



ILGA
EUROPE 

Going Beyond the Law: promoting equality in employment

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INTRODUCTION

European Union (EU) legislation provides for the protection of lesbians, gays and bisexuals (LGB) against discrimination in the workplace.¹ Introduced in November 2000, the legislation came in the form of Council Directive 2000/78/EC² and is generally known as the Employment Framework Directive. As with all Council Directives, Member States are required to transpose the provisions of the Directive into their respective domestic laws.

The introduction of this Directive represents an important step forward in the struggle for equal rights for LGB people in the EU Member States. In their November 2006 report, the European Network of Legal Experts in the non-discrimination field state that transposition of the Directive “has immensely enhanced legal protection against discrimination on the grounds of [...] sexual orientation.” Beyond the reform of national laws, the process of transposing the Directive has meant that legislators, employers, trade unions and other relevant stakeholders have had to engage, some for the first time, with the workplace issues relevant to LGB people. The debate thus initiated, some of which has been disturbing and remains challenging, will ultimately contribute to the broader project of changing societal attitudes toward LGB people.

The European Union-wide project of reforming anti-discrimination legislation and the consequent focus on issues of equality is unprecedented and should be viewed as a hugely significant step forward. We are, however, a long way from realising the benefits that the Employment Directive purports to provide. A major concern is the fact that the response by individual Member States has varied considerably, resulting in an uneven spread of compliance. Secondly, it has become apparent that there are weaknesses and shortcomings in the Directive itself which means that aspects of discrimination against LGB people are not covered, or, in some cases, are rendered more discriminatory. Thirdly, in order to be activated, never mind effective, the legislation requires the person experiencing discrimination to come forward and initiate proceedings in order to prove the discriminatory practice and seek redress. This can be particularly problematic for LGB people. Finally, even if national laws in all Member States complied fully with the provisions of the Directive, it is a reality to be reckoned with that legislation is not enough.

One of ILGA-Europe’s key objectives is to ensure equality of LGBT people in the field of employment across Europe. The production of this document is part of our work in this area. The first version of this document was published in April 2005. This current edition, two years on, is a significant revision and update. The purpose of the document is to:

¹ The European Court of Justice (ECJ) has determined that discrimination on the basis of transsexuality and gender reassignment is covered by the sex ground. (ECJ 30 April 1996, Case C-13/94, P v S and Cornwall County Council) This ruling has been incorporated into the recast Directive on equal treatment of men and women (Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation). It is not within the scope of this publication to discuss the protection afforded to transgender people. Anti-discrimination law is complex and fragmented and remains largely untested in this area.

² Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_78_en.pdf

- Give an overview of the provisions of the Directive
- Report on the level of transposition across the European Union
- Highlight important variance in interpretation that has emerged in the transposition process
- Outline the nature of discrimination experienced by LGB people
- Discuss the impact of the Directive to date for LGB people
- Discuss important aspects of the limitations of the Directive for LGB people
- Present suggestions for action and examples of good practice for employers and trade unions
- Point toward other sources of information and resources

We hope that the document proves useful to those working towards securing rights for LGB people, including trade unions and employers, LGB representative and other human rights and campaigning organisations, as well as LGB workers who want to know their rights. The European Commission is committed to continuing to work with Member States to ensure that national laws fully comply with the principles and provisions of the Directive, including making the provisions of the law known.³ We hope that this publication will contribute to awareness and knowledge of the rights available and the responsibilities mandated through the Directive. Equality legislation needs to be supported and enhanced by other initiatives, including policy development, positive action measures, and awareness-raising and educational campaigns. ILGA-Europe recognises that the ongoing work must involve all stakeholders and be undertaken on many fronts and we are committed to working with all to ensure LGB employees in Europe experience a workplace in which they can realise their potential, free of the fear of discrimination.

³ Article 12, Council Directive 2000/78/EC



CHAPTER 1

THE LEGAL SITUATION

In the European Union, the most important legal development in the field of non-discrimination is undoubtedly the EU Directive adopted on 27 November 2000, which sets out to “establish a general framework for equal treatment in employment and occupation” on a number of grounds of discrimination, including sexual orientation. As will be detailed in this chapter, the Directive protects against discrimination in access to employment (selection and recruitment) and vocational training, in employment and working conditions (including dismissal and pay), as well as in membership in employers’ organisations or professional bodies.

Member States of the Union were under an obligation to translate the minimum standards defined in the Directive into their national legal systems by 2 December 2003. The ten Member States which joined the EU in May 2004, and Romania and Bulgaria which joined in January 2007, had to transpose the Directive prior to accession. Countries preparing to join the European Union in the future – such as Croatia, Macedonia or Turkey – are equally obliged to transpose the Directive into national law prior to their accession.

What follows is an overview of the provisions of the Directive, the level of transposition across Member States and a brief discussion of the issues that have emerged related to how Member States have interpreted the Directive.⁴ This chapter looks at the following aspects of the Directive:

- the definition of discrimination
- the scope of the Directive (who is protected by the Directive, which employment sector is covered by the Directive)
- exemptions to the application of the Directive
- enforcement of the legislation (how to put the law into effect at national level)

The range of ways in which Member States have chosen to transpose the Directive and the resultant complexity of the respective legislation are such that, in this document, it is only possible to present a brief summary of the state of transposition in EU Member States, and give examples of how the Directive has been transposed in some countries. It is important, therefore, for legal and human rights experts at national level to examine their anti-discrimination law in detail in order to determine how their national law reflects the substance and spirit of the Directive.

⁴ Information about the legal transposition in Bulgaria and Romania is not yet available.

1. Discrimination Defined

The Directive incorporates four dimensions of discriminatory behaviour: a) direct discrimination; b) indirect discrimination; c) harassment; and d) instructions to discriminate. It is important to pay attention to the definitions adopted by each country; these definitions determine what constitutes discrimination in a court of law, and therefore what type of evidence individuals have to present to prove a case of discrimination.

a) Direct Discrimination

The Directive defines direct discrimination as follows: “direct discrimination shall be taken to occur where one person is treated less **favourably than another** is, has been or would be treated **in a comparable situation**, on any of the grounds referred to in Article 1.”⁵ (emphasis added).

In effect, we can say that direct discrimination takes place when a person, because of their sexual orientation is treated less favourably than another person of a different sexual orientation.

Overview of transposition

The laws that have been enacted in the Member States on foot of the Directive share a number of important common elements in relation to indicating an incidence of direct discrimination:

- the requirement to demonstrate unfavourable treatment
- the need to illustrate a comparison with another person in a similar situation but with different characteristics
- the opportunity to cite a hypothetical comparator or one from the past
- the insistence that direct discrimination cannot be justified

Of the twenty-five Member States, eighteen have incorporated these elements into their legislation. There remains some concern that in some jurisdictions, pre-existing criminal laws do not reflect the definition of discrimination as outlined in the Directive. Moreover, in both France and the Netherlands, discrimination is not defined within the legislation outlawing it. In the case of the Netherlands however, the history of case law suggests that the operative definition of discrimination is very similar to that of the Directive. In addition, countries have taken different provisions in relation to establishing direct discrimination through a comparison. For example, Spain and Hungary have not expressly listed the possibility of using a past or hypothetical comparator.

b) Indirect Discrimination

The Directive defines indirect discrimination as follows: “indirect discrimination shall be 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** ...” (emphasis added).

⁵ Council Directive 2000/78/EC, Article 2, 2a



Overview of transposition

Twenty of the Member States have incorporated a definition of indirect discrimination similar to that of the Directive. As is the case with direct discrimination, the legislation in France and the Netherlands does not include a definition of indirect discrimination, but case law in the Netherlands would suggest compliance with the Directive.

Indirect discrimination occurs unless a provision, criterion or practice which puts persons at a “particular disadvantage” is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. However, the threshold of disadvantage in cases of indirect discrimination has been defined differently across the States, and in general, it remains to be seen whether the national laws follow the standard set out in the Directive. For example, in Latvia the legislation speaks of “adverse consequences” rather than “particular disadvantage” and in Lithuania, the approach is to examine whether practices result in any “discriminatory advantages”.

In addition, as with direct discrimination, the Directive anticipates that a comparison would be drawn to establish that indirect discrimination has taken place; this has also been interpreted differently across Member States. In Poland, the disadvantage is required to be experienced by all or a significant number of employees of a particular group. In the United Kingdom (UK), it must be demonstrated that the complainant (i.e. the person who claims to be victim of discrimination), as well as the group to which she/he belongs has been disadvantaged, while in Ireland there are restrictions on the use of a comparator in cases pertaining to indirect discrimination.

c) Harassment

In the Directive, harassment is defined as: “unwanted conduct related to any of the grounds referred to in Article 1 [which] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”

Overview of transposition

In a number of Member States the definition of harassment has been restricted in the transposition of the Directive into national laws. In Estonia, for example, the person experiencing harassment must be in a relationship of dependency, e.g. a supervisor or boss; thus it would appear to disregard the possibility of harassment coming from a peer or a colleague in the workforce, i.e., a worker on the same level.

The laws in Austria and Sweden require evidence that the dignity of the person has actually been violated, changing the criterion specified in the Directive which speaks of conduct “with the purpose or effect of violating the dignity of a person.” Moreover, while the Directive speaks of conduct which results in “an intimidating, hostile, degrading, humiliating or offensive environment”, the word “**or**” became “**and**” in Italy, thus raising the criteria for determining if harassment has occurred.

There are also examples of where interpretation at national level has gone beyond the requirements of the Directive, such as the ruling of the Czech Supreme Court which confirmed that it is sufficient if the conduct in question infringes the dignity of the group.

In the absence within the Directive of standards or approaches to determine whether or not a conduct constitutes harassment, several States have sought to clarify this in their legislation. Some States focus on the perception of the victim, while in other States a combined subjective and objective assessment is required.

When it comes to an employer's responsibility for the harassing behaviour of others – other workers or customers, for example – the Directive remains unclear. In Finland and Sweden, the law places a duty on employers to investigate and take action when they become aware that harassment may have taken place. There is no similar duty in the UK or Ireland but in both these jurisdictions, the law states that employers will not be held responsible if they can demonstrate that they have taken reasonable steps to prevent harassing behaviour.

d) Instructions to Discriminate

The Directive does not define nor give any explanatory text on “instructions to discriminate.” This would apply where an employer gives instructions to a third party, e.g. a recruitment agency, with regard to how they should carry out the task for which she/he has been contracted. Any instruction to discriminate on the basis of sexual orientation is unlawful under the provisions of the Directive.

Overview of transposition

In the vast majority of Member States, this aspect of discrimination has been incorporated. An exception is France but it is thought that laws on complicity and liability may produce the same effect. Within the UK, instructions to discriminate are covered in the laws protecting against discrimination on the basis of race, disability and religion in Northern Ireland, but the new law on sexual orientation and religion or belief in the UK does not cover the dimension of “instructions to discriminate”. It should also be noted that in Great Britain, only an equality body can initiate an action to enforce the provision related to instructions to discriminate, not an individual.

2. Scope of the Directive

a) Personal Scope

The Employment Framework Directive is applicable to all persons. This applies both to those who are protected under the provisions and also to those who are obligated to uphold the law. In effect, this should mean that protection is not conditional on nationality, citizenship or residence status. Although the Directive does not explicitly refer to natural and legal persons, it has been argued that there is no reason why the scope of the Directive should not include nationals of a third country as well as EU nationals. It also means that corporations (legal persons), as well as individuals (natural persons), are bound to obey the law and that both can be held accountable for failure to do so. Therefore, an individual owner of a business has the same responsibility not to discriminate on any of the protected grounds as does a large private corporation.

Overview of transposition

On the whole, this is the principle that is in place in most Member States. In Lithuania and Sweden, however, the law explicitly excludes legal persons (e.g. registered companies and associations) from protection against discrimination. The language used in the Austrian legislation implies that legal persons are not protected and in Estonia, the legal tradition would suggest that protection is provided only to nationals.

b) Material Scope

The Directive applies to both the public and private sectors and to all types of working arrangements, i.e. agency, contract, self-employed and temporary employment. Protection against discrimination is provided for in relation to:

- access to employment and self-employment, and opportunities for promotion
- access to all levels of vocational guidance and training, including work experience
- employment and working conditions, including dismissals and pay
- membership of trade unions and professional bodies and access to the benefits they provide.

Overview of transposition

The reports from the European legal experts in the field of non-discrimination indicate that the scope of the Directive has generally been replicated in thirteen out of the twenty-five Member States. One of the requirements of the Directive is that discrimination in the workplace is prohibited in both the public and private sectors. Not all Member States have satisfied this requirement; for example in Malta and in Estonia, protection against discrimination applies only in the private sector. In Hungary, the law lists the public and private entities that are required to enforce anti-discrimination measures

in all their actions. The result is that most public bodies are included but not all of the private sector is covered.

Another dimension of the material scope of the Directive is that its provisions are applicable to contract work, self-employment, military service and statutory office, and in this regard a number of countries fall short of this level of protection. Nine countries do not adequately cover self-employment and/or occupation. For instance, Malta, Greece and Latvia do not cover the military. Malta further falls short in that its anti-discrimination law does not apply to persons performing contract work where that work is not covered by a specific written contract. The laws in Estonia and the Czech Republic do not yet cover self-employment, while in the Netherlands the term “liberal profession” replaces self-employment, thereby requiring a broad interpretation to include freelancers, sole traders and entrepreneurs. Latvian law does not prohibit discrimination on the grounds of age, disability or sexual orientation in vocational guidance or training in the civil service. Finally, there are gaps in protection in relation to membership of employers’ and/or employees’ organisations in Lithuania, Estonia and Latvia.

It is important to note at this point that the scope of the Race Equality Directive⁶, also adopted in 2000 and often coupled with the Employment Framework Directive, covers social protection, social advantages, education and good and services, as well as employment. Thus, people are protected against discrimination because of their racial or ethnic origin in many more aspects of life than those who are protected only under the Employment Framework Directive. While many Member States have stayed within the frame of the scope required under the respective Directives, a number of countries have gone beyond their obligations in terms of transposing the Directives by applying the same protections to all grounds. Here are some examples of States that provide legal protection against discrimination beyond their obligation under the Employment Framework Directive:

- **Austria:** in some provincial legislation, protection is provided on all grounds to the full scope of the Race Directive, including in housing
- **Belgium:** the material scope is even broader than required by the Directives and protection applies to all grounds
- **Czech Republic:** legislation provides full scope protection for all grounds
- **Denmark:** legislation provides full scope protection on the grounds of religion or belief and sexual orientation
- **Finland:** a new draft legislation will ensure equal protection against discrimination to all grounds in all areas
- **France:** all grounds are protected in the area of social treatment, goods and services, including in access to housing
- **Hungary:** legislation indicates practically unlimited scope to all grounds equally

⁶Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin



- **Latvia:** a broad list of grounds is covered in the areas of social protection provided by the state as well as social security and state-provided social services. However, sexual orientation is not included in the list.
- **Lithuania:** protection provided to all grounds in education and goods and services
- **Slovenia:** all grounds are protected in areas such as social protection, social advantages, education and good and services
- **Spain:** protection is extended to religion or belief, disability and sexual orientation in the areas of social advantages
- **Sweden:** discrimination in areas of social assistance and social security is prohibited on the grounds of ethnic origin, religion or belief and sexual orientation. All these grounds, plus disability, are protected in access to goods and services.

3. Exemptions

The Directive allows for a number of exemptions, or exceptions to the implementation of the principle of equal treatment underpinning the Employment Framework Directive. These can be listed as follows:

- a)** Genuine occupational requirements
- b)** Armed forces
- c)** Public security
- d)** Positive action
- e)** Religion
- f)** Family benefits

a) Genuine occupational requirements

A job may be restricted to people of a certain sexual orientation if this is a “genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”. One may say, however, that there are very few jobs where being of a particular sexual orientation is essential to doing that job. Such requirements must be identified at the beginning of the recruitment process and clearly stated in recruitment material. Additionally, the stated requirement must always be open to challenge with a burden on the employer to prove why it is necessary.

Overview of transposition

Most Member States – 21 out of 25 – have satisfactorily transposed the Directive with respect to allowing for genuine occupational requirements. However, there is a risk with regard to the legislation of Estonia, the Netherlands, France and Poland that what is permitted in this area exceeds what is allowed under the provisions of the Directive.

b) Armed Forces

Member States are permitted to exercise an exemption to the principle of equal treatment with respect to age and ability when it comes to the armed forces.

