



The European Region
of the International
Lesbian and Gay Association

Going beyond the law: promoting equality in employment

ENGLISH

REPORT
April 2005



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Going beyond the law: promoting equality in employment

ILGA-EUROPE REPORT
June 2005

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Promoting equality in employment

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Introduction

EU legislation provides for the protection of lesbians, gays and bisexuals (LGB) against discrimination in the workplace. Introduced in November 2000, the legislation came in the form of Council Directive 2000/78/EC and is generally known as the Framework Directive.¹ As with all Council Directives, member states are required to transpose the provisions of the Directive² into their individual domestic laws.

The introduction of this Directive represents an important step forward in the struggle for equal rights for the LGB people in the EU member states. In the first instance, national laws will have to change.

Furthermore, in the process of changing laws, legislators, employers, trade unions and other relevant stakeholders will have to engage, some for the first time, with the workplace issues relevant to LGB people. The debate thus initiated will contribute to the broader project of changing societal attitudes to LGB people.

We are, however, a long way from realising the benefits that the Framework Directive purports to provide for. A major concern is the fact that the response by individual member states has varied considerably, resulting in an uneven spread of compliance. Secondly, it has become apparent that there are weaknesses and shortcomings in the Directive itself which means that aspects of discrimination against LGB people are not covered, or, in some cases, are rendered more discriminatory. Thirdly, in order to be activated, never mind effective, the legislation requires the person experiencing discrimination to come forward and initiate proceedings in order to prove the discriminatory practice and seek redress. This can be particularly problematic for LGB people. Finally, even if national laws in all member states complied fully with the provisions of the Directive, it is a reality to be reckoned with that legislation is not enough.

One of ILGA-Europe's key objectives is to ensure equality of LGBT people in the field of employment across Europe. The production of this document is part of our work in this area. The purpose of the doc-

¹ Discrimination against transgender persons on the ground of their gender identity has been ruled by the European Court of Justice to be a form of sex discrimination and is therefore prohibited under European Union law by Directive 76/207/EEC.

² Throughout this document, Directive refers to the Framework Directive, 2000/78/EC

ument is to:

- * Give an overview of the provisions of the Directive
- * Discuss its strengths and its limitations
- * Outline the nature of discrimination experienced by LGB people
- * Present suggestions for action and examples of good practice for employers and trade unions
- * Point toward other sources of information and resources

We hope that the document proves useful to those working towards securing rights for LBG people, including trade unions and employers, as well as LBG workers who want to know their rights. We hope too to contribute to the debate about how equality legislation needs to be supported and enhanced by other initiatives, including policy development, positive actions measures, and aware-raising and educational campaigns.

I. The legal situation

In the European Union, the most important legal development in the field of non-discrimination was undoubtedly the EU directive adopted on 27 November 2000, which set out to "establish a general framework for equal treatment in employment and occupation". Member States of the Union were under an obligation to translate the minimum standards defined in the Directive into their national legal systems by 2 December 2003, and 1 May 2004 for accession countries.

Countries preparing to join the European Union in the future - such as Romania, Bulgaria or Turkey - are equally obliged to transpose the Directive into national law prior to their accession.

What follows is an overview of the provisions of the Directive. While the Directive covers four grounds, i.e. religion and belief, disability, age and sexual orientation, our discussion throughout this document is confined in the main to issues relevant to sexual orientation.

Scope of the Directive

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

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

Discrimination defined

The Directive prohibits both direct and indirect, which it defines as follows:

- * direct discrimination takes place when a person, because of their sexual orientation is treated less favourably than another person of a different sexual orientation;
- * indirect discrimination takes place when a person, because of their sexual orientation experiences a disadvantage as a result of the impact of an apparently neutral provision, criterion or practice.

An important dimension of the Directive is the incorporation and definition of harassment as a form of discrimination. Harassment is described as:

- * unwarranted conduct toward a person, on the basis of their sexual orientation, that has the purpose or effect of violating that person's dignity and creates an intimidating, hostile, degrading, humiliating or offensive environment.

It is also discriminatory to issue instructions to discriminate on the basis of sexual orientation. This would apply, for example, in the case of an employer issuing instructions to a recruitment agency in relation to the type of candidate sought for a particular position.

Defending one's rights

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

Member States are also required to ensure that organisations, such as trade unions or representative NGOs, can act on behalf of, or in support of a person who takes a proceeding in relation to a discriminatory practice.

Anyone who initiates proceedings against an employer in relation to discriminatory practices is protected, under the terms of the Directive, against victimisation. This means that if a person is dismissed or is subject to any other adverse treatment because they bring a case, the employer could be judged to have broken the law.

Burden of proof

When someone who considers that they have been discriminated against brings a case in which they present facts which are deemed to constitute discrimination, the onus is on the person accused of discrimination to disprove the case. This 'shift' in the burden of proof unto the employer is an important aspect of the legislation.

Sanctions

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

Measures in support of the Directive

The Directive provides for the establishment by Member States of a range of processes, mechanisms and initiatives to ensure compliance, not only with the substantive legal requirements, but also with

the spirit of the Directive in relation to establishing and promoting the principle of equal treatment.

Member States are encouraged to use **positive action** measures to prevent or compensate for disadvantages experienced on the basis of one's sexual orientation. Positive action programmes are well established in many member states in relation to the recruitment, training and general working conditions of women and of some minority groups, e.g. older people, and people living with a disability.

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

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

Dialogue with NGOs is also seen as an important way of promoting equality and Member States are encouraged to facilitate dialogue at this level.

Exemptions

For LGB people the most important exemptions relate (i) to the right which can be exercised by churches and other organisations that require their employees to comply with their ethos and (ii) the provision which allows member states to continue to accord benefits to married partners which are not accorded to unmarried partners.

Genuine occupational requirements

A job may be restricted to people of a certain sexual orientation if this is a 'genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. There are very few jobs where being of a particular sexual orientation is

essential to doing that job. Such requirements must be identified at the beginning of the recruitment process and clearly stated in recruitment material. They are always open to challenge and it is up to the employer to prove why it is necessary.

Compliance

In cases where a Member State fails to implement the Directive, the EU Commission will issue a formal letter outlining the ways in which the Directive has not been met. The next step is for the Commission to issue a 'reasoned opinion' setting a time limit for the Member State to comply. Finally, the Commission can refer the issue to the European Court of Justice.

The European Commission has already started infringement procedures for some of the old EU member states: on 20 December 2004 Germany, Luxembourg, Greece, Austria and Finland were referred to the European Court of Justice for failing to transpose the Framework Directive.

2. What is discrimination?

Introduction

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

From ill-conceived assumptions to unfair treatment

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

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

Indirect discrimination occurs when a person is placed at a disadvantage when, for example, a condition that applies to everyone presents more difficulties for LGB people, e.g. bringing a partner to company functions. One way to think of the difference between direct and indi-

rect discrimination is to think of the former being intentional and the latter being unintentional. Becoming aware of unintentional discriminatory practices, and amending them in line with the principle of equal treatment, is a legal requirement for employers.

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

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

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

Although it has been almost five years since the EU member states have agreed on protecting their citizens from sexual orientation discrimination in employment, there are very few examples of good practice initiated in response to the legislation.

³ See for instance: "Concepciones, actitudes y comportamientos respecto a la homofobia en el ámbito laboral ", FELGT, Spain, 2002

⁴ Statistics Sweden, Working Conditions and Exposure of LGB persons, 2003, http://app.rfsi.se/apa/19/public_files/scb_report_eng.pdf

Studies have revealed some of the reasons why: hesitation to approach what is often considered a 'touchy subject', lack of resources, different priorities and in most cases ignorance.³ Many people are simply not aware that their colleagues may experience their daily work lives in a fundamentally different manner. A Swedish study, conducted by National Statistics Sweden in 2003, revealed that less than 1 % of respondents believed that someone had been discriminated against on grounds of sexual orientation. This stands in stark contrast to the 36% of lesbian, gay and bisexual respondents who reported that they had been discriminated against in the very same workplaces!⁴

Some argue that sexual orientation is a private matter, best confined to the bedroom and has no relevance to the workplace. The flaw in this argument is that it fails to recognise the social dimension of the workplace. People's private and family lives permeate the social situations in the workplace on a regular basis. There seems to be an unwritten rule that discussion about heterosexual family relations is acceptable but talk about life outside work with a same-sex partner is offensive and seen by some as promoting homosexuality.⁵

⁵ ESF Research Report: Straight people don't tell, do they...? Negotiating the boundaries of sexuality and gender at work, J. Lehtonen, K. Mustola (eds.), Ministry of Labour, Finland, 2004, p. 47

