b) Social advantages

The Racial Equality Directive includes within its scope a ban on discrimination in ‘social advantages’.⁴³ This is a concept that has emerged from EU free movement law and it has been defined by the Commission as encompassing ‘benefits of a social or cultural nature which are granted within the Member States either by public authorities or private organisations’.⁴⁴ The breadth of this concept has become evident in EU law on nationality discrimination, where it has been used to challenge discrimination in diverse areas, such as unemployment benefits,⁴⁵ or public assistance with funeral expenses.⁴⁶ Non-discrimination in social advantages is also relevant to LGBT persons. In particular, the Court of Justice held in 1986 that the right to be joined by an unmarried partner in another EU state was a ‘social advantage’.⁴⁷ Therefore, prohibiting discrimination in the area of ‘social advantages’ could provide an important means to promote equal treatment in immigration law (see also point (e) below).

(c) Education

Education is a particularly crucial area in which there is well-documented evidence of the discrimination encountered by LGBT students and staff. A 1998 survey of 307 schools in England and Wales found that 61% of teachers were aware of LGB students in their schools. 82% were aware of incidents of homophobic

⁴³ See further M Bell, ‘Meeting the challenge? A comparison between the EU Racial Equality Directive and the Starting Line’ in I Chopin and J Niessen (eds), *The Starting Line and the incorporation of the Racial Equality Directive into the national laws of the EU Member States and accession states* (London: Migration Policy Group and Commission for Racial Equality, 2001).

⁴⁴ Commission (1999) ‘Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’, COM (1999) 566, 25 November 1999 at p. 7.

⁴⁵ Case C-57/96, *H. Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689.

⁴⁶ Case C-237/94, *O’Flynn v Adjudication Officer* [1996] ECR I-2617.

⁴⁷ Case 59/85, *Netherlands v Reed* [1986] ECR 1283.

verbal bullying, and 26% knew of incidents of physical bullying accompanied by homophobic abuse. Nonetheless, only 6% of schools specifically included homophobic bullying in anti-bullying policies.⁴⁸ Research in Ireland confirms this pattern: 57% of gay and lesbian respondents experienced problems at school, such as depression, low self-esteem and harassment. 89% linked these experiences to their sexual orientation. Moreover, 59% experienced problems in further and higher education.⁴⁹ There is also considerable international research demonstrating higher rates of attempted suicide amongst gay and lesbian youth.⁵⁰ Clearly, tackling homophobia and transphobia in the education system could play an important part in measures to reduce suicide risks amongst LGBT young people.

As with health, discrimination in education occurs at both the ‘micro’ and ‘macro’ levels. Some forms of discrimination are directly experienced by individual students and teachers. Bullying and harassment are prominent issues, but other issues to consider include possible discrimination in admissions, assessment or in the application of disciplinary procedures. Dress codes imposed through school uniforms seek to reinforce rigid conceptions of gender identity. LGBT parents can also encounter difficulties – for example, participation in meetings to review student progress – or alternatively, students with LGBT parents may be vulnerable to harassment and bullying by other students for this reason.

Other forms of discrimination in the education system are more subtle, but equally influential. In particular, the representation of homosexuality and gender identity issues in the curriculum must be considered, with sexual education being a key area.

Considerable international research shows higher rates of attempted suicide amongst gay and lesbian youth.

⁴⁸ N Douglas, I Warwick, S Kemp and G Whitty, *Playing it safe: responses of secondary school teachers to lesbian, gay and bisexual pupils, bullying, HIV and AIDS education and Section 28* (London: Health and Education Research Unit, Institute of Education, 1997) 22-26.

⁴⁹ GLEN (above note 19) 45-48.

⁵⁰ Gay HIV Strategies and Nexus Research Cooperative, *Education – lesbian and gay students – developing equal opportunities* (Dublin: Gay HIV Strategies, 2000) 14.

Discrimination in the curriculum is rarely amenable to individual litigation as a means of redress.

