

EQUALITY



# Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States

Summary of findings, trends,  
challenges and promising practices



**FRA**

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



This report addresses issues related to the right to life (Article 2), freedom from degrading treatment (Article 4), respect for private and family life (Article 7), the right to marry and found a family (Article 9), freedom of expression and information (Article 11), freedom of assembly (Article 12), the right to asylum (Article 18), the principle of non-discrimination (Article 21), and freedom of movement and residence (Article 45) falling under the Chapters I 'Dignity', II 'Freedoms', III 'Equality' and V 'Citizens' rights' of the Charter of Fundamental Rights of the European Union.

Cover image: © istockphoto

A great deal of information on the European Union Agency for Fundamental Rights is available on the Internet. It can be accessed through the FRA website at <http://fra.europa.eu>

Cataloguing data can be found at the end of this publication.

FRA - European Union Agency for Fundamental Rights  
Schwarzenbergplatz 11  
1040 - Wien  
Austria  
Tel.: +43 (0)1 580 30 - 0  
Fax: +43 (0)1 580 30 - 691  
Email: [information@fra.europa.eu](mailto:information@fra.europa.eu)  
[fra.europa.eu](http://fra.europa.eu)

Cataloguing data can be found at the end of this publication.

Luxembourg: Publications Office of the European Union, 2011

ISBN 978-92-9192-695-4  
doi:10.2811/26781

© European Union Agency for Fundamental Rights, 2010  
Reproduction is authorised, except for commercial purposes, provided the source is acknowledged.

*Printed in Luxembourg*

PRINTED ON WHITE CHLORINE-FREE PAPER

# Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States

Summary of findings, trends,  
challenges and promising practices



# Foreword

The European Union (EU) is founded on the value of equality and non-discrimination, and through its policies it combats discrimination based on sexual orientation. Important steps have been taken in this regard. The Employment Equality Directive represents a key measure, which establishes a framework for combating discrimination and bringing to life the principle of equal treatment. The directive, adopted a decade ago, has brought about the introduction of new, or the strengthening of existing, equality regimes in EU Member States. Although significant progress has been made towards the realisation of equality, including in terms of sexual orientation and gender identity, several challenges must yet be overcome. The FRA analysis of key legal trends in this field reveals a number of improvements in some Member States, while also highlighting that developments are taking place at a different pace. The result is an uneven and uncoordinated EU landscape.

The Charter of Fundamental Rights of the EU will become the compass for all EU policies that affect fundamental rights, with some concrete tools already the subject of discussion at EU level. This publication aims to assist EU institutions in their negotiations on a number of specific issues, including the proposed 'horizontal' directive on equal treatment beyond employment, or the initiatives on mutual recognition of civil status, to name just two measures which would considerably advance the legal protection of lesbian, gay, bisexual and transgender (LGBT) rights throughout the EU.

In addition, in March 2010 the Committee of Ministers of the Council of Europe adopted a Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity. Through this recommendation, the most far-reaching such document to date, the Member States have committed themselves to advance the situation of LGBT people throughout Europe. This short and easy-to-read publication links the FRA's research findings with the standards to which the Member States have agreed. This design is aimed at decision-makers at all levels of government, specialised bodies, national human rights institutions and civil society as they work to develop a coherent and systematic approach to the protection of LGBT rights.

In 2011 and 2012, the FRA will continue its work in this area with a survey examining the discrimination and victimisation experiences of LGBT people. The results of this survey will provide comparable data to better understand homophobia, transphobia and discrimination, which can be used to assess the impact of measures taken.

**Morten Kjærum**  
Director



# Contents

FOREWORD .....	3
INTRODUCTION .....	7
<b>1 ATTITUDES AND STEREOTYPING TOWARDS LGBT PEOPLE.....</b>	<b>9</b>
1.1. Research findings.....	9
1.1. Identifying challenges and promising practices.....	10
1.2. Ways forward .....	11
<b>2 RIGHT TO LIFE, SECURITY AND PROTECTION FROM ABUSE AND VIOLENCE .....</b>	<b>13</b>
2.1. Research findings.....	13
2.2. Identifying challenges and promising practices.....	14
2.3. Policy developments at EU level.....	15
2.4. Ways forward .....	15
<b>3 FREEDOM OF ASSEMBLY AND FREEDOM OF EXPRESSION.....</b>	<b>17</b>
3.1. Research findings.....	17
3.2. Policy developments at EU level.....	19
3.3. Ways forward .....	19
<b>4 DISCRIMINATION IN AND BEYOND EMPLOYMENT .....</b>	<b>21</b>
4.1. Research findings.....	21
4.2. Policy developments at EU level.....	26
4.3. Ways forward .....	26
<b>5 EQUAL TREATMENT FOR FAMILY MEMBERS AND MUTUAL RECOGNITION OF CIVIL STATUS .....</b>	<b>27</b>
5.1. Research findings.....	27
5.2. Mutual recognition of civil status .....	30
5.3. Policy developments at EU level.....	30
5.4. Ways forward .....	31
<b>6 INTERNATIONAL PROTECTION FOR LGBT PEOPLE FLEEING HOMOPHOBIA .....</b>	<b>33</b>
6.1. Research findings.....	33
6.2. Policy developments at EU level.....	35
6.3. Ways forward .....	35
<b>IN CONCLUSION .....</b>	<b>37</b>
<b>BIBLIOGRAPHY .....</b>	<b>38</b>





# Introduction

In 2007, the European Parliament asked the European Union Agency for Fundamental Rights (FRA) to conduct research on discrimination against lesbian, gay, bisexual and transgender (LGBT) persons in the EU. In response, the FRA published in 2008 an initial comparative legal analysis of LGBT rights and a second report, in 2009, reviewing the social situation. In 2010, the FRA updated its comparative legal analysis, enabling it to show, for the first time, legal trends.

This synthesis report brings together and contextualises the main findings of the aforementioned FRA reports in light of the Council of Europe Recommendation (CM/Rec(2010)5) on measures to combat discrimination on grounds of sexual orientation or gender identity. Furthermore, it places the findings in the context of relevant initiatives undertaken at EU level.

In addition to research findings, this report is enriched by input from roundtables, working groups and expert meetings, in particular the roundtable 'Addressing stereotypes and hate crime targeting lesbian, gay, bisexual and transgender people' organised by the FRA in Naples in October 2010.

This roundtable brought together non-governmental organisations (NGOs), equality bodies, police, policymakers and international organisations focusing on the identification of challenges and promising practices in addressing stereotyping and negative attitudes towards LGBT people, on the one hand, and intolerance and violence against them, on the other.

In order to enhance readability of the report, referencing has been kept to a minimum. Detailed references to evidence referred to in this publication can be found in the previous FRA reports, for which full references are given in the bibliography at the end of this report. Where possible, a short form of referencing has been chosen in the footnotes, with full references given in the bibliography. An overview of FRA activities and publications in the field of LGBT rights is available on the FRA website at: [http://fra.europa.eu/fraWebsite/lgbt-rights/lgbt-rights\\_en.htm](http://fra.europa.eu/fraWebsite/lgbt-rights/lgbt-rights_en.htm).<sup>1</sup>

---

<sup>1</sup> All hyperlinks referenced in this report have been accessed on 9 December 2010.



# 1

## Attitudes and stereotyping towards LGBT people



### Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity

8. Public officials and other state representatives should be encouraged to promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.

2009, almost half of EU respondents (47%) think that discrimination on grounds of sexual orientation is widespread in their country.<sup>2</sup> This indicates a slight improvement compared with the equivalent findings of 2008, when 51% of EU respondents perceived sexual orientation discrimination as widespread.<sup>3</sup> It appears relatively rare for individuals to have LGBT friends and acquaintances: the EU average stood at 38% in 2009, with the highest rate in the Netherlands (68%) and the lowest rate in Romania (3%). Using a 10-point 'comfort scale' (with '10' indicating most comfortable), individuals were asked to indicate their level of comfort with an LGBT person holding the highest political office. The EU average was 6.5 points, with Sweden (8.7), Denmark (8.4) and the Netherlands (8.2) scoring highest, and Romania (3.4) and Bulgaria (3.2) scoring lowest.

### 1.1. Research findings

#### Attitudes of the general public and the strategy of 'invisibility'

Attitudes of the general public towards lesbian, gay, bisexual and transgender (LGBT) persons across the EU vary from one member state to another. There is evidence to suggest that attitudes are influenced by age (younger people being more tolerant than old), political inclination (left-wing being more tolerant than right-wing), sex (women being more tolerant than men) and education (the more educated being more tolerant than the less educated). Existing national surveys suggest that attitudes towards LGBT persons vary according to the context. For instance, a general tolerance of LGBT persons as potential 'neighbours' does not necessarily translate into the acceptability of LGBT persons being able to marry or adopt children.

To avoid negative reactions, many LGBT persons adopt a strategy of 'invisibility' with co-workers, family and friends. This in itself may lead to emotional difficulties and may be connected with the higher incidences of mental health problems experienced by LGBT persons (see Chapter 4). More generally, the negative attitudes or prejudices of the population can translate into discriminatory treatment by employers, colleagues, service providers, the media, as well as political and religious leaders. While it is possible to ensure legal protection of LGBT persons

**'Hetero-normative'** describes the attitude that heterosexuality – that is, attraction towards people of a different sex only – is normal, natural and superior to homosexuality – that is, attraction towards people of the same sex only – or bisexuality – that is, attraction towards people of either sex.

According to the findings of the Special Eurobarometer survey on discrimination in the EU of November

<sup>2</sup> See European Commission (2009c).  
<sup>3</sup> See European Commission (2008b).

against discrimination, this in itself cannot adequately address the day-to-day problems faced in a hetero-normative context.

A project realised under the EQUAL programme, which was coordinated by Swedish organisations, showed that in schools, for example, everyone is assumed to be heterosexual. The project aimed to reveal ‘what lies beneath the surface’ and how the assumption of heterosexual exclusivity affects interactions among staff and in the classroom.<sup>4</sup> Research shows that social structures and institutions still work on the basis of an underlying heterosexual norm which can generate consequences at odds with a fundamental rights approach.

*“Neither cultural, traditional nor religious values, nor the rules of a ‘dominant culture’ can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity.”*

*Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010)*

### Opinion makers contribute to shaping attitudes

Efforts are made to address the issue of homophobic or transphobic statements in media reports. For instance, the Lithuanian Gay League produced a publication to change the way LGBT issues are presented to the public.<sup>5</sup> In Latvia, a study has identified patterns of homophobic speech and presented a mechanism for monitoring political speeches with regard to gays and lesbians.<sup>6</sup> In some Member States, there are examples of church representatives and politicians who actively lobby against the adoption of rights and protection for LGBT persons or LGBT events, such as gay prides.