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

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

To hide one's true self - coming out in the workplace

"All the time you're on your toes, thinking what am I going to do, what should I say to this? So, yes, it does get quite heavy in the end. It gets really really heavy. How could it not have an effect on you? (...) Being on your guard all the time, watching everything you say (...). That's how it is when you're in the closet, isn't it? All the time you are on your guard. You keep worrying about doing something, or saying something that will make people guess the truth about things."⁶

⁶ Finland, Data from Questionnaire 2002/2003, Female employee, 50 years old, employed in health care sector, talking about being in the closet, source: see footnote 3, Lehtonen/ Mustola

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

⁷ Stonewall, Employment Equality Regulation - Guidelines for Employers, 2003, p. 13, see: http://www.stonewall.org.uk/docs/Employers_Guide_final.pdf

"I work with the under-fives. Nobody at work knows I'm a lesbian. When my long-term relationship ended, I was devastated but I couldn't talk to my colleagues about it - none of them knew I had a partner in the first place. I know they would have supported me if it had been a marriage that ended, and it would have really helped. I felt so alone."⁷

Fear of colleagues' reactions and of jeopardising career prospects force many people to conceal everyday details that might imply same-sex relationships. Some simply conceal personal matters or disclose them only partially. Others invent stories to cover up the truth. Some avoid socialising and close personal contacts with their fellow workers. Similar strategies used include evasion, changing the subject, walking away from uncomfortable conversations, or using gender-neutral language.⁸

⁸ Lehtonen/ Mustola (eds.), p. 40

Recent research has shown that a large percentage of LGB people across the EU do not feel safe enough to be open at work. Yet, without openness, LGB workers are forced to lead a double life and leave part of themselves at home. The oppressiveness of concealment can steal valuable energy from work. It also impinges on what people can talk about and affects other forms of participation. The constant uncertainty of maintaining a false image is wearing, both physically and mentally. It creates a sense of isolation and impacts negatively on work.

Homophobia

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

In a Maltese survey in 1999 for instance, 40% of the population stated that they did not want to have homosexuals as neighbours⁹. In Lithuania (2001) 68% of those surveyed responded similarly. In Slovenia, the Institute for Public Affairs conducted a public opinion poll in 2001, where respondents were asked whether they agreed with the following statement: "To be homosexual is immoral, it is an aberration worth of condemnation". 18% agreed, 33.8% were unsure and 48.2% thought that homosexuals should be treated equally to other people.¹⁰ In a similar survey in Poland, carried out by the Polish Centre for Public Opinion Polls (CBOS) in 2001, 88% believed homosexuality to be unnatural, 41% thought it should not be tolerated and only 5% considered it normal.

⁹ Values of Women and Men in the Maltese Island: a comparative European perspective, Commission for the Advancement of Women, 2000, p. 245

¹⁰ Slovenia Report on Discrimination

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

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

The degree of homophobia differs across the EU. Yet, even in countries where it may no longer be acceptable to publicly ostracise individuals based on their sexual orientation, prejudice prevails. Here an example from Germany (2002) by a CSU parliamentarian: "Leaving

¹¹ "Bei aller Naechstenliebe darf in der Oeffentlichkeit nicht der Eindruck entstehen, als sei diese Lebensform etwas ganz Selbstverstaendliches, als sei es richtig, wenn junge Menschen sich fuer eine solche Lebensform entscheiden. Es ist daher an der Zeit, dass diese Lebensform endlich auch in der Oeffentlichkeit als das bezeichnet wird, was sie ist: die Perversion der Sexualitaet."
 Source: www.bundestag.de/mbd-home/Geis_No0/ehe-undfamilie.htm CSU
 Parliamentarian
 Norbert Geis, February 2002

¹² Jukka Lehtonen (ed), *Sexual and Gender Minorities at Work*, Finland, 2002, p. 9

¹³ See for instance: "Concepciones, actitudes y comportamientos respecto a la homofobia en el ambito laboral de Coslada", FELGT, Spain, 2003

¹⁴ Report on Discrimination of Lesbians, Gay Men and Bisexuals in Slovakia, 2001, p. 55

charity aside, we must not give the impression that this way of life is natural or self-evident, that it is acceptable for young people to decide to lead such a way of life. It is thus about time to publicly denounce this way of life as what it really is: the perversion of sexuality."¹¹

"Hairdressers, truck drivers and ballet dancers"¹²

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

Particular working environments, then, are considered unsuitable for lesbian, gay or bisexual people. Often, they are seen as a danger - a potential source of corruption - to minors. Teaching or childcare professions are therefore considered inappropriate for LGB people.¹³

In Slovakia, for instance, the newspaper PRACA quotes politician Eva Slavkovska (referring to the implementation of the Employment Directive):

"According to the Slovak National Party, the employment of homosexual teachers can have a negative emotional and moral influence on healthy development of children. Therefore, nationalists consider the legal amendment scandalous."¹⁴

In a Swedish survey in 2000, 37% of employees had a negative or sceptical attitude toward working with gay and lesbian people, 15% thought that certain jobs should be denied to homosexuals altogether. Occupations typically considered "gay" include hair dressers, waiter, air steward or artist whilst the police, the army, the church, construction and manufacturing are seen as least suitable. Lesbians are con-

sidered to be good at jobs like security guards, police, athletes, truck drivers and are seen as unsuitable for clothes and beauty shops, church, schools or kindergartens. Traditional gender norms are intertwined with the stereotypical image of gay men as effeminate and lesbians as masculine.¹⁵

¹⁵ In Spain for instance, gay men are colloquially called "loca" or "marica" (crazy woman, sissy) and lesbians are spoken of as "camionera" or "tor-tillera" (truck driver)

"Most people with my educational background (= language studies) end up being teachers. To be a teacher and a lesbian in a small place, a dreadful scenario..."¹⁶

¹⁶ Lehtonen/ Mustola (eds.), p. 159

Such preconceived notions can be damaging to the career development of many LGB people. Evidence in the UK suggests that many lesbians and gay men choose their employment in areas of industry considered 'safe havens' and not necessarily those where their skills, talents and interests are suitably matched to the job requirements.

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

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

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

¹⁷ Report Social Discrimination of LGB people in the Czech Republic, 2003, p. 23

"I came to work and two colleagues started to harass me. They said I was a perverted homosexual and if it weren't a crime, they would have us killed. Then one of them slapped me and said people like us should not be allowed to go out. When the boss came, she fired me on the spot and said she did not want to bring shame on her business." (Czech Republic, woman, aged 19-25)¹⁷

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

Graffiti, posters pictures, emails can also be used as ways of harassing colleagues in the workplace. It can include condescending, deprecating or bullying behaviour or unfair criticism of someone's work performance. Even where actions and comments are not apparently aimed at individuals, if they create an intimidating, hostile, degrading or humiliating environment, they constitute harassment.¹⁸

¹⁸ For further details, see for instance: "Sexual Orientation Discrimination in Northern Ireland. The Law and Good Practice", Equality Commission for Northern Ireland, March 2004, p. 9-10

"Colleagues at work harassed me on numerous occasions. Twice it got particularly bad when one colleague said: 'I would send all queers to Auschwitz, to the camp to get gassed.' I did not report it to the police as the attitude of the Polish police is not all positive about gays. Many officers sneer at gays. If I reported the incidents, I could lose my job quickly." (Poland, gay man aged 26-40)¹⁹

¹⁹ Report on discrimination on the grounds of sexual orientation in Poland, 2001, p. 14

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

Ireland, December 2004 ²⁰

The case, taken under the Employment Equality Act 1998, was resolved in favour of the Mr Piazza, a gay man, who was awarded €10,000 in compensation. It concerned harassment on grounds of sexual orientation experienced by an employee of a Dublin hotel.

On one occasion the hotel's restaurant manager sent an email to the human resources manager, referring to Mr Piazza as "just a bloody woman". On another occasion a kitchen steward called Mr Piazza a "bastard, gay bastard" and a "queer bastard". In a third incident, one of Mr Piazza's male colleagues said to another male colleague: "you want to fuck Gabriele".

All three incidents were considered as evidence of harassment on the basis of sexual orientation and the hotel was found to be liable because it failed to respond adequately to Mr. Piazza's complaints. Although the hotel held an investigation, Mr Piazza was never informed about any findings and no apology was issued. The hotel failed to make it clear that it regarded similar behaviour as serious and unlawful misconduct and it did not take any apparent steps to avoid similar incidents in the future.

²⁰ Gabriele Piazza v The Clarion Hotel. Equality Tribunal decision no. DEC-E2004/033. Available at <http://www.equalitytribunal.ie>)

²¹ Guardian
Newspapers Limited,
29 January 2005

United Kingdom, January 2005²¹

In the first successful case brought under the Employment Equality (Sexual Orientation) Act Rob

Whitfield, aged 28, who was persistently taunted about being gay by senior colleagues won £35,345 in compensation for constructive unfair dismissal, harassment and discrimination. The case is expected to set a benchmark for employers who fail to stamp out anti-gay or lesbian harassment.