Overview of transposition

Only a few countries have expressly indicated their adoption of this exemption, while others have retained the regulations which require consideration of age and capability in relation to the armed forces. In Italy, the law allows for discrimination on the grounds of age, disability, sexual orientation, religion or belief when it comes to assessing suitability for the armed forces, the police, prison and rescue services.

c) Public Security

There is provision within the Employment Framework Directive that allows Member States to weigh up their obligations to implement the principle of equal treatment when it comes to matters of public security and public safety, the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others.

Overview of transposition

Only in a few instances are these exemptions cited within national legislation. However, they can be read as implicit in law. That is to say that Member States will exercise the right to make decisions in the interest of public security and safety, etc., even if in some cases it means having to abandon the principle of equal treatment and discriminate against certain individuals.

d) Positive Action

While an exception to the principle of equal treatment, Member States are encouraged to use positive action measures to prevent or compensate for disadvantages experienced by a particular group. Positive action programmes are well established in many Member States in relation to the recruitment, training and general working conditions of women and of some minority groups, e.g. older people, and people living with a disability, but there are very few known positive action measures in relation to sexual orientation (see later chapters on what employers and trade unions can do to promote equality for some examples).

Overview of transposition

Most Member States have made legal provisions for the introduction of positive action measures. The scope of positive action measures often are clarified in case law. For example, the Belgian Constitutional Court has laid out four conditions that must be fulfilled: the positive action measure must be a response to situations of inequality; the need to redress the imbalance between groups must be recognised by the legislator; the measures must be temporary and terminated once the objective is reached and lastly, the measures must not exceed what is required.



e) Religion

The primary intent of the exemption for religious organisations relates to their right, as an employer, to discriminate against someone of a different religious belief. The exemption applies to Member States where laws allowing religious organisations to protect their ethos in this way were already in place prior to the Directive coming into force. Furthermore, it is to be exercised only in relation to religion or belief and in relation to a genuine occupational requirement. It should not, therefore, be used to justify discrimination on another ground, for example sexual orientation. However, the clause in this exemption which allows the employer to require their workers to “act in good faith and with loyalty to the organisation’s ethos” has been interpreted as ground for discrimination against LGB people.

It is in fact this second aspect of the religious exemption which renders it one of the most problematic for LGB people. It is an area of uncertainty which creates a great deal of fear among LGB people who are employed by church or religious organisations and, as we discuss in more detail in a later chapter, some LGB people have been discriminated against on this basis.

Overview of transposition

Not all countries have incorporated this exemption in their national legislation. However, there is concern that the exceptions based on this exemption are too wide. In Greece, for example, it applies to all persons working for public or private organisations with an ethos based on religion or belief irrespective of the nature of their activities. In Italy, it appears to apply also to organisations that do not have an ethos based on religion or belief, and in Slovakia, different treatment is permissible on the basis on age, sex, religion or belief and sexual orientation in relation to this exemption.

f) Family Benefits

One of the ways in which the Directive fails to grant equality to LGB people relates to the matter of work-related benefits granted to married couples. The Directive allows for Member States to maintain laws on marital status and benefits related to marital status.

Overview of transposition

Since most Member States prohibit same-sex marriage, LGB people are therefore at a disadvantage in that they are excluded from obtaining these benefits. It is the case that the ECJ has ruled that where marriage is available to same-sex couples, for example in Belgium, these couples should be granted the same spousal benefits given to heterosexual married couples. It is also the case that in some jurisdictions, whether because of national law or individual company policy, spousal benefits are also granted to stable co-habiting heterosexual partners, but not to same-sex partners. Clearly, these variances demonstrate a very significant flaw in the Directive. This provision means that the legislation effectively exacerbates this discriminatory practice against LGB people. In addition, this ‘exemption’ allows for different levels of equality between Member States, thus going against one of

the fundamental arguments for Community legislation which is to provide for equality of treatment throughout the European Union.

There is also a concern about what might be the implications of the fact that the “Directive does not apply to payment of any kind made by state schemes or similar, including state social security or social protection schemes”⁷. On a very broad reading of this, a State might argue that the article includes also state schemes providing occupational pensions or other benefits, which would particularly affect a person working in the public sector.

4. Enforcement of the Legislation

This section covers those elements of the Directive pertaining to how anti-discrimination at national level is to be enforced. They are:

- a) Judicial and Administrative Procedures
- b) Burden of Proof
- c) Data Collection
- d) Situation Testing
- e) Victimisation
- f) Sanction and Remedies
- g) The Role of Associations
- h) The Role of Equality Bodies
- i) Implementation & Compliance

a) Judicial and Administrative Procedures

The Directive places an obligation on Member States to provide the means whereby persons who consider that they have been discriminated against can seek redress. This means that there should be ready access to judicial and administrative procedures, which might include conciliation procedures.

Overview of transposition

All States have a range of judicial and non-judicial arrangements. Those outside of court – such as mediation and conciliation – are more accessible than judicial proceedings. In countries such as Portugal, France and Spain, cases are dealt with in a staged manner where a mediation process is part of a court proceeding. In some countries, cases involving the private sector are dealt with differently than those involving the public sector.

⁷Council Directive
2000/78/EC, Art. 3.3



Many countries have established new bodies (often called “equality bodies”) to deal with cases of discrimination and these have been granted a range of powers, ranging from non-binding decisions to binding decisions, the imposition of sanctions, recommendations, and written orders requiring employers to initiate preventative measures.

b) Burden of Proof

Under the terms of the Directive, when someone who considers that they have been discriminated against brings a case in which they present facts which are deemed to constitute discrimination, the onus or burden is on the person accused of discrimination to disprove the case. This ‘shift’ in the burden of proof unto the employer is an important aspect of the legislation and is discussed in more detail in Chapter 2.

The requirement on Member States to ensure that the shift in the burden of proof is in place does not apply to criminal cases or in cases where a court has an investigative role.

Overview of transposition

Several Member States have failed to transpose this component in line with the requirements of the Directive. Below is an overview of how it is operating in some countries:

- The UK and Portugal make provision for a shift in the burden of proof but require victims to ‘prove’ facts
- In Portugal, a victim is required to point to “the worker or workers in regard to whom he or she believes to have discriminated against”
- The provision in Italian law, which is narrowly worded, does not specify that it shall be for the respondent (or the one accused of having discriminated) to prove no breach
- In Austria, the respondent only has to establish facts from which it may be presumed that there has been no discrimination; after that the burden of proof shifts back to the claimant (or the person who considers to have experienced discrimination)
- In France, the shift in the burden of proof only applies in private employment and not in public employment; in addition, it only applies in cases of discrimination based on sex, nationality and race
- In Slovakia, claimants must submit evidence, whereas the Directive requires only to establish facts
- In Hungary, a complainant must prove that he/she possesses the protected characteristic (i.e. a person would have to prove his/her sexual orientation). The law does not cover cases of mistaken assumption
- In Malta, a complainant must provide evidence, whereas the Directive requires only to establish facts
- Lithuania and Luxembourg have made no provisions for the shift of the burden of proof
- The wording of the Estonian provision is considered to be weaker than what is required by the Directive

c) Data Collection

The Directive does not oblige Member States to collect data. It is clear however, that data is necessary in order to make appropriate comparisons and consequent assessment as to whether

discrimination has occurred. Recital 15 of the Directive provides that “the appreciation of facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.” (Data collection is further discussed in Chapter 3.)

Overview of transposition

The legislation of most Member States neither permits nor prohibits the use of statistical evidence to establish indirect discrimination. The exceptions are Belgium, Italy and Ireland. Indeed, there is very limited experience in the overall use of statistical evidence.

Data is also useful for monitoring the implementation of equality policies which is a vital aspect of the implementation of equal treatment. While in some Member States systems are in place to capture such data, in many other no such systems exist.

There are also issues around data protection. Indeed, many Member States claim that legislation regulating how sensitive data should be collected and managed prevents them from using data when it comes to monitoring equality. However, the European Network of Legal Experts in the non-discrimination field demonstrate that this claim is not justified and that it is possible to comply with the requirements of data protection legislation while at the same time use data to promote and improve equality policies and practices.

d) Situation Testing

While there was some discussion of the mechanism of situation testing in the drafting process, the Directive makes no express mention of it. Advocated by some experts as vital in assisting victims to establish a case, situation testing is effectively a type of role play. The objective is to test the situation in which a claimant alleges she/he experienced discrimination. The manner in which another person is treated is observed and used in evidence. For the purposes of situation testing, the ‘test’ person has similar characteristics to the person alleging discriminatory treatment, except that characteristic on which the alleged discrimination is based.

Overview of transposition

Found to be particularly effective in cases involving race, the use of situation testing across the Member States is uneven. In the Czech Republic it has been effective in cases of discrimination against Roma and in Belgium it is expressly recognised by law. However, in more than half of the Member States, it is not used at all.



e) Victimisation

Anyone who initiates proceedings against an employer in relation to discriminatory practices is protected, under the terms of the Directive, against victimisation. This means that if a person is dismissed or is subject to any other adverse treatment because they bring a case, the employer could be judged to have broken the law. Protection is also extended to others including witnesses and other employees of that group, e.g. other LGB employees.

Overview of transposition

Estonia and Lithuania have not transposed this component of the Directive. In a number of countries, protection is limited to the person who took the complaint. According to the UK legislation, the person is protected even when the victimisation comes from someone not involved in the original claim, so that, for example, if an employer refused to give someone a job because he/she had been involved in taking a complaint, they could be prosecuted under the law. There is a limitation in the French law which protects claimants only from dismissal and not any other adverse treatment. In Slovenia, protection against victimisation appears to be the strongest and in line with the full provision of the Directive in that it requires an employer to be proactive in protecting the claimant once discrimination is found to have taken place.

f) Sanction and Remedies

The Directive does not specify the nature or degree of sanction or penalty that should apply to someone responsible for discrimination. This is left for individual Member States to determine. It does, however, say that sanctions should be “effective, proportionate and dissuasive”. Sanctions may include compensation.

Overview of transposition

Among the reports from the country experts of the European Legal Network in the non-discrimination field, only those of Italy and Finland assess the sanctions to be in line with the Directive. It appears that in most countries, sanctions and remedies are based on a remedial approach rather than a preventive approach. Ireland perhaps is an exception in this regard in that sanctions can include a written order requiring the employers to initiate certain actions intended to help prevent discrimination in the future; these actions can include developing equal opportunities policies, arranging training for key members of staff and review of recruitment procedures.

In Spain, sanctions can be brought against employers who fail to meet standards in relation to disability. In the three cases taken in Latvia in 2005, the Court expressed the need for preventative measures to be taken. In some jurisdictions, the specialised equality body is authorised to impose sanctions. Portugal is an interesting example in terms of the range of sanctions that are available; these include prohibition from exercising one’s profession, from access to one’s establishment, from participation to trade fairs and public markets and having one’s licence suspended.

Case law from the European Court of Justice (ECJ) in cases of sex discrimination informs how courts and other relevant bodies will determine appropriate sanctions. In cases of dismissal, the sanction must include re-instatement or compensation. When it comes to compensation, national laws are not allowed to set upper limits and courts must make awards that will fully compensate the person for the damage experienced.

g) The Role of Associations

Member States are required by the Directive to ensure that organisations, such as trade unions or representative NGOs, can act on behalf of, or in support of a person who takes a proceeding in relation to a discriminatory practice (art. 9, paragraph 2).

Overview of transposition

This provision has been adopted variously by Member States. Listed here are just some examples from the many. In Sweden, procedural law allows anyone to engage in proceedings or to support a complainant. In Great Britain, complainants are supported by equality bodies, trade unions and other voluntary sector advice agencies. In the case of Employment Tribunals in Great Britain, there is the facility to represent oneself or to be represented by any other person.

The language of the provision in Lithuania implies that NGOs are permitted participation in civil proceedings. In Greece, legal entities with a legitimate interest in ensuring that the principle of equal treatment is applied can represent a claimant, with his/her written consent, in court and administrative proceedings. The same applies in Estonia, but only in conciliation proceedings.

Few States have granted associations the power to act “on behalf of” victims of discrimination. Spain has a provision for this function in cases outside of employment. The Latvian National Human Rights office is empowered to apply to the court on behalf of a claimant in civil or administrative cases. Poland has arrangements whereby an NGO can bring a claim on behalf of an individual in labour law proceedings. NGOs can also act as *amicus curiae*⁸, as can the Equality Tribunal in Ireland.

An important dimension of the discussion around this aspect is whether or not the provisions of the Directive can be interpreted to allow associations to bring cases independent of a claimant, or without reference to a specific individual victim of discrimination. This is discussed in more detail in the chapter on the LGB experience of the legislation.

h) The Role of Equality Bodies

Member States are required under the terms of the Race Equality Directive to set up a body, the mission of which is to promote equality on the ground of racial and ethnic origin. The specific functions named in the Directive include:

⁸ *Amicus curiae* refers to someone, not a party to a case, who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it.



- provide assistance to individuals pursuing a complaint
- conduct independent surveys, and
- publish independent reports and recommendations

However, the Employment Framework Directive does not include a requirement for the establishing of a specialised body to promote equality for the grounds which it covers.

Overview of transposition

While under the Directive there is no requirement for these bodies to cover all the grounds, many States have chosen to do so. Of the “old” Member States, Austria, Belgium, France, Greece, Ireland, the Netherlands and the United Kingdom have established a specialised body with authority to address sexual orientation discrimination in employment. Sweden has a specialised body dealing with each ground including one entity dealing exclusively with sexual orientation.

All of the new Member States have included all grounds within the remit of the specialised equality body. There is, however, concern about the different powers, resources and tasks that have been granted to these bodies. At a national level where there is more than one specialised body, their differing functions and power can lead to confusion. At a Community level, the differences mean that citizens in some Member States can avail of better assistance than those in other Member States.

There is some debate about the challenges faced by specialised bodies covering all protected grounds. On the one hand there is the concern that a multi-focus approach will dilute the focus, and therefore the impact, in those areas where priorities have been identified. Others argue that a horizontal approach covering all grounds enables for an equality mainstreaming approach by which each ground benefits equally.

i) Implementation and Compliance

The Directive provides for the establishment by Member States of a range of processes, mechanisms and initiatives to ensure compliance, not only with the substantive legal requirements, but also with the spirit of the Directive in relation to establishing and promoting the principle of equal treatment.

These include:

- dialogue with social partners
- dialogue with NGOs
- provision of information

Dialogue with social partners to ensure that monitoring of practices and procedures within the workplace, including collective bargaining and collective agreements, is carried out and that rules, codes of conduct, etc., be revised and amended to reflect equal treatment. The Directive also cites

providing information to people on their rights and on the provisions of the law as an important measure in the promotion of the principle of equal treatment.

Overview of transposition

On the whole, the response to these elements of the Directive has been very limited by Member States. This must be due in part to the absence in the Directive of specific standards by which compliance can be measured. Clearly these elements are important in ensuring that knowledge of and information about anti-discrimination is disseminated and debate encouraged. (The role that social partners can play in ensuring equality of LGB people in employment is discussed in later chapters.)

Infringement Procedures

The Commission has power under article 226 of the EC Treaty to take action against Member States which have not respected their obligations under EU law. There are two types of "infringement procedure". The first is when a Member State does not communicate to the European Commission the measures it has taken to transpose into its national law an EU Directive. The second is when a Member State has transposed a Directive into its national law, but has not done so correctly. In both cases the procedure is the same. The first step is the sending of the "letter of formal notice". If the Member State does not reply within two months, or the Commission is unsatisfied with the reply, it can issue a "reasoned opinion". The deadline for reply is also two months, at which point the Commission can refer the Member State to the European Court of Justice for a formal finding that it has failed to fulfil its obligations under EU law. At each stage of the procedure a formal decision of the College of Commissioners (made up of the 27 European Commissioners) is required.

The European Commission has already taken infringement procedures against some of the old EU Member States: on 20 December 2004, Germany, Luxembourg Greece, Austria and Finland were referred to the European Court of Justice for failing to transpose the Employment Framework Directive. The Directive has since been transposed in these countries.

Ongoing monitoring of the 'quality' of transposition and the implementation of the Directive is in progress. The Commission is currently in negotiations with a number of Member States and it is anticipated that in some instances referral will be made to the European Court of Justice (ECJ).



Conclusion

This section has sought to give an overview of the provisions of the Directive and the level of transposition across the European Union. Details of transposition in each member state are complex and the implications on the implementation of the legislation are unclear. Those interested in ensuring that the principle of equal treatment is adequately transposed for LGB persons, either on an individual level or at a community level, should commit to finding out the details that pertain in their respective countries. A good starting place is the series of publications by the European Network of legal Experts in the non-discrimination field, which can be accessed at:

www.migpolgroup.com/topics/2077.html or at

http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm.

These reports were the primary source of information in the compilation of this chapter.