## 1.1. Identifying challenges and promising practices

Unsettled trends across the EU may reflect or reinforce negative attitudes towards LGBT people, as well as trans- and homophobic stereotyping. A first step in addressing this issue is to identify the challenges and

possible ways to promote a culture of respect and diversity inclusive of LGBT people in Europe’s societies today. Enhancing public understanding and acceptance requires dialogue and engagement between governments and civil society. The FRA therefore organised a roundtable in Naples in October 2010, bringing together various stakeholders in the field of LGBT rights such as NGOs, equality bodies, police, policymakers and international organisations.

### CHALLENGES

#### Identifying key civil actors and current obstacles

The discussions of the Naples roundtable focused on the role and influence of particular institutional elements in society and found that:

- media, political and religious leaders, as well as education institutions have a key role in determining public opinion on LGBT issues;
- these institutions (media, politics, religious leaders, education institutions) can often be resilient to change;
- the absence of legislation securing LGBT rights undermines the possibility of challenging the continuity of particular practices and directly challenging stereotypes;
- medical professionals can act as ‘gate keepers’ in determining access to legal gender recognition and trans-related medical treatment.

In the discussions, participants also identified several obstacles, namely:

- the lack of systematic and coordinated solutions that are based on the participation of the communities they intend to benefit and are directed to their needs;
- the lack of rights awareness by members of LGBT communities, and the consequent lack of empowerment to defend those rights;
- reluctance among the general public to engage in diversity programmes inclusive of LGBT people, such as opposition expressed by parents to such initiatives in schools;
- lack of funding for civil society organisations and other bodies capable of promoting LGBT rights, such as equality bodies.

4 See Under Ytan [Beneath the Surface], available at: [www.ytan.se/?p=1892](http://www.ytan.se/?p=1892).

5 See Lithuanian Gay League (2007).

6 See Mozaika – an Alliance of Lesbian, Gay, Bisexual, Transgendered Persons and their Friends in Latvia (2007).

## 1.2. Ways forward

A number of governments throughout the EU actively promote equal rights and opportunities regardless of sexual orientation or transgender identity or expression. Negative attitudes nevertheless remain. Prejudice against LGBT persons is often based on unfounded assumptions, for example that 'homosexuality is an illness', 'LGBT persons are responsible for the collapse of traditional values' or 'homosexuality is a vice or perversion like drug addiction or paedophilia'. If such prejudices can be countered through education and awareness-raising campaigns, it is likely, that in the long-term, discrimination faced by LGBT persons will be addressed more effectively, in particular if such campaigns are supported by public authorities, such as EU institutions, and national, regional and local governments.

The media play a crucial role in improving the public perception of LGBT people, for example by avoiding homophobic statements, stimulating informed public debate and presenting more balanced portrayals of LGBT issues.

Furthermore, it is important to engage in constructive dialogue with political and religious leaders addressing concerns about the social impact of more tolerant attitudes on LGBT issues. Dialogue should also take place with bodies responsible for promoting human rights, such as national equality bodies and national human rights institutions, as well as with LGBT organisations.

### PROMISING PRACTICE

#### Promoting a culture of respect and diversity inclusive of LGBT people

In Sweden, one of the tasks of the Living History Forum, a government agency with responsibility to promote democracy, tolerance and human rights, is to assist in "combat[ing] the institutionalisation of heterosexuality in society", thereby contributing to making visible and challenging the underlying assumptions which confine LGBT people into invisibility and exclusion.<sup>7</sup>

The Netherlands has also adopted a comprehensive LGBT policy document for the period 2008-2011, entitled 'Simply Gay'. It constitutes a national action plan encompassing 60 different measures, including 24 projects sponsored by various government departments to improve the social acceptance and empowerment of LGBT citizens.<sup>8</sup>

The United Kingdom has included an ambitious programme of work to "tackle outdated prejudices and ensure equal changes for everyone, whatever their sexual orientation or gender identity" in its 'Programme for government'.<sup>9</sup>

Ensuring a systematic approach based on 'leadership and ownership' was highlighted as crucial in the conclusions of a thought-provoking seminar on the exchange of promising practices organised by the European Commission in March 2010.<sup>10</sup> Building on that, the participants of the Naples roundtable concluded that public authorities should ensure the enforcement of human rights standards by adopting an equality agenda in a top-down approach starting from a commitment by senior officials and filtering down into clear guidelines, specific procedures and training. Active consultation with LGBT communities as well as building up the capacity of LGBT organisations to improve their monitoring activities would be important elements in this process. In addition, participants at the roundtable in Naples recommended inter-service dialogue and action plans on issues such as hate-motivated violence, both of which should involve the police, local authorities, schools, university, health authorities and the LGBT community. Such action plans should also focus on long-term and sustainable measures.

<sup>7</sup> See Sweden/Ministry of Integration and Gender Equality (2009).

<sup>8</sup> See the Netherlands/Ministry of Education, Culture and Science (2007).

<sup>9</sup> See UK/Government Equalities Offices (2010).

<sup>10</sup> See Crowley, N. (2010).



## PROMISING PRACTICE

### **Encouraging acceptance of lesbians, bisexuals and gay men in public institutions**

In Sweden, various organisations, including employer associations, trade unions, LGBT organisations, a municipality, a state government and the Ombudsman against sexual orientation discrimination, all coordinated and supported two projects that were funded by the EU EQUAL programme: 'Homosexuals and bisexuals in the care system' and 'Normgiving diversity'. The latter project focused on three professions that "have a normative function and set standards in society": the police, the church and the defence forces. The main partners of the project were employer associations, namely the Swedish Armed Forces, the Swedish National Police Board, and the Association of Parishes and Pastorates of the Church of Sweden, together with several trade unions and NGOs. Both projects produced a training tool to help create open and inclusive workplaces. The main idea of the projects was to create a working environment where every individual is respected and has equal rights, regardless of their sexual orientation.



# 2

## Right to life, security and protection from abuse and violence



### **Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity**

1. Member States should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator.
2. Member States should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance. [...]
6. Member States should take appropriate measures to combat all forms of expression, including in the media and on the internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons.
7. Member States should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination. [...]
31. Taking into due account the over-riding interests of the child, Member States should take appropriate legislative and other measures, addressed to educational staff and pupils, to ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; this includes, in particular, safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.

### 2.1. Research findings

Negative attitudes and stereotypes against LGBT persons manifest themselves in various contexts, such as political debates concerning LGBT rights or during counter-demonstrations at public LGBT events such as prides. Homo- and transphobic statements by political and religious figures appear in the media. In such statements, LGBT persons are often depicted as unnatural, diseased, deviant, linked to crime or prostitution, immoral or socially destabilising. The internet, as a platform for the publication of abusive expression, is an area of particular concern because perpetrators are not easily found or prosecuted.

Negative attitudes towards LGBT persons can also be expressed through abusive behaviour and crime. LGBT NGOs across the EU frequently report that individuals suffer verbal and physical attacks because of their sexual orientation or gender identity. Some extreme cases, concerning mainly attacks on transgender persons, have been fatal. Lesbian and bisexual women are more likely to experience sexual assaults or assaults in private settings than gay or bisexual men, who are more likely to be attacked by unknown perpetrators. The perpetrators are usually young men in groups.

Verbal and physical abuse is commonly experienced by LGBT persons across schools in EU Member States. Bullying and harassment may take the form of physical attacks, or name-calling and threats delivered using the internet or mobile phones. For the most part abusive language is treated as a normal and acceptable part of daily school life. Schools in most countries do not appear to have policies or training to combat bullying, and for those schools that have such policies, it is unclear to which extent they specifically cover homo- and transphobic bullying. However, such bullying can lead to higher drop-out rates and truancy among LGBT students, which will reduce the chances

of going on to further or higher education. It can also result in social isolation and mental suffering, and may increase the risk of self-harming behaviour.

Another issue highlighted by LGBT NGOs is the general invisibility of sexual orientation issues in schools, which may have negative consequences for the self-esteem of LGBT youths reinforcing the overall 'invisibility' of LGBT persons.

there is insufficient information about how frequently such violence occurs across the EU, as many Member States do not keep official statistical data on hate crimes and victims may be reluctant to report incidents directly to the police for fear of 'coming out' or fear of prejudice. In 2011-2012, the FRA will collect data on abuse and victimisation on grounds of sexual orientation and gender identity, through a dedicated survey which will gather comparable data.

Violence against LGBT persons often occurs in the context of counter-protests during LGBT pride marches (see Chapter 3). This shows that intolerant behaviour is not only directed against a particular individual, but also against the right of LGBT persons to express themselves in public. Such counter-demonstrations are often called 'Normality marches' or 'Marches for tradition and culture'.

### Key legal trends in the period 2008-2010: incitement to hatred and hate crime

Overall, protection against insult, assault, incitement to hatred and violence towards LGBT people remains limited in the majority of EU Member States:<sup>11</sup>

- As far as expressions of insult and prejudice against LGBT people and, specifically, incitement to hatred is concerned, only one Member State has adopted new provisions in this regard (Slovenia).
- This brings the total number of Member States prohibiting incitement to hatred towards the LGBT population to 13.
- Greece, Lithuania and Scotland, which is part of the UK, have included homophobic intent as an aggravating circumstance under criminal law. Scotland has become the first jurisdiction to include protection for transgender persons.
- As a result, the total number of EU Member States having classified homophobic or transphobic intent as at least an aggravating circumstance in criminal law amounts to 12 countries.

### CHALLENGES

#### Combating hate crime

During discussions at the Naples roundtable, suggestions were made on how to develop or support a victim-centred approach. Building on the experience of some Member States,<sup>12</sup> these included: the establishment of LGBT focal points or liaison officers within the police forces; training officers at management and street-level to address the culture of taboo within the police; developing a clear message of non-discrimination supported by officers in a leadership role; where relevant, promote dialogue between police hierarchy and LGBT police organisations. Further suggestions included:

- developing alternative reporting and monitoring mechanisms. This could include reporting by LGBT organisations; through other public authorities such as schools or the health services; anonymous or third-party reporting through community support groups;
- allocating appropriate financial and human resources to address anti-LGBT crimes;
- allowing for mutual respect, recognition of LGBT organisations as specialists having relevant expertise in the field at stake;
- ensuring privacy protection – tackle fear of forced outing;
- supporting structures to help file complaints and to accompany victims to the police;
- learning from experiences with 'domestic violence', for example immediate re-housing in case of domestic abuse (shelters);
- putting hate crime prosecutors in direct communication with other key players such as local police and the judiciary.