Mr Whitfield was mercilessly got-at by members of the senior management team. He was nicknamed "Sebastian" by fellow managers, after the political aide played by David Walliams in the TV series Little Britain. A company director Paul Jackson repeatedly called him "dear" after he ordered a kir royale - perceived as a "feminine" drink - at a business conference. Other staff portrayed Mr Whitfield as "abnormal" and called him "queer", a "queen" and someone who liked "poofy drinks and handbags", the tribunal was told.

Giving the panel's verdict, the Chair said: "The damage done here was more than a bruise. Although the acts were not of the grossest kind - for example there was no physical abuse - the number of incidents, the repetition and the persistence constitute enough verbal blows to cause a substantial hemorrhage."

The seriousness of harassment, in all its forms, as a work-related hazard has been increasingly recognised. What might previously have been treated as insignificant isolated incidents are now being regarded as health and safety issues and as having the potential of a serious form of violence.²² Even the "innocent jokes" constitute harassment since the cumulative effect of such 'micro-offences' are a serious affront to a person's dignity.

²² see Dublin
Foundation publication
on Harassment

Direct discrimination

"And then one of my friends who is gay applied for a job. When they got to the question about 'family relations' the interviewer asked 'And you have a wife?' And he said 'Um, a companion, male'. That was the end of the interview."²³

²³ Male candidate during job interview in the area of traffic and transport, Finland

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

Direct discrimination, however, is generally carried out by employers, and occurs when action is taken toward a person simply because of their sexual orientation. It may result in a person failing to get a job because she/he is LGB or because the employer thinks they are LGB. It can also take the form of extra-ordinary processes, that is to say processes which would not be applied to a straight person, as the example of the young Swedish care work (described below) illustrates.

Sweden. Case of discrimination in the job interview

A young woman made a complaint to the ombudsman in relation to what she felt was unwarranted and intrusive questioning about her sexual orientation. The woman had been hired by the Family Care Unit in a local council in Stockholm as a point of contact and guidance for a young girl. The fact that the young woman was a lesbian came up during the first interview. The local council saw this as a problem and expressed concerns that the woman might initiate an affair with the young girl. They also took the position that the parents of the girl be informed. The young woman took issue with this line of argument claiming that they would not have acted in this manner had she been heterosexual. While the council acknowledged that this was the case, questions regarding her sexual orientation were asked on several occasions after this meeting before they finally hired her.

On behalf of the young woman, the ombudsman reached a settlement with the local council. As part of this agreement the local council will, in consultation with the ombudsman, develop guidelines regarding education for employees and a policy in order to avoid discriminatory situations arising in the future. The local council will also pay financial compensation to the woman.²⁴

²⁴ For more information, see : www.homo.se

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

Sweden. Case of discrimination in the workplace

A young woman employee made a complaint to the ombudsman in relation to treatment she received from management and staff following a visit to the work canteen by her female partner. The couple held hands, gave each other light kisses while having lunch in the canteen and later hugged and kissed goodbye outside the building.

When interviewed later by her manager, the woman was told that complaints had been made about her "making out" in the canteen and that he himself had seen them "making out" outside the building. The manager said that the couple were not allowed in the canteen and that they were not allowed to "go at it as they did", whether this was inside or just outside the workplace. In his view homosexuality was not normal and was not something he wanted his company to be associated with. After this incident, the woman was increasingly ignored and did not get the same level of guidance as before. The situation in the workplace became too much for her that she resigned.

Because the company was unwilling to settle the case outside of court, the ombudsman instituted court proceedings against the employer in accordance with art. 24 of the Act (1999:133) banning discrimination in working life on grounds of sexual orientation. However, at a preliminary hearing before the Swedish Labour Court, the ombudsman reached an agreement with the employer on behalf of the plaintiff. As part of this settlement the employer agreed to pay financial damages to the plaintiff.²⁵

²⁵ For more information, see : www.homo.se

In the next example, the Deputy Director of a school, suspecting that one of her teachers is lesbian, subjected her to intrusive questioning and comments. Clearly her remarks were offensive and unwarranted in terms of the work performance of the teacher. A first assessment of the Deputy's behaviour might be that she is guilty of harassment.

However, because the teacher was forced to leave the job because of the persistence of this type of comment, this could be construed as constructive dismissal as the result of direct discrimination.

Hungary. Discrimination in the workplace (Young, female teacher)

"After graduating from university, I began to teach English at a secondary grammar school in Szentendre in 1999. (...) I had no problems until the end of the first semester, when the director of the school asked me if I wanted to stay on. She and the deputy director kept asking me about the way I dress. They wanted me to wear skirts. They also wanted to persuade me to grow my hair. In March the director told me that she had to bear too much criticism because of me. She said it was a denial of femininity and that I am in conflict with myself and that it could only end in a nervous breakdown. She then added that she had had a similar case before, an Englishman, who looked normal but turned out to be gay. When she found out, she immediately dismissed him, arguing that parents would not want a gay person to teach their children. She did not ask me directly whether I was a lesbian but told me clearly that I had chosen the wrong profession and should look for another job."²⁶

²⁶ Report on the Discrimination of Lesbians, Gay Men and Bisexuals in Hungary, 2001, p. 27-29

Indirect discrimination

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

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

be permissible. If however, this cannot be proved, then the practice is discriminatory.

Collective agreements and internal rules

All too often employee terms and conditions and benefits, which are often negotiated between employer and trade unions, are drawn up to accommodate heterosexual lifestyles and take no account of same sex couples. The most important workplace benefit is perhaps the pension scheme and this is also the most common area in which same sex couples are penalised. Most pension schemes allow only the spouse of the pension holder to benefit, thus excluding same sex partners, regardless of how long they have been together as a couple.

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

In 2004, the European Group of Experts on Combating Sexual Orientation Discrimination²⁷ undertook a study on indirect sexual orientation discrimination in relation to partner benefits. The study revealed a surprising lack of awareness of the problem amongst trade unions and employers. Many were not aware whether or not such benefits were available to same-sex couples. Furthermore, many benefit provisions in collective agreements and internal rules do not explicitly restrict benefits to different-sex partners but do not explicitly extend them to same-sex partners either. In small companies such rules are often unwritten and thus open to a greater degree of uncertainty. In short, the overall situation is one of uncertainty and lack of awareness.

²⁷ The European Group of Experts on Combating Sexual Orientation Discrimination was established and funded by the European Commission under the Community Action Programme to combat discrimination 2001-2006. For details see: www.emmeijers.nl/experts

Indirect discrimination in legislation

Another example of indirect discrimination can occur in relation to parental status. In Spain for instance, certain benefits contained in the Workers' Statute are linked to the role of child-raising and are fre-

²⁸ Alan Littler, Thematic Study on Discriminatory Partner Benefits in: Combating sexual orientation discrimination in employment : legislation in 15 EU member states. Report of the European Group of Experts on Combating Sexual Orientation Discrimination, see: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

quently based on the notion that, whether married or not, the parents are of a different sex. So if one parent is not recognised as the legal parent, a same-sex couple raising a young child would be denied the right to reduce the number of hours they are obliged to work.²⁸

Although discriminatory treatment is unlawful, the following obstacles remain:

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

Conclusion

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

3. How employers can promote equality in the workplace

Introduction

There have been two important developments in the last number of years that have brought equality issues to the forefront of Europe's employers. The first is new EU legislation in the field of employment prohibiting discrimination and ensuring minimum health and safety standards. One of the considerations employers have when adopting policies in line with the legislation is the potentially expensive legal claims from staff if they fail to comply.

The second development is the recognition by many employers that there is a business case argument for diversity. A diverse workforce is associated with policies designed to recruit, retain and develop employees from diverse social groups. Such policies go beyond compliance with national anti-discrimination policy. While there are other arguments for building a diverse workforce - ethical, i.e. it is the right thing to do; and regulatory, i.e. to comply with legislation - the potential for economic benefits from an investment in people is becoming an increasingly influential motivator. Sound business arguments have been developed and promoted as to how cultivating a workplace where employees are valued and respected can result in better economic performance. While the business case for diversity in the workplace is at an early stage of development, and is more developed in the USA and Canada than in Europe, it is gaining more attention and is being used by a variety of non-industry players - NGOs, trade unions etc - to promote equality in the workplace.

The birth of diversity management

Studies carried out in the USA show that the performance of LGB employees can decrease by more than 10% if they are faced with a homophobic work climate. In response to this obstacle to productivity, diversity management was born. In Europe the leading country in terms of diversity management is undoubtedly the UK.