CHAPTER 2

LESBIAN, GAY AND BISEXUAL EXPERIENCE OF DISCRIMINATION

Discrimination is the unequal treatment of an individual on the basis of some difference, perceived or actual, that the individual exhibits or represents. Often motivated by preconceived stereotypes, discrimination is some behaviour or action toward an individual based on prejudice. While many people are prejudiced against certain groups of people in society, such attitudes in themselves do not constitute discrimination. Discrimination requires action which puts an individual at a disadvantage.

This chapter will discuss how discrimination is practiced against and experienced by LGB people. It will explore how prejudicial attitudes toward lesbians, gays and bisexuals are based on assumptions and stereotypes, and how these attitudes lead to discriminatory behaviour. With numerous testimonials and examples of discrimination, the chapter also looks at the impact on the lives and careers of LGB people.



“All the time you’re on your toes, thinking what am I going to do, what should I say to this? So, yes, it does get quite heavy in the end. It gets really really heavy. How could it not have an effect on you? (...) Being on your guard all the time, watching everything you say (...). That’s how it is when you’re in the closet, isn’t it? All the time you are on your guard. You keep worrying about doing something, or saying something that will make people guess the truth about things.”⁹

From Ill-conceived Assumptions to Unfair Treatment

In the case of lesbian, gay or bisexual people a widely held stereotype is the notion that they are less suitable to work with children or young people than their heterosexual peers. An employer, who accepts this stereotype as being true and refuses to employ someone on the basis of it, is acting in a discriminatory manner. According to the law now pertaining throughout the European Union, he/she is breaking the law.

According to EU legislation there are four ways in which discrimination in the workplace can be manifest: direct discrimination, indirect discrimination, harassment and issuing instructions to discriminate¹⁰. An example of direct discrimination is when an employer denies promotion opportunities to an employee, whom he knows to be well-qualified, because he has discovered that the employee is gay and lives with his boyfriend.

Indirect discrimination occurs when a person is placed at a disadvantage when, for example, a condition that applies to everyone presents more difficulties for LGB people, e.g. bringing a partner to company functions. One way to think of the difference between direct and indirect discrimination is to think of the former being intentional and the latter being unintentional. Becoming aware of unintentional discriminatory practices, and amending them in line with the principle of equal treatment, is a legal requirement for employers.

Harassment is behaviour which creates a hostile or offensive environment for the person being harassed. It might take the form of being ignored or excluded, physically or verbally abused, outed as gay, or made the subject of jokes and offensive remarks.

If an employer asks a recruitment agency to carry out a recruitment process in such a way as to screen out or deliberately deter LGB people from applying, this can be regarded as “issuing instructions to discriminate” and violates the EU Directive on equality in employment.

⁹ Finland, Data from Questionnaire 2002/2003, Female employee, 50 years old, employed in health care sector, talking about being in the closet, source: see footnote 3, Lehtonen & Mustola (eds)

¹⁰ These are discussed in some detail in Chapter 1, “The Legal Situation”.

“What people do in the bedroom is none of our business” ...

Although it has been almost five years since the EU Member States agreed on protecting their citizens from sexual orientation discrimination in employment, progress on promoting equality for LGB people has been slow.

Studies reveal some of the reasons why: hesitation to approach what is often considered a ‘touchy subject’, lack of resources, different priorities and in most cases ignorance.¹¹ Many people are simply not aware that their colleagues may experience their daily work lives in a fundamentally different manner. A Swedish study, conducted by National Statistics Sweden in 2003, revealed that less than 1% of respondents believed that someone had been discriminated against on grounds of sexual orientation. This stands in stark contrast to the 36% of lesbian, gay and bisexual respondents who reported that they had been discriminated against in the very same workplaces!¹²

Some argue that sexual orientation is a private matter, best confined to the bedroom and has no relevance to the workplace. The flaw in this argument is that it fails to recognise the social dimension of the workplace. People’s private and family lives permeate the social situations in the workplace. There seems to be an unwritten rule that discussion about heterosexual family relations is acceptable but talk about life outside work with a same-sex partner is offensive and seen by some as promoting homosexuality.¹³

An ability to effortlessly engage in social interaction with fellow workers and to follow the requirements and norms in the workplace often forms a precondition for succeeding in one’s work and career. This possibility of informal interaction, of participating in the social aspects of working life, of talking about one’s private life is not necessarily a given for many lesbian, gay or bisexual employees.

Sexual orientation is a relevant issue in the workplace because it is part of who we are and how we live our lives. Tackling homophobia and its damaging impacts are integral to creating a healthy and productive workplace for all. This work goes beyond protection against discrimination; its larger goal is to foster acceptance of and respect for difference, and within the context of the work environment, to cultivate and promote diversity.

To hide one’s true self – coming out in the workplace

Sexual orientation differs from most other grounds for discrimination in that it can be concealed. In many places sexual orientation is still a taboo topic that is not openly discussed. A major challenge is to make it an everyday issue in the workplace. The new legislation has provided an important signal of the necessity for change in attitudes, but laws alone are not enough. General heterosexual assumptions in the workplace still force many LGB employees to ‘rearrange’ their lives by what they say and how they behave at work.

¹¹ See for instance: « Concepciones, actitudes y comportamientos respecto a la homofobia en el ámbito laboral », FELGT, Spain, 2002

¹² Statistics Sweden, Working Conditions and Exposure of LGB persons, 2003, http://app.rfsl.se/apa/19/public_files/scb_report_eng.pdf

¹³ ESF Research Report: Straight people don’t tell, do they...? Negotiating the boundaries of sexuality and gender at work, J. Lehtonen, K. Mustola (eds.), Ministry of Labour, Finland, 2004, p. 47



“I work with the under-fives. Nobody at work knows I’m a lesbian. When my long-term relationship ended, I was devastated but I couldn’t talk to my colleagues about it – none of them knew I had a partner in the first place. I know they would have supported me if it had been a marriage that ended, and it would have really helped. I felt so alone.”¹⁴

Fear of colleagues’ reactions and of jeopardising career prospects force many people to conceal everyday details that might imply same-sex relationships. Some simply conceal personal matters or disclose them only partially. Others invent stories to cover up the truth. Some avoid socialising and close personal contacts with their fellow workers. Similar strategies used include evasion, changing the subject, walking away from uncomfortable conversations, or using gender-neutral language.¹⁵

Recent research has shown that a large percentage of LGB people across the EU do not feel safe enough to be open at work. For example, in a survey carried out in France in 2006, 42% of respondents said they were not “out” in their workplace; 66% of them explained their desire to remain hidden with a fear of reprisals.¹⁶ Yet, without openness, LGB workers are forced to lead a double life and leave part of themselves at home. The oppressiveness of concealment can steal valuable energy from work. It also impinges on what people can talk about and affects other forms of participation. The constant uncertainty of maintaining a false image is wearing, both physically and mentally. It creates a sense of isolation and impacts negatively on work.

¹⁴ Stonewall, Employment Equality Regulation - Guidelines for Employers, 2003, p. 13, see: http://www.stonewall.org.uk/docs/Employers_Guide_final.pdf

¹⁵ Lehtonen & Mustola (eds.), p. 40

¹⁶ Results of the survey are available at www.autrecherche.org. A similar study was done in Poland in 2001; the report is available at http://warszawa.lambda.org.pl/dokumenty/Raport_dyskryminacja_2000_e.pdf

¹⁷ Values of Women and Men in the Maltese Island: a comparative European perspective, Commission for the Advancement of Women, 2000, p. 245

¹⁸ Sexual Orientation Discrimination in Slovenia, Report by SKUC-LL, 2001 www.ljudmila.org/siqrd/sods.html

Homophobia

As discussed above, the workplace has a significant social dimension to it. Rather than a sterile environment devoid of context, the workplace is inhabited by individuals. These individuals – be they colleagues, managers, employers or clients – bring their view of reality to work. Often, when it concerns LGB people, this view of reality is tainted by prejudice and ill-conceived notions of what it means to be lesbian, gay or bisexual.

In a Maltese survey conducted in 1999 for instance, 40% of the population stated that they did not want to have homosexuals as neighbours.¹⁷ In Lithuania, 68% of those surveyed in 2001 responded similarly. In Slovenia, the Institute for Public Affairs conducted a public opinion poll in that same year, where respondents were asked whether they agreed with the following statement: “To be homosexual is immoral, it is an aberration worth of condemnation”. 18% agreed, 33.8% were unsure and 48.2% thought that homosexuals should be treated equally to other people.¹⁸ In a similar survey carried out by the Polish Centre for Public Opinion Polls (CBOS) in 2001, 88% of Polish respondents believed homosexuality to be unnatural, 41% thought it should not be tolerated and only 5% considered it normal.

The degree of homophobia differs across the EU. Yet, even in countries where it may no longer be

Prejudice can take many forms and can be influenced by different sources. The negative image of what it means to be lesbian, gay or bisexual has often been influenced by the following ill-conceived notions:

- Homosexuality as illness
- Homosexuality as crime
- Homosexuality as deviance from the norm
 - Homosexuality as sin
- Homosexuality as sexual promiscuity

acceptable to publicly ostracise individuals based on their sexual orientation, prejudice prevails. Here an example from Germany (2002) by a CSU parliamentarian: "Leaving charity aside, we must not give the impression that this way of life is natural or self-evident, that it is acceptable for young people to decide to lead such a way of life. It is thus about time to publicly denounce this way of life as what it really is: the perversion of sexuality."¹⁹

"Hairdressers, truck drivers and ballet dancers"²⁰

Prejudice takes many forms. It can influence our basic assumptions about people, which in turn can impose limitations on those people. Consider for instance top management in a leading business: the assumption is that people in this kind of position live in heterosexual, family settings. It is almost inconceivable that senior managers could live openly as gay or lesbian. Or think of the difficult situation of gay men in traditionally male-oriented domains such as the army. Often gay men are seen as a double threat; on the one hand, they are considered too effeminate and unmanly, and on the other, too promiscuous and threatening.

Particular working environments, then, are considered unsuitable for lesbian, gay or bisexual people. Often, they are seen as a danger – a potential source of corruption – to minors. Teaching or childcare professions are therefore considered inappropriate for LGB people.²¹

In a Swedish survey in 2000, 37% of employees had a negative or sceptical attitude toward working with gay and lesbian people, 15% thought that certain jobs should be denied to homosexuals altogether. For instance, a recent study on attitudes towards sexual minorities in Latvia found that a majority of Latvians (53%) oppose discrimination against LGB in the workplace. At the same time, a sizable portion of the population, 45%, support professional bans for gays and lesbians in such places as schools and the military.²²

In Slovakia, for instance, the newspaper PRACA quotes politician Eva Slavkova (referring to the implementation of the Employment Directive): "According to the Slovak National Party, the employment of homosexual teachers can have a negative emotional and moral influence on healthy development of children. Therefore, nationalists consider the legal amendment scandalous."²³

¹⁹ "Bei aller Naechstenliebe darf in der Oeffentlichkeit nicht der Eindruck entstehen, als sei diese Lebensform etwas ganz Selbstverstaendliches, als sei es richtig, wenn junge Menschen sich fuer eine solche Lebensform entscheiden. Es ist daher an der Zeit, dass diese Lebensform endlich auch in der Oeffentlichkeit als das bezeichnet wird, was sie ist: die Perversion der Sexualitaet." Source: www.bundestag.de/mdb/home/Geis_No0/eheundfamilie.htm CSU Parliamentarian Norbert Geis, Feb.2002

²⁰ Jukka Lehtonen (ed), Sexual and Gender Minorities at Work, Finland, 2002, p. 9

²¹ See for instance: « Conceptions, attitudes y comportamientos respecto a la homophobia en el ambito laboral de Coslada », FELGT, Spain, 2003

²² Viktor Makarov, "Latvians' attitudes towards sexual minorities: dimensions and temperature", 2006, [http://iecietiba.lv/article.php?rub=4&id=1641&la=3](http://dialogi.lv/http://iecietiba.lv/article.php?rub=4&id=1641&la=3)

²³ "Report on Discrimination of Lesbians, Gay Men and Bisexuals in Slovakia", 2001, p. 55 (in www.ilga-europe.org/europe/publications/non_periodical/meeting_the_challenge_of_accession_2004)



“I got to know my sexual orientation better during my student years, and felt anguished at the Department of Psychology because of the conservative ideas about homosexuality as a disorder. (...) When I got my Master’s Degree, I did not want to look for clinical work, I though I would start feeling suffocated by the attitudes within the working community. I also thought my professional competence in helping heterosexual couples might be called into question.”

“Most people with my educational background (= language studies) end up being teachers. To be a teacher and a lesbian in a small place, a dreadful scenario...”²⁴

Occupations typically considered “gay” include hair dresser, waiter, flight attendant or artist whilst the police, the army, the church, construction and manufacturing are seen as least suitable. Lesbians are considered to be good at jobs like security guards, police, athletes, truck drivers and are seen as unsuitable for jobs in clothes and beauty shops, church, schools or kindergartens. Traditional gender norms are intertwined with the stereotypical image of gay men as effeminate and lesbians as masculine.²⁵ Such preconceived notions can be damaging to the career development of many LGB people. Evidence in the UK suggests that many lesbians and gay men choose their employment in areas of industry considered ‘safe havens’ and not necessarily those where their skills, talents and interests are suitably matched to the job requirements.

A great number of LGB people move from their communities because of prevailing negative attitudes towards non-heterosexuality. Others move because they want to live in a city where it is easier to meet other lesbians, gays or bisexuals. Choices about where to live as well as choices about training and occupation are often made on the basis of societal assumptions about what might be appropriate. It is clear from studies across the EU that LGB employees do not always use their potential to the fullest because of fear of discrimination.

Harassment

“It was just a joke... no need to get upset about it.”

Harassment can take many forms. It can involve physical conduct, ranging from inappropriate touching to serious assault. Harassment can also take the form of verbal abuse and is often implied in jokes, insults, innuendos, nicknames, teasing, and name-calling. An example of verbal harassment on grounds of sexual orientation is the use of female nicknames or pronouns when referring to gay men, or male nicknames when referring to lesbians. Implying that someone has HIV/Aids because they are gay or lesbian, or threatening to “out” a person are also forms of verbal harassment.

²⁴ Lehtonen/ Mustola (eds.), p. 159

²⁵ In Spain for instance, gay men are colloquially called “loca” or “marica” (crazy woman, sissy) and lesbians are spoken of as “camionera” or “tortillera” (truck driver)

Graffiti, posters pictures, emails can be used as ways of harassing colleagues in the workplace. It can include condescending, deprecating or bullying behaviour or unfair criticism of someone's work performance. Even where actions and comments are not apparently aimed at individuals, if they create an intimidating, hostile, degrading or humiliating environment, they constitute harassment as it is defined in the Directive.²⁶

While humour may be the spice of life and a workplace without the occasional joke would be tiresome, there is often a fine line between harmless teasing and offensive behaviour. The harmful nature of heterosexist, racist or sexist attitudes and behaviours must not be underestimated. Offensive jokes are not humorous – they are a form of psychological violence.

Detailed here are two cases of harassment on grounds of sexual orientation that were taken to justice under employment legislation:

1) Case taken under the Employment Equality Act 1998 in Ireland (December 2004)²⁷

The case concerned harassment on grounds of sexual orientation experienced by Mr Piazza, a gay man employed by a Dublin hotel. On one occasion, the hotel's restaurant manager sent an email to the human resources manager, referring to Mr Piazza as "just a bloody woman". On another occasion a kitchen steward called Mr Piazza a "bastard, gay bastard" and a "queer bastard". In a third incident, one of Mr Piazza's male colleagues said to another male colleague: "you want to fuck Gabriele". All three incidents were considered as evidence of harassment on the basis of sexual orientation and the hotel was found to be liable because it failed to respond adequately to Mr Piazza's complaints. Although the hotel held an investigation, Mr Piazza was never informed about any findings and no apology was issued. The hotel failed to make it clear that it regarded similar behaviour as serious and unlawful misconduct and it did not take any apparent steps to avoid similar incidents in the future. The case was resolved in favour of Mr Piazza, who was awarded €10,000 in compensation.