In England and Wales, ‘section 28’ is an unusually explicit source of discrimination, forbidding the promotion by local authorities of the teaching of the ‘acceptability of homosexuality as a pretended family relationship’.⁵¹ In the long-run, discrimination in the curriculum is rarely amenable to individual litigation as a means of redress. On the contrary, there is a need to focus on incorporating equality considerations in curriculum development and revision. As with healthcare resource allocation, this implies enforcement mechanisms that go beyond individual complaint procedures.

(d) Access to and supply of goods and services including housing

Discrimination in goods and services concerns a diverse range of issues such as access to bars, restaurants, hotels, leisure facilities, banking, insurance schemes, etc. For example, a survey of LGBT persons in Romania found that 10.6% had experienced discrimination in commercial establishments;⁵² a similar survey in Poland found that 20% of respondents had experienced such discrimination.⁵³ In the Polish survey, bars, restaurants and hotels were identified as the most common sites of discrimination.⁵⁴ The fear of such discrimination is also reflected in the Polish respondents – 71% conceal their sexual orientation in such places in order to avoid discrimination.⁵⁵

Access to goods and services is one area where a significant number of Member States have already prohibited sexual orientation discrimination. Relevant legal provisions exist in Denmark, Finland, France, Ireland, Luxembourg, the Netherlands and Sweden.⁵⁶ This is an area of discrimination particularly central to the objectives of the European Union, given that the inter-

⁵¹ Section 2A, Local Government Act 1986 (as amended).

⁵² ACCEPT, above note 31, p. 25.

⁵³ Lambda Warszawa Association, above note 32, p. 20.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* 21.

⁵⁶ See generally, Commission, ‘Report on Member States’ legal provisions to combat discrimination’ (Luxembourg: OOEPC, 2000); ILGA-Europe (eds), *Equality for lesbians and gay men – a relevant issue in the civil and social dialogue* (Brussels: ILGA-Europe, 1998).

nal market is based on the removal of any barriers to the free movement of goods and services.⁵⁷

Housing can be regarded as a good (where it is being purchased), or a service (where it is being rented). LGBT persons face a range of discriminations in the area of housing. The risk of discrimination by those offering property for rent can compel LGBT people to conceal their sexual orientation when seeking accommodation.⁵⁸ Transgendered individuals may be particularly vulnerable to discrimination where individuals make assumptions about their gender identity based on their personal appearance. For those wishing to buy property, discrimination by insurance companies can create obstacles to taking out a mortgage.⁵⁹ Once resident in accommodation, LGBT persons may be vulnerable to harassment. Research in Ireland in 1995 found that 11% of lesbian and gay respondents had experienced discrimination in housing, such as verbal harassment. Significantly, 43% felt they would experience such harassment, if people living in their vicinity knew their sexual orientation.⁶⁰

Succession to a tenancy following the death of an unmarried partner can also be problematic. This is highlighted in a case pending before the Court of Human Rights, *Karner v Austria*. Mr. Karner shared a flat with his gay partner in Vienna from 1989 until 1994, when his partner died. The landlord sought to terminate the tenancy, which was originally agreed with Mr. Karner's partner. The Austrian Supreme Court found in favour of the landlord and terminated the tenancy. Although the Austrian Rent Act allows for succession to the tenancy by a 'life companion', this was held not to cover a same-sex couple. The Court of Human Rights has accepted that there is an admissible case of sexual orientation discrimination potentially in breach of the Convention.⁶¹

57 Article 3(1)(c) EC.

58 Mobility International et al, above note 37, p. 7.

59 J Lewis, 'United Kingdom' in ILGA-Europe (eds), *Equality for lesbians and gay men – a relevant issue in the civil and social dialogue* (Brussels: ILGA-Europe, 1998) 94.

60 GLEN, above note 19, p. 66.

61 Partial decision as to the admissibility of Application 40016/98, *Karner v Austria*, 11 September 2001. Available at: www.echr.coe.int/Eng/Judgments.htm. For a similar case in the UK, see *Fitzpatrick v Sterling Housing Association* [2001] 1 Appeal Cases 27.

