

# Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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## Foreword

The study was compiled by Ms Merle Haruoja, Ms Marianne Meiorg and Mr Kari Käsper, experts of Estonian human rights law. Ms Haruoja is Head of the Estonian Institute of Human Rights and Ms Meiorg and Mr Käsper work for the Foundation of Estonian Human Rights Centre.

The research team took into account all information available from publicly accessible sources. In addition, formal Letters of Inquiry were sent to public authorities including *Tööinspeksioon* [Labour Inspectorate], the former *Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board], which is now reorganised into the *Politsei- ja Piirivalveamet* [Police and Border Guard Board], *Tallinna Sotsiaal- ja Tervishoiuamet* [Tallinn City Social Welfare and Health Care Board], *Õiguskantsleri kantselei* [Office of the Chancellor of Justice], *Soolise võrdõiguslikkuse volinik* [Gender Equality Commissioner], which is now reorganised into *Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik* [Gender Equality and Equal Treatment Commissioner], *Sotsiaalministeerium* [Ministry of Social Affairs], *Justiitsministeerium* [Ministry of Justice] and *Riigikohus* [Supreme Court of Estonia]. Research team members also consulted with several NGOs active in the field of prevention of discrimination on the grounds of sexual orientation.

The team used comparative and analytical approaches to the research subject. Where necessary, EU and national law were compared, contrasted, and deficiencies in national law were highlighted. Relevant Estonian laws, regulations and practices were analysed.

In general, it can be said that the public authorities were forthcoming in providing information. However, as the LGBT rights have not apparently been a priority, very little statistical data is available. In addition, the laws and regulations regarding the prohibition of discrimination based on sexual orientation were recently adopted and therefore no developed practice or case law has emerged yet.

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# Executive Summary

## Implementation of Employment Directive 2000/78/EC

The Directive is implemented through the *Võrdse kohtlemise seadus* [Equal Treatment Act]<sup>1</sup> that entered into force on 1 January 2009 and the new *Töölepingu seadus* [Employment Contracts Act] that entered into force on 1 July 2009.<sup>2</sup>

The Employment Contracts Act requires employers to follow the principle of equal treatment referring to the more specific Equal Treatment Act. Applications on the subject can be submitted to the newly founded Gender Equality and Equal Treatment Commissioner and the Chancellor of Justice that can produce only non-binding opinions. Complaints can be submitted to *töövaidluskomisjon* [labour dispute committee] if they concern employment relations, or to courts. So far there have been no cases in either of them regarding discrimination based on sexual orientation.

## Freedom of Movement

Directive 2004/38/EC is fully implemented by Euroopa Liidu kodaniku seadus [Citizen of European Union Act],<sup>3</sup> which provides every citizen of any European Union Member State full freedom of movement. The accompanying right is only for spouses, children or dependents. Unmarried couples or couples in civil unions or registered partnerships are not recognised as ‘spouses’. Currently there is no practice to indicate whether same-sex marriages would be recognised as marriages for the purposes of migration laws, including for the purposes of residence permits. However, LGBT partnerships of any type may fall under the concept of ‘household’ but there is no practice to confirm it.

In fact, it can be questioned whether Estonia has fully implemented Article 3(2)(b) of Directive 2004/38/EC, which provides that the partner with whom the Union citizen has a durable relationship, duly attested, ‘shall, in accordance with its national legislation, facilitate entry and residence for the following persons’.

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<sup>1</sup> Estonia/Riigikantselei (23.12.2008) *Riigi Teataja* I, 56, 315.

<sup>2</sup> Estonia/Riigikantselei (27.06.2009) *Riigi Teataja* I, 36, 234.

<sup>3</sup> Estonia/Riigikantselei (08.06.2006) *Riigi Teataja* I, 26, 191.

## Asylum and Subsidiary Protection

Directive 2004/83/EC is fully implemented by *Välismaalasele rahvusvahelise kaitse andmise seadus* [Act on Granting International Protection to Aliens].<sup>4</sup> The Act does not expressly provide sexual orientation as a ground for persecution and there is no specification as to whether it could be included under 'a particular social group'.

The Act provides for an accompanying right to asylum/subsidiary protection only to a number of persons closely connected to the applicant and that list does not include partners with whom the person is not married or has contracted a civil union or registered partnership. There has only been one application substantiated with the claims of discrimination based on sexual orientation but this was rejected without analysis of the content.

## Family Reunification

Family reunification is regulated by the Act on Granting International Protection to Aliens. As in the case of accompanying right to asylum/subsidiary protection, the exhaustive list of persons considered family members for the purposes of family reunification does not include partners with whom the person is not married or has contracted a civil union or registered partnership.

## Freedom of Assembly

The application of rules in the area is unclear in the context of discrimination on the basis of sexual orientation. There have been few cases of the public exercise of the right and there have been controversies regarding its exercise.

It appears that although the public authorities clearly understand and heed the obligation not to interfere with demonstrations, severe administrative and financial burdens have been placed on the organisers of such events. The authorities have appeared uncooperative and unhelpful in providing assistance when registering an event or protection.

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<sup>4</sup> Estonia/Riigikantselei (2006) *Riigi Teataja* I, 2, 3.

## Criminal Law, Hate Speech

Homophobic hate speech has been criminalised in *Karistusseadustik* [Penal Code].<sup>5</sup> However, the provision has not been applied by the authorities in practice, therefore, its effectiveness remains unclear. The Ministry of Justice has confirmed that a draft proposal is under preparation in order to make the application of the hate speech provisions in the Penal Code more effective as well as specify the regulation of hate crimes in general.

## Transgender Issues

Transgender issues have a short history in the Estonian legal system. There is no practice, reported cases or statistics on the subject. Therefore, there has not been any opportunity to develop an approach to transgender discrimination. Provisions affecting specific aspects of transsexuality and gender reassignment are not available in one compact legal act but rather dispersed in a number of legal acts. Full gender reassignment in medical as well as legal terms is facilitated.

## Miscellaneous

Additionally, it should be mentioned that *Eesti Vabariigi Põhiseadus* [Constitution of the Republic of Estonia]<sup>6</sup> includes in its catalogue of fundamental rights the prohibition of discrimination. In the past two years there have been only a few studies that have addressed sexual orientation issues. In 2009, the Ministry of Justice published a study on the legal regulation concerning non-married cohabiting couples, discussing in detail also same-sex couples.

There are no laws similar or comparable to the institutional homophobia that surfaced in Lithuania. However, the Gender Equality and Equal Treatment Commissioner refers to an amendment made to a decree in a local municipality, explicitly excluding same-sex couples from municipal social benefits.

