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ILGA-Europe's response to the European Commission's request for input regarding the implementation of Article 9 of Council Directive 2000/78/EC

The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) is a European NGO with 391 national and local lesbian, gay, bisexual, transgender and intersex (LGBTI) member organisations in 45 European countries, and works for human rights and equality for lesbian, gay, bisexual, transgender and intersex people at European level.

ILGA-Europe enjoys consultative status at the Economic and Social Council of the United Nations (ECOSOC), participative status at the Council of Europe and receives financial support from the European Commission and other funders. It is also a member of the Platform of European Social NGOs. ILGA-Europe was established as a separate region of the ILGA in 1996. www.ilga-europe.org.

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This submission, collated by ILGA-Europe, includes various concerns regarding the implementation of Article 9 of *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*. It also elaborates how the absence of class action and the NGO's inability to pursue test cases without the identification of a victim limits the impact of the Directive.

In preparation towards this paper, ILGA-Europe launched a call to its EU-based member organisations to collect fresh evidence of inadequate implementation and we received responses from Austria, Germany, the Netherlands Poland, Spain, Sweden and the United Kingdom with a varying level of detail. However, in spite of our best intentions, we were not in a position to prepare a paper which provides an exhaustive list of concerns and implementation breaches. This is due to many reasons, including the fact that in several countries NGOs are unable to represent victims of discrimination due to legal, administrative or other barriers, and also the fact that not all organisations have the required resources to represent cases adequately.

In view of this, we call on the European Commission to treat this paper as yet another source of evidence which is to be taken in conjunction with the various reports prepared by the EU Fundamental Rights Agency¹, reports prepared by the European Network of Legal Experts in the Non-Discrimination Field², the reports by the Council of Europe's Commissioner for Human Rights³, and the expected results from the EU Fundamental Rights Agency's LGBT survey which will be launched in May of this year⁴.

Report 1 **The United Kingdom's implementation compiled by Prof Mark Bell (University of Leicester)**

Article 9(2)

The British government took the view that Article 9(2) permits states to choose between *either* allowing associations to act 'on behalf' or 'in support of' the complainant. Pursuant to this reading of the Directive, it did not make any alterations to the existing legal framework on the basis that it was already possible for associations to provide support to complainants.

¹ FRA (2010) *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis* fra.europa.eu/en/publication/2012/homophobia-transphobia-and-discrimination-grounds-sexual-orientation-and-gender; *Country thematic studies on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity – 2010 update* fra.europa.eu/en/national-contribution/2012/country-thematic-studies-homophobia-transphobia-and-discrimination; *Homophobia and Discrimination on the grounds of Sexual Orientation in the EU Member States: Part 1 - Legal Analysis* fra.europa.eu/sites/default/files/fra_uploads/192-FRA_hdgso_report_Part%201_en.pdf

² Various publications and reports

³ CommHR (2011) *Discrimination on the grounds of sexual orientation and gender identity in Europe* www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf

⁴ Expected to be launched on 17 May 2013

It is true that there are no particular legal obstacles to associations providing advice to individuals regarding their anti-discrimination rights. It is also the case that associations can provide financial support or legal representation to individuals if they so choose. For example, many trade unions have schemes that will provide, under certain conditions, legal representation for individuals who are bringing a complaint concerning discrimination at work. However, the complaint has to be brought by the individual in his or her name (subject to the possibility for the Employment Tribunal to order that the identities of the parties to the complaint remains anonymous in limited circumstances).

It is not possible for an association to bring a complaint 'on behalf' of an individual in the sense of being a named party in the case rather than the actual individual complainant. Neither is it possible for an association to act on behalf of a group of complainants; each must lodge an individual complainant.

There are some circumstances where associations can bring litigation in their own name. For example, if the association is bringing a judicial review in administrative law, then it is not necessary to identify an individual complainant. This would be the case where there is a challenge to the legality of a provision of legislation, or to a decision by a public body. For example, in *R (Amicus-MSF and others) v Secretary of State for Trade and Industry and CARE and others* [2004] IRLR 430, a trade union brought a judicial review action against the exception for employment by an organized religion in the Employment Equality (Sexual Orientation) Regulations 2003.