## 2.2. Identifying challenges and promising practices

*"A group of young people from my town have harassed me many times to 'persuade' me that there is no place for lesbians here. They've assaulted me verbally and physically. Once, I was beaten, too. They threatened that they would rape me to show how good it is to be with a man, because I need a man" (female interviewee, Poland)*

*See Abramowicz (ed.) on the 'Situation of bisexual and homosexual persons in Poland'.*

Surveys from some Member States suggest that only about 20% of hate crimes are reported by victims, although many LGBT persons have experienced homophobic or transphobic violence. However,

<sup>11</sup> For more detailed information see FRA (2010a).

<sup>12</sup> See, for instance, those collected by ILGA-Europe in *Joining forces to combat homophobic and transphobic hate crime. Cooperation between police forces and LGBT organisations in Europe*.





## CHALLENGES

### Addressing anti-LGBT abuse and violence

The discussions at the Naples roundtable identified challenges and obstacles to addressing abuse and violence against LGBT people. In this respect, police cooperation, reporting, recording and investigation of incidents were identified as crucial areas where challenges persist. In particular, these refer to:

- lack of knowledge and understanding of LGBT issues by authorities and law enforcement officials;
- patterns of unchallenged homophobia and transphobia within police forces;
- mutual mistrust is often present between NGOs and police;
- criticism from LGBT groups tends to be answered defensively, rather than being seen as an opportunity for re-evaluation;
- investigation of discriminatory motives in crime tends to be underdeveloped, leading to a lack of data on the prevalence of hate-motivated incidents;
- fear of re-traumatisation among victims of hate crime because of negative reactions by police.

As a result of these challenges, LGBT organisations in various Member States feel that actual cooperation with public authorities is almost impossible, even in the mid-term. Existing efficient cooperation mechanisms were identified as a starting point in order to improve the situation. Furthermore, the discussions identified specific obstacles in addressing transphobic crime as opposed to homophobic crime, such as:

- the need to train police and courts to use correct pronouns and names;
- the absence of hate crime legislation covering transphobic offences (except in a handful of jurisdictions);
- the lack of recognition of transphobic crimes, e.g. an attack by a male on a transwoman being seen as male-on-male violence;
- media coverage is generally driven by sensationalism.

## 2.3. Policy developments at EU level

In relation to the security of LGBT people and protection from abuse and violence, three key policy developments at EU level can be observed.

- In its resolution on the situation of fundamental rights in the EU (2004-2008) of 14 January 2009, the European Parliament calls on the European Commission, after consulting the Agency, to propose legislation to combat homophobia similar to Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.<sup>13</sup>
- In the Stockholm Programme, which sets out the framework for an open and secure Europe serving and protecting the citizens, the European Council holds that *“since diversity enriches the Union, the EU and its Member States must provide a safe environment where differences are respected and the most vulnerable protected. Measures to tackle discrimination [...] and homophobia must be vigorously pursued”*.<sup>14</sup>
- The European Commission Action Plan Implementing the Stockholm Programme stipulates that *“all policy instruments available will be deployed to provide a robust European response to fight all forms of discrimination [...] and homophobia”*.<sup>15</sup>

## 2.4. Ways forward

### Right to life, security and protection from hatred and violence

In order to prevent and combat verbal and physical abuse against LGBT people, Member States are encouraged to consider promoting more balanced public opinion on LGBT issues by facilitating dialogue between LGBT groups, the media, political representatives and religious institutions. Member States and EU institutions, as provided for by the treaties, should take appropriate practical measures to combat all forms of expression inciting, spreading or promoting hatred or other forms of discrimination against LGBT people, as well as incidents and crimes motivated by prejudice against LGBT persons. Equally, renewed commitment to countering anti-LGBT crimes and violence should lead to more effective action, exploring the potential of the new EU Treaties for the

<sup>13</sup> See European Parliament (2009c).

<sup>14</sup> See European Council (2009), paragraph 2(3), p. 14.

<sup>15</sup> See European Commission (2010a), p. 3.

development of legal provisions at EU and national level. Such legal provisions should grant the same level of protection as the one granted to hate speech and crime motivated by racism or xenophobia.

### **Data collection on the prevalence of abuse and victimisation**

Member States are also encouraged to ensure that relevant quantitative data in the form of regular surveys and official data recorded by authorities are gathered and analysed. This will help monitor the extent and nature of discrimination on the grounds of sexual orientation or gender identity, and criminal victimisation.



# 3

## Freedom of assembly and freedom of expression



### Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity

13. Member states should take appropriate measures to ensure [...] that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, [...].

14. Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly [...] can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity. [...]

32. Taking into due account the over-riding interests of the child, appropriate measures should be taken to this effect at all levels to promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity. This should include providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity.

to issues they consider important for the protection of their rights. In this regard, pride marches or similar gatherings and events constitute an important means through which LGBT persons exercise their right to freedom of assembly and freedom of expression. In the past decade, bans or administrative obstacles have created problems for the organisation of lawful and peaceful LGBT demonstrations in several EU Member States. As highlighted in Chapter 2, many incidences of hate speech and hate crime occur in the context of counter-demonstrations against LGBT people when exercising their freedom of expression and assembly through these events.

In some Member States, public authorities have not been able or willing to ensure the safety of participants in LGBT demonstrations from attacks by counter-demonstrators. Within the past five years, attacks of this kind have occurred in Bulgaria, Czech Republic, Estonia, Hungary, Italy, Latvia, Poland, Romania, Slovakia and Sweden. Such incidents were often accompanied by homophobic public statements or abusive speech. In several Member States (Bulgaria, Czech Republic, Cyprus, Hungary, Italy and Malta), calls for improving the rights of LGBT persons have invariably been met with negative responses from some politicians and representatives of religious institutions or groups. In some Member States, LGBT NGOs have also experienced problems in renting premises for political or cultural activities, and organisers of public LGBT debates have encountered problems in obtaining access to cultural and political venues. However, in other Member States LGBT

**Freedom of assembly** refers to the right of people to gather together in a physical place. This might be in a closed space, like a town hall meeting, or in the open, like a march or a demonstration. The right to freedom of assembly can be limited by the government only to protect the rights of other people, such as public safety (for example if there is a risk of violence) or public morality (for example public displays of pornography).

### 3.1. Research findings

An important means of addressing the problem of intolerance and negative attitudes is through positively influencing public opinion, for example by raising awareness of LGBT issues. This can be achieved through public events, where LGBT persons can express their identity and draw public attention

organisations have celebrated pride events with the participation and support of political figures and religious organisations.

## Key legal trends in the period 2008-2010: freedom of assembly

The FRA 2010 legal update reveals progress in the context of freedom of assembly and freedom of expression for LGBT persons.

- In Poland, Romania and Bulgaria Pride marches were held successfully.
- In contrast, in Lithuania the 2010 Baltic Pride was threatened with cancellation at short notice, and in Latvia the right to organise marches continues to be challenged by elected officials despite several court rulings annulling attempted bans.
- It is noteworthy that while most EU Member States have legislation authorising the banning of demonstrations that incite hatred, violence or discrimination (on grounds of sexual orientation), they are often reluctant to use these powers to prevent violent counter-demonstrations.

In 2010, the European Court of Human Rights (ECtHR) examined again an application against Russia concerning the banning of LGBT demonstrations and concluded that such bans violated the right to peaceful assembly. Furthermore, it held that the applicant suffered discrimination on the grounds of his sexual orientation, because the main reason for the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality.<sup>16</sup> The court cited for the first time the recommendation from the Council of Europe's Committee of Ministers and stated clearly that *"it was not the behaviour or the attire of the participants that the authorities found objectionable but the very fact that they wished to openly identify themselves as gay men or lesbians, individually and as a group"* (paragraph 82), thereby blurring the separation between acceptance of behaviour in a strictly private setting and intolerance for any open identification as a gay man or a lesbian. In addition, the court added that *"there is no ambiguity about the other member states' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms"* (paragraph 84). Commenting on the value of an open and informed debate, the court held that such a debate *"would also clarify some common points of confusion, such as whether a person may be*

*educated or enticed into or out of homosexuality, or opt into or out of it voluntarily"* (paragraph 86).

In 2009, the Lithuanian Parliament adopted a Law on the Protection of Minors against the Detrimental Effects of Public Information. Article 4 of this Act addresses sexuality and family relations, stating (among other things) that information *"which promotes sexual relations; [...] which expresses contempt for family values, encourages the concept of entry into a marriage and creation of a family other than that stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania"* is detrimental to minors. The Act does not explicitly mention that information on homosexuality is considered as detrimentally affecting minors. However, the law might be problematic insofar as it bans information on same-sex relationships, currently excluded from the concept of marriage and family as stipulated in the Constitution and the Civil Code of Lithuania. According to the ECtHR case law developed under Article 14 on the principle of non-discrimination of the European Convention on Human Rights (ECHR), any difference in treatment based on sexual orientation requires particularly serious reasons by way of justification, and the margin of appreciation of states is narrow.

The prohibition in Lithuanian law of the 'promotion' of homosexuality and same-sex relations to minors constitutes the only recent example of such legislation. In contrast, a number of Member States have taken action to foster education and dialogue, with the aim of challenging negative attitudes towards homosexuality and LGBT people, namely: Estonia, France, Germany, the Netherlands, Spain and the UK. The 2010 FRA comparative legal analysis provides more information in this regard.<sup>17</sup>

**Freedom of expression** can also be read together with the right to freedom of assembly. Often when people assemble, it is to transmit a particular message and express themselves. In general terms, authorities are in a position, when necessary, to limit freedom of expression in a democratic society, based on a limited number of exceptions. However, it cannot be restricted simply because the ideas expressed may shock or offend people. This is because in a democratic society there should be tolerance of diverse views and opinions, including expressions relating to sexual orientation or gender identity that some people may find offensive.

<sup>16</sup> See ECtHR, *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010.

<sup>17</sup> See FRA (2010a), pp. 35 ff.

## 3.2. Policy developments at EU level

As regards freedom of assembly and freedom of expression, the European Parliament has adopted a number of resolutions to equally promote these rights for LGBT people.

- Various European Parliament resolutions adopted between 2006 and 2007 stated that discriminatory bans of Pride marches contravene the principles protected by the ECHR.<sup>18</sup>
- The European Parliament resolution of 17 September 2009 on the Lithuanian Law on the Protection of Minors against the Detrimental Effects of Public Information reaffirms the importance of the EU fighting against all forms of discrimination, including discrimination based on sexual orientation.