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<sup>5</sup> Estonia/Riigikantselei (2001) *Riigi Teataja* I, 61, 364.

<sup>6</sup> Estonia/Riigikantselei (28.06.2007) *Riigi Teataja* I, 43, 311.

## Good practices

The recent practice of the Gender Equality Department of the Ministry of Social Affairs, which has adopted an extended notion of gender equality and has become active in issues of sexual orientation, is a positive development. Small, but significant examples of good practices also include the capacity of the Gender Equality and Equal Treatment Commissioner to hear work-related sexual orientation discrimination issues; the inclusion of hate crime provisions in the Penal Code; legal research into same-sex marriage by the Ministry of Justice and changes in national curricula allowing for discussion of sexual minorities in school.

## A. Implementation of Employment Directive 2000/78/EC

Employment Directive 2000/78/EC regarding discrimination on the grounds of sexual orientation is implemented by *Töölepingu seadus* [Employment Contracts Law] adopted on 17 December 2008 and *võrdse kohtlemise seadus* [Equal Treatment Act], which was adopted on 11 December 2008.<sup>7</sup> The Equal Treatment Act is also intended to implement Racial Equality Directive 2000/43/EC.

The Employment Contracts Law includes a general provision on the principle of equal treatment stating, “employers shall ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and Gender Equality Act.” (§3). Although the supervision over the implementation of the Act is generally within the competence of *Tööinspeksioon* [Labour Inspectorate], the provision on discrimination is within the competence of the *Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik* [Gender Equality and Equal Treatment Commissioner] (§115 of the Employment Contracts Law). In case of a dispute arising out of an employment relationship, the person may turn to the *töövaidluskomisjon* [labour dispute committee].<sup>8</sup>

The position of the Gender Equality and Equal Treatment Commissioner was created by the new Equal Treatment Act, the aim of which is to guarantee the protection of persons from discrimination based on race, nationality, colour, religion or belief, age, disability or sexual orientation. The Act provides for the principle of equal treatment, tasks for implementing and promoting these principles and resolution of disputes.

The scope of the Equal Treatment Act is defined in §2 and it fully corresponds with the scopes of Directives 2000/78/EC and 2000/43/EC defined in their Articles 3. The Act’s scope depends on the basis of discrimination and therefore in case of discrimination based on sexual orientation the Act applies only in the area of employment while discrimination based on nationality (ethnicity), race or colour is covered also in the area of health care, social security, education, access to goods and provisions of services. The Commissioner has criticised the differentiations between the types of discrimination: by adopting the Equal Treatment Act, Estonia has implemented the mere minimum of the norms

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<sup>7</sup> Estonia/Riigikantselei (23.12.2008) *Riigi Teataja* I, 56, 315.

<sup>8</sup> Estonia/Riigikantselei (1996) *Individaalse töövaidluse lahendamise seadus* [Individual Labour Dispute Resolution Act] *Riigi Teataja* I, 3, 57.



from EU Council Directive 2000/78/EC. This is a result of the discussions in the Parliament, since the original draft of the Act foresaw prohibition of discrimination of every minority group in every area of law. The present solution in the Equal Treatment Act causes problems and creates a so-called hierarchy between the types of discrimination.<sup>9</sup>

The main features of the draft of the Equal Treatment Act:

- § 3 defines discrimination, which fully corresponds to Art 2 of Directives 2000/78/EC and 2000/43/EC;
- § 10 provides for exceptions to the prohibition of discrimination in the interests of public security and order, prevention of crimes, protection of health, rights and freedom of others. All measures taken must be proportional to one of the stated aims.
- The procedural provisions of the two mentioned Directives are fully transposed by the Act. For example burden of proof Articles are transposed by §9 of the Act providing for a shared burden and stating that respondent's refusal to prove his/her non-violation of a equal treatment principle is equal to admittance to discrimination;
- Chapter 4 renamed the former Gender Equality Commissioner as Gender Equality and Equal Treatment Commissioner. It also extended the Commissioner's competence for resolving discrimination complaints to include discrimination based on other grounds, such as sexual orientation.

The Commissioner is appointed by the Minister of Social Affairs for five years. The organisation of work should be specified in the Statutes of the Commissioner but the new Statutes are yet to be adopted after the previous Statutes of the Gender Equality Commissioner were repealed on 1 January 2009.<sup>10</sup> The draft of the Statute has been sent to the round of approval.

The Commissioner is competent to consult and assist persons in pursuing their complaints about discrimination. She may also receive applications from individuals and provide an opinion as to the possible existence of discrimination (§16 of the Equal Treatment Act). These opinions are not legally enforceable but merely 'provide an assessment which...allows for an assessment of whether the principle of equal treatment has been violated in a particular legal relationship'.<sup>11</sup> Applications to the Commissioner do not necessarily have to be submitted by the victims themselves, interested organisations or group of persons can also do that.

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<sup>9</sup> Estonia/*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik* (11.01.2010) *Teemauring homofobia ja diskrimineerimise kohta seksuaalse sättumuse alusel* [Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation] no 3-1/005.

<sup>10</sup> Estonia/*Riigikantselei* (15.03.2005) *Soolise võrdõiguslikkuse voliniku põhimäärus* [Statutes of Gender Equality Commissioner] *Riigi Teataja* I, 14, 73.

<sup>11</sup> Paragraph 18 (2) of the Equal Treatment Act.

Complaints over discrimination based on sexual orientation can also be submitted to the *Õiguskantsler* [Chancellor of Justice]. This institution was established by the Constitution. He/she is appointed by the Parliament on the proposal of the President of the Republic. In addition to the constitutional task of reviewing legislation's conformity with the Constitution, the Chancellor was also given the task of monitoring whether state agencies respect fundamental rights and freedoms and the principles of good governance (§ 19(1) of *Õiguskantsleri seadus* [Chancellor of Justice Act]<sup>12</sup>). In regard to private relations, such as those of employment, the Chancellor merely has the right to conduct conciliation procedures, which are voluntary to both of the parties (§19(2)).

The Chancellor and the Gender Equality and Equal Treatment Commissioner are legally separate and independent positions. The Commissioner, being a public official, can be the subject of a complaint filed with the Chancellor. One of the major differences between the two positions is that the Commissioner is specialised in discrimination issues while the Chancellor is not. Another major difference is that the Chancellor may only review cases regarding actions by 'a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties', while the Commissioner can review cases also in regard to private persons with no public duties. When the dispute concerns only private persons, the Chancellor only has the possibility to conduct conciliation procedure if the parties agree to it.