²⁶ For further details, see for instance: "Sexual Orientation Discrimination in Northern Ireland. The Law and Good Practice", Equality Commission for Northern Ireland, March 2004, p. 9-10

²⁷ Gabriele Piazza v The Clarion Hotel. Equality Tribunal decision no. DEC-E2004/033. Available at <http://www.equalitytribunal.ie>

²⁸ Guardian Newspapers Limited, 29 January 2005

2) Case brought under the Employment Equality (Sexual Orientation) Act in the United Kingdom (January 2005)²⁸

In the first successful case taken under the UK Equality Act, Rob Whitfield, aged 28, who was persistently taunted about being gay by senior colleagues, won £35,345 in compensation for

²⁹ Report "Social Discrimination of LGB people in the Czech Republic", 2003, p. 23 (in www.ilga-europe.org/europe/publications/non_periodical/meeting_the_challenge_of_accession_2004)

"I came to work and two colleagues started to harass me. They said I was a perverted homosexual and if it weren't a crime, they would have us killed. Then one of them slapped me and said people like us should not be allowed to go out. When the boss came, she fired me on the spot and said she did not want to bring shame on her business." (Czech Republic, woman, aged 19-25)²⁹



“Colleagues at work harassed me on numerous occasions. Twice it got particularly bad when one colleague said: ‘I would send all queers to Auschwitz, to the camp to get gassed.’ I did not report it to the police as the attitude of the Polish police is not all positive about gays. Many officers sneer at gays. If I reported the incidents, I could lose my job quickly.” (Poland, gay man aged 26-40) ³⁰

constructive unfair dismissal, harassment and discrimination. The case is expected to set a benchmark for employers who fail to stamp out anti-gay or lesbian harassment. Mr Whitfield was mercilessly got-at by members of the senior management team. He was nicknamed "Sebastian" by fellow managers, after the political aide played by David Walliams in the TV series "Little Britain". A company director Paul Jackson repeatedly called him "dear" after he ordered a kir royale - perceived as a "feminine" drink - at a business conference. Other staff portrayed Mr Whitfield as "abnormal" and called him "queer", a "queen" and someone who liked "poofy drinks and handbags", the tribunal was told. Giving the panel's verdict, the Chair said: "The damage done here was more than a bruise. Although the acts were not of the grossest kind - for example there was no physical abuse - the number of incidents, the repetition and the persistence constitute enough verbal blows to cause a substantial haemorrhage."

The seriousness of harassment, in all its forms, as a work-related hazard has been increasingly recognised. What might previously have been treated as insignificant isolated incidents are now being regarded as health and safety issues and as having the potential of a serious form of violence.³¹ Even the "innocent jokes" constitute harassment since the cumulative effect of such 'micro-offences' are a serious affront to a person's dignity.

³⁰ Report on discrimination on grounds of sexual orientation in Poland, Lambda Warszawa Association, 2001, p.14 http://warszawa.lambda.org.pl/dokumenty/Raport_dyskryminacja_2000_e.pdf

³¹ European agencies such as Dublin Foundation and the European Agency for Health and Safety at Work (Bilbao) address issues of violence and harassment at work. For more information and access to publications, go to www.eurofound.europa.eu/ewco/health/harassment/ for the Dublin Foundation and to <http://ew2006.osha.europa.eu/> for the Bilbao Institute.

Direct Discrimination

So far in this section we have looked at a variety of forms of homophobic attitudes and harassing behaviour. We have explored how some of the behaviours are often perceived to be innocent and harmless. The examples given demonstrate the opposite and show that, while often the full impact is not revealed, lesbians, gays and bisexuals who are subjected to harassment suffer on a range of levels. Harassment, which is now legally defined as a form of discrimination, is the most common problem faced by lesbian gay and bisexual workers. Most often it is meted out by colleagues and others associated with the work place. While employers may turn a blind eye to harassment, they rarely sanction it.

Direct discrimination, however, is generally carried out by employers, and occurs when action is taken toward a person simply because of their sexual orientation. It may result in a person failing to get a

job because she/he is LGB or because the employer thinks they are LGB. It can also take the form of extra-ordinary processes, that is to say processes which would not be applied to a straight person, as the following example of the young Swedish care work illustrates.

Case of discrimination in the job interview in Sweden:

A young woman made a complaint to the Swedish Ombudsman against discrimination on grounds of sexual orientation in relation to what she felt was unwarranted and intrusive questioning about her sexual orientation. The woman had been hired by the Family Care Unit in a local council in Stockholm as a point of contact and guidance for a young girl. The fact that the young woman was a lesbian came up during the first interview. The local council saw this as a problem and expressed concerns that the woman might initiate an affair with the young girl. They also took the position that the parents of the girl be informed. The young woman took issue with this line of argument claiming that they would not have acted in this manner had she been heterosexual. While the council acknowledged that this was the case, questions regarding her sexual orientation were asked on several occasions after this meeting before they finally hired her. On behalf of the young woman, the ombudsman reached a settlement with the local council. As part of this agreement the local council undertook to develop guidelines regarding education for employees and a policy in order to avoid discriminatory situations arising in the future. The local council also paid financial compensation to the woman and apologised to her.³²

Once in the workplace, an employer can directly discriminate against a worker by refusing to allow them to take up training or promotion opportunities; by treating them differently in relation to working conditions, pay and benefits; by sacking someone on the basis of their sexual orientation. Direct discrimination can also take place when an employer treats an LGB employee differently than they would treat a heterosexual worker.

In the next example, the deputy director of a school, suspecting that one of her teachers is lesbian, subjected her to intrusive questioning and comments. Clearly her remarks were offensive and

³² For more information on this complaint and other employment-related cases taken by the Swedish Ombudsman, see : www.homo.se

³³ Report on the Discrimination of Lesbians, Gay Men and Bisexuals in Hungary, Háttér Society for Gays and Lesbians in Hungary & Labrisz Lesbian Association, 2001, p. 27-29 www.policy.hu/sandor/report.html

“After graduating from university, I began to teach English at a secondary grammar school in Szentendre in 1999. (...) I had no problems until the end of the first semester, when the director of the school asked me if I wanted to stay on. She and the deputy director kept asking me about the way I dress. They wanted me to wear skirts. They also wanted to persuade me to grow my hair. In March the director told me that she had to bear too much criticism because of me. She said it was a denial of femininity and that I am in conflict with myself and that it could only end in a nervous breakdown. She then added that she had had a similar case before, an Englishman, who looked normal but turned out to be gay. When she found out, she immediately dismissed him, arguing that parents would not want a gay person to teach their children. She did not ask me directly whether I was a lesbian but told me clearly that I had chosen the wrong profession and should look for another job.”³³



“And then one of my friends who is gay applied for a job. When they got to the question about ‘family relations’ the interviewer asked ‘And you have a wife?’ And he said ‘Um, a companion, male!’ That was the end of the interview.”³⁴

unwarranted in terms of the work performance of the teacher. A first assessment of the deputy’s behaviour might be that she is guilty of harassment. However, since the teacher was forced to leave the job because of the persistence of this type of comment, this could be construed as constructive dismissal as the result of direct discrimination.

Indirect Discrimination

Indirect discrimination arises where a provision, criterion or practice, which cannot be objectively justified, has the effect of disadvantaging people of a particular sexual orientation. Often, indirect discrimination on the ground of sexual orientation occurs because of the assumption that all workers are heterosexual and so the workplace culture does not take account of people from another sexual orientation.

An example of indirect discrimination in recruitment procedures is when a job is advertised and application is restricted to married couples. A male gay applicant and his partner apply but are not short-listed because they are not a married couple. However, since in most EU Member States marriage is not open to same-sex couple couples, it would be impossible, through no fault of their own, to meet the application criteria. If the employer can prove that the job requires a married couple, then this restriction would be deemed to be permissible. If however, this cannot be proved, then the practice is discriminatory.

Collective Agreements and Internal Rules

All too often employee terms and conditions and benefits, which are often negotiated between employers and trade unions, are drawn up to accommodate heterosexual lifestyles and take no account of same-sex couples. The most important workplace benefit is perhaps the pension scheme and this is also the most common area in which same-sex couples are penalised. Most pension

³⁴ Male candidate during job interview in the area of traffic and transport, Finland

schemes allow only the spouse of the pension holder to benefit, thus excluding same-sex partners, regardless of how long they have been together as a couple.

Other benefits where same-sex couples are penalised relate to leave arrangements, for example bereavement or family emergency leave. Health insurance, travel concessions and relocation expenses are other types of benefit which often only apply to heterosexual married couples.

In 2004, the European Group of Experts on Combating Sexual Orientation Discrimination³⁵ undertook a study on indirect sexual orientation discrimination in relation to partner benefits. The study revealed a surprising lack of awareness of the problem amongst trade unions and employers. Many were not aware whether or not such benefits were available to same-sex couples. Furthermore, many benefit provisions in collective agreements and internal rules do not explicitly restrict benefits to different-sex partners but do not explicitly extend them to same-sex partners either. In small companies such rules are often unwritten and thus open to a greater degree of uncertainty. In short, the overall situation is one of uncertainty and lack of awareness.

Indirect Discrimination in Legislation

Another example of how indirect discrimination can occur is in relation to parental status. Where certain benefits are linked to the role of child-raising, they are frequently based on the notion that, whether married or not, the parents are of a different sex. So if one parent is not recognised as the legal parent, a same-sex couple raising a young child might be denied the right to reduce the number of hours they are obliged to work.³⁶

Although discriminatory treatment is unlawful, the following obstacles remain:

- There is a lack of awareness amongst employers and trade unions
- Employees reluctant to claim benefits covered by such rules since in most cases it would force them to come out; even though the directive protects against victimisation, prejudice and fear of harassment is often a considerable deterrent
- This type of discrimination remains a hidden issue; often rules do not explicitly include or exclude same-sex partners and in many cases the terms of collective agreements or the internal rules of employers are not readily available.

³⁵ The European Group of Experts on Combating Sexual Orientation Discrimination was established and funded by the European Commission under the Community Action Programme to combat discrimination 2001-2006. For details see: www.emmeijers.nl/experts

³⁶ Alan Littler, Thematic Study on Discriminatory Partner Benefits in: Combating sexual orientation discrimination in employment: legislation in 15 EU Member States. Report of the European Group of Experts on Combating Sexual Orientation Discrimination, see: http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/exorappen.pdf



Conclusion

In dealing with discrimination in the workplace, LGB workers face particular difficulties. One difficulty is the fear of reporting the discrimination. The great majority of LGB employees do not feel safe enough to be open about their sexual orientation at work. The fear of rejection, the perceived threats of being identified as “one of them” leads many people to remain invisible. The price of this concealment is high: isolation, loneliness, the inability to talk about one’s private life, the constant pressure of being on guard.



CHAPTER 3

LESBIAN, GAY AND BISEXUAL EXPERIENCE OF THE LEGISLATION

The first observation that can be made in relation to how LGB people have experienced the new anti-discrimination legislation is that very few cases have been taken, and even fewer have been successful. This in itself represents a challenge to further potential claimants. People need to see the law in operation if they are to be encouraged to claim their rights.

It is early days for any substantive evaluation of how effective the legislation is in realising equal treatment, and therefore a better way of life, for lesbians, gay men and bisexuals in employment. One of the barriers to adequate implementation of the law that has been identified is the lack of information about the details of the legislation – even about its existence.³⁷ It is timely, therefore, to revise our publication of April 2005 by discussing how the Directive has been transposed and the extent to which LGB people have benefited from it. We will look at the experts' view and at relevant case law. The aim is to raise awareness and to encourage observers and activists to become more familiar with the details of how the law is being implemented in their country.

This section of the report looks at those aspects of the Directive that present particular challenges for LGB people and some current and pending court cases. The aspects of the Directive which arguably present the most potential difficulty are: (1) the exemption to the principle of equal treatment on the basis of an ethos based on religion or belief; (2) the exemption in relation to family benefits; (3) burden of proof; and (4) accessing justice.

³⁷ According to the 2007 Eurobarometer, only 30% of the public in the EU is aware of existing legislation prohibiting discrimination on grounds of sexual orientation. http://ec.europa.eu/public_opinion/archives/eb_special_en.htm - Eurobarometer 263 (EB65.4)



Exemption for Religious Ethos

As stated in Chapter 1, this exemption was intended to allow employers with an ethos based on religion or belief to discriminate against someone whose religion or belief was incompatible with the employer's ethos. The exemption was intended to apply only to the ground of religion or belief, which means that under this exemption, employers can not discriminate against someone on the basis of age, or ethnic background, for example, nor on the basis of sexual orientation.

However, the clause in the exemption which allows the employer to require their workers to "act in good faith and with loyalty to the organisation's ethos" poses a potential risk of discrimination on the basis of sexual orientation and has in fact been used as ground for discrimination against LGB people. Crucial here is who decides what it means to act in good faith and with loyalty, and according to what criteria? Is it enough for a religious organisation to hold a position that homosexuality is in conflict with its religious ethos for them to exercise a right to discriminate against lesbians and gays? What about those lesbians and gays who practice the religion espoused by the organisation and who can demonstrate good faith and loyalty to the organisation? One could perhaps find many heterosexuals whose behaviours or associations outside of work might be deemed to be antithetical to those of the religious organisation for whom they work. A person's sexual orientation does not preclude them from fulfilling their work responsibilities without endangering the ethos of their employer while at the same time living their own life in freedom.

The impact of the exemption is likely to be experienced on a number of fronts. In the first instance, it is likely to deter LGB people from applying for jobs within such organisations, which in some fields of employment, such as education, could prove to significantly limit their options. Those who might not be deterred from applying might choose instead to hide their sexual orientation and suffer the difficulty which that entails.

There is also the consideration of those already employed within organisations with a religious ethos. It could be argued that their position has become more difficult since the introduction of the equality legislation, in that the right of employers with an ethos based on a religion or a belief to discriminate has been made explicit in this exemption. This kind of situation – on the one hand fear of uncertain consequences and on the other hand the potential threat implicit in the power granted to the employer – is more conducive to the regression of rights than it is to the promotion of equal treatment.

Relevant Cases

*Háttér v Karoli Gaspar Calvinist University (Hungary)*³⁸

A case taken in Hungary illustrates one aspect of the challenges around the exemption for religious ethos. The case involved access to education, not employment. However, the legislation in Hungary went beyond the scope of the Directive to include education. The Theological Faculty of Karoli Gaspar Calvinist University in Hungary wanted to exclude students who followed a “homosexual way of life” from being educated as pastors or religion teachers. The Supreme Court of the country ruled that it was permissible to exclude lesbians and gays given that they might later become pastors.

On 10 October 2003, the Council of the Faculty of Theology deemed that a student, whose homosexuality had become well-known, was unfit to be a minister and decided that the person concerned should not continue his studies in the institute. On 28 November 2003, the Faculty Council decided to uphold its initial decision but offered the student to continue his studies in another faculty where lay theologians as well as ministers are educated. The student decided to go to court to challenge the Faculty’s decision and to seek remedy. In the case, the student was represented by Háttér Support Society for LGBT People, a non-governmental organisation working for the protection of human rights and against discrimination against lesbians, gays, bisexuals and transsexuals.

In its action, submitted on 10 February 2004, Háttér - alleging the breach of the right to equal treatment – applied to enforce its inherent rights based on Article 76 of Civil Code. Háttér emphasised that the perspectives concerning homosexuality developed by the Faculty serve as principal basis for the practice which makes the possibility of participating in education dependent upon sexual orientation. By excluding non-heterosexuals from the education of ministers and theology-teachers, the Faculty regards heterosexuality as a precondition for admission to this education. Háttér demanded that the court declare that an infringement had occurred, to oblige the respondent to make an appropriate public disclosure for restitution, to withdraw the contested statement, to pay non-pecuniary damages and to pay fine to be used for public interest. In this case, the Court ruled in favour of the Theological Faculty.

Case of Maris Sants

A recent case taken in Latvia involved a Lutheran minister, Maris Sants, who had lost his job after he came out about his homosexuality. This was widely reported and therefore widely known. When he subsequently applied for a job as a history teacher, and despite initial encouragement by the institution to do so during a phone enquiry, he was later told that the position had been filled. He was told that the position had already been filled by the time he applied and that the contract with the successful candidate was awaiting completion following the candidate’s return from vacation.

³⁸ More information is available at www.hatter.hu/en/



In the court case which ensued, the Court found that the school was still actively seeking to fill the position when the claimant, Maris Sants, submitted its application. The Court also found that the claimant was more experienced than the successful candidate. The Court concluded that because the more qualified candidate had not been invited for an interview, the school acted discriminately on the basis of the claimant's sexual orientation. The claim for pecuniary damages was denied but moral damages in the amount of LVL2 2,000 (€2,500) were awarded.

This was the first case taken in Latvia based on the non-discrimination provisions of the Labour Law. It was particularly important because it established that sexual orientation, though excluded from the protected grounds listed in the law at the time, was to be considered a prohibited ground of discrimination. In September 2006, the Latvian parliament voted to explicitly ban discrimination on the ground of sexual orientation in employment and housing. The bill had been rejected in June 2006, an act which resulted in considerable condemnation and warning from both the Prime Minister and the President of Latvia, but also from the European Parliament and by the European Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimir Spidla.