²⁹ Stonewall Brochure: "Corporate Equality Index 2005. The top 100 employers for gay people in Britain" available at <http://www.stonewall.org.uk/docs/CorporateEqualityIndex.pdf>

Britain: 2005 Stonewall Corporate Equality Index²⁹

In January 2005, UK LGB rights organisation Stonewall published its first Corporate Equality Index, showcasing the UK's Top 100 employers for lesbian, gay and bisexual staff. The British Council is the country's top employer for gay people, with Citigroup, Credit Suisse First Boston, IBM and Manchester City Council in joint second place.

Stonewall's Top 100 Employers include 12 FTSE 100 companies and 11 government departments. Employers were ranked according to criteria ranging from implementation of an effective equalities policy, to granting equal benefits for same-sex partners, to having openly gay staff on their board of directors.

The Top 100 organisations have demonstrated a clear commitment to meeting the needs of gay staff and customers, showing good practice in the public, private and voluntary sectors from which other employers across Britain - and Europe - can learn.

In Germany, the large multinational companies are following, with Ford, Schering, and Deutsche Bank leading the way by supporting the creation of LGB networks within their companies and by granting the same terms and conditions, including partner benefits, to both LGB and heterosexual workers.

In France, more and more companies are starting to develop LGB groups; one example is GARE, an association of the SNCF and another is RATP, within the City of Paris and Canal Plus. In Belgium, there are very few examples, most of which are in the larger multinational companies and the universities.³⁰

³⁰ MAGENTA, Egalite des chances concernant les femme d'orientation sexuelle minoritaire et les personnes d'identite de genre minoritaire: prevention de l'homophobie au travail", 2003, p. 31

The business case for diversity

"The people we have form our human capital. To me that is a more important corporate asset than all of the plant and equipment, all of

the oil fields and pipelines. If we can get a disproportionate share of the most talented people in the world, we have a chance of holding a competitive edge. That is the simple strategic logic behind our commitment to diversity and to the inclusion of individuals - men and women regardless of background, religion, ethnic origin, nationality or sexual orientation. " (Chief Executive, British Petroleum BP)³¹

In 2003, the European Union commissioned a study on the costs and benefits of diversity.³² An objective was to document why employers invest in diversity. The findings show that investment in diversity reduces costs, ensures access to a wider talent base and enhances the reputation of the organisation with clients, customers and employees.

An inclusive approach to recruitment and selection practices widens the recruitment base and attracts a wider range of applicants. In the war for talent, being able to attract and retain the best, has positive cost implications in terms of avoiding constant recruitment or training of new staff.

Preventing discrimination helps alleviate the risk of legal claims. If a case of harassment is brought against a company, the costs of defending a case and possibly paying compensation are high. Legal claims are expensive, damaging and time-consuming and, therefore, best avoided.

"For us, turnover is more than a measure of employee satisfaction or morale. Lower turnover yields cost savings and improves business performance. The benefits include lower recruitment costs and retaining skilled employees who deliver better service. We know committed employees are more likely to be motivated, creative and productive."³³

Unfair treatment and harassment in the workplace can cause staff to resign or take sick leave due to anxiety and stress. There is also the potential adverse impact on staff productivity and morale. Effective equality policies help reduce absenteeism and stress-related

³¹ European Commission, DG Employment and Social Affairs, The Costs and Benefits of Diversity, 2003, p. 53

³² European Commission, DG Employment and Social Affairs, The Costs and Benefits of Diversity, 2003

³³ Jeremy del Strother, divisional director, personnel and development, NATIONWIDE (UK), in: Stonewall, The Employment Equality (Sexual Orientation) Regulations. Guidelines for Employers, 2003, p. 8

absence. A safe and diverse workplace benefits everyone - an organisation where lesbians, gay men and bisexuals can be open about their sexuality is a good workplace for all.

Germany: Gay manager association Voelklinger Kreis awards Max-Spohr Prize

Launched in 2001, the Germany gay managers association has now awarded the Max-Spohr-Prize a total of three times. The prize is conferred to companies that illustrate clearly their commitment to society's diversity, both within their organizations and beyond. They see diversity as a management instrument that contributes to a company's success.

Criteria for awarding the prize include whether or not an organization promotes an inclusive culture of respect, formulates equality policies and establishes the structures to implement it, whether it addresses harassment and supports LGB employee networks, whether it grants equal partner benefits to same-sex partners, whether it provides publicity and training amongst its staff, and whether it sponsors community initiatives.

The prize has so far been awarded to:

2001	Ford Foundation
2002	Deutsche Bank
2004	Deutsche Bahn

For more information, see: www.vk-online.de

From compliance to good practice

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

I. BUILD A CULTURE OF RESPECT

In many organisations, sexual orientation continues to be a taboo topic. Prejudice and the fear of discrimination - as we have discussed in chapter 2 - have wide repercussions in the workplace. Creating a positive work culture is challenging but vital: creating a supportive environment will increase job satisfaction and morale and therefore productivity. Feeling safe and appreciated for who you are gives all employees the possibility to realise their potential to the fullest.

Britain: Stonewall's Diversity Champion Scheme³⁴

Launched in 2001, the Diversity Champions programme is an acclaimed scheme which helps organisations improve their working environments for LGB employees. Top UK members include IBM, Lehman Borthers and Ford from the private sector, and the British Council, Department of Trade and Industry and Metropolitan Police in the public sector.

Diversity Champions provides a forum for employers to:

- * Develop good practice
- * Discuss what works and what doesn't
- * Understand the issues faced by lesbian, gay and bisexual employees and service users
- * Find out more about the impact of the lesbian, gay and bisexual markets

To find out more, visit: www.stonewall.org.uk

³⁴ Stonewall Brochure: "Diversity Champions. Promoting Diversity in the Workplace", available at http://www.stonewall.org.uk/docs/Div_Champions_Info_Pack.pdf

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

- * publicise a message of **openness, trust and equality**, reinforce message to all members of staff and make it clear that harassment is not tolerated
- * explicitly invite same-sex partners to the company's **social events**
- * provide **leadership** at all levels - role models, public statements, etc.
- * appoint senior-level **champions for LGB equality**
- * allocate adequate **resources** (staff, time, funding)

* review your **equality and diversity policy and strategy** - link it to business or service outcomes and communicate its importance to managers

A robust and effective equal opportunities policy should explicitly include LGB employees. The policy should set out the employer's commitment and make it clear to employees that discrimination is unlawful and unacceptable. If you are unsure on how to best include sexual orientation, consult with appropriate trade unions, employee representatives or external NGOs.

³⁵ Stonewall, The Employment Equality (Sexual Orientation) Regulations. Guidelines for Employers, 2003, p. 14

In 2001, Barclays launched its 'success through inclusion' policy. All members of Barclays' executive committee signed an equality and diversity charter. Gary Hoffman, chief executive of Barclaycard, was appointed senior champion for sexual orientation.³⁵

Diversity at Ford

**"At Ford diversity has been the cornerstone of our corporate culture for years. Diversity is one of the key strength's of our company which brings together employees of more than 57 nations. Essentially, for Ford diversity management is about respecting and valuing every single employee, irrespective of his or her ethnic origin, religion, sexual orientation or social origin."
(Ulrich Schumacher, Board of Directors, Personnell, Ford Germany)**

2. TACKLE WORKPLACE BULLYING AND HARASSMENT

Harassment is probably the most common form of discrimination experienced by lesbian, gay and bisexual people at work. Most employers now have harassment policies but do not refer to harassment on grounds of sexual orientation. All too often lesbian, gay and bisexual workers who complain of harassment are accused of being oversensitive, having no sense of humour or of 'bringing it on themselves' by not hiding their sexual orientation. Even more often, LGB employees are afraid to even make a complaint.³⁶

The seriousness of harassment as a psychological form of violence has been increasingly recognised. By not acting to prevent bullying and harassment, employers not only risk litigation, they also risk increased levels of sick leave, higher rates of resignations and lower levels of commitment and effectiveness.

To tackle workplace bullying, employers should...

