

Q & A Homophobia Report

- What are the key findings of the report?

One of the Agency's principle conclusions is that there should be one horizontal directive for all discrimination grounds covered by Article 13 of the EC Treaty with the same extended scope and institutional guarantees as provided for the grounds of race and ethnic origin by the Racial Equality Directive 2000/43/EC.

The analysis of the unequal treatment of same sex couples across the EU points to the urgent need to clarify the situation in conformity with international human rights law for rights and benefits provided for spouses and partners under the EU's Free Movement Directive, the Family Reunification Directive and the Qualification Directive.

The report finds that 18 EU Member States have already gone beyond the minimal prescriptions regarding sexual orientation in implementing the Employment Equality Directive 2000/78/EC by providing protection against discrimination for Lesbians, Gays, Bisexuals and Transsexuals (LGBTs) not only in employment, but also in other areas such as education, social security, healthcare, and access to goods and services, thus following the model of the Racial Equality Directive. FRA considers this development very positive and welcome. On the other hand, however, there is a paucity of official or even unofficial statistical data across the EU on discrimination on grounds of sexual orientation. The sociological forthcoming second part of the report is expected to shed some light on this situation. Yet, there clearly is a need for Member States to strengthen their efforts to facilitate access to complaint and redress procedures to LGBT persons.

Furthermore, the report finds that the issue of transgendered persons, who are also victims of discrimination and homophobia, is adequately addressed in only 12 EU Member States that treat discrimination on grounds of transgender as a form of gender discrimination. According to the European Court of Justice, the legal instruments for equal treatment of men and women should be interpreted so as to afford protection also against transgender discrimination. Therefore, Member States should be encouraged to make this visible in their domestic laws relating to equal treatment.

Homophobic hate speech and hate crime represent obstacles to the possibility for individuals to exercise their free movement and other rights in a non-discriminatory manner. This can be combated using EU wide criminal legislation. The report also documents incidents of banning LGBT demonstrations, such as "pride parades".

The report also highlights examples of good practice to overcome underreporting of LGBT discrimination, to promote inclusion and to protect transgender persons.

- Why did FRA choose this topic for its first report?

For some time now NGO reports, such as ILGA's, have highlighted the problems gays and lesbians face in their every day lives in many EU countries. Discrimination is a major human rights issue. The Charter of Fundamental Rights clearly prohibits discrimination on various grounds including sexual orientation. Until now Community legislation (Directive 78/2000) prohibits direct and indirect discrimination, as well as harassment on grounds of sexual orientation, but only in employment. There is a growing debate regarding the extension of the much more comprehensive protection of the Race Equality Directive (43/2000) to cover other grounds, such as sexual orientation, disability, etc. In this context the Agency received in June 2007 a specific request from the European Parliament to prepare a comprehensive study on homophobia and discrimination on the ground of sexual orientation, to be used in its debate for a "horizontal directive" on all discrimination grounds.

- Should LGBT people enjoy the same level of protection against discrimination as ethnic groups?

Certain grounds of discrimination, for example race and ethnicity, do benefit from a better protection than others in international human rights law. Indeed, the idea that certain grounds are more 'suspect' than others, justifying a stricter degree of scrutiny of differences in treatment based on such characteristics, is familiar in international jurisprudence. However, even though the idea of a 'hierarchy of grounds' is not per se prohibited under international law, differences in treatment between different categories as to the degree of protection they are afforded can only be acceptable if they are reasonably and objectively justified. For the European Union, the principle of equal treatment constitutes a fundamental value: Article 21 of the Charter of Fundamental Rights prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

The Racial Equality Directive 2000/43/EC provides comprehensive protection against discrimination on the grounds of race or ethnicity in several spheres of social life employment and training, education, social protection (including

social security and healthcare), social advantages, membership and involvement in organisations of workers and employers and access to goods and services, including housing. However, the Employment Equality Directive which provides protection against discrimination on grounds of sexual orientation, as well as religion or belief, disability and age covers only the areas of employment and training.

In light of this, the principle of equal treatment in EU law appears paradoxically to be applied through the existing directives “unequally” creating an artificial “hierarchy” of grounds of discrimination, protecting one more comprehensively than others.

Although various anti-discrimination provisions may offer a certain level of protection against sexual orientation discrimination in the Member States, treating grounds of discrimination differently is not commensurate with the EU's fundamental principle of equal treatment. Furthermore, the task of EU law is to approximate national legislation to a common denominator so that a fundamental principle of the European Union, enshrined in its Charter of Fundamental Rights, can be implemented respected and protected equally in all Member States.

- The report deals with the status of same sex partnerships and same sex marriage. Does the EU have a say in these issues?

The fight against discrimination on the grounds of sexual orientation falls clearly under community competence according to Art 13 of the EC Treaty. However, EU legislation concerning the rights of same sex partners is limited to three directives:

the free movement directive,

the family reunification directive,

and the qualification directive.

The report deals with the issue of the rights and benefits available to same sex couples in the application of these directives and finds that there is an urgent need to clarify the situation across the EU.

For countries that do not allow same-sex marriage, international human rights law requires that they either have access to a registered partnership, which provides them with the same advantages as if they had access to marriage; or, that their “durable relationships” allow them the same advantages.

It must be noted that differences in treatment between married couples and unmarried couples are legitimate, precisely because opposite-sex couples can make a deliberate choice to marry or not.

But when same-sex couples are prohibited from marrying they have no such choice. Therefore, the advantages recognized to married couples should be automatically extended to unmarried same-sex couples either when they form a registered partnership or, in the absence of such an institution, they are in a “durable relationship”.

- The report deals with the freedom of assembly and criminal law. Are these issues part of your Agency’s mandate?

Discrimination against LGBTs often manifests itself through the ban of LGBT manifestations and parades, homophobic manifestations and assemblies, incidents of violence and hate speech. Thus, the report addresses such phenomena in order to identify how they are dealt with by the legal systems in the Member States and to examine possible EU measures in this respect.

- Why does the report deal with transgender issues?

Because transgender people are also victims of homophobia, as ILGA reports have indicated, and as the 2006 European Parliament resolution “Homophobia in Europe” has acknowledged.

The report finds that the issue of transgendered persons is adequately addressed in only 12 EU Member States that treat discrimination on grounds of transgender as a form of sex discrimination. But even in these cases it is generally a matter of existing practice by the anti-discrimination bodies or the courts rather than an explicit stipulation of legislation. Transgendered people should be protected from discrimination in the European Union avoiding any legal uncertainty. The European Court of Justice considers that the instruments implementing the principle of equal treatment between men and women should be interpreted in order to afford a protection against discrimination on grounds of transgender.

- What can the EU do to fight against discrimination of LGBT people?

The Agency presents its opinions in this report for concrete action at EU level. It also identifies “good practice”, which can stimulate debate and inspire action.

More specifically, FRA is of the strong opinion that the European Union institutions should firstly create a horizontal antidiscrimination directive which ensures equal protection for all discrimination grounds following the scope of the Racial Equality Directive. Secondly, that they should issue clarifications and guidance regarding the treatment of same sex marriages and same sex partnerships and other LGBT issues under the Free Movement Directive, the

Qualification Directive and the Family Reunification Directive. Thirdly, that they should issue clarification and guidance that discrimination of transgender people and on the grounds of gender identity should be treated as discrimination on the ground of gender.

Furthermore, FRA states that the Working Party established under Article 29 of the Data Protection Directive should deliver an opinion concerning the permission and conditions of the processing of sensitive personal data for statistical purposes, particularly in the context of antidiscrimination policies.