The Chancellor's competence on equality and equal treatment matters, including equality concerning sexual orientation, is the following:

- the review of the conformity of a legal act with the constitution and laws (competence for normative review);
- the breach of the prohibition of discrimination during the exercise of public duties (competence as ombudsman);
- conciliation proceedings between private parties.

The procedure of complaints to the Chancellor is simple. The complainant must submit an application, which can also be done through the Chancellor's website.<sup>13</sup> The Chancellor will then provide an opinion on whether or not discrimination had taken place. As in the case of the Commissioner, the opinion of the Chancellor is not legally binding. In case of a conciliation procedure, the application is forwarded to the opponent,

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<sup>12</sup> Estonia/*Riigikantselei* (18.03.1999) *Riigi Teataja* I, 29, 406.

<sup>13</sup> In Estonian: <http://www.oiguskantsler.ee/index.php?menuID=34>. In English: <http://www.oiguskantsler.ee/index.php?menuID=69>.

who may respond. If no solution is reached, the parties will meet for negotiations. Any agreement reached is subject to enforcement procedure.<sup>14</sup>

In case of discrimination in employment, a person can also turn to a labour dispute committee. According to § 3 of *Individuaalse töövaidluse lahendamise seadus* [Individual Labour Dispute Resolution Act],<sup>15</sup> a disagreement arising from the employment relationship of an employee and employer may be resolved by a labour dispute committee if they find that a labour dispute cannot be resolved by agreement. This body is not specialised in equality and discrimination matters but can be turned to in such matters.

In addition to what is stated above, the persons can also turn to the court with their claims of discrimination in employment relations. Although *actio popularis* as a possibility is not recognised in Estonian courts, civil society organisations do have a limited possibility to act in support of an individual who is a direct victim of a legal act or action. According to the Code of Civil Procedure, a person may participate in court disputes personally, through a contractual representative (§ 217) or use the help of an adviser (§ 228).<sup>16</sup> According to § 217, a contractual representative must essentially be someone with certified knowledge of law or one plaintiff/defendant (in case where there are multiple plaintiffs/defendants) or an ascendant, descendant and spouse. In *Riigikohus* [Supreme Court] a contractual representative must be a sworn attorney.

Only recently organisations have gained access to financial support to represent individuals in court or act as representatives. So far, only *Eesti Juristide Liit* [Estonian Union of Lawyers]<sup>17</sup> and *SA Õigusteenuste Büroo* [Foundation Office of Legal Services]<sup>18</sup> have received such aid but neither is specifically orientated to victims on the grounds of sexual orientation. The former provides legal assistance from law students who have no authorisation to represent clients in court and the latter provides assistance to low-income individuals.

In addition to contractual representatives, the Code of Civil Procedure foresees the possibility to use the help of an advisor that can be anyone with an active civil procedural legal capacity (§ 228).<sup>19</sup> An adviser may appear in court together with the participant in the proceeding. He/she cannot perform procedural acts or file petitions but can provide explanations and anything

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<sup>14</sup> Section 23 of the Chancellor of Justice Act.

<sup>15</sup> Estonia/Riigikantselei (1996) *Riigi Teataja* I, 3, 57.

<sup>16</sup> Estonia/Riigikantselei (2005) *Riigi Teataja* I, 26, 197.

<sup>17</sup> See: <http://www.juristideliit.ee/est/tegevus/tasuta-F5igusabi.php> (14.02.2008).

<sup>18</sup> See: <https://www.otb.ee/> (14.02.2008).

<sup>19</sup> Active civil procedural legal capacity is the capacity of a person to exercise civil procedural rights and perform civil procedural obligations in court by the person's acts - § 202 of the Code of Civil Procedure.

presented by an adviser is deemed to have been presented by the participant in the proceeding unless the participant in the proceeding immediately withdraws or corrects it. However, this possibility is rarely, if ever, used by civil society organisations and the victims of discrimination. In fact, as a result of an e-mail correspondence with one of the organisations, it seems that this possibility is not even known to the organisations or the victims.<sup>20</sup>

The Gender Equality and Equal Treatment Commissioner has had one application concerning allegations of discrimination based on sexual orientation but it did not concern employment relations.<sup>21</sup> The Office of the Chancellor reports it has received six petitions concerning discrimination based on sexual orientation.<sup>22</sup> See Annex 2 on the statistical information. According to information received from the Chancellor of Justice, there have only been two cases concerning employment relations.<sup>23</sup> This case is summarised in Annex 1. The Labour Inspectorate has no case-law in regard to sexual orientation to report.<sup>24</sup>

The case-law of Estonian courts is available on the Internet. The case-law of the Supreme Court can be accessed through the database to be found in the Court's homepage.<sup>25</sup> The database covers all the decisions given by the Court. The last keyword-based search conducted on 03.04.2008 did not give any results. An inquiry with the Supreme Court confirmed that they have no case-law in regard to sexual orientation.<sup>26</sup> The case-law of the first and second court instances is available in databases KOLA<sup>27</sup> and KIS<sup>28</sup>. The KOLA database includes all decisions up to 31.12.2005 that have entered into force provided that they were not subject to the limitation for disclosure provided by law. The KIS database includes decisions as of 01.01.2006. The last keyword-based search conducted on 11.01.2010 did not give any results. Therefore, according to the databases no cases related to discrimination based on sexual orientation have reached the courts.

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<sup>20</sup> E-mail correspondence with Ms Lisette Kampus, member of Diversity and the executive board of ILGA-Europe (03-04.04.2008).

<sup>21</sup> Estonia/*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik* (11.01.2010) *Teemauuring homfoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel* [Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation] no 3-1/005.

<sup>22</sup> Estonia/*Õiguskantsleri kantselei* [Office of the Chancellor of Justice] (04.02.2008) *Vastus teabenõudele* [Response to request for information] no. 5-3/0800287.

<sup>23</sup> Response to request for information.

<sup>24</sup> Estonia/*Tööinspeksioon* [Labour Inspectorate] (25.01.2010) *Vastus teabenõudele* [Response to request for information] no 1-05/50-1.

<sup>25</sup> See: <http://www.riigikohus.ee/> (03.04.2008).

<sup>26</sup> Estonia/*Riigikohus* [Supreme Court of Estonia] (31.01.2008) *Vastus küsimustikule* [Response to Questionnaire].

<sup>27</sup> See: <http://kola.just.ee/> (03.04.2008).