- ★ **explain to staff why harassment because of sexual orientation is unacceptable:** adapt existing harassment policy to specifically cover harassment on grounds of sexual orientation; make specific references to harassment in your induction programmes, secure support of managers and staff; consult on policies with appropriate trade unions, employee representatives or workforce
- ★ **make it easy for people to report a problem:** provide several routes for making complaints; keep it confidential; assess what practical steps can be taken if no formal complaint is made; individuals may be reluctant to bring forward a complaint for fear of being outed; they may be concerned that a complaint is not taken seriously or that he/she will be victimised if a complaint is brought; it might prove useful to have designated advisor who is appropriately trained
- ★ **deal effectively with complaints:** ensure that complaints are dealt with promptly, seriously, sympathetically, confidentially and effectively; take all reasonable steps to make sure that those who do make a complaint are not victimised because of it

³⁶ UNISON, , Equalities in UNISON: Bargaining Support Guide, Negotiating Equality for Lesbian, Gay, and Bisexual Workers, December 2003, p. 14

* **monitor complaints and review policy:** establish procedures for the investigation of complaints; make sure the process is transparent and supports are available for complainants; train managers on review procedures; collect data on how complaints have been handled, the timeframe, the actions taken and outcomes achieved

3. PUBLICISE, IMPLEMENT AND MONITOR THE POLICIES YOU ADOPT

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

European Gay and Lesbian Managers Association

Founded in 200, EGMA brings together gay and lesbian manager associations from France, Germany, Austria, Switzerland and Italy. The main focus of the network is to promote equal rights of LGB people in employment.

All EGMA members work closely with employers in their respective home countries and can be approached for advice on how to become a best practice equal opportunity employer for LGB employees. The following organisations form part of EGMA:

Austria	AGPRO	www.agrpo.at
France	L'Autre Cercle	www.autrecercle.org
Germany	Voelklinger Kreis Wirtschaftsweiber	www.vk-online.de www.wirtschaftsweiber.de
Italy	PrIMO	www.primo-net.it
Switzerland	Network	www.network.ch

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

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

4. PROVIDE REGULAR TRAINING TO ALL EMPLOYEES

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

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

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

misconceptions of LGB people and of the way managers might involuntarily disadvantage certain groups

HoF - LGBT people in the Swedish Armed Forces

HoF was founded in December 2001 to support serving members of the Swedish Armed Forces who are lesbian, gay, bisexual or transgender. The aim of HoF is to provide a social network, to offer specialist advice and information to all members of staff of the Swedish Armed Forces.

"Military organisations all over the world traditionally tend to be associated with homophobia. We have always had the male body as an ideal. This worship of the male body has become a norm for the ideal soldier, who is physically and mentally strong and medically perfect. To make soldiers obey, one has tried to control their instincts: sleep, food, rest and sex. Sexuality is the hardest of these to control. The worst thing that could happen was therefore that a soldier could be suspected of homosexuality, because then one couldn't wield power over him using that instinct. In this way homophobia can be generated and that is why it is so strong in the Armed Forces - probably stronger than in most other sectors of society. The American "Don't Ask, Don't Tell"-policy, which prohibits openly gay and lesbian people in the Armed Forces, is perhaps the clearest example of this in the Western world.

Even if we in the EU have come further than that, by, amongst other things, a precedential judgement in the European Court of Human rights, I still venture to say that we have a great challenge in front of us. And it is important that we take up the gauntlet!"³⁷

³⁷ (Krister Fahlstedt, Chairman of HoF, Den Haag, November 2004), For more information, see: www.hof.org.se

5. SUPPORT ESTABLISHMENT OF LGB EMPLOYEE NETWORKS

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

Schering AG

When Schering's employees opened their company brochure this May, the first thing they saw was the rainbow symbol, standing for the company's lesbian, gay and bisexual employee network SAG Rainbow.

"When we met for the first time 6 years ago, we wanted more than anything else a secure space, where we could be open about our sexual orientation without fear from hostility and discrimination", remembers Marcus Klein (39), head of unit in Schering's clinical development department. Then, fear was the key driver, as most were not open about their sexuality at work. The group was an exclusive, secret circle - it seemed impossible to present the initiative openly within the company.

This has now changed. To incorporate homosexuality as something normal within the organization is the goal of Martina Schäfer (38) und Thomas Norpoth (51), spokespeople for SAG Rainbow. When SAG Rainbow recently published a flyer about the network amongst their fellow colleagues the reaction was positive. "It is brilliant that you had the courage to do this!"³⁸

³⁸ Siegessäule 12/2003
- Das Ende der
Monokultur Die
Zauberformel für
Gewinnsteigerungen:
Diversity Management
: Warum Ford,
Deutsche Telekom und
die Commerzbank ihre
schwullesbische
Belegschaft entdecken
(Kathrin Walther)

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

- * establish employee networks in consultation with LGB staff; contact and consultation via anonymous surveys, via staff associations or trade unions, via third parties (e.g. NGOs)
- * connect the network to the rest of the organisation and other networks: purpose, responsibility, resources
- * ensure leaders of the organisation promote the network: high-profile senior managers as champions of network
- * be prepared for negative reactions - must be able to explain how the network benefits the whole organisation
- * provide easy and confidential access to the network
- * publicise the network both internally and externally

LGB employee networks in European companies

Examples of LGB employee networks in Europe include Kaleidoscope at British Telecom, GLEAM at JP Morgan and Chase, Spectrum at Barclays, Rainbow Group at IBM and Energy in French electrical and gas industries. The leading companies in terms of managing diversity in Germany include Ford, Deutsche Bank, Schering, VW, Commerzbank, Telekom, Lufthansa and the Deutsche Bahn.

See for instance:

Deutsche Telekom	www.queerbeet.net
Volkswagen-Bank	www.queerdirect.de
Volkswagen	www.wolfsburger-kreis.de
Ford	http://fordglobe.org/de/
Deutsche Bank	http://karriere.deutsche-bank.de/wms/dbhr/index.php3?ci=40&language=1

6. REVIEW TERMS AND CONDITIONS

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

German Foreign Ministry

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

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

- * **create explicitly inclusive policies:** your policies should state that the following are available to same-sex employees and their families: bereavement leave, parental leave and adoptive parental leave, relocation allowances, carer's leave, travel benefits, discounts on the company's or other services, private healthcare
- * **make communications inclusive:** use same-sex employees as examples when you explain benefits of reward packages, HR needs to understand inclusive nature of benefits and communicate accordingly - talk about partners not husbands/ wives
- * **choose the best suppliers:** pension companies that are committed to equal treatment, same for life insurance and health insurance providers
- * **guarantee access to benefits without compromising confidentiality:** the manner in which an employee has to notify his/ her employer of his/her same-sex partner in many cases will require the

coming-out of the employee. In cases where it is not certain whether the benefit would be granted, this constitutes a major deterrent. To overcome this, ensure confidentiality of the data that is provided to the HR team

Examples of travel-related benefits for same-sex partners

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

The Austrian Federal Railways has so far refused to extend to unmarried same-sex partners the benefits available to their heterosexual unmarried counterparts. This is an example of unlawful discrimination and will undoubtedly be challenged under the new legislation.

Airlines are on the whole more progressive. In Italy, for instance, at least two airlines do not make a distinction between same-sex and different-sex unmarried partners in terms of travel benefits and any other employment benefits. The same is true for Belgian and German airlines. French airlines are regulated by collective agreements that ensure that the entire French air transport sector does not discriminate on grounds of sexual orientation.³⁹

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

³⁹ Alan Littler, Thematic Study on Discriminatory Partner Benefits in: Combating sexual orientation discrimination in employment : legislation in 15 EU member states. Report of the European Group of Experts on Combating Sexual Orientation Discrimination, see: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

USA company as catalyst for change

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

7. RECRUIT, SELECT AND PROMOTE FAIRLY

Recruiting processes can often be discriminating for lesbians, gay men and bisexuals. In many cases, this is unintentional - an application form that asks whether you are married, single or divorced for instance; or the interview question enquiring about the candidate's personal life. Performance management as well can put LGB people at a disadvantage. There are numerous examples of LGB employees that have been passed over for promotion, disciplined unfairly or dismissed for no good reason. Equal opportunities policies alone are not enough. They have to be complemented with concrete action throughout the steps of an employee life cycle.

JP Morgan undertook a recruitment campaign targeting LGBT university networks. This included sponsoring a gay-friendly careers booklet for Oxford University students.⁴⁰

If employers want to recruit and retain the best talent and avoid the cost of litigation, they should...