Older LGBT men and women can experience problems in finding residential care.

Finally, older LGBT men and women can experience problems in finding residential care or sheltered accommodation that recognises and meets their needs. To date, there is only one sheltered housing scheme specifically designed for lesbians and gay men in Europe. The LA Ries Foundation in Amsterdam manages this and it was created following evidence of sexual orientation harassment in some sheltered housing facilities.⁶² Research in North-East England amongst lesbians and gay men revealed that two-thirds would prefer mixed (gay and straight) accommodation, whereas one-third sought single-sex accommodation.⁶³ If an individual was refused access to a residential care facility on the ground of his or her sexual orientation or gender identity, then clearly this could be the subject of an individual complaint. However, the failure to take into account older LGBT persons in the planning and provision of such accommodation is more effectively tackled through focusing on the policy-making and service-delivery process. Service-providers need to understand that providing equal treatment requires specialist information, training and services. Once again, this reinforces the need to consider complementary measures to promote equality alongside the option of litigation.

(e) Immigration

Discrimination in immigration and asylum law is explored in depth in ILGA-Europe's Policy Paper on EU Justice and Home Affairs Policies.⁶⁴ Essentially, the key issue is immigration rights for LGBT people and their family members. EU law as it stands only provides family reunion rights for married couples and their other family members. Yet, the Netherlands is the only state in the European Union where same-sex couples can get

⁶² Age Concern, *Opening Doors - working with older lesbians and gay men* (London: Age Concern England, 2001) 43.

⁶³ *Ibid* 33.

⁶⁴ Available at: www.ilga-europe.org

married. Therefore, most LGBT families in the Union are excluded from the family reunion rights conferred by EU law. ILGA-Europe recommends the inclusion in immigration law of other forms of legally recognised partnership that have proliferated recently in the European Union, alongside free movement rights for all couples based on a durable relationship, and their children. Whilst this demands reform of the specific immigration law instruments, anti-discrimination law should also apply to immigration in general. This would protect against discriminatory definitions of the family, but also against incidents of discrimination or harassment in the administration of immigration law. Immigration was not included in the material scope of the Racial Equality Directive, however, it falls clearly within the scope of the EC Treaty by virtue of Title IV. Hence, there are no legal barriers to its inclusion in an anti-discrimination Directive.

Most LGBT families in the Union are excluded from the family reunion rights conferred by EU law.

(f) Asylum

Similar considerations apply to asylum law, which is also not included in the Racial Equality Directive. Asylum applications based on persecution related to sexual orientation or gender identity demand equal treatment with claims based on other forms of persecution. Discrimination and harassment related to sexual orientation or gender identity in the implementation of asylum law needs to be prohibited. Finally, many asylum law instruments, like immigration law, contain discriminatory definitions of the family.⁶⁵ In particular, family reunion rights often remain dependent on a marital relationship, whereas it is not possible for most LGBT persons in the world to enter into a legally recognised marriage.

⁶⁵ For example, Article 15, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, [2001] OJ L212/12.

3. How can enforcement of anti-discrimination law be improved?

The Framework Directive primarily relies on enforcement of its provisions through individual litigation. The only exception is the possibility for organisations with a legitimate interest in enforcing the principle of equal treatment to intervene in support or on behalf of an individual complainant.⁶⁶ Whilst this is a welcome provision, it does not provide independent legal standing for such organisations and the need for an identified complainant remains. A strategy that depends purely on individual litigation is unlikely to be fully effective, particularly for grounds such as sexual orientation and gender identity, where existing experience in the European Union suggests individual litigation levels are likely to be low.⁶⁷ This weakness in the Framework Directive needs to be addressed in any future anti-discrimination Directive. Specifically, there are a number of measures that should be adopted: creation of equal treatment bodies; independent legal standing for organisations; and positive duties to promote equality.