Case of a youth worker with the Church of England

In 2007, a case was brought before the UK Employment Tribunal regarding a refusal by a Church of England bishop to appoint a gay man as a youth worker. In this case, the Right Reverend Anthony Priddis, Bishop of Hereford, admitted having blocked the appointment of John Reaney, but he denied that it was because Reaney was gay; the bishop explained that his decision was based on the fact that Reaney was having sex outside of marriage. Bishop Priddis also said that he had made it clear to Reaney that a person in a committed sexual relationship outside of marriage, whether they were heterosexual, homosexual, bisexual or transgender, would also be turned down for the role which he said was a key appointment within the diocese. Reaney disputes this and claims his homosexuality was the only reason he was turned down for the job. The judgement of the tribunal is pending as of April 2007.

Exemption of Family Benefits

One of the ways in which the Directive fails to grant equality to LGB people relates to the matter of work-related benefits granted to married couples. The Directive allows for Member States to maintain laws on marital status and benefits related to marital status. Since most Member States prohibit same-sex marriage, LGB people are therefore at a disadvantage in that they are excluded from obtaining these benefits. Where marriage is available to same-sex couples³⁹, same-sex married couples should be granted the same spousal benefits given to heterosexual married couples. In

³⁹ Belgium, Spain and the Netherlands

some jurisdictions, whether because of national law or individual company policy, spousal benefits are also granted to stable co-habiting heterosexual partners, but not to same-sex partners. In the UK, following the introduction of legislation to allow same-sex couples to register their partnership, the regulations governing equality in employment were amended to enable same-sex couples the benefits previously reserved for heterosexual married couples.

Clearly, these variances demonstrate a very significant limitation for LGB people in the implementation of the principle of equal treatment. On the one hand, the legislation effectively exacerbates this discriminatory practice against LGB people. In addition this 'exemption' allows for different levels of equality between Member States, thus going against one of the fundamental arguments for Community legislation.

There is also a concern about what might be the implications of the fact that the "Directive does not apply to payment of any kind made by state schemes⁴⁰ or similar, including state social security or social protection schemes". On a very broad reading of this, a state might argue that it includes also state schemes providing occupational pensions or other benefits, which would particularly affect person working in the public sector.

An emerging issue in this area relates to the coming into force of the EU Directive on the right to free movement.⁴¹ Adopted in 2004, the Directive was due to have been transposed into national legislation by April 2006. The Directive sets out the conditions under which EU citizens can move to another Member State and take up residence there. Of particular relevance to LGB people is how the rules on movement apply to same-sex couples. In the consultations on the text of the Directive, ILGA-Europe sought to have the rights of same-sex couples covered. However, the final text is unclear. On one hand, Article 2(2) simply states: "'family member' means... the spouse'. On the other hand, the preamble of the Directive includes the following statement: 'Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as... sexual orientation.' Although the preamble is not legally binding, it will be used by the Court of Justice to guide interpretation of the Directive.

On the basis of the preamble, it could be argued that same-sex spouses are covered under the provisions of the Directive on freedom of movement, because to exclude them would mean discrimination on the grounds of sexual orientation. Indeed, it is anticipated that the law will be tested in this regard over the next number of years as same-sex couples exercise the right to move within the European Union. Marriage is a status granted by national law; therefore, the EU should not distinguish between legally contracted marriages within the Member States. It will be important to observe what happens when same-sex couples, who marry in the Netherlands, Belgium or Spain, exercise their right to move to another Member State where same-sex marriage is not available,

⁴⁰ Directive 2000/78/EC, Art. 3.3

⁴¹ Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States



seeking the same level of rights as a married couple. In any event, it will be up to the Courts to make rulings in such cases which can then be used as precedent.

Under the Directive on freedom of movement, the situation with regard to same-sex registered partners is somewhat clearer, though not entirely. The Directive allows for free movement for those who formed a partnership in an EU Member State and who want to move to a country where a similar arrangement for registration is available. In cases where a Member State is preparing legislation to bring in same-sex partnership registration, that country is required to accommodate the free movement of registered partners. Where the Directive remains unclear is in relation to the diversity of arrangements within the EU with the corresponding range of rights available.

In the context of this discussion of the Employment Framework Directive, the issue at hand is the potential for conflict when the two Directives intersect and the ensuing impact on protection from discrimination in the workplace. Will the prospect of non-recognition of a partner deter same-sex couples from moving, thereby forgoing the right of free movement, never mind employment and other life options? What of the same-sex couple, temporarily resident and married in one of the three countries where marriage is permitted, returning to their home country where neither same-sex marriage nor partnership registration is permitted? And what about the same-sex married or registered couple, one of whom is an EU citizen and the other from a third country who want to, or who are required by work to, move to another EU country? These are important questions which require attention by both law makers and by all those charged with ensuring that the principle of equal treatment is upheld. It is anticipated that these issues will be clarified in the courts as cases are taken by LGB seeking to exercise their full rights.

Relevant Cases

Germany

A female civil servant in Germany applied for supplementary payments granted by her employer to married couples. The woman was in a registered partnership with her female partner according to the procedures available under German law. When she was denied the supplemental payments, she took a case to the Federal German Administrative Court claiming a violation of the principle of equal treatment concerning employee benefits for homosexual partnerships. In January 2006, the Court ruled that the woman had not been discriminated against and that her employer was acting legally in granting certain benefits only to married civil servants and not to those in registered partnerships. The Court further ruled that the constitutional guarantee of equality is not violated due to the special protection granted to marriage under the law and EU law is not violated as it prohibits unequal treatment on sexual orientation but allows for advantages connected to family status.

ILO Tribunal

In a ruling from the International Labour Organisation's Administrative Tribunal, the Food and Agriculture Organisation (FAO) – a United Nations agency – was ordered to recognise a Dutch marriage between a male employee and another man for the purposes of staff benefits. The employee had complained of a decision of his employer not to pay him the benefits that married employees are entitled to according to the staff regulations. The ILO Tribunal ordered the FAO to pay the benefits retroactively and also to pay moral damages (of 10,000 Euros) to the employee for having denied the employee his rights. (Judgment No. 2590, 7 February 2007)

Burden of Proof

"Proof is often an insurmountable obstacle in cases of discrimination."⁴² This challenge is not new. The experience of the courts in dealing with cases of sex discrimination resulted in a body of case law which introduced a shift in the burden of proof. If a woman could show that a group of women is less well paid than a group of men performing similar work, the responsibility shifts to the employer to prove that such unequal treatment is not based on gender. Ultimately, the EU adopted a Directive mandating that procedures at national level incorporate the principle of the shift of the burden of proof in cases of sex discrimination.

This principle is integral to the Employment Framework Directive and its optimum transposition and implementation is vital to the effectiveness of the legislation. However, in order for the shift in the burden of proof to come into operation, a claimant needs to get past the first post, i.e. show that on prime facie evidence, discrimination can be presumed to have taken place. As has been noted earlier, few cases brought by LGB people have been taken and even fewer have been successful, often because of lack of evidence to indicate discrimination. In most instances, the information about how the discriminatory behaviour was decided is in the hands of the employer.

The use of data is an important tool in the implementation of the equal treatment laws. Ninety three per cent of respondents to a survey conducted by the EU Commission, who were mostly experts in the area of non-discrimination, reported that data collection is important or very important in the development of policies to promote equality. However, the November 2006 report of the European Network of Legal Experts in the non-discrimination field concludes that data is "a seriously under-utilised tool to secure and promote the realization of equal treatment"⁴³

The report discusses three key ways in which data can be used to ensure compliance with equal treatment legislation:

⁴² Isabelle Rorive, European Anti-Discrimination Law Review, Issue No. 3, April 2006

⁴³ Measuring Discrimination, Data Collection and EU Equality Law, Timo Makkonen, European Network of Legal Experts in the non-discrimination field



Within the context of legal proceedings taken on behalf of individuals, data can be used to demonstrate unequal treatment, in both cases of direct and indirect discrimination. Given that discrimination is often subtle, and therefore difficult to prove, statistical evidence can be powerfully revealing. It is also often the case that much of the important information in cases of discrimination is in the possession, and therefore the control, of the respondent. In such instances independent statistics can form a persuasive part of the claimant's evidence. It would appear that the under-usage cannot be attributed so much to the complexity involved constructing comparator groups or in calculating relative disadvantage, but rather to the more fundamental issue of the lack of data collection in the first instance.

- Within the context of legal proceedings taken on behalf of individuals, data can be used to demonstrate unequal treatment, in both cases of direct and indirect discrimination. Given that discrimination is often subtle, and therefore difficult to prove, statistical evidence can be powerfully revealing. It is also often the case that much of the important information in cases of discrimination is in the possession, and therefore the control, of the respondent. In such instances independent statistics can form a persuasive part of the claimant's evidence. It would appear that the under-usage cannot be attributed so much to the complexity involved constructing comparator groups or in calculating relative disadvantage, but rather to the more fundamental issue of the lack of data collection in the first instance.
- Data collection has proved very useful in monitoring compliance with equal treatment legislation and polices in the workplace. Such monitoring involves obtaining basic data on the composition of the workforce, such as age, ethnic origin and gender in order to observe under-representation of one section of the community, for example. Workplace monitoring is considered to be highly effective and yet only a few EU Member States have systems in place to capture data.
- When it comes to the analysis of the causes, extent and effects of discrimination, quantitative and qualitative data plays an important role. Many, if not most, EU Member States do produce some data in this respect but it is limited in terms of the grounds covered and the methods used.

As a means of obtaining information, an effective tool used in the UK permits claimants to send a questionnaire to respondent. Some of the questions are general and refer to the existence of an equal opportunities policy, while others are more specific questions asking, for example, about training on discrimination for key players. The returned questionnaire can be submitted to a court by the plaintiff and the judge is permitted to draw conclusions as may be appropriate to the case. This can include conclusions in relation to evasive or equivocal replies.

"Situation testing" is considered by experts to be another important way of getting past the first post

to enable the burden of proof to become operational. While there was some discussion of the mechanism of situation testing in the process of drafting of the Directive, the EU legislation makes no express mention of it. The objective of this mechanism – which is based on a type of role play – is to test the situation in which a claimant alleges she/he experienced discrimination. The behaviour adopted with another person who has similar characteristics to the claimant, except that characteristic on which there is an alleged discrimination, is observed and used in evidence. In her discussion of the pros and cons of situation testing, Isabelle Rorive of the Faculty of Law at the Free University of Brussels concludes that unless we are willing to use non-traditional methods of proof, “the legal principle of equal treatment risks being reduced to a declaration of good intent that exists only on paper, with no connection to social reality”.⁴⁴

Accessing Justice

Making the processes whereby a victim of discrimination can find redress is a legal requirement of Member States under the provisions of the Employment Framework Directive. Chapter 1 of this document details all those measures covered in the Directive by which access to justice can be made easier, whether it is by allowing NGOs, equality bodies or trade unions to take up cases on behalf of those who experience discrimination. In addition to adequate implementation of all facets of the Directive, national authorities need to be vigilant in identifying challenges and barriers as they are revealed. This should ideally include being aware of current legal analysis, the observations of human rights and other discrimination-focused NGOs as well as those challenges that become apparent in the actual experience of victims of discrimination

One crucial challenge however remains that, in order for the law to become operable, the burden is on the person who has been discriminated against to initiate proceedings. Without activation by an individual who has experienced discrimination the law remains dormant and without power. This model of legislation, then, depends on the commitment and determination of the individual claimant. Additionally, this type of anti-discrimination legislation is designed to deal with discrimination after it has happened rather than providing for a co-operative environment where employers are encouraged to take a proactive approach to reforming discriminatory practices.

In the case of LGB people, deciding to take a case can be particularly problematic because of fears of being out and the potential they face, therefore, of exacerbating their problems at work. They run the risk of not gaining the support of co-workers because of homophobia.

Clearly, however, LGB people would not be the only ones to benefit from a legislative environment

⁴⁴ Isabelle Rorive, European Anti-Discrimination Law Review, Issue No. 3, April 2006



that was less reliant on the individual enforcement model. Positive duties, such as exist in Northern Ireland and on some grounds in other parts of the UK, have the potential to prevent discrimination before it can happen, while encouraging employers to pursue proactive equality-promoting policies and practices. A positive duties model means employers can be cast as potential enforcers of equality rather than defenders against discrimination. (See following chapters for examples of proactive measures which employers and trade unions can take.)

Another aspect of the difficulty of accessing justice relates to the imbalance in the capacity of the individual victim and that of the employer. Professor Miguel Polares Maduro, Advocate-General at the European Court of Justice draws attention to two key facets of this imbalance.⁴⁵ The first is the information costs involved in taking a discrimination case to court and how this acts as a deterrent. The 'one-shot litigant' is faced with lack of capacity in terms of accessing appropriate information and also of organising the information. This is especially so in comparison to those against whom the case is taken, who very often have gone through the process before and for whom the costs of information do not have to be repeated. The second relates to the capacity of the person bringing forward a case of discrimination when it comes to access to lawyers.

The capacity of associations to support individual claimants and/or to act on behalf of claimants merit closer consideration as a way, in the first place, of ensuring that cases are taken and also that the strongest case possible is put forward. Some experts believe that empowering organisations to take cases independent of a specific individual claimant is the only way to address particular forms of structural discrimination.⁴⁶

⁴⁵ European Anti-Discrimination Law Review, Issue No. 2, October 2005

⁴⁶ Professor Miguel Polares Maduro, European Anti-Discrimination Law Review, Issue No. 2, October 2005

⁴⁷ A research undertaken jointly by the Equality Commission for Northern Ireland and the Irish Equality Authority on the particular challenges faced by LGB people in accessing justice should be published in the autumn of 2007. The research is expected to "identify strategies whereby specialized equality bodies can enable lesbian, gay and bisexual individuals to secure their rights under equality law."

Finally, consideration needs to be given to those Member States where societal attitudes remain strongly prejudiced and hostile toward LGB people, despite the introduction of anti-discrimination. Such environments mean increased challenges for LGB in accessing their rights.⁴⁶ The banning or curtailment of gay pride parades, the attempt to explicitly prohibit LGB people from particular professions, and the negative media coverage and public discourse about LGB people represent the negative public attitude which prevails in some Member States. These forces work against the implementation of anti-discrimination and lessen the capacity of LGB to exercise their rights under the law.

Below are brief overviews of some of the cases that have been taken by LGB people since the introduction of anti-discrimination legislation in their country.

Northern Ireland

In Northern Ireland, a 23 year-old man brought a case to the Industrial Tribunal under the Industrial Tribunal under the Employment Equality (Sexual Orientation) Regulations (NI 2003). The man worked

in a warehouse owned by Next (a clothes and home furnishing company) where he had been subject to homophobic harassment through name-calling and verbal insults. He also claimed he was humiliated by inappropriate questions about his sexual preferences.

In settling the case, Next denied liability but also acknowledged that the employee had brought the proceedings in good faith. The company paid £5000 in compensation and reaffirmed its continued commitment to the principle of equality of opportunity and undertook to train all temporary staff employed in its warehouse in its equal opportunities policies. In taking his case, the man was supported by the Northern Ireland Equality Commission.

United Kingdom

In 2005, Mr Lewis, the global head of equity with HSBC bank, was dismissed for gross personal misconduct. Another male employee of the bank accused Mr Lewis of sexual harassment and inappropriate behaviour in the bank's gym. In bringing the case to the UK Employment Tribunal, Mr Lewis alleged that his dismissal was motivated by homophobic prejudice. The Tribunal found that he was not fired because of his sexual orientation. However, it also found but that he was discriminated against in relation to how the bank's internal investigation was conducted and in the decision to suspend him. Damages remain to be decided.

Poland

In May 2005, a young man brought a case to the District Court in which he made a claim for compensation for unlawful dismissal from work. The claimant's work had been negatively evaluated by his supervisor and his claim was that this was because of his sexual orientation. In March 2006, the Court found that the claimant had not proved facts and the case was dismissed without shifting burden of proof to the employer. The Court established that the employer did not know that he was gay and this was an unknown fact which could not have been made public. The Court did recognise that the claimant felt pressure and criticism at work but that it was not clear whether this was because he was gay or just incompetent at his job.

Spain

The airline company, Alitalia, dismissed a gay man for indiscipline. The man applied to court to have the dismissal cancelled on basis that he was discriminated against because he was gay. The Court upheld his claim of unfair dismissal but his ruling was overturned on appeal. The case was brought finally to the Constitutional Court which agreed with the first court that he had been unlawfully dismissed. The Court ruled that Alitalia should reinstate the worker and that it should pay his full salary retroactively. The Court referred to the Directive in ruling that while sexual orientation was not listed in the national legislation as a protected ground, it was obviously intended under 'any other circumstance.'