★ **let people know they are welcome to apply:** this includes where advertisements are placed and the use of language; recruitment literature could include any LGBT initiative you have taken (e.g. extending benefits to same-sex partners or supporting employee networks), as well as info on diversity policies in place; ask LGB staff to help make policies and procedures inclusive and effective; methods used for monitoring recruitment of other minority groups may be extended

to LGB people where appropriate

* **application forms should reflect equal opportunity policies:** do not include questions about marital status, spouse/ partner or other personal circumstances; exercise caution when taking into account information provided in an application form in relation to an applicant's criminal record (laws relating to gay men have changed significantly over time. It is possible that applicants may have acquired a criminal conviction many years ago to a matter no longer considered unlawful)

* **ensure fair references:** make supervisors/ managers aware that all informal or formal references should be fair and non-discriminatory (not influenced by personal prejudices relating to individual's real or perceived sexual orientation)

* **make the recruitment process transparent:** be open about recruitment process, keep record of each stage of recruitment, deal promptly with any complaints

* **train the decision-makers:** make sure recruiters do not make unfounded assumptions based on stereotypes; instruct selection panels that they should not ask questions about a candidate's marital status or other personal circumstances (may be perceived as intrusive and imply potential discrimination); set up system so that staff know where to go if they think interviewer has made prejudiced remark or decision

* **create the right climate:** communicate that recruitment, promotion, rewards and redundancies are based on merit and competence; management development should include diversity awareness as one of key competencies

* **develop formal performance management systems:** introduce performance management systems based on competencies for each job

4. What trade unions can do

Introduction

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

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

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

Trade union status across member states

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

⁴¹ Jukka Lehtonen, "A Job that needs to be done: Trade organizations and lesbian, gay, bisexual and trans people" in: Lehtonen (ed), Sexual and Gender Minorities at Work, Finland, 2002

⁴² MAGENTA, Egalite des chances concernant les femme d'orientation sexuelle minoritaire et les personnes d'identite de genre minoritaire: prevention de l'homophobie au travail", 2003

⁴³ For more details, see for instance: (a) Irish Congress of Trade Unions, Lesbian, Gay and Bisexual Rights in the Workplace - Congress Guidelines for Negotiators, December 2003 email: congress@ictu.ie; (b) UNISON, Negotiating Equality for Lesbian, Gay and Bisexual Workers. Bargaining Support Guide, December 2003 www.unison.org.uk; (c) Public Services International and Education International, Working for lesbian and gay members, 1999

Trade unions and LGB rights

In Finland trade unions on the whole have ignored the specific needs of LGB employees. In a 2002 survey, only 6 reported to have started acting on behalf of their LGB members, mostly in connection to training, advice and collective bargaining. Even though non-discrimination legislation in Finland had been in place since 1995, in 2002 only 50% of trade unions were aware of the effects of the legislation. Trade unions were however, generally open to work on LGB issues and agreed that employees should be treated equally regardless of the form of relationship they were in.⁴¹

In Belgium, there are some encouraging examples of co-operation between trade unions and LGB organisations to combat discrimination in the workplace. In France, although the CGT for instance has created a working group on sexual orientation discrimination, the overall situation is still patchy. In 2003, the organisation SOS Homophobia reported that out of 81 workplace discrimination complaints, only 10 people had contacted their trade unions for support.⁴²

The Trade Union Congress (TUC) in the UK and the Irish Congress of Trade Unions (ICTU) in Ireland, have taken a clear stand against sexual orientation discrimination.

Suggestions for practical action

Often, the reason for not acting is uncertainty in terms of how to address what is still a challenging topic. Many trade unions do not feel sufficiently equipped in terms of understanding the nature of discrimination, its effects, the legal background and the available tools to overcome it. How can trade unions support their LGB membership? What are the key issues for LGB persons to look out for in negotiations? How can trade unions develop a concrete work plan to promote equality in employment? What follows are some ideas and practical steps to help trade unions take action.⁴³

I. ACKNOWLEDGE THE PROBLEM

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

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

Finland. Trade unions and sexual orientation discrimination

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

"I wish the trade unions took the challenge of improving the situation of lesbian, gay, bisexual and transgender people seriously. There should be training and awareness-raising within the unions so that they can take a more active political role in promoting equality".⁴⁴

⁴⁴ Jukka Lehtonen, "A Job that needs to be done: Trade organizations and lesbian, gay, bisexual and trans people" in: Lehtonen (ed), Sexual and Gender Minorities at Work, Finland, 2002

Research indicates that the most common form of discrimination experienced by LGB people is harassment. Often expressed in the form of jokes, banter, exclusion - seemingly minor offences - harassment has been deemed to be a form of violence. It is defined in the EU legislation as a form of discrimination and is considered to be a health and safety issue. On these arguments then, it is clear that harassment is a trade union issue.

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

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

2. TAKE A STAND FOR EQUALITY

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

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

★ undertake an **audit of all union services** - from counselling, to credit schemes to legal representation - to ensure they do not directly

or indirectly discriminate against LGB members

- ★ adopt a **confidentiality policy** which is communicated to all union staff
- ★ **amend job descriptions** to include a requirement to be sensitive to diversity issues
- ★ **communicate union policy** throughout the union pointing out that discrimination will not be tolerated and that the union will treat such discrimination as a serious workplace issue
- ★ **make lesbian and gay issues visible** through publishing articles in union journals, producing leaflets, posters or pamphlets
- ★ create an **inclusive environment** for LGB members: extend non-discrimination policies to sexual orientation; extend equality working groups' remit to cover sexual orientation

Sweden. Confederation of Professional Employees (TCO) takes a stand

Approximately 80% of all employees in Sweden are members of a trade union - the three main unions have a total membership of approx 3.8 million.⁴⁵

Although the Act on a Ban against discrimination in Working Life based on sexual orientation came into force in 1999, hardly any trade union representatives were trained on its implications. Little information was available on sexual orientation discrimination, the mechanisms for dealing with complaints were often insufficient and internal resistance prevented many unions from taking preventative steps.

In 2001 the TCO became the first Swedish trade union to openly show its commitment to LGB members by participating in Stockholm Pride in August 2001. After publishing an article on LGB members in the Stockholm Pride magazine, the TCO included a question on attitudes towards gay and lesbian people at work into its national survey.⁴⁶

The results indicated clearly how much of a taboo issue sexual orientation continued to be. The survey was followed by: (a) publication of an brochure on the new law, (b) organisation of a training seminar on trade unions' responsibility with regard to sexual orientation discrimination, (c) presence at Stockholm Pride with an information tent.⁴⁷

TCO's decision to participate so actively in Stockholm Pride can be seen as a turning point in trade union involvement. Together with other organisations, including the Swedish LGBT organisation RFSL, the TCO set up a three-year project to promote equality of LGB people in employment, with a particular focus on the church, the armed forces and the police.⁴⁸

⁴⁵ Carina Bildt, Trade union members' perception of discrimination in the workplace because of sexual orientation, in: Arbetslivsrapport Nr. 2004:15, Arbetslivsinstitutet (National Institute for Working Life), p. 9

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

⁴⁷ Elisabet Qvarford, 'The Union goes gay' in: Lehtonen (ed.), Sexual and Gender Minorities at work, 2002

⁴⁸ www.normgivande.nu

3. DEVELOP A COHERENT STRATEGY

The EU Framework Directive represents an important step forward in tackling workplace discrimination. But laws alone do not change anything. Trade unions have a key responsibility in making sure that the rights granted on paper are translated into everyday practice at work.

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

* consult your members through an **anonymous survey to all members**

This could be a useful place to start in coming to understand the nature of the issues within local branches as well as within the movement as a whole. There are some important considerations to bear in mind in launching a survey of this kind:

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

* use the results of the survey as the basis to develop an action plan to promote workplace equality for lesbian, gay and bisexual workers

Again, in developing the **action plan**, these are some points to remember

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

ble, look to LGB representative groups

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

4. PROVIDE TRAINING AND INFORMATION

Much of the hostility towards lesbian, gay and bisexual people arises out of ignorance and fear. Often, people have confused and ill-conceived notions of what it means to be lesbian, bisexual or gay. Many are not aware of possible forms of discrimination against their LGB colleagues.

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

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

Diversity Training at Public Services International

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

5. SET UP A SUPPORT AND COMPLAINT MECHANISM

Trade unions have an important role to play in dealing with individual complaints of workplace discrimination. Unions should be aware that many LGB members may be reluctant to approach union representatives for help as this would mean revealing their sexual orientation. In an environment that is often hostile to lesbian, gay or bisexual people, coming out may lead to harassment of other forms of discrimination at a personal or institutional level. To overcome this fear, it is of utmost importance that support structures are implemented that guarantee an adequate level of confidentiality.

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

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

Unison LGBT networks

UNISON (the UK public sector union) has a long-standing commitment to LGBT rights, anchored explicitly in the union's rules. UNISON employs a full-time LGBT equality officer and supports a developing network of branch LGBT groups. Branches join together into 12 regional LGBT groups. At national level, the work is co-ordinated by the national LGBT committee, made up of regional representatives. The national committee plays a crucial role in representing LGBT rights at Union executive level and hosts an annual conference where members from branch or regional groups meet to decide on policies for the forthcoming year.