<sup>28</sup> See: <http://www.kohus.ee/kohtulahendid/index.aspx> (03.04.2008).

## B. Freedom of Movement

In the case of EU citizens and their family members, the right to move and reside within the territory of Estonia is regulated by the Citizen of European Union Act. The same right in the case of Third Country citizens is regulated by *Välismaalaste seadus* [Aliens Act].<sup>29</sup>

The Citizen of European Union Act is implementing the Directive 2004/38/EC of 29.04.2004. Therefore, according to the Act, every citizen of any EU Member State has the right to stay in Estonia on the basis of a valid travel document or identity card (§ 7). This right is independent and does not depend on the citizenship of the person's partner, spouse, parent or any other family member. Such right may only be restricted if there is good reason to believe that the person poses a danger to public order, national security or the health of other persons (§ 8).

The case is somewhat different when the family member of the EU citizen is a third country citizen. According to § 3 of the Citizen of European Union Act, family members are:

- a spouse of the EU citizen;
- a child under 21 years of age or a dependent adult child of the EU citizen or of his/her spouse (dependent child);
- a dependent parent of the EU citizen or of his/her spouse; or
- any other person who, in the EU citizen's country of origin, is a dependant of the EU citizen or is a member of his/her household, or who is permanently unable to cope independently owing to health reasons or disability and it is necessary that the EU citizen personally cares for him/her.

The term 'spouse' referred to in § 3 of the Act is somewhat controversial when looked at in the light of the rest of Estonian legislation. According to the current *Perekonnaseadus* [Family Law Act],<sup>30</sup> marriage is contracted between a man and a woman. The same position is retained with the new Family Law Act, which will enter into force on 1 July 2010, which also states that any marriage contracted between persons of the same sex is invalid (§10).<sup>31</sup> Therefore, in the Estonian legal system only heterosexual marriages can be contracted. This is strengthened by the opinion of the Chancellor of Justice, expressed in his statement on regularisation of same-sex family relations:

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<sup>29</sup> Estonia/Riigikantselei (1993) *Riigi Teataja* I, 44, 637.

<sup>30</sup> Estonia/Riigikantselei (1994) *Riigi Teataja* I, 75, 1326.

<sup>31</sup> Estonia/Riigikantselei (2009) *Riigi Teataja* I, 60, 395.

‘Marriage as a type of family has been afforded special protection by the state, especially as a basis for the society and for the continuation and growth of the nation (§ 27 (1) of the Constitution). This means that marriage is a sustainable unit, formed from a man and a woman, who can have common descendants and who are thus the guarantors for the continuation of the society. The fact that same sex persons do not have this possibility, is a difference, which can provide a reasonable explanation for different treatment of different sex and same sex couples ... Therefore my opinion is that the unequal treatment of homosexual persons within the meaning of contracting a marriage is justified’.<sup>32</sup>

It is somewhat unclear whether this also affects the legal status of homosexual marriages contracted in another state once the married couple enters the territory of Estonia. It must be noted, however, that the Citizen of European Union Act merely refers to ‘a spouse of the citizen of the European Union’ without mentioning the legal status of the marriage in the country of origin, as opposed to a person falling under the fourth category of persons who constitute ‘family members’ because ‘in the country of origin of the citizen of the European Union, [he/she] is a dependant of the citizen of the European Union or is a member of his or her household’.

However, according to § 55 (2) of *Rahvusvahelise eraõiguse seadus* [Private International Law Act],<sup>33</sup> ‘marriage contracted in a foreign state is deemed to be valid in Estonia provided that it is contracted pursuant to the procedure provided by the law of the state where the marriage is contracted and provided that the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses’. *Siseministerium* [Ministry of Interior] did state that they see no reason why same-sex spouses could not be considered as spouses within the meaning of the EU Citizen Act, if their marriage was contracted according to the regulations in place in their country of origin.<sup>34</sup> This should currently be considered as a general policy of Estonian authorities, which is yet to be confirmed by actual practice.<sup>35</sup> It is worth noting, however, that the former Citizenship and Migration Board (currently the *Politsei- ja Piirivalveamet* [Police and Border Guard Board]) responded that same-sex spouses would likely be interpreted as ‘members of a household’, discussed below, rather than as ‘spouses’.<sup>36</sup>

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<sup>32</sup> Estonia/*Õiguskantsleri kantselei*, 01.2006 no. 6-1/060166/0600782.

<sup>33</sup> Estonia/*Riigikantselei* (24.04.2002) *Riigi Teataja* I, 35, 217.

<sup>34</sup> Telephone conversation with Ms Grete Kaju, legal advisor for the Department of the Migration and Border Control Policy, Ministry of Interior (08.04.2008).

<sup>35</sup> Estonia/former *Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board] (08.04.2008) *Küsimus tõlgendamise kohta* [Question on Interpretation].

<sup>36</sup> Estonia/former *Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board] (08.04.2008) *Küsimus tõlgendamise kohta* [Question on Interpretation].

The answers from these institutions are somewhat contradictory and there is no legal provision, practice or decision on this question. Usually the Citizenship and Migration Board will decide the issue on the basis of its understanding of the Estonian law. If its decision is contested, it will be discussed at a higher level. It is therefore not clear under Estonian law whether same-sex spouses who have validly contracted a marriage according to the law of the country of origin will be recognized as spouses for the purposes of letter a) of Article 2(2) of the Free Movement Directive. There is no provision to this effect and the issue has not arisen to date.

As opposed to doubts surrounding LGBT marriage, the view on registered partnerships or civil unions is clear under Estonian legislation. According to the Family Law Act, the only union between two people that brings with it rights and obligations is marriage (§ 1 (2)). In the present context this is confirmed by § 3 of the Citizen of European Union Act, which excludes any other union but marriage between two people as a basis for freedom of movement entitlements. There is however a general discussion over the need to adopt a partnership act allowing the registration of same-sex partnerships.<sup>37</sup> The discussion is yet to materialise in a draft law. This does not contradict Art 2/2/b of Directive 2004/38/EC. Therefore in general, homosexual couples, whether married or having contracted a registered partnership will fall under the category of other family members in Art 3/2 of Directive 2004/38/EC.