CHAPTER 4

EMPLOYERS' OBLIGATIONS & GOOD PRACTICE OPTIONS

Social partners (i.e. employers and trade unions) have a central and unique role to play in the implementation of the Directive. On the one hand, employers are bound by law not to discriminate on the basis of sexual orientation and to ensure that others in the workplace do not discriminate against LGB people. On the other hand, they can significantly contribute to advancing equality more broadly in society and to changing mentalities.

In this chapter, we suggest measures that employers can take to ensure that they meet their obligations under the Directive where LGB people are concerned. We also set out guidelines for employers to go beyond the letter of the Directive and proactively promote equality in the workplace for their LGB employees.

Employers' Obligations under the Directive

1. Recruit, select and promote fairly

Under the Directive, employers have an obligation to prevent direct discrimination in employment on the basis of sexual orientation, i.e. unfavourable treatment in recruitment, selection and promotion because of a person's sexual orientation. This means that employers have to review all policies, including recruitment processes and criteria, terms and conditions, collective agreements etc in order to ensure they comply with the legislation. In order to bring policies and practices in line and thus avoid contravening to the provisions of the Directive, it may be necessary to consult legal advice.

In practice however, equal opportunities policies of employers alone are often not enough to ensure that discrimination does not take place. Recruitment processes can be discriminating for lesbians, gay men and bisexuals; in many cases, this is unintentional – an application form that asks whether you are married, single or divorced for instance – or the interview question enquiring about the candidate's personal life. Performance management as well can put LGB people at a disadvantage. There are numerous examples of LGB employees that have been passed over for promotion, disciplined unfairly or dismissed for no good reason.

If employers want to ensure that they are complying with the law – and thus avoiding potential litigation – as well as to recruit and retain good employees, they should complement equal opportunities policies with concrete action throughout the steps of an employee life cycle. Some of these actions could be defined as “soft” forms of positive action.⁴⁸

In order to ensure fair recruitment, selection and promotion, employers should:

- **let people know they are welcome to apply:** this includes thinking about where advertisements are placed and the language which is used; recruitment literature could include any LGBT initiative undertaken (e.g. extending benefits to same-sex partners or supporting employee networks), as well as information on diversity policies in place; LGB staff can be consulted to help make policies and procedures inclusive and effective; methods used for monitoring recruitment of other minority groups may be extended to LGB people where appropriate
- **application forms should reflect equal opportunities policies:** avoid questions about marital

⁴⁸ In “Positive action – Introducing the concept”, Mark Bell defines “soft” forms of positive action as “steps [that] do not directly impinge on the prerogatives of advantaged groups (e.g. men or able-bodied persons), but rather constitute extra efforts on the part of the employer or service provider. Outreach advertising is a good example; this is where a firm includes a statement in a job advertisement specifically welcoming applications from a currently under-represented group (e.g. women).” in Putting Equality into Practice: What role for positive action?, European Commission, DG Employment and Social Affairs, 2007.

JP Morgan undertook a recruitment campaign targeting LGBT university networks. This included sponsoring a gay-friendly careers booklet for Oxford University students.



Citigroup UK sponsored recruiting events and career fairs for gay and lesbian students at London Business School, Oxford, INSEAD and the LSE.

status, spouse/ partner or other personal circumstances; exercise caution when taking into account information provided in an application form in relation to an applicant's criminal record (Laws relating to gay men have changed significantly over time. It is possible that applicants may have acquired a criminal conviction on a matter no longer considered unlawful.)

- **ensure fair references:** make supervisors/managers aware that all informal or formal references should be fair and non-discriminatory (not influenced by personal prejudices relating to individual's real or perceived sexual orientation)
- **make the recruitment process transparent:** be open about the recruitment process, keep record of each stage of recruitment, deal promptly with any complaints
- **train the decision-makers:** make sure recruiters do not make unfounded assumptions based on stereotypes; instruct selection panels to avoid questions about a candidate's marital status or other personal circumstances which may be perceived as intrusive and imply potential discrimination; set up system so that staff know where to go if they think the interviewer has made prejudiced remark or decision
- **create the right climate:** communicate that recruitment, promotion, rewards and dismissal are based on merit and competence; management development should include diversity awareness as one of key competencies
- **develop formal performance management systems:** introduce performance management systems based on competencies for each job

2. Tackle workplace bullying and harassment

A second obligation for employers under the Directive is to protect their employees against harassment. Indeed, the Directive classifies harassment and bullying as a form of discrimination. Harassment is probably the most common form of discrimination experienced by lesbian, gay and bisexual people at work. While more and more employers have harassment policies, these policies often do not specifically refer to harassment on grounds of sexual orientation. Moreover, lesbian, gay and bisexual workers who complain of harassment are accused regularly of being oversensitive, having no sense of humour or of 'bringing it on themselves' by not hiding their sexual orientation. Even more often, LGB employees are afraid to even make a complaint.⁴⁹

The seriousness of harassment as a psychological form of violence is well recognised. By not acting to prevent bullying and harassment, employers are not only breaking the law and as a consequence risking litigation, they also risk increased levels of sick leave, higher rates of resignations and lower levels of commitment and productivity.

⁴⁹ UNISON, Equalities in UNISON: Bargaining Support Guide, Negotiating Equality for Lesbian, Gay, and Bisexual Workers, December 2003, p. 14 (www.unison.org.uk/out/index.asp)

To tackle workplace harassment and bullying, employers should:

- **communicate to staff that harassment is unacceptable and unlawful:** adapt existing harassment policy to specifically cover harassment on grounds of sexual orientation; make specific references to harassment in induction programmes, secure support of managers and staff; consult on policies with appropriate trade unions, employee representatives and directly with employees
- **make it easy for people to report a problem:** provide several routes for making complaints; ensure confidentiality; assess what practical steps can be taken if no formal complaint is made; individuals may be reluctant to bring forward a complaint for fear of being outed; they may be concerned that a complaint is not taken seriously or that he/she will be victimised if a complaint is brought; it might prove useful to have a designated advisor who is appropriately trained
- **deal effectively with complaints:** ensure that complaints are dealt with promptly, seriously, sympathetically, confidentially and effectively; take all reasonable steps to make sure that those who do make a complaint are not victimised because of it, as it is an obligation under the Directive to protect anyone who initiates legal proceedings from victimisation
- **monitor complaints and review policy:** establish procedures for the investigation of complaints; make sure the process is transparent and support mechanisms are available for complainants; train managers on review procedures; collect data on how complaints have been handled, the timeframe, the actions taken and outcomes achieved

3. Review terms and conditions

One of the most important ways in which LGB people are indirectly discriminated is through non-recognition and/or non-acceptance of same-sex couples and partners. As mentioned in the chapter on “LGB experience of the legislation”, the Directive allows for Member States to maintain laws on marital status and benefits to marital status. In other words, in countries where there is no recognition of same-sex marriage and/or registered partnership, there is no obligation on the employer to extend benefits (such as pensions and special leaves) to same-sex couples.

This being said, in countries which recognise same-sex marriage and/or registered partnership, the failure by an employer to provide the same work benefits to married and/or registered same-sex

Britain: Stonewall's Diversity Champion Scheme

Launched in 2001, the Diversity Champions programme is an acclaimed scheme which helps organizations to improve their working environments for LGB employees. Top UK members include IBM, Lehman Brothers and Ford from the private sector, and the British Council, Department of Trade and Industry and Metropolitan Police in the public sector. Diversity Champions provides a forum for employers to: develop good practice; discuss what works and what doesn't; understand the issues faced by LGB employees and service users; find out more about the impact of the lesbian, gay and bisexual markets. To find out more, visit: www.stonewall.org.uk/workplace/



couples can be construed as indirect discrimination. Similarly, in organisations which grant benefits to unmarried cohabiting heterosexual couples, not offering those same conditions to unmarried cohabiting same-sex couples could also constitute indirect discrimination. However, given the limitations of the Directive on this issue in most countries, extending work benefits to same-sex partners remains a matter of good practice and “positive” action to promote equality as opposed to a matter of obligation. Examples of such practices are cited below in the section “Good practices and business case for diversity”.⁵⁰

4. Publicise, implement and monitor the policies you adopt

Policies are worth little if they end up gathering dust in cupboards. Employers need to ensure that their organisation's practices are in line with the policies that are adopted. They are of little use, if nobody knows about their existence.

To ensure the usefulness of non-discrimination measures, employers should:

- include a measurable **action plan** on equality for LGB people
- keep local managers' discretion to a minimum to ensure **consistency** across the board
- effectively **communicate all equality and harassment policies** and procedures to employees, contractors and agency staff – e.g. through staff briefings, contracts of employment, staff handbooks, notice boards, circulars, written notifications to individual employees, trainings, publications, advertisements
- publicise clearly that complaints procedures are confidential
- put into place a monitoring system of the take-up of policies

⁵⁰ For more information, see Alan Littler, Thematic Study on Discriminatory Partner Benefits in: Combating sexual orientation discrimination in employment: legislation in 15 EU Member States, at http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/sexorappen.pdf

European Gay and Lesbian Managers Association

EGMA brings together gay and lesbian manager associations from France, Germany, Austria, Switzerland and Spain to promote equal rights of LGB people in employment. All EGMA members work closely with employers in their respective countries and can be approached for advice on how to become a best practice equal opportunities employer for LGB employees. (www.egma.cc)

Members of EGMA include: L'Autre Cercle (www.autrecercle.org); Voelklinger Kreis (www.vk-online.de); Wirtschaftsweiber (www.wirtschaftsweiber.de); Switzerland Network (www.network.ch); and Xarxagay (www.xarxagay.org).

Challenging stereotypes about LGBT people in the Swedish Armed Forces

HoF was founded in December 2001 to support serving members of the Swedish Armed Forces who are lesbian, gay, bisexual or transgender. The aim of HoF is to provide a social network, to offer specialist advice and information to all members of staff of the Swedish Armed Forces. Among other things, HoF has been working to challenge stereotypes in the armed forces: *"Military organisations all over the world traditionally tend to be associated with homophobia. We have always had the male body as an ideal. This worship of the male body has become a norm for the ideal soldier, who is physically and mentally strong and medically perfect. [...] In this way homophobia can be generated and that is why it is so strong in the Armed Forces - probably stronger than in most other sectors of society."*⁵¹

5. Provide regular training to all employees

Training is an important aspect of any strategy. Promoting equality in the workplace for LGB people is a new practice for most employers. Everyone has a lot to learn. Understanding homophobia, how negative stereotypes are created and become established and how they can lead to feelings of fear and hostility can go a long way to reversing attitudes. Deciding to end discrimination is one thing, knowing how to end discrimination must begin with understanding it.

To help everybody in the company understand discrimination better, employers should:

- provide training and written guidance to all employees so they understand their responsibilities, including specific reference to sexual orientation
- provide diversity awareness training to all levels of staff
- provide all managers, supervisors and personnel with training and development to help them implement the organisation's equality and diversity action plan
- train managers to identify where prejudice might enter judgment about people; include examples of disguised homophobia, of common misconceptions of LGB people and of the way managers might involuntarily disadvantage certain groups

⁵¹ Krister Fahlstedt, Chairman of HoF, Den Haag, November 2004). More information at www.hof.org.se

Training tools to promote equality for LGB people in the workplace

In recent years, many handbooks and training programmes have been developed to enable employers, trade unions and work colleagues to raise awareness about issues and bring about a change of attitudes. Here are just some of these tools:

- * **All Clear – Lesbians, Gays & Bisexuals at Work: a handbook and CD-Rom produced by an EQUAL project team in Sweden (www.frittfram.se)**
- * **Stonewall's "Respecting LGB people in the workplace": a video-based learning resource available at www.stonewall.org.uk/workplace/**
- * **Pride not Prejudice: a DVD tool for employers, legal aid staff and individuals on the rights of LGB workers produced by the UK Law Centres Federation (www.lawcentres.org.uk)**



Good Practices and Business Case for Diversity

Anti-discrimination laws place obligations on employers to protect employees – or potential employees – from discrimination, and to ensure equal treatment regardless of one's sexual orientation. But beyond compliance with anti-discrimination policy, there is a growing argument for a business case for diversity. Building a diverse workforce is not only an ethical issue (i.e. it is the right thing to do) and a matter of regulation (i.e. to comply with legislation); the potential for economic benefits from investment in people is becoming an increasingly influential motivator. Indeed, sound business arguments have been developed and promoted as to how cultivating a workplace where employees are valued, respected and treated equally can result in better economic performance.

⁵² MAGENTA, Egalite des chances concernant les femmes d'orientation sexuelle minoritaire et les personnes d'identité de genre minoritaire: prévention de l'homophobie au travail", 2003, p. 31

⁵³ European Commission, The Costs and Benefits of Diversity, 2003, p. 53

⁵⁴ Stonewall, The Employment Equality Regulations. Guidelines for Employers 2003, p. 8

Studies carried out in the USA showed that the performance of LGB employees can decrease by more than 10% if they are faced with a homophobic work climate. In response to this obstacle to productivity, diversity management was born. In Europe, the United Kingdom has been leading in terms of diversity management in general, and in relation to LGB employees specifically; in Germany, the large multinational companies are following, with Ford, Schering, and Deutsche Bank leading the way by supporting the creation of LGB networks within their companies and by granting the same terms and conditions, including partner benefits, to both LGB and heterosexual workers. In France, more and more companies are starting to develop LGB groups; one example is GARE, an association of the SNCF and another is RATP, within the City of Paris and Canal Plus. In Belgium, there are very few examples, most of which are in the larger multinational companies and the universities.⁵²

"The people we have form our human capital. To me that is a more important corporate asset than all of the plant and equipment, all of the oil fields and pipelines. If we can get a disproportionate share of the most talented people in the world, we have a chance of holding a competitive edge. That is the simple strategic logic behind our commitment to diversity and to the inclusion of individuals - men and women regardless of background, religion, ethnic origin, nationality or sexual orientation. "(Chief Executive, British Petroleum BP)⁵³

"For us, turnover is more than a measure of employee satisfaction or morale. Lower turnover yields cost savings and improves business performance. The benefits include lower recruitment costs and retaining skilled employees who deliver better service. We know committed employees are more likely to be motivated, creative and productive." J.del Strother, Director personnel and development, NATIONWIDE (UK)⁵⁴

Germany: Gay manager association Voelklinger Kreis Prize

Since 2001, the Germany gay managers association awards the Max-Spohr-Prize to companies that illustrate clearly their commitment to society's diversity – both within their organisations and beyond – and that see diversity as a management instrument that contributes to a company's success. Criteria for awarding the prize include whether or not an organization promotes an inclusive culture of respect, formulates equality policies and establishes the structures to implement it, whether it addresses harassment and supports LGB employee networks, whether it grants equal partner benefits to same-sex partners, whether it provides publicity and training amongst its staff, and whether it sponsors community initiatives. The prize has been awarded to: Ford Foundation (2001), Deutsche Bank (2002), Deutsche Bahn (2004) and Volkswagen Bank (2006). (More information available at www.vk-online.de)

The European Union has also started to promote the business case for diversity.⁵⁵ In 2003, the European Commission produced a study on the costs and benefits of diversity. An objective was to document why employers invest in diversity. The findings show that investment in diversity reduces costs, ensures access to a wider talent base and enhances the reputation of the organisation with clients, customers and employees. An inclusive approach to recruitment and selection practices widens the recruitment base and attracts a wider range of applicants. In the war for talent, being able to attract and retain the best, has positive cost implications in terms of avoiding constant recruitment or training of new staff. Preventing discrimination also helps alleviate the risk of legal claims. If a case of harassment is brought against a company, the costs of defending a case and possibly paying compensation are high. Legal claims are expensive, damaging and time-consuming and, therefore, best avoided.

Companies surveyed for the European Commission study also indicated that they consider effective equality policies to help reduce absenteeism and stress-related absence. Unfair treatment and harassment in the workplace can cause staff to resign or take sick leave due to anxiety and stress. There is also the potential adverse impact on staff productivity and morale. Finally, one should remember that a safe and diverse workplace generally benefits everyone; an organisation where lesbians, gay men and bisexuals can be open about their sexuality is a good workplace for all.