## 3.3. Ways forward

To fulfil the right to freedom of assembly of LGBT people, local and regional authorities should facilitate efforts by LGBT organisations to organise events such as Pride marches. This type of event can raise public awareness on LGBT issues and empower LGBT people. The support for such events could take different forms, for example providing practical support, especially when these events take place in less supportive environments. Arguments regarding the preservation of ‘public order’ should not be used to impose undue restrictions on LGBT-related events and other manifestations of LGBT identities or relationships. Public authorities should ensure that homophobic counter-demonstrations do not hinder lawful LGBT events. There are many promising practice examples of LGBT events across the EU, where public institutions and civil society organisations, including in some cases churches, have worked together.

The right to freedom of expression implies that everyone has a right to disseminate and to receive unbiased information about LGBT persons and their relationships, and to live in an open and inclusive environment. This is particularly important for children, including LGBT children. In educational settings, it is essential that measures are in place to confront prejudicial attitudes and prevent the harm they cause, because it is in these settings that young people’s attitudes are formed. Such measures could include the following: open discussion of LGBT issues to encourage tolerance and understanding among both staff and students; anti-bullying policies that expressly include homophobia and transphobia; training for teachers on how to address LGBT issues in teaching and how to deal with incidences of homophobic and transphobic harassment.

<sup>18</sup> See European Parliament (2006a,b), (2007).



# 4

## Discrimination in and beyond employment



### **Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity**

46. Member states are encouraged to take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including on grounds of sexual orientation or gender identity; national human rights structures should have a broad mandate to enable them to tackle such issues.

### 4.1. Research findings

Discrimination against LGBT persons occurs in many day-to-day situations, such as the workplace, or when accessing services like healthcare. This section examines discrimination in this broader social context, also taking into account multiple and intersectional discrimination, as an under-researched, but unfolding, phenomenon.

Currently EU law (through the Employment Equality Directive) prohibits discrimination on the basis of sexual orientation only in the context of employment and training. Transgender persons who intend to undergo or have undergone gender reassignment surgery receive protection under the Gender Equality Directive (recast) and Gender Equality Directive on Goods and Services, both within and beyond the sphere of employment. This is because, in a line of cases starting with *P. v S. and Cornwall County Council*, the Court of Justice of the European Union (CJEU) ruled that the notion of 'sex discrimination' also encompasses discrimination on grounds of gender

reassignment. However, as the next section will show, this general approach has not evenly permeated the law and practice in all Member States.

### The extent of discrimination in the workplace

Employment is a key aspect of everyone's life, where colleagues interact both professionally and personally. Despite the existence of legislation prohibiting sexual orientation discrimination in the workplace, such discrimination remains a problem.

This is not easy to recognise by looking at the available statistics. The 2008 FRA legal analysis of sexual orientation and gender identity discrimination revealed that most Member States do not keep data on the number of complaints of discrimination submitted, and that where this information is available, the number of complaints is extremely low.

However, research conducted in many Member States shows that where individuals are open about their sexual orientation or gender identity in the workplace they face harassment from co-workers and exclusion from social activities. In addition, employers often treat them less favourably in matters of promotion, training or requests for holiday. Transgender persons in particular appear to suffer greater difficulties. As a consequence, LGBT persons are reluctant to 'come out' in the workplace and those who do and experience discrimination are reluctant to make complaints for fear of negative consequences. A further reason for low numbers of complaints appears to be a lack of awareness of anti-discrimination laws, according to the results of a 2007 Eurobarometer report.<sup>19</sup> In 2007, 45% of EU respondents indicated that they believed there were no laws prohibiting sexual orientation

<sup>19</sup> See European Commission (2007)

discrimination when hiring employees. For these reasons, the FRA has committed to gathering EU-wide comparable data through a specific survey on LGBT discrimination which will be carried out between 2011 and 2012.

*“Discrimination on the basis of gender and sexual orientation has ceased to constitute a political cleavage, and [non-discrimination] is enshrined in the EU’s founding act and statement of values. It is something that distinguishes Europe from many other parts of the world. We are inspired by the sense for human dignity and the uniqueness of each person. Everyone deserves equal chances in life.”*

*Statement by Herman Van Rompuy, President of the European Council, on the International Day Against Homophobia, 17 May 2010*

## The legal situation: key developments in the period 2008-2010

The 2010 legal update reveals steady progress in a number of EU Member States in relation to the scope of legal protection against sexual orientation discrimination. In a few Member States, the legal framework has been simplified, strengthened or increased in scope at regional or local level.

In a majority of Member States, discrimination on grounds of sexual orientation is prohibited beyond employment. The areas currently covered by the Racial Equality Directive encompass social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services, including housing. As for sexual orientation discrimination:

- 11 Member States cover all of these areas, with two additional Member States since 2008 (Czech Republic and the UK).
- seven additional Member States cover at least some of these areas.

Therefore, in total, 18 Member States prohibit this form of discrimination beyond employment.

As regards gender identity, national legislation is often unclear in how, if at all, it protects transgender persons. Since the presentation of the 2008 FRA legal report, three more Member States have chosen to introduce an explicit prohibition of discrimination on grounds of gender identity, either as an autonomous ground or as a form of ‘sex’ discrimination (Czech Republic, Sweden and the UK), bringing the total number of Member States to 12. Sweden adopted a particularly broad formula, by referring to ‘transgender

identity or expression’ in order to protect transgender people beyond those who have undergone or intend to undergo gender reassignment. Nonetheless, a fragmented situation remains throughout the EU. There is also a lack of clarity in applicable standards and definitions in at least 15 Member States.

There also remains a lack of clarity surrounding the scope of the exception in the Employment Equality Directive afforded to religious and ethos-based organisations which permits them to differentiate between individuals on the basis of their religion or belief where this constitutes an occupational requirement in the workplace. The FRA found that the potential for spill-over effects *vis-à-vis* LGBT workers is greater in Germany, Lithuania, the Netherlands and the UK.

## Equality bodies

National equality bodies promote equal treatment, conduct research on discrimination and offer advice to victims. EU law obliges Member States to establish equality bodies in the area of race discrimination and sex discrimination only. The Employment Equality Directive does not require the establishment of these bodies in relation to other grounds of discrimination, including sexual orientation. Nevertheless, many Member States have gone beyond what is required by EU law to establish additional protection for LGBT persons. Twenty Member States (Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovakia, Slovenia, Sweden and the UK) have set up single equality bodies dealing with all grounds for discrimination in the 2000 directives, including discrimination based on sexual orientation. This is an increase of two Member States since 2008 (Denmark and Estonia). Seven Member States (Czech Republic, Finland, Italy, Malta, Poland, Portugal and Spain) currently have no equality body covering sexual orientation discrimination.

However, with respect to gender identity, the European network of national equality bodies, Equinet, has confirmed significant challenges in making equality legislation work for transgender people, and has stepped up its efforts to enhance protection and support new policy and promising practice initiatives.

## Employment-related partner benefits

Often an employer grants an employee certain benefits and these might extend to the employee’s spouse if the employee is married. Examples of this might include a ‘survivor’s pension’ for the widow or





widower of an employee who dies, or a free travel pass for the husband or wife of an employee working for a transport company. Because these benefits are connected to employment insofar as they constitute part of the pay of the worker, the prohibition of sexual orientation discrimination applies to benefits for the employee's spouse. At present only five Member States permit same-sex couples to marry (Belgium, the Netherlands, Portugal, Spain and Sweden). There is no obligation in EU law to allow same-sex couples to marry, but where this is allowed the spouse cannot be denied these benefits simply because it is of the same sex. This would constitute a less favourable treatment of the worker on grounds of sexual orientation.

Although only five EU Member States allow same-sex marriage, a majority of other states allow same-sex registered partnerships. Where marriage is not available to same-sex couples a registered partnership is the only other way to have a relationship legally recognised. Such registered partnerships usually give each partner particular rights similar to those of marriage. Even though partners in this situation are not technically spouses, the CJEU has issued a judgment in this regard. In the *Maruko* case, the CJEU decided that where national law treats registered partnerships and married spouses similarly, then the former should not be treated less favourably than the latter for the purposes of the right to a survivor's pension. Not all Member States have created registered partnerships, which means that those couples who do not have the option under national law of formalising their relationship have no access to these benefits. The prohibition of direct discrimination, however, means that if benefits are afforded to unmarried different-sex partners, then they must also be afforded to unmarried same-sex partners.

## Multiple discrimination

Our sexual orientation and gender identity are two of the multiple dimensions of our personality. We are defined by a collection of various characteristics whether these are physical or psychological. Sometimes a person may possess more than one characteristic that places them at a disadvantage relative to the majority population such as their age, race, sex, sexual orientation, (dis)ability. This has two consequences: to aggravate the suffering of that individual; to complicate the possible solutions that may redress the difficulties encountered.

As such, the difficulties faced by a gay man with a disability may be quite different to that of an elderly lesbian woman. In both cases, these individuals may face discrimination against them based on prejudice against not only their sexual orientation, but also their

disability or age. Research has suggested, for instance, that LGBT persons with disabilities may experience 'asexualisation' by, among others, carers and members of the LGBT community itself. Furthermore, inaccessible LGBT venues, bars and meeting places create physical obstacles for LGBT persons with disabilities attempting to participate in the LGBT community. Some LGBT persons in care facilities and care homes for the elderly face social isolation and stereotyping from personnel and other residents.

Discrimination can come from the majority population, but it can also come from other individuals who share one of the dimensions of their identity. Thus, a gay man might be discriminated against by the majority population for being gay. But he may also be discriminated against by other LGBT persons because of a disability or because of his religious beliefs, or ethnicity. Likewise a Muslim person may face discrimination from non-Muslims, but they may also face discrimination from other Muslims, for instance, because of their sexual orientation or a disability. This phenomenon can be described as being a 'minority within a minority'.<sup>20</sup>

Difficulties arise in offering support and legal remedies to victims of multiple discrimination because NGOs tend to revolve around single issues or divide their work on discrimination into distinct grounds. Similarly, national equality bodies may be divided along the different grounds of discrimination and deal with them separately. As a result, NGOs may not find themselves in a strong position to advise or support victims of multiple discrimination since they are unable to deal with the diversity of situations that may exist. Also it is not uncommon for national equality bodies to categorise any complaints they receive according to one ground and only pursue legal cases on this basis. This makes cases more simple to argue and easier to win, but it does mean that part of the problem is ignored.