(a) Creation of equal treatment bodies

One of the most glaring differences between the Racial Equality Directive and the Framework Directive is the absence in the latter of any obligation on Member States to establish bodies for the promotion of equal treatment. In contrast, the Racial Equality Directive requires states to designate such bodies, which may be part of other national human rights agencies.⁶⁸ The equal treatment body must, as a minimum, provide independent assistance to individual victims of discrimination, conduct independent surveys concerning

⁶⁶ Article 9(2).

⁶⁷ In the Netherlands, where sexual orientation discrimination was prohibited by the General Equal Treatment Act in 1995, the number of cases brought on the sexual orientation ground has been significantly lower than for other grounds of discrimination. In 1999, out of a total of 118 cases handled by the Equal Treatment Commission, only 7 concerned the sexual orientation ground. See, Commissie Gelijke Behandeling, *Jaarverslag 1999*, available at: www.cgb.nl/jaarverslagframeset.html In Ireland, during 2000, only one sexual orientation case was referred to the Office of the Director of Equality Investigations under all equality legislation. This represented 0.7% of all cases referred: The Office of the Director of Equality Investigations, *Annual Report 2000* (Dublin: ODEI) 17.

⁶⁸ Article 13.

discrimination and publish independent reports and recommendations on discrimination. Neither the Commission nor the Council have convincingly explained why victims of racial discrimination are in greater need of institutional assistance and support than victims of discrimination based on sexual orientation, age, disability and religion or belief. Moreover, the Council Common Position on the proposed amendment to the 1976 Equal Treatment Directive includes an obligation on states to establish such bodies to assist victims of gender discrimination.⁶⁹

At the national level, there are already a number of examples of best practice on sexual orientation and gender identity discrimination. In Sweden, a specific Ombudsman for Discrimination based on Sexual Orientation has existed since 1999.⁷⁰ In the Netherlands, sex and sexual orientation discrimination fall within the remit of the Equal Treatment Commission, which was created in 1995.⁷¹ In Ireland, the promotion of equal treatment (including irrespective of sex and sexual orientation) is included in the remit of the Equality Authority.⁷² The Irish Office of the Director of Equality Investigations deals with individual cases of discrimination.⁷³ Finally, it should be noted that the Belgian government is proposing to extend the remit of the Centre pour l'Égalité des Chances et la Lutte contre le Racisme to cover a wider range of discriminatory grounds, including sexual orientation.⁷⁴ The Racial Equality Directive demonstrates that it is possible to respect national diversity in the specific organisation of such bodies, whilst ensuring that all individuals have a minimum right to institutional assistance throughout the Union.

Victims of discrimination based on sexual orientation should have the same institutional assistance as victims of racial discrimination.

⁶⁹ EU Council, 'Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council amending Council 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' Doc No 9848/01, Brussels, 17 July 2001.

⁷⁰ See further www.homo.se

⁷¹ See further www.cgb.nl

⁷² See further www.equality.ie

⁷³ See further www.odei.ie

⁷⁴ Communiqué, 6 December 2000, 'Lutte contre le racisme'. Available from: faits.fgov.be

(b) Independent legal standing for organisations

As mentioned above, the Framework Directive does not permit organisations promoting equality to bring discrimination complaints in their own name (unless the organisation itself is the victim of the discrimination). This reduces the potential for a proactive approach to combating discrimination. For example, in *Grant v South-West Trains*,⁷⁵ an individual employed by a rail company challenged the denial by her employer of free rail travel for her same-sex partner, whereas the opposite-sex partners of other employees were entitled to this benefit. Clearly, this was a practice that did not only impact on Lisa Grant, but also on all employees of South-West Trains in same-sex relationships. Rather than having to wait for an individual to bring this challenge, it would be more effective to permit organisations, such as trade unions, to challenge discriminatory practices. Therefore, any future anti-discrimination Directive should provide independent legal standing for organisations with a legitimate interest in the promotion of equal treatment, as well as the relevant equal treatment body.