Paragraph 3 of the Citizen of European Union Act also provides that a family member in the context of that Act can also be ‘a member of a household’, thus fully reflecting Art 3/2/a of Directive 2004/38/EC. According to § 3 (3), a member of a household is ‘the person ... who resides together with a citizen of the European Union in a shared household and has a personal income’. The Citizenship and Migration Office noted that, in principle, this can include LGBT partnership.<sup>38</sup> However, it was also noted that there has only been 1-2 cases where ‘household’ has been cited as a ground for being a family member and these cases did not include LGBT partnerships. It is thus difficult to state with certainty whether under Estonian legislation LGBT partnerships fall under the concept of ‘the household’ and can benefit from the right to enter and stay in Estonia as a family member of EU citizen.

It may however be questioned whether Estonia has fully implemented Art 3/2/b of Directive 2004/38/EC, which provides that the partner with whom the EU citizen has a ‘durable relationship, duly attested’, ‘shall, in accordance with its national legislation, facilitate entry and residence for the following persons’. The Citizen of European Union Act does not recognise

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<sup>37</sup> Estonia/Justitsministeerium (2009) *Mitteabieluline kooselu ja selle õiguslik regulatsioon*.

<sup>38</sup> Telephone conversation with Ms Liis Annus, Head of Department for Documentation of Foreigners, former Citizenship and Migration Board (27.02.2008).

any other 'durable relationship' but marriage and, to some extent applicable here, members of a household. There is no basis, thus, under which a 'durable relationship' would be a basis for entry and stay in Estonia of a partner of EU citizen.

In the context of the present study, the children and dependents of the LGBT EU citizens are the only group of individuals that can, for sure, take advantage of the provisions on the right to move and stay in Estonia. The particularities of their right to move and stay are provided in § 10 of the Citizen of European Union Act:

'(1) A family member has the right to stay in Estonia together with a citizen of the European Union on the basis of a valid travel document for a period of up to three months after the date of entry in Estonia (the provision is amended but the changes will not enter into force until 1.10.2010. After that date the provision will be the following: 'A family member has the right to stay in Estonia together with a citizen of the European Union if he/she has a valid travel document and visa').

(2) Visa is not required from a family member who has a legal basis for staying in Estonia as provided in the Aliens Act.

(2<sup>1</sup>) Family member may be provided with a visa if:

1) he/she has a valid travel document

2) it is proven that he/she is travelling with a citizen of the European Union or is joining him/her, and

3) his/her status of family member has been proven.

(2<sup>2</sup>) Family member does not have to have a health insurance contract.

(3) A family member is prohibited to stay in Estonia if he/she has no right to stay or other legal basis to stay in Estonia.

(4) A family member staying in Estonia on the basis of the right to stay shall, within three months after the date of entry in Estonia, apply for temporary right of residence, or leave Estonia before the expiry of such term, unless he or she has applied for temporary right of residence.

(5) The stay in Estonia of a family member who has applied for temporary right of residence is legal until the processing of his or her application for temporary right of residence has been concluded.

(6) A family member staying in Estonia on the basis of the right to stay is prohibited from employment or operation as a self-employed person in Estonia'.



The right to stay of the family member may be restricted if there is good reason to believe that the person poses a danger to public order, national security or the health of other persons (§11).

In Estonia the residence system is divided into two: temporary residence of five years and permanent residence.

Every EU citizen has a right to acquire temporary residence. For a stay that exceeds the three-month-period for which only a travel document or identity card is needed he/she must register his/her residence (§ 13). The temporary residence extends automatically for another five years if he/she continues to be registered as a resident in Estonia and there are no reasons to extinguish or terminate it. At the same time, after five years of uninterrupted residence, the EU citizen may apply for permanent residence (§ 40). Under certain conditions, the EU citizen may also apply for a permanent residence permit before the expiry of five consecutive years of residence (§ 40 (2)). These are rights that the partner of an EU citizen who is himself/herself an EU citizen can take advantage of independently of the partner.

In the case of an EU citizen's family member who is not an EU citizen, obviously, the conditions set for the term 'family member' under § 3 of the Act must be satisfied. Also, there are certain additional requirements for the EU citizen with whom the person wishes to reside (§ 20 (1)).

The family member must apply for an extension of the temporary residence permit, showing the continuance of the conditions under which he/she had previously received the permit (§ 28). In case of a child § 45 (4) would also be relevant, which states that a newborn child of a family member with permanent right of residence in Estonia is entitled to permanent right of residence regardless of nationality. In case of the death of the EU citizen with right of residence in Estonia, the family member has the right to apply for a permanent residence permit under certain conditions (§ 45 (3)).

The possibility of the partners of EU citizens to take advantage of the freedom of movement and residence is mainly a question of a national legislation in every EU Member State when it comes to the aspects that have been left for them to decide. If the partner is an EU citizen, he/she has the freedom of movement already as an EU citizen, independent from his/her partner. If the partner is a third country national, the situation is somewhat stricter. Estonia does not recognise LGBT registered partnerships or civil unions as already discussed above. Thus, if according to a host state LGBT partnerships would be recognised, couples from Estonia cannot take advantage of that in the context of freedom of movement. Under Estonian law, same-sex couples also cannot marry, as already discussed.

Estonia does however recognise the concept of 'household', which is a basis for the freedom of movement for a member of a household. The Statistics Estonia, which uses this concept, applies three criteria to determine whether there is a 'household' – (1) same address; (2) joint financial and/or food resources; and (3) individuals consider themselves to be one household.<sup>39</sup> According to the Statistics Estonia, there is no reason to exclude LGBT partners from this concept if they fulfil these criteria.<sup>40</sup> Moreover, they have considered LGBT partnerships as cohabiting couples for the purposes of statistics. Therefore, LGBT couples forming a 'household' in Estonia can benefit from the freedom of movement. The same applies to their children and other family members that are part of the household.

According to the information from the Citizenship and Migration Board, there have been no cases on the grounds of sexual orientation and no statistics have been compiled.<sup>41</sup> There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, no cases have reached any courts either, which is explained in detail above.

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<sup>39</sup> Definition available on at: [http://pub.stat.ee/px-web.2001/I\\_Databas/Social\\_life/06Households/02Household\\_budget/02Monthly\\_expenditure/HH09.htm](http://pub.stat.ee/px-web.2001/I_Databas/Social_life/06Households/02Household_budget/02Monthly_expenditure/HH09.htm) (28.02.2008). Based on § 5 of *Rahva ja eluruumide loenduse seadus* [Population and Housing Census Act], Estonia/Riigikantselei (11.06.1998) *Riigi Teataja* I, 52/53, 772.

<sup>40</sup> Telephone conversation with Mr Arvo Valtin, Executive Data Administrator, Department of Social Surveys Service (28.02.2008).

<sup>41</sup> Estonia/former *Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board] (04.02.2008) *Vastus teabenõudele* [Response to request for information].