Finally, it is worth noting that the Equality and Human Rights Commission can provide legal representation to individual complainants. It only does this in cases of strategic importance due to limited resources, but it has occasionally intervened in cases relating to sexual orientation. For example, it provided legal support in *Hall v Bull* [2012]1 WLR 2514 concerning the refusal of a bed and breakfast hotel to provide a room with a double bed to a same-sex couple.

Genuine Occupational Requirement Exception

The Employment Equality (Sexual Orientation) Regulations 2003 created controversy by including two types of exception due to genuine occupational requirements. One was similar to that found in the Directive, but there was an additional exception permitting requirements related to sexual orientation in employment 'for the purposes of an organized religion' (Reg 7(3)). This was not expressly permitted by the Directive, except insofar as it could be incorporated under Article 4(1). This was challenged in the judicial review by *Amicus-MSF*, but the High Court held that it was lawful on the basis that it would be interpreted narrowly and mainly confining to position working directly for religious organizations (e.g. priests). It would not extend to positions in organizations with a religious ethos, such as faith schools. The High Court felt that this was consistent with Article 4(1) of the Directive. Trade unions and NGOs remained concerned that it created uncertainty for LGB individuals working in religious organizations.

The Commission's Reasoned Opinion implied that this provision was viewed as going beyond the scope of the Directive, however, it seems that this was not pursued further following the adoption of the Equality Act 2010. This introduces a new legal framework.

There is a general exception for occupational requirements, but there remain specific additional exceptions for employment for the purposes of an organized religion. In relation to the latter, it is permitted to impose requirements related to sexual orientation or civil partnership (i.e. not being in a civil partnership) where this is necessary due to the compliance or non-conflict principles:

Schedule 9, Para 2:

5. The application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion.

6. The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.'

For example, this might mean that the Church of England would be justified in refusing to appoint a gay man as a Bishop due to his sexual orientation.

The difficulty arises from the ambiguous nature of some of the language in this exception, especially sub-paragraph 6. There has not been any significant litigation yet testing the meaning of this exception. There were few cases under the preceding exception. One of the notable decisions held that the exception could not be relied upon to refuse to appoint a gay man to the position of a Church Youth Worker where he had committed himself to celibacy for the duration of the appointment: *Reaney v Hereford Diocesan Board of Finance* (2007).

Report 2 Austria's implementation compiled by Kurt Krickler (HOSI Wien)

Associations 'with a special interest' can get involved in individual cases but cannot take class action. This can be on behalf of somebody or a group of people without identifying an individual plaintiff putting forward a claim of having suffered personal discrimination, if a whole group is discriminated against (e.g. if a company would write into an advert "we do not employ homosexuals", in such a case only an individual could sue, but even here of course with the support of a specialised organisation such as the Klagsverband. So in this respect we demand the possibility of class action.

With regard to sexual orientation, we have never come across a case that would fall under such an action. As a whole, there were few workplace cases - with regard to sexual orientation (perhaps as little as half a dozen in 9 years).

Unfortunately, both in January 2011 and December 2012 two bills to extend protection on the grounds of sexual orientation beyond the field of workplace to other areas such as goods and services have failed.

Report 3 **Germany's implementation compiled by Manfred Bruns & Klaus Jetz (LSVD)**

As required by Article 9 § 1 the possibility of legal protection in Germany is provided by the legal guarantee of Article 19 § 4 of the Constitution⁵ which ensures conditions for access to the various courts including in the procedural codes.

Article 9 § 2 RL has been implemented in Germany through Article 23 of the *General Equal Treatment Act* (AGG). Then shall advise the anti-discrimination associations favored in all sectors and in all court instances. They also must not disadvantage through all branches of court of first instance in oral proceedings as counsel. You may, however litigation either in their own name (class action) but would still need to be done at least as a representative of a victim.

The absence of class action law makes it impossible for anti-discrimination associations, to take cases to the highest court. NGOs cannot become active on their own or on behalf of the victim, they just can support and accompany victims to court. This circumstance (the lack of the NGO's right to lead a proceeding) makes it impossible for NGOs to lead sample proceedings (sample litigation) until the end (until the last instance).

It is often difficult to bring those who are being discriminated to file for a law suit. Such law suits are therefore lost because organizations cannot file them under their own name.

Legal proceedings that organisations would like to bring before the German Federal Constitutional Court to receive a verdict that would be binding for all constitutional bodies of the Republic and each federal state as well as all courts and authorities usually take ten or more years. This is usually very expensive and stressful for the victims. It happens regularly that victims give up after the second or third verdict to their detriment and do not want to pursue the law suit any longer. We then have to look for another victim of the same problem and start new proceedings with him.