⁵⁵ European Commission, DG Employment and Social Affairs, "The Costs and Benefits of Diversity", 2003. This document was followed up in 2005 by the publication of "The Business Case for Diversity – Good Practices in the Workplace" by the European Commission. http://ec.europa.eu/employment_social/fundamental_rights/public/pubs_en.htm

⁵⁶ Stonewall's Corporate Equality Index listing the "Top 100 employers for gay people in Britain" is available at www.stonewall.org.uk/workplace/1477.asp

Britain: Stonewall Corporate Equality Index

In January 2005, UK LGB rights organisation Stonewall published its first Corporate Equality Index, showcasing the UK's Top 100 employers for lesbian, gay and bisexual staff. Organisations that have been named the country's top employer for gay people include: British Council (2005), Staffordshire Police (2006), and IBM (2007).⁵⁶



Stonewall's Top 100 Employers include FTSE 100 companies and government departments. Employers are ranked according to criteria ranging from implementation of an effective equality policy, to granting equal benefits for same-sex partners, to having openly gay staff on their board of directors.

The remainder of this chapter sets out guidelines for employers who want to promote equality in the workplace. The overall thrust of the guidelines is that employers are better served if they implement policies that go beyond the minimum statutory compliance with anti-discrimination laws and work instead with a focus on what is needed to create a secure, healthy and respected workforce. In other words, the focus is on being proactive in the promotion of equality rather than reactive to regulations and laws.

1. Build a culture of respect

In many organisations, sexual orientation continues to be a taboo topic. Prejudice and the fear of discrimination – as we have discussed in the chapter “LGB experience of discrimination” – have wide repercussions in the workplace. Creating a positive work culture is challenging but vital: creating a supportive environment will increase job satisfaction and morale and therefore productivity. Feeling safe and appreciated for who you are gives all employees the possibility to realise their potential to the fullest.

To create a climate where everyone feels safe and does their best, employers should:

- publicise a message of **openness, trust and equality**, reinforce this message to all members of staff and make it clear that harassment is not tolerated
- explicitly invite same-sex partners to the company's **social events**
- provide **leadership** at all levels: have role models in the company, make public statements, support public events such as gay prides, etc.
- appoint senior-level **champions for LGB equality**
- allocate adequate **resources** (staff, time, funding) to promoting equality in the workplace
- review your **equality and diversity policy and strategy**, link it to business or service outcomes and communicate its importance to managers

⁵⁷ Stonewall, The Employment Equality Regulations. Guidelines for Employers, 2003, p.14

A robust and effective equal opportunities policy should explicitly include LGB employees. The policy should set out the employer's commitment and make it clear to employees that discrimination is

In 2001, Barclays launched its 'success through inclusion' policy. All members of Barclays' executive committee signed an equality and diversity charter. Gary Hoffman, chief executive of Barclaycard, was appointed senior champion for sexual orientation.⁵⁷



Companies supporting Gay Prides

Over the last few years, an increasing number of public and private employers have been sponsoring and taking part in gay prides across Europe. Here are a few examples:

- * The Swedish Armed Forces participated to the Stockholm Pride in 2005
- * ING Bank had a boat in Amsterdam's Canal Pride in 2006
- * Sponsors of the London Pride 2007 include British Airways, Ford and the Metropolitan Police Authority

unlawful and unacceptable. If you are unsure on how to best include sexual orientation, consult with appropriate trade unions, employee representatives or external NGOs.

2. Support the establishment of LGB employee networks

An employee network can challenge the invisibility of LGB staff and their issues. It gives LGB staff a forum for sharing experiences and allows organisations to tap into the specific experience and knowledge of LGB staff. Furthermore, it helps lesbians, gay men and bisexuals within the organisation to feel safe enough to come out and be open about their private lives.

To support and give visibility to LGB staff, employers should:

- **establish employee networks in consultation with LGB staff;** contact and consultation via anonymous surveys, via staff associations or trade unions, via third parties (e.g. NGOs)
- **connect the network to the rest of the organisation and other networks:** purpose, responsibility, resources

⁵⁸ Siegessäule 12/2003 - Das Ende der Monokultur Die Zauberformel für Gewinnsteigerungen: Diversity Management: Warum Ford, Deutsche Telekom und die Commerzbank ihre schwulesbische Belegschaft entdecken (Kathrin Walther)

Schering AG LGB network

When Schering's employees opened their company brochure in the spring of 2003, the first thing they saw was the rainbow symbol, standing for the company's lesbian, gay and bisexual employee network SAG Rainbow. "When we met for the first time 6 years ago, we wanted more than anything else a secure space, where we could be open about our sexual orientation without fear from hostility and discrimination", remembers Marcus Klein, head of unit in Schering's clinical development department. Then, fear was the key driver, as most were not open about their sexuality at work.

The group was an exclusive, secret circle; it seemed impossible to present the initiative openly within the company. This has now changed. To incorporate homosexuality as something normal within the organisation is the goal of Martina Schäfer and Thomas Norpoth, spokespeople for SAG Rainbow. When SAG Rainbow recently published a flyer about the network amongst their fellow colleagues the reaction was positive. "It is brilliant that you had the courage to do this!"⁵⁸



LGB employee networks in European companies

Examples of LGB employee networks in Europe include Kaleidoscope at British Telecom, GLEAM at JP Morgan and Chase, Spectrum at Barclays, Rainbow Group at IBM, GALA at ING Bank, and EnerGay in French electrical and gas industries. Examples of networks in German-based companies include: Deutsche Telekom (www.queerbeet.net); Volkswagen-Bank (www.queerdirect.de); Volkswagen (www.wolfsburger-kreis.de); Ford (<http://fordglobe.org/de/>); Deutsche Bank (<http://karriere.deutschebank.de>)

- **ensure leaders of the organisation promote the network:** high-profile senior managers as champions of network
- **be prepared for negative reactions:** you must be able to explain how the network benefits the whole organisation
- **provide easy and confidential access to the network**
- **publicise the network** both internally and externally

3. Review terms and conditions

Every lesbian, gay or bisexual employee will have experienced discrimination in terms of the way the employer handles compensation and benefits. Despite the fact that non-traditional family patterns are increasingly common in Europe, they are not recognised in many so-called 'family-friendly' policies. In promoting diversity an organisation's policies must reflect a social view of parenthood and family rather than a biological or legal one.

If employers want to reward all employees fairly and maximise staff motivation, they should:

- **create explicitly inclusive policies:** policies should state that benefits are available to same-sex employees and their families: bereavement leave, parental leave and adoptive parental leave, relocation allowances, carer's leave, travel benefits, discounts on the company's or other services, private healthcare
- **make communications inclusive:** use same-sex employees as examples when you explain benefits or reward packages; human resources needs to understand inclusive nature of benefits and communicate accordingly, e.g. talk about partners not husbands/wives
- **choose the best suppliers:** pension companies that are committed to equal treatment; the

The German Foreign Ministry has an increasingly open approach to homosexuality. Not only do they support their internal LGB network, they have also begun to treat same-sex registered partnerships en par to marriage. Registered same-sex couples, for instance, qualify for diplomatic service in the same way as heterosexual married couples would. To ease the process, the Foreign Ministry has started to investigate which countries officially accept same-sex couples.

Examples of travel-related benefits for same-sex partners

Railways across Europe typically offer travel benefits to their staff's partners. Many have extended this to same-sex partners as well. The Spanish National Railway Company RENFE had a policy of distinguishing between different-sex and same-sex unions. When this was challenged in court, the company reformed their collective agreements and explicitly extended all benefits to both married and non-married unions, irrespective of sexual orientation.

Airlines are on the whole more progressive. In Italy, for instance, at least two airlines do not make a distinction between same-sex and different-sex unmarried partners in terms of travel benefits and any other employment benefits. The same is true for Belgian and German airlines. French airlines are regulated by collective agreements that ensure that the entire French air transport sector does not discriminate on grounds of sexual orientation.⁵⁹

same applies for life insurance and health insurance providers

- **guarantee access to benefits without compromising confidentiality:** the manner in which an employee has to notify his/ her employer of his/her same-sex partner in many cases will require the employee to come out. In cases where it is not certain whether the benefit would be granted, this constitutes a major deterrent. To overcome this, ensure confidentiality of the data that is provided to the human resources team.

Generally speaking, large multi-national corporations are increasingly starting to provide benefits to their employees irrespective of their sexual orientation or their marital status. The most progressive industries tend to be airlines, some manufacturing and IT businesses as well as the financial services.

⁵⁹ For more information, see Alan Littler, Thematic Study on Discriminatory Partner Benefits in: Combating sexual orientation discrimination in employment: legislation in 15 EU Member States, at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/sexorappen.pdf

USA company as catalyst for change

In Ireland, most companies tended to grant benefits to married couples only. When a large company from the USA began operating in Ireland, they brought along their practice of extending partner benefits to all unmarried partners. This has contributed to an increasing change in other Irish companies, who have since started to follow suit. Now more and more Irish employers avoid discrimination in terms of workplace benefits.



CHAPTER 5

THE RESPONSIBILITIES OF TRADE UNIONS

Trade unions were formed to improve and protect the working conditions of their members. If a worker is discriminated against or harassed on the basis of sexual orientation, trade unions have a key responsibility in challenging the discrimination, protecting the individual and working for improvements for all.

The situation of LGB workers is a relatively new issue for trade unions. As organisations, many have been driven by other priorities and have often worked under the assumption that everyone is heterosexual unless they say otherwise. This is gradually changing as trade unions across the European Union acknowledge the diverse make-up of their membership and the workplace at large. Negotiating for workers' rights today means taking into account the specific needs of ethnic minorities, people with disabilities, older workers as well as lesbian, gay or bisexual workers.

Since harassment is now recognised as a health and safety issue, trade unions cannot afford to overlook the effects of harassment, bullying or unequal treatment of their lesbian, gay or bisexual membership. Beyond the social justice and the health and safety arguments, trade unions are motivated by the drive to recruit and retain members. It is in their interest, therefore, to equally represent their LGB membership.



Trade Union Status across Member States

For historical-political reasons, trade unions do not occupy the same position in every member state. In some countries as many as 70% of the workforce belongs to trade unions, in others the figure is as low as 20%. There are examples of trade unions who take the lead in fighting for equality of lesbians, gay men and bisexuals in their area or country. There are others where trade unions are hesitant to co-operate with LGB organisations and still have a long way to go to overcome internal resistance and prejudice.

In Finland, trade unions on the whole have ignored the specific needs of LGB employees. In a 2002 survey, only 6 reported to have started acting on behalf of their LGB members, mostly in connection to training, advice and collective bargaining. Even though non-discrimination legislation in Finland had been in place since 1995, in 2002 only 50% of trade unions were aware of the effects of the legislation. Trade unions were however, generally open to work on LGB issues and agreed that employees should be treated equally regardless of the form of relationship they were in.⁶⁰

In Belgium, there are some encouraging examples of co-operation between trade unions and LGB organisations to combat discrimination in the workplace. In France, although the Confédération Générale du Travail (CGT) for instance has created a working group on sexual orientation discrimination, the overall situation is still patchy. In 2003, the organisation SOS Homophobia reported that out of 81 workplace discrimination complaints, only 10 people had contacted their trade unions for support.⁶¹ The Trade Union Congress (TUC) in the UK and the Irish Congress of Trade Unions (ICTU) in Ireland, have taken a clear stand against sexual orientation discrimination.

Suggestions for Practical Action

Often, the reason for not acting is uncertainty in terms of how to address what is still a challenging topic. Many trade unions do not feel sufficiently equipped in terms of understanding the nature of discrimination, its effects, the legal background and the available tools to overcome it. How can trade unions support their LGB membership? What are the key issues for LGB persons to look out for in negotiations? How can trade unions develop a concrete work plan to promote equality in employment? What follows are some ideas and practical steps to help trade unions take action.⁶²

⁶⁰ Jukka Lehtonen, "A Job that needs to be done: Trade organizations and lesbian, gay, bisexual and trans people" in: Lehtonen (ed), *Sexual and Gender Minorities at Work*, Finland, 2002

⁶¹ MAGENTA, *Egalite des chances concernant les femmes d'orientation sexuelle minoritaire et les personnes d'identité de genre minoritaire: prévention de l'homophobie au travail*, 2003

⁶² For more details, see for instance:
(a) Irish Congress of Trade Unions, *Lesbian, Gay and Bisexual Rights in the Workplace - Congress Guidelines for Negotiators*, December 2003 email: congress@ictu.ie;
(b) UNISON, *Negotiating Equality for Lesbian, Gay and Bisexual Workers. Bargaining Support Guide*, December 2003 www.unison.org.uk;
(c) Public Services International and Education International, *Working for lesbian and gay members*, 1999



Finland. Trade unions and sexual orientation discrimination

In a survey carried out in 2002, trade union members were asked about their experience with their unions in cases of sexual orientation discrimination. Of those respondents that reported having experienced discrimination at work, very few – 11 % – contacted their trade union representatives about it. A surprisingly large proportion of respondents – 53% – said that if they were to experience discrimination, they would not contact the trade unions. Why?

“I wish the trade unions took the challenge of improving the situation of lesbian, gay, bisexual and transgender people seriously. There should be training and awareness-raising within the unions so that they can take a more active political role in promoting equality”.⁶³

1. Acknowledge the problem

The first step in working for full equality is to acknowledge that discrimination on the grounds of sexual orientation is a serious problem. There are lesbian women, gay men and bisexual men and women in workplaces everywhere. Because so many do not feel safe in being open about their sexual orientation, there is a common misconception that everyone at work is straight. The invisibility of LGB people is at the core of the difficulties they face in the workplace. The culture created within the workplace which anticipates conformity to a heterosexual norm, results in LGB suppressing their grievances. Consequently, if we accept things on face value we can believe that issues of discrimination and harassment on the basis of sexual orientation are not a feature of the workplace.

Another common mistake is to assume that sexual orientation has nothing to do with the work place; that it is a private matter, best confined to the bedroom. As we have discussed earlier in this document, however, the social dimension to the working day means that LGB people should feel equally free to talk about their partners, their social life, etc, as their heterosexual co-workers. A workplace which restricts their right and freedom to do so is one which discriminates against them.

An important part of acknowledging the problem of discrimination on the basis of sexual orientation is to develop an understanding of homophobia. This may involve specific training and it would be useful to consult with a local LGB organisation – or one working on equality issues in general – as to how homophobia training can be arranged.

It may also be important to take a strong stand against any resistance to change within the trade union – whether from officials or from membership. On the one hand the existence of the legislation should be proof enough of the problem and of the need for trade union action. The reality is however, that in some Member States, trade unions have been shown to be woefully unaware of the legislation. It is clear that trade unions need to decide to respond proactively to the provisions of the legislation.

⁶³ Jukka Lehtonen, “A Job that needs to be done: Trade organizations and lesbian, gay, bisexual and trans people” in: Lehtonen (ed), *Sexual and Gender Minorities at Work*, Finland, 2002

2. Take a stand for equality

Many LGB members of trade unions are hesitant to contact their unions in cases of discrimination because they do not see their unions as potential defenders of their rights. Often, LGB employees are not aware that the unions may offer legal assistance or they are uncertain whether the union can be trusted.

It is important that unions take concrete steps to create an inclusive environment within the union that explicitly extends to LGB members. If a union is to act on behalf of members on these issues, then it must put its own house in order where that is necessary. To do so, a union should:

- undertake an audit of all union services – from counselling, to credit schemes to legal representation – to ensure they do not directly or indirectly discriminate against LGB members
- adopt a confidentiality policy which is communicated to all union staff
- amend job descriptions to include a requirement to be sensitive to diversity issues
- communicate union policy throughout the union pointing out that discrimination is illegal and that the union treats discrimination as a serious workplace issue
- make lesbian and gay issues visible through publishing articles in union journals, producing leaflets, posters or pamphlets
- create an inclusive environment for LGB members: extend non-discrimination policies to sexual orientation; extend equality working groups' remit to cover sexual orientation

⁶⁴ Carina Bildt, Trade union members' perception of discrimination in the workplace because of sexual orientation, in: Arbetslivsrapport Nr. 2004:15, Arbetslivsinstitutet (National Institute for Working Life), p. 9

⁶⁵ To the question "How do you feel about having a gay man or a lesbian woman as your colleague or supervisor? To what extent do you think gay or lesbian people are advantaged or disadvantaged in working life?", 46% of respondents thought that LGB workers were at a disadvantage, 30% felt uncomfortable about working with an LGB colleague.

⁶⁶ Elisabet Qvarford, 'The Union goes gay' in: Lehtonen (ed.), Sexual and Gender Minorities at work, 2002

⁶⁷ Information on the Normgiving Diversity project is available at www.normgivande.nu

Swedish Confederation of Professional Employees (TCO) takes a stand

Approximately 80% of all employees in Sweden are members of a trade union – the three main unions have a total membership of approximately 3.8 million.⁶⁴ Although the Act on a Ban against discrimination in Working Life based on sexual orientation came into force in 1999, hardly any trade union representatives were trained on its implications. Little information was available on sexual orientation discrimination, the mechanisms for dealing with complaints were often insufficient and internal resistance prevented many unions from taking preventative steps.