## C. Asylum and Subsidiary Protection

Council Directive 2004/83/EC of 29.04.2004 is fully implemented into Estonian national law by the Act on Granting International Protection to Aliens.

According to § 4 (1) a refugee is an alien who, owing to a well-founded fear of being persecuted or for reasons of race, religion, nationality, political opinion or membership in a particular social group, is outside his/her country of nationality and is unable or, owing to such fear, unwilling to avail himself/herself of the protection of that country and with regard to whom no circumstance exists precluding recognition as a refugee. There is no specification as to what is meant by those grounds for persecution. Nor was explanation provided in the Explanatory Note accompanying the Act's draft.<sup>42</sup> It is therefore unclear whether sexual orientation can be considered under 'a particular social group'. The same was admitted by an official from the Citizenship and Migration Board during a 14.02.2008 phone conversation. The official stated that this question will be dealt with once such grounds (for persecution) are cited by an asylum seeker.

The former Citizenship and Migration Board, which was responsible for granting refugee status or subsidiary protection is now replaced by the Police and Border Guard Board.<sup>43</sup> The new Board explained in its response to data request that the processing of applications for asylum does not include 'phallometry' or 'phallometric testing'.<sup>44</sup> The asylum seeker may present any oral or written evidence to prove the circumstances referred to in the asylum application.

According to information from the newly founded Police and Border Guard Board, there was one application for asylum in 2009, which was substantiated on the alleged discrimination based on sexual orientation in the origin state.<sup>45</sup> The application was rejected on the basis of §21(1) p 1, which requires rejection if another EU Member State was responsible for the review of the application.

According to § 7 of the Act on Granting International Protection to Aliens, family members of a refugee and of a person enjoying subsidiary protection are:

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<sup>42</sup> Explanatory Note attached to the draft, available at: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=052630010&login=proov&password=&system=ems&server=ragne11> (15.02.2008).

<sup>43</sup> Estonia/Riigikantselei (2009) *Politsei ja piirivalve seadus* [Police and Border Guard Act] *Riigi Teataja* I 2009, 62, 405.

<sup>44</sup> Estonia/*Politsei- ja Piirivalveamet* (11.01.2010) E-mail responding to request for information.

<sup>45</sup> Estonia/*Politsei- ja Piirivalveamet* (11.01.2010) E-mail responding to request for information..

- his/her spouse;
- his/her and his/her spouse's unmarried minor child, including adopted child;
- unmarried minor child under his/her or his/her spouse's custody and maintained by him/her or his/her spouse, including adopted child. In case of shared custody the agreement of the other party sharing custody is required;
- his/her or his/her spouse's unmarried adult child if the child is unable to cope independently owing to his/her state of health or disability;
- a parent or grandparent maintained by him/her or his/her spouse if the country of origin does not provide support resulting from other family ties.

The above list is exhaustive; therefore, partners to whom the seekers of asylum or subsidiary protection are not legally married are excluded. The marriage must have been concluded before arriving in Estonia. Here again arises the issue over same-sex marriages already discussed under the Freedom of Movement heading. In addition, as already discussed, no other unions or relationships but legally certified marriage between two individuals are recognised.

Except for the one application referred to above, there have been no cases on the grounds of sexual orientation and no statistics have been compiled.<sup>46</sup> There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, no cases have reached any courts either, which is explained in detail above.

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<sup>46</sup> Estonia/former *Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board] (04.02.2008) *Vastus teabenõudele* [Response to request for information]; and Estonia/*Politsei- ja Piirivalveamet* (11.01.2010) E-mail responding to request for information.

## D. Family Reunification

According to § 65 of the Act on Granting International Protection to Aliens, the Police and Border Guard Board decides on the reunification of families only if the persons applying for it constitute ‘family members’ of a person enjoying temporary protection. The exhaustive list of such persons is provided in § 7 (4) of the same Act:

- his/her spouse;
- his/her or his/her spouse’s unmarried minor child, including adopted child;
- other close relative who lived with him/her in the country of origin and was dependent on him/her.

Here again arises the issue over same-sex marriages already discussed under the Freedom of Movement heading. In addition, as it can be seen from § 7 (4), cohabiting or registered partners are not included in the list of ‘family members’. Therefore, registered or merely cohabiting same-sex couples will not have a right to unification.

According to information from the former Citizenship and Migration Board and the newly founded Police and Border Guard Board, there have been no cases on the grounds of sexual orientation and no statistics have been compiled.<sup>47</sup> There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT person. Similarly, no cases have reached any courts either, which is explained in detail above.

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<sup>47</sup> Estonia/former *Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board] (04.02.2008) *Vastus teabenõudele* [Response to request for information];.and Estonia/*Politsei- ja Piirivalveamet* (11.01.2010) E-mail responding to request for information.

## E. Freedom of Assembly

In general, freedom of assembly is guaranteed according to § 47 of the Constitution. More specific regulation is provided by the *Avaliku koosoleku seadus* [Public Assembly Act],<sup>48</sup> which sets out possible restrictions for freedom of assembly. There are no rules which would discriminate on the grounds of sexual orientation in the Act, therefore, any discrimination that may occur is a question of the application and interpretation, rather than the text, of the law.

Inciting hatred, violence or discrimination on grounds of sexual orientation is mentioned as a basis for prohibiting a demonstration. Section 3 (3) of the Public Assembly Act declares as prohibited any assembly that incites hatred, violence or discrimination also based on the grounds of sexual orientation. Therefore there is a legal basis for prohibiting anti-LGBT demonstrations.

There has been constant public debate surrounding the yearly LGBT Pride parade that has taken place in Tallinn since 2004. During the 2006 parade counter-demonstrators attacked parade participants the police were accused of not providing sufficient protection. This also prompted Amnesty International to issue a statement calling for better protection for the freedom of assembly.<sup>49</sup> In 2007 parade organisers issued a public statement that parade organisation ‘has turned out to be more complicated than in previous years’ and accused the public authorities of a lack of cooperation.<sup>50</sup> The organisers also submitted a complaint to the Chancellor of Justice’s office. The Chancellor concluded that although the requirement by *Põhja Politseiprefektuur* [Northern Police Prefecture] to parade organisers to use a private security firm to guarantee participants’ safety is in itself legal, the refusal of the organisers to fulfil the requirement cannot be a ground for refusing to allow the parade to take place.<sup>51</sup> It also established that the Northern Police Prefecture had not followed standards of good governance

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<sup>48</sup> Estonia/Riigikantselei (1997) *Riigi Teataja* I, 30, 472

<sup>49</sup> Amnesty International (15.08.2006) *Estonia: The right to freedom of peaceful assembly must be protected*, available at: <http://www.amnesty.org/en/library/info/EUR51/001/2006> (14.02.2008).