Research on multiple discrimination is in its early stages. In 2011, the FRA is conducting fieldwork research to collect data on this phenomenon. Currently, our understanding and knowledge of the extent and impact of multiple discrimination is limited and most Member States have few relevant activities or policies in place. In Belgium, the Flemish Framework Decree explicitly offers protection against cross-discrimination, and a proposal to introduce a similar amendment to Finnish legislation was made in 2009. UK legislation explicitly prohibits 'combined discrimination'.

<sup>20</sup> On multiple discrimination, see FRA (2010b).

## Health

### **Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity**

**33.** Member states should take appropriate legislative and other measures to ensure that the highest attainable standard of health can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity.

Accessing health services is important not only when a person needs medical attention, but also in order to prevent health problems occurring in future. LGBT persons experience several difficulties in relation to health services, with transgender persons in particular experiencing more difficulties than LGB persons also because of the specific needs related to gender reassignment treatment.

Firstly, LGBT persons may experience discrimination when accessing healthcare. This may come in different forms. There are reports of medical staff being openly insulting to LGBT persons and comparing their sexuality to paedophilia or bestiality. Medical staff may also treat sexual orientation or sexual identity as a matter of psychological disorder. In certain Member States, it is reported that LGBT children in State care are subjected to 'conversion therapy'. In some cases medical staff may simply refuse to offer treatment or particular levels of care (such as bathing patients). In many Member States, gay men are prohibited from donating blood because of prejudice regarding HIV/AIDS. Such experiences often lead LGBT persons not to disclose their sexual orientation or gender identity to doctors, which in turn might have an impact on the treatment they are offered. As a result of fears of prejudice LGBT persons may not seek medical support when it is needed, and may not undergo routine preventive treatment, such as cervical smear tests or screening for sexually transmitted illnesses.

Secondly, LGBT persons may be affected by strong negative attitudes from family, friends, peers, colleagues or more generally. When coupled with

fear of prejudice from medical staff this may lead to the higher incidences of ill health among LGBT persons, and particularly mental health with higher than average incidences of depression, self-harm and suicide attempts than the majority population.

At a general level there is a widespread presumption of hetero-normativity among health professionals that may be conducive to creating a number of problems for LGBT persons. For instance, research indicates that gynaecologists often automatically presume a patient to be in a heterosexual relationship and offer advice accordingly. Another difficulty is the failure to recognise same-sex partners of patients as 'next of kin'. In some Member States, this may be a conscious policy while in others it is merely a clerical issue where standardised paperwork does not provide an option to record 'same-sex partner' or 'civil partner'. Another area where hetero-normativity is expressed is in the area of reproductive health services, since many Member States limit access to fertility treatment to women in heterosexual relationships. However, in some Member States (for instance Denmark, Romania, Spain and the UK) lawmakers and the courts have moved towards the removal of barriers to reproductive health services for LGBT persons, permitting access for individuals regardless of marital status or sexual orientation.

### **Access to and legal recognition of gender reassignment**

#### **Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity**

**35.** Member states should take appropriate measures to ensure that transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise in the field of transgender healthcare, without being subject to unreasonable requirements.

**21.** Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way.

Transgender persons face transphobia and discrimination on grounds of their gender identity and not necessarily because of their sexual orientation. Transgender persons might be heterosexual,



homosexual or bisexual. However, the term refers to the way that a person expresses and feels their gender, rather than whether a person is attracted to members of the different sex or not. Transgender persons suffer from discrimination, often on a greater scale than lesbians, gays and bisexuals, particularly in the areas of employment and healthcare. Surveys also show that transgender people face more negative attitudes than LGB people. They are especially affected by abusive speech and hate crime and reports of fatal attacks are not infrequent.<sup>21</sup>

A transgender person may choose to express his/her gender identity in different ways. Gender identity may be expressed through language, clothing, mannerism and cosmetics, and choice of name or pronouns. To make more permanent physical changes, surgery and hormone treatment may be used. Coming to terms with one's gender identity can take several years, and may or may not involve gender reassignment.

### What is transgender identity and expression?

The sex that we are officially assigned at birth is based on our biological features. However, this might not match our gender identity – that is, the way we feel and think about our gender. A transgender person is someone who has and/or expresses their gender identity differently from the sex that they were assigned at birth.

Those persons who undergo gender reassignment experience significant difficulties in some EU Member States when they wish to get access to surgery and/or to obtain legal recognition of their preferred gender. Under European human rights law, governments must allow individuals to access gender reassignment devices and must legally recognise a person's gender reassignment. This includes the right to marry someone of the (newly) opposite sex. However, several problems remain, especially with regard to the position of transgender people who do not wish to or cannot access surgery. Difficulties in obtaining legal recognition of gender reassignment, especially for a large proportion of individuals who do not fall within the category of 'transsexuals' but who express other forms of gender variance, has an obvious impact on the possibility to find a job or housing without having to disclose one's gender identity.

<sup>21</sup> See, for instance, the research project *Transrespect versus Transphobia Worldwide*, available at: [www.transrespect-transphobia.org/](http://www.transrespect-transphobia.org/). According to the figures provided, from January 2008 to November 2010, 21 killings of transgender people were reported in eight Member States (Germany: 2, Italy: 13, Portugal: 1, Spain: 3 and UK: 2). These figures only reflect the reported cases which could be found through internet research.

### Key trends in the period 2008-2010: access to, and legal recognition of, gender reassignment

Four EU Member States have amended their legislation and practice concerning access to gender reassignment treatment and legal recognition of gender reassignment, namely alteration of the recorded name or sex on official documents. These are Austria, Germany, Latvia and Portugal; legislative changes in this regard are expected in Ireland and the Netherlands.

In Latvia, new legislation explicitly permits a change of name following gender reassignment. In Germany, the requirement to divorce in order to alter the recorded sex on official documents has now been abolished. Ireland is expected to put legislation in place allowing for legal recognition of gender reassignment, and in the Netherlands there are proposals aimed at eliminating the requirement of compulsory sterilisation. In Austria, courts have found that surgery cannot be imposed as a precondition for alteration of an individual's name; and in Malta a judgment of the Constitutional Court delivered on 30 November 2010 found that the impossibility for a transgender woman to marry her male partner violated Article 12 of the ECHR on the right to marry.<sup>22</sup>

Portugal adopted in March 2011 a new law on legal recognition of gender reassignment. Under the new rules, the recognition of the preferred gender can be obtained through a simple administrative procedure and within eight days. As precondition for legal recognition, an application of the interested person is necessary, accompanied only by a certificate from a medical multidisciplinary team.

Some attention has been paid in the EU to an understanding of gender identity as involving a strong element of self-determination, rather than primarily a psychiatric disorder.<sup>23</sup> Throughout the EU, however, the conditions attached to gender reassignment treatment and to legal recognition of gender reassignment remain often vague and not determined by law. The approach in most Member States remains unduly cumbersome and highly medical, while also continuing to attract stigma. This situation often hinders an improvement of access to treatment, legal recognition and social status of a very marginalised and victimised population, which faces a high degree of stigmatisation, exclusion and violence.

<sup>22</sup> See Malta Today (2010).

<sup>23</sup> An interesting development can be observed in France, where a government order No. 2010-125 of 8 February 2010 removed transsexuality from the list of 'long term psychiatric conditions' (ALD 23). The process, however, remains attached to the assumption of 'long term affections' relating to a severe pathology (coded under ALD 31).

## 4.2. Policy developments at EU level

In the field of discrimination in and beyond employment, developments in EU policy focus on two areas.

### Sexual orientation and multiple discrimination:

- In July 2008, the European Commission presented a proposal to the Council<sup>24</sup> for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The proposal aims to supplement the existing EU legal framework, by establishing a uniform minimum level of protection within the EU for people who have suffered discrimination outside the labour market. This would eliminate the current ‘hierarchy of grounds’ which exists in EU law where the grounds of sex, and racial and ethnic origin receive protection across a wider range of contexts beyond employment.
- On this proposal, the European Parliament adopted a legislative resolution on 2 April 2009, where it proposed a number of amendments in order to further strengthen the legal framework and to include a greater focus on multiple discrimination.<sup>25</sup>
- As of 2010, the European Council has been discussing this proposal, but has not yet reached political agreement.
- The President of the European Parliament, the President of the European Council, and the Vice-President of the European Commission and Commissioner for Justice, Fundamental Rights and Citizenship expressed a high-level political commitment against discrimination on the grounds of sexual orientation and gender identity on the International Day against Homophobia on 17 May 2010.

### Gender identity:

- A 2010 European Parliament resolution acknowledged discrimination on grounds of gender identity, and insisted that future EU gender equality initiatives should explicitly cover gender identity and address combating discrimination arising from gender reassignment.<sup>26</sup>
- A 2010 European Commission Communication states that ‘the Commission is also studying the specific issues pertaining to sex discrimination

in relation to gender identity’.<sup>27</sup> In particular, the Commission staff working document on *Actions to implement the strategy for equality between women and men 2010-2015*,<sup>28</sup> accompanying the equality strategy, states that ‘in line with the jurisprudence of the CJEU on gender identity and gender discrimination, the Commission will pay particular attention to this aspect in the overall monitoring of the implementation of the relevant Directives and notably in the reporting on the application of Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services’.

## 4.3. Ways forward

Two thirds of EU Member States ban discrimination based on sexual orientation beyond the sphere of employment, to include some or all of those areas covered by the Racial Equality Directive. However, different forms of discrimination are still not equally addressed within the EU. The adoption of the European Commission’s proposal for a ‘horizontal directive’ to address the existing ‘hierarchy of grounds’ in EU law would significantly improve equal protection against discrimination on all grounds across the EU.

Stronger and clearer protection against discrimination on the ground of ‘gender identity’ is also necessary. In this regard, Member States should ensure that this type of discrimination is effectively addressed in legislation transposing the recast Gender Equality Directive to clarify existing definitions and extend protection beyond those who are undergoing or have undergone gender reassignment.

The European Commission could consider expressly including gender identity among the prohibited grounds of discrimination in the Gender Equality Directive on Goods and Services.

The FRA is engaged in ongoing dialogue with the European network of national equality bodies, Equinet, which has stepped up its efforts to enhance protection of transgender people, and support new policy and promising practice initiatives.

Recent practices in some Member States abolishing divorce and genital surgery as preconditions to the rectification of the recorded sex or alteration of name on official documents constitute good practice that could be considered by other Member States.

To address the current paucity of comparable data, the FRA will conduct a survey on discrimination on grounds of sexual orientation and gender identity in 2011.