In August 2001, the TCO became the first Swedish trade union to openly show its commitment to LGB members by participating in Stockholm Pride. After publishing an article on LGB members in the Stockholm Pride magazine, the TCO included a question on attitudes towards gay and lesbian people at work into its national survey.⁶⁵ The results indicated clearly how much of a taboo issue sexual orientation continued to be. The survey was followed by: (a) publication of a brochure on the new law, (b) organisation of a training seminar on trade unions' responsibility with regard to sexual orientation discrimination, (c) presence at Stockholm Pride with an information tent.⁶⁶

TCO's decision to participate so actively in Stockholm Pride can be seen as a turning point in trade union involvement. Together with other organisations, including the Swedish LGBT organisation RFSL, the TCO set up a three-year project to promote equality of LGB people in employment, with a particular focus on the church, the armed forces and the police.⁶⁷



The European Trade Union Confederation (ETUC) and LGB equality

“The European trade union movement is at the forefront in defending human rights and trade union rights. This fight must include a commitment to equal treatment, respect and dignity for lesbians, gay men, bisexuals and transgendered people. However, we have to admit that to date, the rights and realities of lesbians, gay men, bisexuals and transgendered people have been given insufficient attention, both inside and outside the trade union movement. (...) Trade unions can, and should be, a strong ally for lesbians, gay men, bisexuals and transgendered people, because they are powerful players in the field of work and employment policies.”⁶⁸

In May 2003, the ETUC congress adopted a 4-year Action Programme, in which it committed itself to recognise diversity, build solidarity between different groups of workers, combat discrimination and reflect and act on prejudices that may be inherent in trade unions’ structures. In June 2006, the ETUC issued a public statement condemning “inflammatory statements” made by right politicians against lesbians and gays and re-affirmed its opposition to discrimination on the basis of sexual orientation.
(www.etuc.org)

3. Develop a coherent strategy

The focus of any strategy adopted by a trade union should be the improvement of working conditions for all lesbian, gay and bisexual workers. Little is to be gained by undertaking an exercise which is limited to, for example, acknowledging the provisions of the law or the production of a poster which talks about trade union backing LGB rights.

A **first step** would be to consult your members through an **anonymous survey**. This can be a useful place to start in coming to understand the nature of the issues within local branches as well as within the movement as a whole. There are some important considerations to bear in mind in launching a survey of this kind:

- use focus groups of members to consult on the content and purpose of the survey
- consult with LGB representative groups so as to take account of the sensitivities
- ensure absolute confidentiality throughout the process
- communicate the purpose of the survey and guarantee publication of the results
- consider co-operation with employers
- make available a confidential information line

A **second step** would be to **use the results** of the survey as the basis to **develop an action** plan to promote workplace equality for lesbian, gay and bisexual workers. Again, in developing the action plan, these are some points to remember:

- if sexual orientation is being incorporated into an existing equality action plan, make sure it is not simply an add-on but rather that the specifics pertaining to sexual orientation are articulated clearly
- in the ongoing consultation process, ensure LGB participation, where possible with local LGB

⁶⁸ John Monks, General Secretary ETUC, written address to ILGA-Europe Annual Conference, 15 October 2003

Public Services International (PSI) and Education International (EI)

PSI and EI, recognising that few of their affiliates were engaged in organising around the issues of lesbian and gay workers or specifically challenging homophobia, produced a publication called *Working for Lesbian and Gay Members*. By publishing this handbook, the two trade unions wanted to encourage affiliates to:

- * start organising lesbian and gay workers
- * incorporate lesbian and gay issues into union work
- * support international solidarity work around lesbian and gay issues
- * create awareness of lesbian and gay issues at the workplace.

They also hoped that the handbook would prove useful for unions that want to build a lesbian and gay network in their union. PSI and EI plan to update their joint publication in 2007.

(www.ei-ie.org/lgbt/en/ and www.world-psi.org)

members and where not possible, look to LGB representative groups

- build in actions, targets, indicators and monitoring and evaluation processes
- identify resources to match the actions
- assign responsibilities to the appropriate officers and personnel

4. Provide training and information

Training is an important tool to raise awareness and build capacity within the union. Many unions already offer training to their members and staff. This training should be extended to cover sexual orientation discrimination and workplace diversity.⁶⁹

- train the **union leadership**
- provide **compulsory training for union staff at all levels** (including elected officials) on diversity issues including sexual orientation
- arrange for **expert inputs** at membership meetings
- work with employers to promote training **throughout the workforce**
- provide **information on legal protection and on union action** to promote equality
- dedicate resources to specific **high-visibility campaigns**
- provide **advice and negotiation guidelines** on sexual orientation discrimination

⁶⁹ For information on available training tools to promote equality for LGB people in the workplace, please refer to examples cited in Chapter 4.

Diversity Training at Public Services International

Public Services International has written an “Organising Diversity” training module to be used in general training programmes. It focuses on discrimination in general and includes sexual orientation. It was designed as a training kit that can be utilised and modified to fit different national contexts. It is offered to PSI members around the world.



Unison LGBT networks

UNISON (the UK public sector union) has a long-standing commitment to LGBT rights, anchored explicitly in the union's rules. UNISON employs a full-time LGBT equality officer and supports a developing network of branch LGBT groups. Branches join together into 12 regional LGBT groups. UNISON's LGBT network provides support structures, engages in union negotiations, organises training courses and generally provides a forum for debate and assistance. The network also works on promoting the rights of transgender people in the workplace and on issues of multiple discrimination. (www.unison.org.uk/out/lgbt/index.asp)

5. Set up a complaint and support system

An LGB network within the trade union can provide encouragement, support and visibility. It gives LGB members a chance to meet, share ideas and establish priorities. It also allows trade unions to make use of the expertise LGB members can bring to the union. If such a network exists, make sure to consult it on any initiatives you may plan to take.

- improve the way you **handle complaints of workplace bullying or discrimination**
- nominate a **confidential point of contact** for LGB members (e.g. LGB members officer at local, regional and national level)
- communicate procedures regularly
- **encourage all workers to report** discriminatory behaviour, not just the victims
- support the **creation of networks of LGB members** and provide necessary resources

6. Incorporate LGB concerns in your negotiations

A major component of a comprehensive strategy relates to the core work of the unions, i.e. negotiations with employers on behalf of the workers. Just as Member States are required, when transposing the EU legislation, to remove all laws and regulations which are contrary to the promotion of equal treatment, so too are employers required to ensure that their processes are updated to remove any potentially discriminatory impacts on gay, lesbian and bisexual workers. Unions can play a key role in this regard by taking the lead in negotiating for more than the legal minimum.

- undertake regular **equality audits** to uncover discriminatory practices
- negotiate **equal opportunities policies and procedures** with employers which specifically refer to discrimination on grounds of sexual orientation
- negotiate for a **confidential complaints procedure** in case of harassment or bullying
- negotiate **family-friendly policies**, accessible for LGB workers without having to jeopardise their confidentiality (e.g. parental leave, social events)
- **pensions and other benefits**: negotiate for equal pension rights for same-sex couples

- ensure that **no policies discriminate on the grounds of sexual orientation** in recruitment and selection, career development and promotion, sickness and absence

7. Cooperate with LGB organisations and other trade unions

In every EU Member State, organisations exist that are active in promoting equality for lesbian, gay and bisexual people. These can be an invaluable resource for trade unions that wish to start addressing sexual orientation discrimination in employment.

- organise official union participation in, or support for LGB events such as pride marches or conferences
- publish articles in LGB journals to highlight your commitment
- co-operate with LGB organisations on specific projects or training activities



CHAPTER 6

KEY RECOMMENDATIONS

In setting out these recommendations, ILGA-Europe is mindful that work to improve equality legislation, policies and practices, and ultimately the quality of the working environment for LGB people, is ongoing on a range of levels and in a range of forums. We anticipate, therefore, many opportunities to forward our recommendations and proposals in greater detail. For the purposes of this document, we will confine the scope of our recommendations to the broad areas.

To the European Commission

To realise the potential of the Employment Framework Directive, the European Commission should:

- continue to closely scrutinise how the Directive has been transposed and implemented in law, policy and practices, and to take infringement procedures when needed
- strongly insist to Member States on their responsibility to provide information about rights and obligations, and to promote social dialogue
- support further research, analysis and data collection to determine the impact of the Directive, in particular in relation to the application and interpretation of exemptions (refer to chapter 3)
- continue to support the work of the network of legal experts in the field of anti-discrimination in providing independent information and advice on relevant developments in the Member States
- increase activities to raise awareness of equality bodies and trade unions on sexual orientation discrimination and to support them in developing mechanisms to facilitate access to justice for victims of discrimination
- continue to identify and disseminate good practices to promote equality in the workplace
- ensure the allocation of adequate and necessary resources to the anti-discrimination and diversity section within the Community Action Programme PROGRESS, including resources required by representative NGOs to continue and expand their work
- mainstream equality guidelines in other relevant European policy areas, in particular in the framework of PROGRESS

With regard to reform of the legislation, consideration should be given to the following:

- legislation which includes the duty to proactively promote equality (positive duty)
- the remit of the equality bodies to be extended to cover sexual orientation, indeed to cover all grounds
- a reconsideration of the definition of discrimination from one that is comparator-based, to one which focuses on the cause and effects of discrimination
- the extension of the legislation beyond the workplace to include the provision of goods and services
- provide independent legal standing for organisations with a legitimate interest in enforcing the principle of equal treatment



To Member States

- ensure that anti-discrimination laws and national policies are in full compliance with the provisions and spirit of the Employment Framework Directive
- demonstrate government commitment to equality in the workplace by setting sanctions in line with the Directive
- establish independent equality bodies with all necessary powers and resources to promote and defend the rights of all workers against discrimination on all grounds
- mainstream equality considerations at the core of all policy making processes
- target resources towards NGOs that work to promote equality
- create incentives for employers to adopt workplace diversity programmes

To the Social Partners

- encourage member organisations, i.e., trade unions and employers to adopt a proactive approach to equality in the workplace that would, in the first instance, involve maximum compliance with the tenets of the Directive
- insist on the abolition of any rules, procedures and practices that are not fully consistent with the principle of promoting equality
- work together to promote dialogue and to initiate awareness raising campaigns
- every effort should be made to ensure that equality is a workplace issue for all employees, that there is a comprehensive communication strategy in place and that training is provided
- LGB employees should be supported to network and should be consulted by both trade unions and employers on matters relating to equality policies
- lobby government to go beyond full compliance with the legislation and to put in place measure to encourage the widespread adoption of workplace diversity programmes
- multi-national companies should ensure that their equality policies reach the same standard of good practice in all countries in which they operate

ANNEX 1

SOME USEFUL DEFINITIONS

Biphobia – prejudice, hatred or fear of bisexual people

Burden of proof – the obligation to prove allegations or accusations which are presented in a legal action. Usually, the one who claims to be victim of wrong-doing has the obligation to prove his/her accusations. The Directive however introduces a shift in the burden of proof from the claimant (the person who claims to be victim of discrimination) to the respondent (the person accused of having discriminated). The shift in the burden of proof means that the respondent has the burden of proving that his/her practice is not in fact discriminatory.

Discrimination

Direct discrimination – a situation where a person is treated less favourably than others on grounds of his or her sexual orientation. Unfair treatment can be based on a range of factors, such as age, ethnic background, disability or sexual orientation.

Indirect discrimination – where an apparently neutral provision or practice would put persons having a particular sexual orientation at a disadvantage compared to others.

Harassment – any act or conduct that is unwelcome to the victim, which could be regarded in relation to the victim's sexual orientation as offensive, humiliating or intimidating. It can include spoken words, gestures or the production, display or circulation of written words, pictures or other material.

Heterosexism – attitudes, behaviour or policies and practices that arise from the assumption that everyone is heterosexual

Homophobia – prejudice, hatred or fear of LGB people and same-sex attraction

Positive action – this term is typically understood to cover a wide range of measures taken to compensate for present and past disadvantages that exist because of discrimination. These can range from advertising a job within a specific under-represented group (i.e. job posting at a LGBT university network) to having quotas of employees from a certain group.

Sexual orientation – a person's sexual and emotional attraction to people of the same and/ or different sex; in colloquial language often described as lesbian, gay, straight or bisexual

Lesbian – a woman who is sexually and emotionally attracted to women

Gay – a person who is sexually and emotionally attracted to members of the same-sex

Bisexual – a person who is sexually and emotionally attracted to people of the same and the different sex

Heterosexual – a person who is sexually and emotionally attracted to the opposite sex; colloquial term often used is 'straight'

Homosexual – dated and quasi medical term for lesbians and gay men, rarely used by LGB people themselves but at times found in formal documents

Transgender – people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include, but it is not limited to: transsexuals, intersex persons, cross-dressers, and other gender variant people.

Gender identity – a person's sense of conformity between their biological and psychological gender. This is the individual's gender concept of self, which does not necessarily dependent on the sex they were assigned at birth.

Gender Expression – the expression of oneself in external presentation and/or appearance through behaviour, clothing, hair-cut, voice, body characteristics, etc.

Transphobia – prejudice, hatred or fear of transgender people

'Out' – being open about one's homosexuality

Victimisation – in the law, 'victimisation' is a specific term to mean discrimination against a person because they have made a complaint or been a witness in another person's complaint.



ANNEX 2

EQUAL PROJECTS ON LGB IN THE WORKPLACE

The **EQUAL Programme** is part of the European Union's strategy for more and better jobs and for ensuring that no one is denied access to them. Funded by the European Social Fund, through the Community Action Programme to Combat Discrimination, this initiative tested new ways of tackling discrimination and inequality experienced by those in work and those looking for a job. EQUAL co-finances activities in all EU Member States. EQUAL differs from the European Social Fund mainstream programmes in its function as a laboratory and in its emphasis on active co-operation between Member States.

A number of EQUAL projects focused on LGB rights in the workplace. Most projects resulted in the publication of training tools and books on addressing sexual orientation discrimination and promoting equality in the workplace.

"EQUAL Sexualities at Work" (2001-2003)

This project brought together four partner organizations working on increasing the knowledge about homosexuality and bisexuality in different workplaces, and on finding ways to change negative attitudes into positive ones. The four cooperating projects were the following:

- **"Homosexuals and Bisexuals in the Care System"** (Sweden) www.rfsl.se/?p=566
- **"Normgiving Diversity"** on LGB within the Church, the police, and the armed forces (Sweden) www.normgivande.nu
- **"Sexual and Gender Minorities at Work"** (Finland) www.valt.helsinki.fi/sosio/tutkimus/equal
- **"Enabling Safety for LesBiGay Teachers"** (The Netherlands) www.lesbigayteachers.nl

"TRACE – Transnational Cooperation for Equality" (2004-2006)

This project brings together employers, trade unions, governmental public bodies and NGOs all working against discrimination on the grounds of sexual orientation. The common interest is to abolish discrimination and the inequality of homosexual and bisexual people in the area of employment, and enable them to work under the same circumstances as their heterosexual colleagues. The project involves the following four countries and partners:

- **Deledios** (France) www.autretercerle.org
- **Open and Safe at Work.lt** (Lithuania) www.atviri.lt
- **Partnership for Equality** (Slovenia) www.ljudmila.org/lesbo
- **Beneath the Surface on discrimination in school** (Sweden) www.ytan.se

The introduction in 2000 of the EU Directive prohibiting discrimination in the workplace on the basis of sexual orientation represented an unexpected and much welcomed advance in the progress toward real equality for lesbian, gay and bisexual (LGB) people. The legislation offered the possibility of a transformation in the working life of lesbians, gays and bisexuals. No longer did they need to hide their sexual orientation for fear of harassment or discrimination. Such freedom would enable them to participate fully and openly and thus enjoy better social and professional relationships with their colleagues. Because of the new environment, they would better realise their career potential and bring home concrete benefits for their partners. Such was the promise.

The first version of this document, published in 2005, explored the extent to which that promise had been realised. The current edition, significantly revised and updated, looks at the state of transposition of the EU Directive, discusses its limitations and weaknesses in ensuring equality of LGB people in the employment, as well as the experience of LGB people of the legislation.

An important position taken in the discussions is that legislation is not enough. If equality for lesbians, gays and bisexuals is to become a reality in the workplace, then reacting to inequality is not going to do it. The focus has to be on measures and initiatives that actively promote equality. Employers and trade unions have a central and unique role to play in this respect. Therefore, relying on the testimonials of lesbians, gays and bisexuals with first hand experience, as well as the good practice available, the document points to practical steps that employers and trade unions can be taken to help realise the promise of equality in the workplace.