<sup>50</sup> R. Mets (02.07.2007) ‘Pöördumine seoses Tallinna Pride 2007 korraldamisega seondvalt’, in *Eesti Päevaleht*, available at: <http://www.epl.ee/?arvamus=392837> (14.02.2007).

<sup>51</sup> Estonia/Õiguskantsleri kantselei (09.2007) ‘Soovitus õiguspärasuse ja hea halduse tava järgimiseks’ [‘Recommendation to observe legality and good governance’], letter to *politseiprefekt* [Police Prefect] Raivo Kütt, p. 13.

by not fully cooperating with the parade organisers, as well as not correctly responding to their initial e-mails.<sup>52</sup>

In conclusion, as pointed out by the Chancellor of Justice in his analysis of the Police Prefecture's actions,<sup>53</sup> although the authorities seem to be well aware of their negative obligations not to disturb the parade, they are not so much aware of the positive obligation to provide an environment where freedom of assembly and related rights can be enjoyed (for example, by protecting protesters from counter-protesters).

In 2009, a demonstration "Marriage = Man + Woman" took place in Tartu organised by MTÜ Agape Eesti and the Union of Estonian Evangelical Students, accompanied by web-based campaign (<http://www.perekond.ee/>). The main message of the demonstration was to protest against attempts by the Ministry of Justice to regulate the relationship between same-sex couples. The demonstration was attended by circa 200 persons and received feedback and positive coverage in Estonian media.<sup>54</sup> Additionally, the campaign received 5754 signatures, which were forwarded to the Ministry of Justice.

There is no statistical information available from any official or unofficial sources regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, no cases have reached any courts either, which is explained in detail above.

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<sup>52</sup> Estonia/Õiguskantsleri kantselei (09.2007) 'Soovitus õiguspärasuse ja hea halduse tava järgimiseks' ['Recommendation to observe legality and good governance'], letter to poliitseiprefekt [Police Prefect] Raivo Kütt, p. 13.

<sup>53</sup> Estonia/Õiguskantsleri kantselei (09.2007) 'Soovitus õiguspärasuse ja hea halduse tava järgimiseks' ['Recommendation to observe legality and good governance'], letter to poliitseiprefekt [Police Prefect] Raivo Kütt, p. 13.

<sup>54</sup> Risto Mets (26.11.2009) 'Tartlased avaldasid perekonnale toetust', in *Tartu Postimees*, available at: <http://www.tartupostimees.ee/?id=193507> (14.02.2010); Karoliina Vasli (20.11.2009) 'Tartus tuleb heteroparaad: Heinz Valk kiidab takka!' in *Õhtuleht*, available at: <http://www.oh tuleht.ee/index.aspx?id=355832> (14.02.2010).

## F. Criminal Law, Hate Speech

Incitement of hatred and discrimination is prohibited by § 12 of the Constitution of the Republic of Estonia, which reads as follows:

‘...The incitement of national, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable’.

The Penal Code provides the main provisions regarding hate speech. Section 151 of the Code criminalises ‘activities which publicly incite to hatred, violence or discrimination on the basis of...sexual orientation...if this results in danger to the life, health or property of a person...’ This provision has never been used in practice for homophobic hate speech. The Ministry of Justice has confirmed that a draft proposal is under preparation to be submitted for consultation in Autumn 2010 with the purpose of making the application of the hate speech provisions in the Penal Code more effective as well as supplementing the regulation of hate crimes in general.<sup>55</sup>

The Supreme Court has decided what text could be regarded as inciting to social hatred and violence, and interpreted the relevant provision of the Penal Code as follows:

‘§ 151 of the Penal Code is included in division “Offences against equality”. Violation of the right to equality means that in the case of groups that differ on the grounds of ethnic origin, race, colour, sex, language, origin, religion, political opinion, financial or social status a member of one group (“we”) denies the equality of the members of the other group (“others”). Under § 151 of the Penal Code the elements of the offence do not consist only in the denial of equality of the persons belonging to another group but also in incitement to such denial among other persons’.<sup>56</sup>

There have been no criminal cases brought to court regarding homophobic hate speech, thus there have been no convictions and no sanctions.

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<sup>55</sup> Estonia /*Justiitsministeerium* [Ministry of Justice] (04.02.2010) *Vastus FRALEX-i küsimustikule* [Reply to FRALEX questionnaire]

<sup>56</sup> Estonia/*Riigikohus* [Supreme Court] (2007) *Võrdse kohtlemise ja diskrimineerimise alased kaasused Eesti Vabariigi Riigikohtu praktikas 2007*, available at: [http://www.riigikohus.ee/vfs/682/t6lkimiseks\\_MEMO-eriraportoor%20%28L\\_Kanger%29.pdf](http://www.riigikohus.ee/vfs/682/t6lkimiseks_MEMO-eriraportoor%20%28L_Kanger%29.pdf) (15.02.2008).



Specifically, there have been no criminal proceedings instituted based on §151 of the Penal Code in 2008 or 2009.<sup>57</sup>

Homophobic motivation is not listed among general aggravating factors in § 58 of the Penal Code.

In addition to criminal law, civil law also includes a provision in the *Võlaõiguseadus* [Law of Obligations Act],<sup>58</sup> which prohibits defamation or dissemination of incorrect information. There is no information that this provision has ever been applied in the courts in the context of homophobic hate speech.

There is no statistical information available from any official or unofficial sources regarding the impact/social reality of relevant legislation for LGBT person. Similarly, no cases have reached any courts either, which is explained in detail above.

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<sup>57</sup> Estonia/*Politsei- ja Piirivalveamet* (11.01.2010) E-mail responding to request for information.

<sup>58</sup> Estonia/*Riigikantselei* (2001) *Riigi Teataja* I, 81, 487.

## G. Transgender Issues

Transgender issues have a short history in the Estonian legal system. There is no practice, reported cases or statistics on transgender issues, including on discrimination based on a person's transsexuality, except one case, where an application was submitted to the Chancellor of Justice; the case, however, was discontinued (summarised in Annex 1). The Gender Equality and Equal Treatment Commissioner has also received one application but discrimination was not identified in this particular case. Therefore, there has not been any opportunity to develop an approach to transgender discrimination. There is also no authority or explanation as to whether transgender issues are covered by regulations on sexual orientation and discrimination based on sexual orientation.