<sup>24</sup> See European Commission (2008a).

<sup>25</sup> See European Parliament (2009d).

<sup>26</sup> See European Parliament (2010a), paragraph 79.

<sup>27</sup> See European Commission (2010b), p. 11.

<sup>28</sup> See European Commission (2010c).



# 5

## Equal treatment for family members and mutual recognition of civil status



### **Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity**

**23.** Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples.

**24.** Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

**25.** Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

to third-country nationals. Importantly, where an individual wishes to move to another country, he or she may also wish to take a family member along, or to be joined by him or her at a later date. However, the ability to do this is partially conditioned on the way that national and EU law understand ‘family member’, and how they apply the principle of equal treatment in this field. This section explores the law and practices relating to the ability of same-sex couples to exercise their right to free movement or family reunification.

In general terms, Member States retain the competence to specify who can marry, when, and to whom. A married individual, who wishes to move to another Member State, or into the EU from a third country, has the right to bring along his or her spouse. However same-sex couples do not always enjoy this right, even where they have entered a marriage or a registered partnership where this is possible. This is because it is the law of the Member State of destination which defines the notion of ‘family member’. There are conditions which apply in order to establish when the destination member state is required by EU law to allow or recognise same-sex marriages or partnerships established in other Member States.

The rights of same-sex couples vary depending on how EU law categorises each person. EU law divides individuals into three categories: EU citizens moving to another member state, third-country nationals, and those seeking international protection.

### 5.1. Research findings

The ability of EU citizens to move freely across borders and reside in other Member States, subject to particular conditions, constitutes one of the central elements and goals of EU integration. Increasingly, individuals make use of this opportunity to study or work. This has also been extended, to a lesser degree,

## Key legal trends in the period 2008-2010: equal treatment in free movement and family reunification

- At national level, several developments can be noted in relation to the opening up of marriage for same-sex couples. In addition to Belgium, the Netherlands and Spain, marriage is now permitted in Portugal and Sweden, and similar legislation is in the process of being adopted in Luxembourg and in Slovenia. Austria, Hungary and Ireland have also adopted a registered partnership scheme for same-sex couples.
- The meaning of the term 'family member' in the context of the law on free movement, family reunification, and asylum, while often remaining vague, has been or will be expanded in Austria, France, Hungary, Ireland, Luxembourg, Portugal and Spain to include same-sex couples to differing degrees and in different areas.
- On the other hand, Bulgaria, Estonia and Romania have consolidated or amended their legislation to specify that marriage is reserved for opposite-sex couples only, and to deny recognition of same-sex partnerships and marriages concluded abroad.
- This situation signals the persistence of an uneven landscape with respect to freedom of movement and family reunification for same-sex couples, which is summarised below.

There have been remarkable developments internationally in this field. In the case of *Schalk and Kopf v. Austria*,<sup>29</sup> which is now final, the ECtHR noted the "rapid evolution of social attitudes towards same-sex couples". The court also considered it "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life'". In addition, previous case law of the ECtHR makes it clear that same-sex partners must be treated on an equal footing with respect to different-sex partners of the same status. In 2010, the court reiterated that an unmarried same-sex partner should be able to succeed to a tenancy held by his/her deceased partner: in *Kozak*,<sup>30</sup> the court unanimously held that the blanket exclusion of persons living in same-sex relationships from succession to a tenancy was in breach of Article 14, taken in conjunction with Article 8 (the right to respect for private and family life). It also made a number of significant statements which broaden the 2003 *Karner* decision, recognising that states should acknowledge "developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life" (paragraph 98). Subsequently, in *P.B. & J.S. v*

*Austria*,<sup>31</sup> the court applied the same principle to a case concerning the extension of a worker's health and accident insurance to his same-sex partner. The court reiterated that a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of 'family life' (paragraph 30), and confirmed that the burden falls on the country to prove that there was a 'necessity' to exclude certain categories of people from the scope of application of the law in question (paragraph 42). It concluded that a difference in treatment between same-sex and different-sex partners was not justified.

## Free movement of EU citizens

The Free Movement Directive allows an EU citizen, under certain conditions, to move and reside within the EU and gives him or her the right to be accompanied by a 'spouse'. A citizen has the right to reside in another member state for up to three months. If a citizen wishes to remain longer they must fall within a particular category, as defined by EU law: worker or self-employed person, student, or person of independent means. A citizen is entitled to bring along his or her spouse to reside in the host member state, even if the spouse does not fall into one of the categories given. However, if the host Member State does not recognise same-sex marriages or partnerships, then this person only has a right to join their partner if they themselves fall into one of these categories. A citizen with a same-sex partner, wishing to reside in another Member State may find themselves in one of three situations listed below.

Firstly, if the couple is married in their home state, the individual should have the right of a spouse to join their partner, under the Free Movement Directive. Currently, Belgium, the Netherlands, Portugal, Spain and Sweden enable same-sex couples to be legally married. For the purposes of entry and residence rights under the Free Movement Directive, eight Member States would not distinguish between a same-sex or an opposite-sex spouse for the purposes of entry and residence rights (Belgium, Denmark, Finland, the Netherlands, Portugal, Spain, Sweden, and the UK). In the remaining 19 Member States, the same-sex spouse would not be treated as a spouse (Austria, Bulgaria, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovak Republic, Slovenia). In some of these, the same-sex spouse might be granted entry and residence rights as a (registered or unregistered) partner. By contrast, in Estonia, the new Family Law Act, which entered into force on 1 July 2010, states

29 See ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010.  
30 See ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010.

31 See ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010. At the time of writing this judgment is not yet final.

that any marriage contracted between persons of the same sex is invalid. It is therefore rather unlikely that under Estonian law same-sex spouses who have validly contracted a marriage in another country will be recognised as spouses, even if the Citizen of European Union Act refers more broadly to 'a spouse of the citizen of the European Union'. In Romania, the new Civil Code adopted in 2009 prohibits same-sex partnerships and marriages, including denial of recognition of partnerships and marriages concluded in other countries. In Bulgaria, Article 7 of the new Family Code (1 October 2009) confirms that marriage is a mutual agreement between a man and a woman.

Secondly, if the couple has entered into a registered partnership in their home country, then an individual may be able to join his or her partner in the host country as a 'partner'. According to EU law, however, this possibility depends on whether the host country treats registered partnerships as equivalent to marriage. Under the Free Movement Directive if the host country's national law treats registered partnerships as equivalent to marriage, then the Member State must grant entry and residence to the registered partner of an EU citizen moving to its territory as a family member. Fourteen Member States (Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the UK) seem to grant entry and residence rights to registered partnerships that have effects equivalent to marriage. In contrast, in 11 other Member States, no registered partnership exists in domestic legislation (Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania, and Slovak Republic). In these Member States, either registered partners do not qualify as family members for the purposes of entry and residence, or the situation is unclear.

Thirdly, if the host country does not treat registered partnerships as equivalent to marriage, then the couple will fall under the rules on unregistered (*de facto*) partners in a 'durable relationship'. EU law places no obligation on Member States to allow or recognise registered partnerships. If the couple has not formalised their relationship, or cannot do so, then they will fall under the rules on unregistered partnerships. Unregistered partners do not enjoy the same right as a spouse to join their partner. Instead the Free Movement Directive obliges Member States to 'facilitate entry and residence' to unregistered partners who are in a 'durable relationship'. This applies equally to same-sex and to different-sex couples. This rule is

not as clear as the concrete right enjoyed by a 'spouse' to join their partner, and the vague wording is open to differences of interpretation. Furthermore, such couples must show proof that the relationship is 'durable'. National rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, the Commission's Guidelines emphasise that, in this case, national rules would need to allow for 'other relevant aspects (such as for example a joint mortgage to buy a home)' to be taken into account.<sup>32</sup> Moreover, any denial of entry or residence must be fully justified in writing and open to appeal.

### Third-country nationals

The Family Reunification Directive allows spouses to be re-united. However, Member States are not explicitly obliged to extend this right to same-sex registered (or unregistered) partnerships.

If the couple is married in their non-EU country, then the individual should have the right of a spouse, under the Family Reunification Directive, to join their partner. Only eight Member States would not distinguish between a same-sex or an opposite-sex spouse for the purposes of family reunification (Belgium, Denmark, Finland, the Netherlands, Portugal, Spain, Sweden and the UK). Currently, 13 Member States grant family reunification rights to same-sex partners: nine of them have decided to extend the right to family reunification to both registered and unmarried same-sex partners in a *de facto* cohabitation (Austria, Belgium, Denmark, Finland, Ireland, the Netherlands, Spain, Sweden and the UK), whereas four of them restrict this possibility to registered partnerships only, thus excluding unmarried partners in a *de facto* cohabitation (Czech Republic, Germany, Hungary and Luxembourg). Furthermore, it can be noted that five Member States (Austria, Czech Republic, Germany, Ireland and Luxembourg) are likely to treat same-sex spouses, validly married abroad, as registered partners for the purposes of family reunification.

<sup>32</sup> See European Commission (2009a), p. 4.

## LGBT people seeking international protection

The Qualification Directive sets out the conditions in which Member States should offer asylum or international protection to third-country nationals. Those at risk of persecution in their home country (including on grounds of sexual orientation) can benefit from this protection. Member States are under a duty to recognise the unmarried partner in a stable relationship as a family member only if the legislation or practice of the member state concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens. Twelve Member States allow this, subject to certain conditions (Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Ireland, Luxembourg, the Netherlands, Spain, Sweden and the UK). This is not allowed in 14 Member States and the situation is unclear in France.

## 5.2. Mutual recognition of civil status

Legal certainty of one's civil status is a basic tenet of domestic legal systems throughout Europe. That is why most Member States require certain formalities and keep public registers of facts touching upon one's civil status. However, given the various differences in recognising same-sex partnerships, LGBT people moving from one Member State to the other cannot automatically count on such legal certainty. Their civil status acquired in one Member State, for instance where a couple got married, is not necessarily 'portable' to another, with all the consequences that this implies. EU action in this field might have a substantial impact if it actually succeeds in securing consensus around the principle that the validity of civil status acts should only be assessed according to the law of the country of registration, in accordance with the prohibition of 'double regulation' already established as a foundation of the single market. In short, this means that the member state of destination should be prohibited from reassessing the validity of a marriage or a partnership already considered valid according to the law of the Member State where it was formed. It is worth clarifying that, even under this regime, any Member State would still be free to define the conditions for access to marriage or similar legal schemes in a 'purely internal' situation, having no link with EU Law like, for instance, the relationship between two nationals of that Member State.