Any future anti-discrimination Directive should provide independent legal standing for organisations with a legitimate interest in the promotion of equal treatment.

⁷⁵ C-249/96 [1998] ECR I-621.

⁷⁶ Commission, 'Incorporating equal opportunities for women and men into all Community policies and activities' COM (96) 67.

⁷⁷ Commission, 'Report on the implementation of the action plan against racism – mainstreaming the fight against racism', January 2000. Available at: europa.eu.int/comm/employment_social/fundamri/eu_racism/main_en.htm

(c) Positive duties to promote equality

Taking the steps outlined above should make litigation easier, where this is necessary. It must also be acknowledged, however, that many issues concerning equality rights in public policy do not lend themselves to resolution through litigation. Whereas individual or group complaints can be an effective means to enforce the *negative* right not to be discriminated against, alternative and complementary strategies are necessary to move towards the enforcement of a *positive* right to equality. This parallels closely with the increas-

ing acceptance of the need to ‘mainstream’ equality considerations in policy-making; in other words, equality must be taken into account at every stage of policy formulation, implementation and evaluation.

The Commission has already explicitly embraced the need for mainstreaming to combat discrimination based on sex,⁷⁶ racial or ethnic origin,⁷⁷ and disability.⁷⁸ Yet, as the Action Programme Decision⁷⁹ states ‘the different forms of discrimination cannot be ranked: all are equally intolerable.’⁷⁹ One of the main weaknesses in the current approach to mainstreaming at the European Union level is the absence of any clear framework for the integration of equality considerations across all policy fields. Various examples are emerging at the national level as to how this can be arranged. One of the most innovative is found in Northern Ireland, where all public authorities are under a duty in carrying out their functions to:

‘have due regard to the need to promote equality of opportunity – (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) between men and women generally; (c) between persons with a disability and persons without; and (d) between persons with dependants and persons without.’⁸⁰

A detailed framework requires all public authorities to create ‘equality schemes’ – mechanisms for consultation and evaluation of all policies and functions to ensure respect for the equality duty.⁸¹

Creating a structure through which equality considerations are placed at the heart of EU law and policy making is an objective that extends beyond the focus of this paper. However, the mainstreaming approach

⁷⁸ Commission, ‘Mainstreaming disability within EU employment and social policy’ DGV services working paper, 1999. Available at: europa.eu.int/comm/dgs/employment_social/key_en.htm

⁷⁹ Recital 5, Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), [2000] OJ L303/23.

⁸⁰ Section 75, Northern Ireland Act 1998. See further B Fitzpatrick, ‘The Fair Employment and Equal Treatment (Northern Ireland) Order 1998, The Northern Ireland Act 1998’ (1999) 28 *Industrial Law Journal* 336.

⁸¹ S Mullally, ‘Mainstreaming equality in Ireland: a fair and inclusive accommodation?’ (2001) 21 *Legal Studies* 99.

The mainstreaming approach should also influence any future anti-discrimination Directive.

should also influence any future anti-discrimination Directive. One example of how this can be achieved is found within the Council's Common Position on the amendment to the 1976 Equal Treatment Directive. Article 1(1)(a) states:

*'Member States shall actively take into account the objective of equality between women and men when formulating and implementing laws, regulations, administrative provisions, policies and activities ...'*⁸²

Similarly, any future anti-discrimination Directive must impose a positive duty on Member States to promote equality irrespective of sexual orientation or gender identity.

4. Conclusions and Recommendations

Securing consensus on the need for more EU anti-discrimination legislation will take time and persuasion.

This paper has set out the reasons why it is necessary for the European Union to adopt a further anti-discrimination Directive, as well as identifying the key areas to which this Directive should apply. The experience of working towards the Framework Directive indicates that securing consensus on the need for more EU anti-discrimination legislation will take time and persuasion. At one level, there is an obligation here on national and European LGBT and human rights organisations to take the initiative in campaigning for stronger anti-discrimination laws. However, there are also areas where the various EU institutions, in particular the Commission and the Parliament, could provide constructive support for LGBT groups in achieving this objective.