UNISON's LGBT network provides support structures, engages in union negotiations, organises training courses and generally provides a forum for debate and assistance.⁴⁹

⁴⁹ For more info, see:
<http://www.unison.org.uk/out/lgbt/index.asp>

6. INCORPORATE LGB CONCERNS IN YOUR NEGOTIATIONS

A major component of a comprehensive strategy relates to the core work of the unions, i.e. negotiations with employers on behalf of the workers. Just as member states are required, when transposing the EU legislation, to remove all laws and regulations which are contrary to the promotion of equal treatment, so too are employers required to ensure that their processes are updated to remove any potentially discriminatory impacts on gay, lesbian and bisexual workers. Unions can play a key role in this regard. This will require a thorough audit including the provision of facilities, social and family events, as well as the more hard core matters of recruitment and promotion practices, pay and conditions, training and benefits. Unions can take the lead in negotiating for more than the legal minimum

- * undertake regular **equality audits** to uncover discriminatory practices
- * negotiate **equal opportunity policies and procedures** with employers which specifically refer to discrimination on grounds of sexual orientation
- * negotiate for a **confidential complaints procedure** in case of harassment or bullying
- * negotiate **family-friendly policies**, accessible for LGB workers without having to jeopardise their confidentiality (e.g. parental leave, e.g. social events)
- * **pensions and other benefits**: negotiate for equal pension rights for same-sex couples
- * ensure that **no policies discriminate on the grounds of sexual orientation** - recruitment and selection, career development and promotion, sickness and absence

7. COOPERATE WITH LGB ORGANISATIONS AND OTHER TRADE UNIONS

In every EU member state organisations exist that are active in promoting equality for lesbian, gay and bisexual people. These can be an invaluable resource for trade unions that wish to start addressing sex-

ual orientation discrimination in employment.

The next chapter of this document gives details of a number of such organisations, in different member states, that have been funded under the EU EQUAL programme to develop new workplace practices to assist lesbian, gay and bisexual workers. The learning from these projects could prove useful in a range of settings.

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

The European Trade Union Confederation (ETUC) and LGB equality

"The European trade union movement is at the forefront in defending human rights and trade union rights. This fight must include a commitment to equal treatment, respect and dignity for lesbians, gay men, bisexuals and transgendered people. However, we have to admit that to date, the rights and realities of lesbians, gay men, bisexuals and transgendered people have been given insufficient attention, both inside and outside the trade union movement.(...)Trade unions can, and should be, a strong ally for lesbians, gay men, bisexuals and transgendered people, because they are powerful players in the field of work and employment policies."⁵⁰

In May 2003, the ETUC congress adopted a 4-year Action Programme, in which it committed itself to :

- * recognise the diversity of the European workforce, and build solidarity between all the different groups of workers
- * combat discrimination in all its forms with respect to gender, nationality, race, disability, sexual orientation and gender identity, age, religion and social origin
- * reflect and act on prejudices that may be inherent in trade unions' own structures

The European Trade Union Confederation has an important role to play. It brings together 76 national trade union confederations from across Europe. As such it provides an invaluable

⁵⁰ John Monks, General Secretary ETUC, written address to ILGA-Europe Annual Conference, 15 October 2003

5. The policy response: from reactive to proactive

There can be no doubt that this Directive will have a significant impact. It considerably widens the scope of EU-level regulation in the field of discrimination, from discrimination based on sex to discrimination based on a wide range of counts. With regard to sexual orientation, the introduction of anti-discrimination laws in the member states will have varying degrees of significance, depending on the level of institutional homophobia in each state. The ensuing debate, at both governmental and societal level, can only help, at least in the long run, to counter homophobia, particularly in those member states where it is most virulent. The Directive represents the potential for a common foundation for the development of robust anti-discrimination policies in all Member States. It also represents an opportunity for further lobbying and campaign work.

Nevertheless, much work remains to be done in order to secure a working environment that is free from discrimination for LGB people and where homophobia does not inhibit their full participation in all aspects of working life. This section looks at how the work needs to be progressed along two broad fronts:

- (i) strengthening the existing legal framework
- (ii) promoting proactive equality initiatives

Strengthening the existing legal framework

This section looks at a number of ways in which the legislations fails to meet the needs of lesbian, gay and bisexual workers. It is important that, in the first review of the Directive in 2006, these concerns are dealt with and the legislation strengthened.

Privileging marriage

One of the ways in which the Directive fails to grant equality to LGB people relates to the matter of work-related benefits granted to mar-

ried couples. The Directive allows for member states to maintain laws on marital status and benefits related to marital status. Since most member states prohibit same-sex marriage, LGB people are therefore at a disadvantage in that they are excluded from obtaining these benefits. It is the case that the Commission has ruled that where marriage is available to same-sex couples, for example in Belgium, they should be granted the same spousal benefits given to heterosexual married couples. It is also the case that in some jurisdictions, whether because of national law or individual company policy, spousal benefits are also granted to stable co-habiting heterosexual partners, but not to same sex partners. Clearly, these variances demonstrate a very significant flaw in the Directive. On the one hand the legislation effectively exacerbates this discriminatory practice against LGB people. In addition this 'exemption' allows for different levels of equality between member states, thus going against one of the fundamental arguments for Community legislation.

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

Religious ethos

The primary intent of the exemption for religious organisation relates to their right, as an employer, to discriminate against someone of a different religious belief. In practice this should mean that the exemption does not apply to sexual orientation, which in turn should mean that a potential applicant or employee need not disclose his/her sexual orientation. However, there is another clause in this exemption which allows the employer to require their workers to "act in good faith and with loyalty to the organisation's ethos". This allows for potential discrimination against LGB people. It is an area of uncertainty which creates a great deal of fear among LGB people, particularly

those who are employed by church or religious organisations. Such employees are likely to remain closeted at work, suffering the resultant adverse effects of the closet rather than risk dismissal. This kind of situation - on the one hand fear of uncertain consequences and on the other hand the potential threat implicit in the power granted to the employer - is more conducive to the regression of rights than it is to the promotion of equal treatment.

Onus on individual litigant

It could be argued that regardless of the quality of the law that is introduced as a result of the Directive, unless the law is activated by an employee who has experienced discrimination, then that law is ineffective and without power. This model of legislation, then, depends on the commitment and determination of the individual claimant. Conversely, it positions the employer in the defensive position. Additionally, this type of anti-discrimination legislation is designed to deal with discrimination after it has happened rather than providing for a co-operative environment where employers are encouraged to take a proactive approach to reforming discriminatory practices.

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

Clearly, however, LGB people would not be the only ones to benefit from a legislative environment that was less reliant on the individual enforcement model. Positive duties, such as exist in Northern Ireland and on some grounds in other parts of the UK, have the potential to prevent discrimination before it can happen, while encouraging employers to pursue proactive equality-promoting policies and practices. A positive duties model means employers can be cast as potential enforcers of equality rather than defenders against discrimination.

Measures to support the legislation

As outlined in section 1 of this document, the Directive cites a number of mechanisms which can work to support the effective implementation of the legislation. These include:

- * dialogue with social partners
- * dialogue with NGOs
- * information dissemination
- * awareness raising campaigns
- * positive action programmes
- * support for claimants from interest groups

On the whole the response to these elements of the Directive has been very limited by member states. This must in part be due to the absence in the Directive of specific standards by which compliance can be measured. Clearly these elements are important in ensuring that knowledge of and information about anti-discrimination is disseminated and debate encouraged. They are particularly important given that the legislation is based on the individual enforcement model. The Commission needs to ensure, not just adequate compliance with these measures, but also to specify what constitutes good practice. Scrutiny of implementation of the Directive should include a close look at the degree to which potential claimants are enabled to exercise their rights by an environment in which these supportive measures are in place.

Differences in national implementation

Amongst the twenty-five EU member states, there are significant differences in the way that the Directive has been transposed. Some Member States decided to go beyond the minimum and some have also extended protection to the area of facilities, goods and services. However, not every country has fully met the minimum requirements

Apart from failing to adhere to minimum standards, there are some instances in which the Directive itself is responsible for the different degree to which the spirit of equal treatment is reflected in national law. For example, there is no requirement to establish an equality body to support anti-discrimination on the grounds of sexual orienta-

tion. However, in some member states where such a body has been set up or already existed, its remit has been extended to cover sexual orientation, and in one state there is an equality body specifically and solely to cover sexual orientation.

Infringement procedures

The European Commission has already started infringement procedures⁵¹ for some of the old EU member states: on 20 December 2004 Germany, Luxembourg, Greece, Austria and Finland were referred to the European Court of Justice for failing to transpose the Employment Framework Directive.

In the meantime, individuals affected by discrimination in countries with no legislation have two steps that they can take. First of all, organs of the state (such as public authorities) are bound by the provisions of the Directive, as long as they are "unconditional, clear and precise". It is quite likely that a lot of the provisions in the Directive would be directly effective.

If a member state has not yet passed legislation, an affected person cannot start litigation against private, non-state, individuals or organisations, relying on the provisions of the Directive. National courts, however, are under a duty to interpret any existing legislation consistently with the Directive in such a way as to secure the outcome the Directive is trying to achieve⁵². In other words, the safest route to follow for any European employer is to assume that the rules outlined above apply.