## 5.3. Policy developments at EU level

In the field of equal treatment for family members and mutual recognition of civil status, several European Parliament resolutions, as well as the European Commission Action Plan implementing the Stockholm Programme, set out the policy direction at EU level for the coming years.

- A Resolution of the European Parliament on the Free Movement Directive called on the European Commission to issue appropriate proposals within the framework of the Stockholm Programme to guarantee free movement, without discrimination, based on the grounds listed in Article 19 of the TFEU, drawing on the analysis and conclusions contained in the Fundamental Rights Agency report.<sup>33</sup>
- Subsequently, another European Parliament Resolution called on Member States "*without prejudice to national legislation on family law, to ensure freedom of movement for EU citizens and their families, including both registered partnerships and marriages, in accordance with Articles 2 and 3 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and to avoid all kinds of discrimination on any ground, including sexual orientation*".<sup>34</sup>
- The European Commission Action Plan implementing the Stockholm Programme sets out the following initiatives for the period 2010-2013:
  - a green paper on the free circulation of the documents: civil status documents, authentic acts and the simplification of legislation COM(2010) 747 final;
  - a proposal on matrimonial property rights and property consequences of the separation of couples from other types of unions COM(2010) 127 final;
  - a report on implementation of the free movement directive (2012);
  - a proposal on mutual recognition of the effects of certain civil status documents (2013);
  - a proposal for dispensing with the formalities for the legalisation of documents (2013).
- The European Parliament followed up on the European Commission Action Plan and in November 2010 adopted a resolution calling for mutual recognition of official documents in order to facilitate the free movement of persons.<sup>35</sup>

<sup>33</sup> See European Parliament (2009a).

<sup>34</sup> See European Parliament (2009b), paragraph 37.

<sup>35</sup> See European Parliament (2010b).





## 5.4. Ways forward

In relevant areas of EU law, in particular employment-related partner benefits, free movement of EU citizens, and family reunification of refugees and third-country nationals, EU institutions and Member States should consider explicitly incorporating same-sex partners, whether married, registered, or in a *de facto* union, within the definitions of 'family member'. In particular in the context of free movement, this could be achieved by explicitly adopting the 'country of origin' principle already firmly established in other areas of EU law.

In relevant areas of EU action concerning mutual recognition of the effects of certain civil status documents and on dispensing with the formalities for the legalisation of documents between Member States, EU institutions and Member States should ensure that practical problems faced by same-sex couples are addressed, for instance by considering the conflicts of laws principle of the law of the place where the act was formed, in combination with the prohibition of 'double regulation'.

In addition, with respect to the initiatives foreseen in the European Commission's Action Plan implementing the Stockholm Programme on matrimonial property regimes and patrimonial aspects of registered partnerships, it is important that: legal certainty for same-sex registered partners and unmarried couples is enhanced; citizens' practical needs are addressed; and that the family life of those individuals involved in such unions is acknowledged and recognised.



# 6

## International protection for LGBT people fleeing homophobia



### Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity

42. In cases where Member States have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law.

44. Asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity [...].

This legal setting does not mean that it is impossible for LGB persons to claim asylum; however, it may make applications for asylum more difficult if an individual has to prove that being LGB means that they are part of a 'particular social group'.

As regards gender identity as grounds for persecution, which had remained implicit in the Qualification Directive, the situation remains very unclear at Member State level. The protection offered to LGB persons under the Qualification Directive should logically extend to transsexual and transgender people as well, since they too form a distinctive 'social group' whose members share a common characteristic and have a distinct identity due to perceptions in the society of origin. However, this interpretation is not uniformly recognised. The current version of Article 10(1)(d) of the Qualification Directive stipulates that "gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article". This provision is very vague in its meaning and about the possibility of

### 6.1. Research findings

The previous section explored the ability of same-sex couples either to move with or subsequently join their partners in the context of free movement or family reunification. This section explores the rules and practices surrounding the granting of asylum or similar status by Member States for persons fleeing their home country because of persecution on the basis of their sexual orientation or gender identity.

Through the Qualification Directive, European Union law sets out who can be considered a refugee and be granted asylum by a Member State. An individual may be eligible to seek asylum where they are being persecuted because of their membership of a 'social group'. According to the legislation, a 'particular social group' can include LGBT persons. However, this does not necessarily mean that any LGBT person has the right to come to the EU and claim asylum. There are many difficulties in actually making or proving a claim.

### Key legal trends in the period 2008-2010: international protection

- With the developments in the legislation of Finland, Latvia, Malta, Poland, Portugal and Spain, the total number of Member States which explicitly consider lesbian, gay and bisexual (LGB) people as a 'particular social group' has now risen to 23 countries. This signals a clear trend towards legislative inclusion of LGBT people as potential victims of persecution.
- However, in three Member States (Estonia, Greece, and the UK) the legislation does not explicitly include LGBT persons as a 'particular social group'. Neither is this the case in Denmark, which is not bound by the Qualification Directive.

accepting transsexual and transgender refugees – a vagueness that is exacerbated in some language versions.<sup>36</sup>

The recast of the Qualification Directive, currently under negotiation, promises some improvements. According to the European Commission proposal, 'gender related aspects should be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.<sup>37</sup> Ensuring that transsexual and transgender people being persecuted on grounds of gender identity can rely on Article 10 is essential for guaranteeing the respect of rights and liberties of this often victimised population.

## CHALLENGES

### Establishing asylum claims

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status – the Asylum Procedures Directive – is meant to ensure a rigorous examination of applications for international protection in line with international and Union obligations of Member States.

The FRA analysis of national case law shows that there is variation among Member States in relation to what is required in order to prove the existence of a well-founded fear of persecution on grounds of sexual orientation. Firstly, some Member States consider that if homosexuality is illegal in the asylum-seeker's country, this will be enough by itself to constitute 'persecution'. However, others require not only that homosexuality is an offence, but also that it carries a serious punishment. Secondly, some Member States require the asylum seeker to show that the risk of persecution is real by proving that they have been open about their sexual orientation or gender identity. Thirdly, some Member States operate a 'fast track' procedure (with more limited opportunities to defend one's case) for asylum seekers coming from 'safe countries of origin', which can include countries that criminalise homosexuality. Fourthly, asylum procedures in some Member States require proof of sexual orientation in such a way that may be painful or distressing. For instance, it has been found that in the Czech Republic authorities test the physical reaction of asylum seekers who claim to be gay to erotic material ('phalometric testing'), which is clearly degrading and conflicts with the right to privacy. It has also been reported that some authorities will require psychiatric tests or subject individuals to humiliating and intensive questioning where they have alleged sexual abuse. Some authorities are also said to apply stereotypes in deciding whether an individual is telling the truth, in particular whether they 'look' gay because of features such as long hair or earrings. Claims may also be turned down where individuals have been married or only reveal their sexual orientation later in proceedings, which may not take into account the highly taboo nature of homosexuality in the asylum-seeker's home culture.

On 21 October 2009 the European Commission adopted a proposal to recast the Asylum Procedures Directive (see below), which touches upon some of the issues just mentioned.

<sup>36</sup> The various language versions are not consistent enough to ensure inclusiveness; for instance, the French version speaks of 'aspects relatifs à l'égalité entre hommes et femmes'.

<sup>37</sup> See European Commission (2009b).



## 6.2. Policy developments at EU level

- Article 10 of a European Commission proposal to recast the **Qualification Directive**, dealing with reasons for persecution, stipulates that *“gender related aspects should be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”*.<sup>38</sup>
- The European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) has adopted a draft report on this proposal. The alternative wording put forward for Article 10 is that *“gender related aspects, including gender identity, should be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”*.<sup>39</sup>
- The European Commission has also put forward a proposal for a directive of the European Parliament and of the Council on minimum standards on **procedures** in Member States for granting and withdrawing international protection (recast), amending the Procedures Directive.<sup>40</sup>
- On this proposal, the European Parliament has adopted a legislative resolution on 6 April 2011. This constitutes the parliament’s first reading; asylum rules will effectively be amended at the end of the ordinary procedure, which entails finding an agreement with the Council of the European Union on these amendments. The resolution contains various modifications to strengthen the position of LGBT asylum seekers. Measures include providing expert advice to asylum officials on sexual orientation and gender identity; protecting claimants’ privacy; guaranteeing that physical examinations fully respect human dignity and integrity, for instance in cases involving minors or transgender people; and ensuring that applications by LGBT asylum-seekers are not ‘fast-tracked’ for removal to their country of origin.<sup>41</sup>

## 6.3. Ways forward

There are many ways to improve protection for LGBT people seeking international protection. For example, the explicit inclusion of gender identity as a ground of persecution in the current reform of the Qualification Directive would clarify the protection of transgender people. Ensuring respect for human dignity, integrity and privacy in the procedures for granting and withdrawing international protection remains paramount.

The European Asylum Support Office, in its development of material to assist Member States, should facilitate the understanding and proper handling of cases raising issues of sexual orientation and gender identity.

The United Nations High Commissioner for Refugees Guidance note on Refugee Claims relating to Sexual Orientation and Gender Identity of 2008 (and its forthcoming update of 2011) is of particular relevance in assessing asylum claims regarding an individual’s assertion of orientation or identity, irrespective of marital status, children or conformity with stereotypes. Current uses of degrading and intrusive assessments of credibility of asylum claims based on sexual orientation and gender identity should be discontinued.

<sup>38</sup> *Ibid.*

<sup>39</sup> European Parliament (2010c), see amendments 2 and 12.

<sup>40</sup> European Commission (2009d).

<sup>41</sup> European Parliament (2010d).



## In conclusion

The legal and social research carried out by the FRA between 2008 and 2010 show some positive trends but also some difficulties, as well as different degrees of protection and fulfilment of LGBT rights throughout the EU. Both Member States and EU institutions have taken a number of important steps in this area. In addition, as of 31 March 2010, a Recommendation of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity shows agreement, among Council of Europe Member States, that a level playing field across all areas of concern should be developed in practice.

Moreover, it is important to measure future progress more comprehensively. In 2011 and 2012, the FRA will conduct a survey on discrimination and victimisation on grounds of sexual orientation and gender identity in the EU, through a diverse range of methodological approaches. The data collected, together with the Council of Europe Committee of Ministers' Recommendation, will provide useful evidence and guidance for EU institutions as they fulfil their obligation to combat discrimination actively, including discrimination on grounds of sexual orientation and gender identity, whenever defining and implementing EU policies and activities (Article 10 of the Treaty on the Functioning of the European Union). The survey will help clarify what future steps are needed, especially in light of the different pace and the lack of uniform approaches across Member States. A coherent EU-wide framework for action with clear milestones for the fulfilment of LGBT rights could draw inspiration from efforts in other areas of EU policy, such as equality between women and men or disability. An EU approach could aim to mobilise legislative, financial and policy coordination tools in the context of a shared multi-annual framework.