Report 4 **Poland's implementation compiled by Paweł Knut (Campaign against Homophobia)**

47 of the most representative Polish human rights NGOs, operating under a special platform called *The Coalition for Equal Treatment*, prepared several legal submission in which they evaluated the measures taken by the Polish government to implement the Directive.

The Platform's overall assessment for both the implementation and the application in practice of the legal provisions, is rather negative. This albeit the fact that it is true that,

⁵ http://www.gesetze-im-internet.de/gg/art_19.html

to some extent, the implementation of the Directive has increased the minimum standards of protection against discrimination in the area of employment.

The objections are focused mainly on the *Act of 3 December of 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment* (the so-called "Equality Act"), *Act of 26 June 1974 The Labor Code* and *Act of 20 April 2004 on promotion of employment and labour market institutions*.

The reasons for these objections are:

1. *Wide range of exemptions* – the claims are related to the limited list of legally protected grounds on which the discrimination is prohibited and the fact that certain social groups can benefit from a different range of protection guaranteed by Equality Act.
2. *Vague and ambiguous text of the provisions* – currently it is not clear if the subjects mentioned in the Article 2 of the Equality Act are the subjects who can benefit from the protection against discrimination given by the provisions contained in this Act or, on the contrary, the subjects who are obliged not to violate the principle of equal treatment.
3. *Incorrect implementation of the provisions included in the Directives* - the Equality Act and The Labour Code contain the incorrect definition of direct discrimination (the definition considers 'a hypothetical unequal treatment' as a ground of discrimination). Despite of the fact that definition of the direct discrimination provides the possibility for the different grounds of discrimination to occur simultaneously, the Labour Code does not provide the possibility to assert multiplied claims.
4. *Harassment* - Legal provisions prohibiting harassment of all groups has not yet been adequately implemented into Polish legal system.
5. National legislation, which regulates the standards of providing the professional training, still does not contain adequate definition of direct and indirect discrimination.
6. Furthermore many legal regulations concerning access to certain services (e.g. lawyers, legal advisers, doctors, bailiffs) lack anti-discrimination provisions.

Finally, to evaluate the effectiveness of the implementation process it is also worth to mention some of the statistics, which demonstrate the frequency of invoking to the rights guaranteed by the Equality Act. The information obtained from the Ministry of Justice shows that from the moment of entry into force of the Equality Act only 30 cases requesting compensation for damages (caused by unequal treatment) were received by regional and district courts. The courts concluded 15 cases (9 dismissed, 3 remanded, 1 returned and 2 discontinued).

Report 5 **The Netherlands's implementation compiled by Joyce Hamilton (COC)**

The *Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC (Country Report 2011 – The Netherlands)*⁶ by Rikki Holtmaat demonstrates the problems in the Netherlands rather well, especially sections 0.2 (general situation) and 6.2 (information on support by NGOs to victims).

Regarding the case of discrimination in employment within religious institutions e.g. schools, there is court case of a teacher fired on the basis of his sexual orientation. He has fought and won that court case which was also supported by a positive statement of the Dutch Human Rights Institute. Despite this fact, dismissal of teachers is still possible as the present *Dutch Equal Treatment Law* provides religious schools with the right to refuse and/or expel homosexual teachers and students. According to the law, such a decision cannot be based on the 'sole fact' of their homosexuality, but because of so called 'additional circumstances'. What might constitute 'additional circumstances' is up to judges to decide, but the paragraphs thus pose a threat to openly gay students and teachers in religious schools.

Report 6 **Sweden's implementation**

In Sweden, there is no real legal transposition problem. However, the 12 victim support organisations (ADB anti-discrimination bureau), which are NGOs, don't take anti-discrimination cases where the sanctions could go over 20000 SK (circa €2000) because their (State) funding is limited, and if they lost such cases their very existence could be put in question.

Furthermore, the Ombudsman (against discrimination) could also assist victims but chose only cases with strategic litigation interest. In December, the anti-discrimination ombudsman at national level called on the gvt to make for funding available to NGOs to ensure that victims really get support. But nothing was done so far.

⁶ http://www.non-discrimination.net/content/media/2011-NL-Country%20Report%20LN_final.pdf