Anti-discrimination legislation alone is not enough

If the goal of equality initiatives is the creation of societies and communities free from discrimination and where all citizens are afforded equal access to opportunities, then even the best legislation is not sufficient to the task. The Commission has a responsibility to go beyond the issuance of Directives by establishing standards in terms of how member states must focus on proactively pursuing and promoting equality. This includes those initiatives discussed above in

⁵¹ Where a member state fails to implement an EU Directive, the European Commission can take action under article 226 of the Treaty. The so-called infringement procedures contain three steps: (a) a formal letter is sent to the respective government, outlining why it considers the transposition insufficient; (b) a reasoned opinion setting a time limit for the Member State to comply; (c) reference to the European Court of Justice

⁵² European Commission, Annual Report on Equality and Non-discrimination, 2004, p. 17

measures to support legislation.

Other initiatives which the Commission should consider are:

- * a re-focusing of the new Community Action Programme, PROGRESS
- * increased resources to member states
- * the integration of equality policies to other policies, e.g. the guidelines relating to the European Employment Strategy and the Broad Economic Policy Guidelines
- * data gathering, monitoring and research
- * participation of relevant stakeholders

Progress

As one of the key strands of the EU's non-discrimination policy, the Council launched a Community Action Programme in 2000, funding action to improve understanding of issues related to discrimination, to develop the capacity to combat and prevent discrimination and to promote values underlying the fight against discrimination. The Action Programme has proven to be an effective tool to complement the legislation and implement EU policy objectives in practice.

The European Commission's proposal for a new programme, PROGRESS, aims to rationalise all financial tools in the social and employment field into one single framework that is to reflect the Lisbon policy goals. While this move toward rationalisation and simplification is potentially positive, there is a concern that it may lead to a reduction of existing initiatives. If there is not an exercise to formulate specific, appropriate policy responses then areas in need attention are likely to go unaddressed. There is no mention, for example, of a specific initiative to follow up the work of the EQUAL programme, an important element of which was the transnational exchange of learning. While equality mainstreaming is a positive policy direction, it should not preclude the resourcing of targeted projects.

Increased resources

There are a number of ways in which increased resources could be usefully employed. Of particular importance is support to NGOs work-

ing for equality for LGB people. Research shows that LGB organisations are among the most poorly funded of the equality NGOs in almost all member states. Often these organisations need to build their capacity to engage with national policy makers as well as in EU networks and forums.

Funding could also be used to support systems and practices that support an effective implementation of the legislation. This includes advocacy support mechanisms for claimants and potential claimants. Such mechanisms are inadequate across all member states and a dedicated stream of EU funding could encourage good practice in this area.

The adoption of positive action schemes has been poor and this is another area where ring fenced funding could be used to stimulate innovation. The focus of EU funding should be to encourage uptake across all member states and, as with claimant support systems, provide for development and dissemination of good practice.

Equality mainstreaming

Until equality practices are integrated into other mainstream policy guidelines and administrative systems, equality will continue to be seen as a peripheral concern. Of key importance here are the employment guidelines which are compiled by the Commission in relation to the EU Employment Strategy. At member state level, government departments need to mainstream equality guidelines into all relevant policies, in particular employment policies.

Data gathering, monitoring and research

The function of data gathering and monitoring will play an increasingly important role. In the first instance it will be important to establish benchmarks, at both national and EU level, against which to monitor progress. In terms of monitoring this function will be crucial for the close analysis of collective agreements, labour codes, internal employer rules etc. The work of the EU Foundation for the Improvement of Living and Working Conditions in Dublin is making a valuable contribution to the monitoring of EU employment legislation.

Responsibilities of social partners

There appears to be a generally positive response to the Directive from both trade unions and employers' organisations. In most member states the trade unions have expressed the view that the Directive doesn't go far enough, citing, for example, that there is no provision for them to bring cases independent of a claimant. Some trade unions have produced guidelines for its representatives working on equality issues and some have lobbied governments to enhance and clarify their regulations. In the UK, for example, the TUC is calling for a positive duty to promote equality and has criticised the government for not extending equality on the grounds of sexual orientation to employers' benefits provisions, for example allowing pension schemes to continue to offer benefits only to married couples.

Employer's organisations, while broadly welcoming the Directive, have expressed concerns about its implementation. Chief among their concerns is the change in burden of proof and the practical implications of introducing anti-discrimination law concerning age.

Social partners have an important ongoing role in relation, not only to the effective implementation of the legislation but also to the larger project of promoting equality in the workplace. Their relationship with their members means that they can provide the lead when it comes to developing good practice and in going beyond good practice. And their relationship with government affords them the opportunity to widen the debate and insist on stronger measures to promote true equality in the workplace.

The EQUAL Programme of the European Union

EQUAL is part of the European Union's strategy for more and better jobs and for ensuring that no-one is denied access to them. Funded by the European Social Fund, through the Community Action Programme to Combat Discrimination, this initiative is testing new ways of tackling discrimination and inequality experienced by those in work and those looking for a job. EQUAL co-finances activities in all EU Member States.

EQUAL differs from the European Social Fund mainstream programmes in its function as a laboratory and in its emphasis on active co-operation between Member States.

Contact details for EQUAL projects with a focus on LGBT in the workplace:

Round One 2001-2003

Homosexual & Bisexuals in the Care System

www.rfsl.se/equal

Normgiving Diversity

www.normgivande.nu

Enabling Safety for LEsBiGay Teachers

[www.lesbi-](http://www.lesbi-gayteachers.nl)

[gayteachers.nl](http://www.lesbi-gayteachers.nl)

Sexual and Gender Minorities at Work

www.valt.helsinki.fi/sosio/tutkimus/equal

Round Two 2004-2006

La Lutte Contre l'homophobie, las lesbophobie et las transpho-

bie axel.queval@wanadoo.fr

Beneath the Surface

anette.sjodin@rfsl.se

Partnerstvo za enakost

natasa.sukic@mail.ljudmila.org

Atviri ir Saugus darbe

edis@gay.lt

6. Key recommendations

Introduction

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

To EU Commission

To realise the potential of the Employment Equality Directive the EU Commission could strengthen its capacity in a number of key areas:

- * closer scrutiny of how the Directive has been transposed
- * stronger insistence to Member States regarding their responsibility to provide information and promote social dialogue
- * research and data collection to determine the impact of the Directive
- * the identification and dissemination of good practice
- * a more co-ordinated approach to ensure a common vision of equality throughout the Member States
- * additional resources targeted towards representative NGOs that are in a position to act as advocates and whose work is to promote equality

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

- * legislation which includes the duty to proactively promote equality (positive duty)
- * the remit of the equality bodies to be extended to cover sexual orientation, indeed to cover all grounds
- * a reconsideration of the definition of discrimination from one that is comparator-based, to one which focuses on the cause and effects of discrimination

- * the extension of the legislation beyond the workplace to include the provision of goods, facilities and services
- * the mainstreaming of equality guidelines in other relevant policies, for example the EU Employment Strategy and the accompanying Guidelines
- * provide independent legal standing for organisations with a legitimate interest in enforcing the principle of equal treatment

With regard to completing the work on the new Community Action Programme, PROGRESS, consideration should be given to the following:

- * funds should be allocated to measures that seek to promote equality mainstreaming
- * funding should also be targeted at projects that promote the exchange of good practice in the promotion of equality between member states
- * the role of NGOs in the work to promote equality should be acknowledged and NGOs should be resourced to continue and expand their work

To member states

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

To the social partners

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

7. Some useful definitions

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

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

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

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

Heterosexual - a person who is sexually and emotionally attracted to

the opposite sex; colloquial term often used is 'straight'

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

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

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

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

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

Transphobia - prejudice, hatred or fear of transgender people

Biphobia - prejudice, hatred or fear of bisexual people

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

'Out' - being open about one's homosexuality

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

tures or other material.

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

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

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

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

In this document we explore the extent to which we have realised that promise. The document looks at the nature and extent of the legislation's provisions as well as its limitations and weaknesses. Some of the issues explored include: How effective can legislation be that relies on the determination and commitment of the person who is discriminated against coming forward to make the law active? Is it not better to prevent discrimination before it happens? How are potential victims of discrimination helped to make the law effective?

An important position taken in the discussions is that legislation is not enough. If equality for lesbians, gays and bisexuals is to become a reality in the workplace, then reacting to inequality is not going to do it. The focus has to be on measures and initiatives that actively promote equality. This requires a collective effort on the part of all stakeholders. Relying on the testimonials of lesbians, gays and bisexuals with first hand experience, as well as the good practice available, the document points to practical steps that can be taken to help realise the promise of equality in the workplace.