## Bibliography

Further detailed references to evidence referred to in this summary report can be found in the previous FRA reports on this subject, all of which are available on the FRA website at [www.fra.europa.eu/fraWebsite/research/publications/publications\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/publications/publications_en.htm).

### FRA reports

European Union Agency for Fundamental Rights (FRA) (2010a), *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity – 2010 Update*, Comparative legal analysis, Luxembourg: Publications Office of the European Union.

FRA (2010b), 'Multiple discrimination', *EU-MIDIS Data in focus 5*, Luxembourg: Publications Office.

FRA (2009), *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States – Part 2: The social situation*, Luxembourg: Publications Office.

FRA (2008), *Homophobia and discrimination on the grounds of sexual orientation and gender identity in the EU Member States – Part 1: Legal analysis*, Luxembourg: Publications Office.

### EU documents and European case law

European Council (2009), *The Stockholm Programme – an open and secure Europe serving and protecting the citizens*, Brussels, 2 December 2010.

European Court of Human Rights (ECtHR), *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010.

ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010.

ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010.

ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010.

European Commission (2010a), *Delivering an area of freedom, security and justice for Europe's citizens: Action plan implementing the Stockholm Programme*, COM (2010) 171 final, 20 April 2010, available at:

[http://ec.europa.eu/commission\\_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf](http://ec.europa.eu/commission_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf).

European Commission (2010b), *Strategy for equality between women and men 2010-2015*, COM (2010) 491 final, 21 September 2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0491:FIN:EN:PDF>.

European Commission (2010c), *Actions to implement the strategy for equality between women and men 2010-2015*, Staff working document accompanying COM (2010) 491, SEC (2010) 1079/2.

European Commission (2009a), *Guidance for better transposition and application of Directive 2004/38/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*, COM (2009) 313 final, 2 July 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>.

European Commission (2009b), *Proposal for a Directive on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast)*, COM (2009) 551 final/2, 23 October 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF>.

European Commission (2009c), *Discrimination in the EU in 2009*, Special Eurobarometer 317/Wave 71.2, Brussels, available at: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_317\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_317_en.pdf).

European Commission (2009d), *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*, COM (2009) 554 final, 21 October 2009, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0554:FIN:EN:PDF>.

European Commission (2008a), *Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426 final, 2 July 2008.





European Commission (2008b), *Discrimination in the EU: Perceptions, experiences and attitudes*, Special Eurobarometer 296/Wave 69.1, Brussels, available at: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_296\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf).

European Commission (2007), *Discrimination in the European Union*, Special Eurobarometer 263/Wave 65.4, Brussels, available at: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_263\\_sum\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_sum_en.pdf).

European Parliament (2010a), *Resolution on assessment of the results of the 2006-2010 Roadmap for Equality between women and men, and forward-looking recommendations*, 17 June 2010 (P7\_TA(2010)0232), available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0232+o+DOC+XML+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0232+o+DOC+XML+Vo//EN).

European Parliament (2010b), *Resolution on civil law, commercial law, family law and private international law aspects of the Action plan implementing the Stockholm Programme*, 23 November 2010 (P7\_TA(2010)0426), available at: [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0426&language=EN&ring=A7-2010-0252](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0426&language=EN&ring=A7-2010-0252).

European Parliament (2010c), *Draft Report on the proposal for a directive on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast)*, 28 September 2010, 2009/0164(COD), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-448.996+o1+DOC+PDF+Vo//EN&language=EN>.

European Parliament (2010d), *Legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*, 6 April 2011 (P7\_TA-PROV(2011)0136), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0136&language=EN&ring=A7-2011-0085>.

European Parliament (2009a), *Resolution on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, 2 April 2009 (P6\_TA(2009)0203), available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0203+o+DOC+XML+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0203+o+DOC+XML+Vo//EN).

European Parliament (2009b), *Resolution on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme*, 25 November 2009 (P7\_TA(2009)0090), available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0090+o+DOC+XML+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0090+o+DOC+XML+Vo//EN).

European Parliament (2009c), *Resolution on the situation of fundamental rights in the European Union 2004-2008*, 14 January 2009 (P6\_TA(2009)0019), available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0019+o+DOC+PDF+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0019+o+DOC+PDF+Vo//EN).

European Parliament (2009d), *Resolution on the proposal for a Council directive of implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, 2 April 2009 (P6\_TA(2009)0211), available at: [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0211&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0211&language=EN).

European Parliament (2007), *Resolution on homophobia in Europe*, 26 April 2007 (P6\_TA(2007)0167), available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0167+o+DOC+XML+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0167+o+DOC+XML+Vo//EN).

European Parliament (2006a), *Resolution on homophobia in Europe*, 18 January 2006 (P6\_TA(2006)0018), available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0018+o+DOC+XML+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0018+o+DOC+XML+Vo//EN).

European Parliament (2006b), *Resolution on the increase in racist and homophobic violence in Europe*, 15 June 2006 (P6\_TA(2006)0273), available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0273+o+DOC+XML+Vo//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0273+o+DOC+XML+Vo//EN).

## Further references

Abramowicz, M. (ed.) (2007), *Situation of bisexual and homosexual persons in Poland*, Kampania Przeciw Homofobii & Lambda Warsaw

Crowley, N. (2010), *Public policies combating discrimination against and promoting equality for LGBT people*, Final seminar report, the Netherlands, 18-19 March 2010, available at: <http://ec.europa.eu/social/main.jsp?catId=840&langId=en>.

Lithuanian Gay League (2007), *A media for diversity: LGBT in the news – a guide for better reporting*, available at: [www.ilga-europe.org/home/guide/country\\_by\\_country/lithuania/a\\_media\\_for\\_diversity\\_lgbt\\_in\\_the\\_news\\_a\\_guide\\_for\\_better\\_reporting](http://www.ilga-europe.org/home/guide/country_by_country/lithuania/a_media_for_diversity_lgbt_in_the_news_a_guide_for_better_reporting).

Malta Today (2010), 'Sex change woman wins her legal battle to get married', 30 November 2010, available at: [www.maltatoday.com.mt/news/sex-change-woman-wins-her-legal-battle-to-get-married](http://www.maltatoday.com.mt/news/sex-change-woman-wins-her-legal-battle-to-get-married).

Mozaika – an Alliance of Lesbian, Gay, Bisexual, Transgendered Persons and their Friends in Latvia (2007), *Homophobic speech in Latvia: monitoring the politicians*, available at: [www.ilga-europe.org/home/guide/country\\_by\\_country/latvia/homophobic\\_speech\\_in\\_latvia\\_monitoring\\_the\\_politicians](http://www.ilga-europe.org/home/guide/country_by_country/latvia/homophobic_speech_in_latvia_monitoring_the_politicians).

Netherlands / Ministry of Education, Culture and Science (2007), *Gewoon homo zijn; Lesbisch en homoemancipatiebeleid 2008-2011*[Simply gay; Dutch Government LGBT Policy document 2008-2011], Netherlands: Ministry of Education, Culture and Science, available (in Dutch) at: [www.rijksoverheid.nl/documenten-en-publicaties/notas/2007/11/14/nota-lesbisch-en-homo-emancipatiebeleid-2008-2011-gewoon-homo-zijn.html](http://www.rijksoverheid.nl/documenten-en-publicaties/notas/2007/11/14/nota-lesbisch-en-homo-emancipatiebeleid-2008-2011-gewoon-homo-zijn.html).

Polacek, R. and Le Déroff, J. (2010), *Joining forces to combat homophobic and transphobic hate crime. Cooperation between police forces and LGBT organisations in Europe*, Brussels: International Lesbian, Gay, Bisexual, Trans & Intersex Association (ILGA) – Europe, available at: [www.ilga-europe.org/home/news/latest\\_news/ilga\\_europe\\_s\\_new\\_publications\\_on\\_homophobic\\_transphobic\\_hate\\_crimes\\_and\\_working\\_with\\_the\\_police](http://www.ilga-europe.org/home/news/latest_news/ilga_europe_s_new_publications_on_homophobic_transphobic_hate_crimes_and_working_with_the_police).

Sweden/Ministry of Integration and Gender Equality (2009), *Equal rights and opportunities regardless of sexual orientation or transgender identity or expression*, Factsheet, Stockholm: Ministry of Integration and Gender Equality.

UK/Government Equalities Offices (2010), *Working for Lesbian, Gay, Bisexual and Transgender Equality*, UK: Government Equalities Offices, available at: [www.equalities.gov.uk/pdf/424757\\_LGBT-factsheet\\_Web.pdf](http://www.equalities.gov.uk/pdf/424757_LGBT-factsheet_Web.pdf).



European Union Agency for Fundamental Rights

**Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States**

Summary of findings, trends, challenges and promising practices

2010 — 40 pp — 21 x 29.7 cm

ISBN 978-92-9192-695-4

doi:10.2811/26781

**Europe Direct is a service to help you find answers  
to your questions about the European Union**

Freephone number (\*):

00 800 6 7 8 9 10 11

(\* ) Certain mobile telephone operators do not allow access to 00 800 numbers or these calls may be billed.

## HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

The European Union (EU) is founded on the values of equality and non-discrimination, and through its policies works to combat discrimination, including discrimination based on sexual orientation or gender identity. This report of the European Union Agency for Fundamental Rights (FRA) twins its research findings in the field with the relevant EU standards in a short and easy-to-read publication designed to equip those who shape policy with the information they need to develop a coherent and systematic approach to the protection of lesbian, gay, bisexual and transsexual (LGBT) rights. It builds on previous FRA legal and social research from 2008, enabling, for the first time, a review of legal trends. Its findings show that although the EU and its Member States have made significant progress towards the realisation of equality, progress is occurring at a variety of speeds, resulting in an uneven response to discrimination in areas including protection from abuse and violence or freedom of assembly. The report also explores possible options for EU Member States to combat discrimination moving forward, such as targeted data collection or the promotion of even-handed debates.



Publications Office

### FRA - EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Schwarzenbergplatz 11 - 1040 Vienna - Austria  
Tel: +43 (1) 580 30 - 60 - Fax: +43 (1) 580 30 - 693  
fra.europa.eu - info@fra.europa.eu  
facebook.com/fundamentalrights  
twitter.com/EURightsAgency

ISBN 978-92-9192-695-4



9 789291 926954