First, whilst LGBT groups and individuals are quite aware of the reality of everyday discrimination in areas

such as housing, healthcare, education and goods and services, there is a genuine need for further research in order to build up a clearer picture of the specific problems experienced in these fields. Projects in these areas, including empirical research initiatives, should be supported through the Article 13 Action Programme and other EU funding programmes. An excellent example of the types of projects that could be developed is the EU-funded GLEE Project on 'Educational Initiatives to Combat Homophobia and Heterosexism'.⁸³ Moreover, given that the negotiation of any future anti-discrimination Directive is likely to coincide with the enlargement of the European Union, it is essential that funding be provided to support the participation of all applicant states in such projects.

Second, plans for a specific Directive on Disability Discrimination have been linked with the Commission's proposal for 2003 to be the European Year of People with Disabilities.⁸⁴ Similarly, 1997, European Year Against Racism, proved a catalyst for the insertion of Article 13 in the EC Treaty and the establishment of the Vienna Monitoring Centre on Racism and Xenophobia. Given the inclusive and horizontal approach implied by Article 13 EC to combating discrimination, we believe that a *European Year for Equality* would be a highly constructive initiative at this stage. This would be an opportunity to promote equality on all grounds, and in all areas of life, as well as raising awareness that discrimination is not only found within the workplace. Again, it would be essential that this initiative extended to all the applicant states.

Finally, ILGA-Europe notes that whereas discrimination on grounds of sex, racial or ethnic origin, disability and age have all been the subject of individual communications and reports from the Commission, no specific

Projects should be supported through the Article 13 Action Programme and other EU funding programmes.

A European Year for Equality would be a highly constructive initiative.

⁸² EU Council, above note 69.

⁸³ See further glee.oulu.fi/index.html

⁸⁴ COM (2001) 271.

policy documents exist in relation to discrimination on grounds of sexual orientation or gender identity. A comprehensive evaluation of the Commission's activities and policy objectives in these areas could provide greater visibility and clarity for EU anti-discrimination policy in respect of LGBT people.

Recommendations

▼ The European Union must move quickly to adopt legislation prohibiting discrimination on the grounds of sexual orientation and gender identity where this occurs outside employment.

▼ The legislation should apply to all areas falling within the powers of the European Union, including, as a minimum, social protection, social security, healthcare, social advantages, education, access to and the supply of goods and services, housing, immigration and asylum.

▼ The legislation should oblige Member States to establish equal treatment bodies with a duty to assist individual victims of discrimination on the grounds of sexual orientation and gender identity. The equal treatment bodies should have the power to investigate and pursue suspected cases of discrimination.

▼ The legislation should provide independent legal standing for organisations with a legitimate interest in the promotion of equality to challenge discrimination.

▼ Any body exercising a public function, whether at the national or EU level, should be under a duty to promote equality, irrespective of sexual orientation or gender identity, at every stage of policy formulation, implementation and evaluation.

▼ EU funding should be provided to support further research into the nature and extent of discrimination faced by LGBT persons in areas outside employment.

The Commission should propose a ‘European Year for Equality’.

▼ The Commission should present a Communication on the role of the European Union in combating discrimination on grounds of sexual orientation and gender identity.

In November 2000, the Council of the European Union adopted the Framework Directive on Equal Treatment in Employment and Occupation. This Directive, which enters into force on 2 December 2003, forbids discrimination in employment on grounds of religion or belief, age, disability or sexual orientation. It is a first, important step for the European Union in combating the entrenched social and legal discrimination that lesbian, gay, bisexual and transgender (LGBT) people face across the Member States.

This paper examines the next steps for the European Union in combating discrimination. In particular, it argues that there is a clear need for the Union to move quickly to complement the measures introduced in the area of employment with further legislation designed to prohibit discrimination in other spheres of life, such as healthcare, education and housing.