There are a number of legal acts that include provisions regulating specific acts on transgender issues.

The regulation of 07.05.1999 no. 32 by the Ministry of Social Affairs *Soovahetuse arstlike toimingute ühtsed nõuded* [Common requirements to medical acts of sex change]<sup>60</sup> provides the basis for medical and legal acts related to gender/sex change. It is the belief of the Ministry of Social Affairs that the regulation has a somewhat vague legal status and it is mainly by tacit agreement that it is followed.<sup>61</sup>

The regulation was enacted on the basis of § 8 (1) 6) of the *Rahvatervise seadus* [Public Health Act],<sup>62</sup> providing that one of the duties of the Ministry of Social Affairs is 'to plan and organise implementation of national programmes, projects and other measures for creation of a physical and social environment which is safe for health, prevention of health disorders and disease, and health promotion'. The Ministry of Social Affairs is of the opinion that the link between the general mandate given by § 8 (1) 6) and the regulation is too indirect. However, due to the lack of general unified regulation of the issues of transsexuality, the regulation was based on that provision. This does not make the regulation invalid or illegal. This provision does provide a general basis for the regulation and gender/sex change operations are not in any way legally inhibited.<sup>63</sup> According to the Ministry of Social Affairs, there has been no need to develop a more

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<sup>60</sup> Estonia/Riigikantselei (27.05.1999) *Riigi Teataja* L, 87, 1087.

<sup>61</sup> Estonia/Sotsiaalministeerium [Ministry of Social Affairs] (08.02.2008) *Vastust Teie 11.01.08 kirjale* [Response to 11.01.08 letter].

<sup>62</sup> Estonia/Riigikantselei (11.07.1995) *Riigi Teataja* I, 57, 978.

<sup>63</sup> Telephone conversation with Ms Helen Trelin, Advisor, Department of Health, Ministry of Social Affairs (07.04.2008).

comprehensive regulation. Scattered regulation has worked relatively well considering the small population in Estonia.

According to the regulation of 07.05.1999 no. 32, the precondition for deciding a person's gender and allowing medical acts necessary for gender/sex change is a decision by the medical expert commission appointed by the Minister of Social Affairs. The applicant must submit an application to the Ministry of Social Affairs requesting a decision by the expert commission. He/she must present the following evidence:

- certification of transsexual identity during at least two years prior to the application;
- a psychiatrist's decision that excludes the possibility that the wish to undergo gender/sex change is caused by psychiatric disorder;
- compatibility of chromosomatic and gonad gender/sex certified by genetic research.

The medical expert commission's decision is the basis for a decree by the Ministry of Social Affairs, which authorises medical acts to change a person's gender/sex. At least two years must pass from the beginning of the medical treatment before the expert commission will issue a decision on the change of gender/sex. This will be a basis for subsequent legal changes necessary for a person to wholly acquire new gender.

Name change of the person is performed by the vital statistics office. This possibility is provided by § 15 of *Nimeseadus* [Names Act]:<sup>64</sup>

'If the gender of a person is changed, on the basis of a written application of the person, the parent(s) of the minor or of the guardian of the minor ward, a new given name shall be assigned to the person and a foreign-language surname of the person may be changed if the gender feature is reflected in the surname pursuant to the national tradition of the person'.

Section 49 of *Rahvastikuregistri seadus* [Population Register Act] regulates the formation and granting of the new personal identification code for the person who has undergone the gender/sex change, because the code is formed on the basis of a person's sex and date of birth.<sup>65</sup> According to § 52 of this Act, the new personal identification code will be formed and granted by an authorised processor 'upon amendment of the data on the sex of a person on the basis of an application of the person and a certificate of a medical institution holding a corresponding licence'.

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<sup>64</sup> Estonia/*Riigikantselei* (2005) *Riigi Teataja* I, 1, 1.

<sup>65</sup> Estonia/*Riigikantselei* (29.06.2000) *Riigi Teataja* I, 50, 317.

The formation and granting of the new personal identification code is also the basis for the issuance of a new birth certificate, which will be organised by the vital statistics office (§ 52 of the Population Register Act). The birth certificate is the basis for a new passport.

In addition, the regulation of 18.01.2002 no. 28 '*Riikliku pensionikindlustuse registri*' pidamise põhimäärus [Statute for managing the 'state pension insurance register']<sup>66</sup> is important since it regulates the state pension insurance register. The data in this register is the basis for accounting for social tax paid by or on behalf of persons, their years of pensionable service and accumulation period, and the procedure of determining and paying their state pension and benefits (§ 4 (2)). Paragraph 31 of this regulation provides for a change of data and personal identification code upon a change of gender/sex.

According to the database of the Supreme Court and those of the first and second instances referred to under the Freedom of Movement heading, there are no cases concerning transsexuals. Statistical information on name changes based on change of gender and number of persons who changed their gender/sex is provided in Annex 2.

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<sup>66</sup> Estonia/Riigikantselei (2002) *Riigi Teataja* I, 7, 38.

<sup>71</sup> Estonia/Riigikohus (2007), p. 1.

## H. Miscellaneous

It should be mentioned that the Constitution of Estonia includes in its catalogue of fundamental rights the prohibition of discrimination (§ 12): ‘Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds...’

As it is stated in the report by the Supreme Court of Estonia on cases concerning equal treatment, ‘this provision is considered to be a very modern one, as it includes inter alia discrimination on the basis of “property or social status”, *i.e.*, the ground that usually is not included in the discrimination catalogue’.<sup>71</sup> The list of grounds of discrimination is not exhaustive, as is indicated by the phrase ‘or other grounds’. The Supreme Court has developed and repeatedly applied a test for determining whether a treatment is unequal: ‘if there is a reasonable and appropriate ground, the unequal treatment in legislation is justified’.

Regardless of the long-time and clear constitutional prohibition of discrimination, the statistical information shows that the Estonian population is fairly ignorant with respect to discrimination based on sexual orientation.

The Ministry of Social Affairs ordered a poll in 2007 as part of the EU Equal Opportunities Year.<sup>72</sup> Among other grounds of discrimination, sexual orientation was also included. The poll demonstrated that the Estonian population rarely considers sexual orientation to be one of the grounds of discrimination. Only 1 per cent of the people who had been discriminated against or whose acquaintances had been discriminated against recognised sexual orientation as a probable ground. However, 19 per cent of the respondents who found that discrimination occurs in Estonia often or sometimes did think that sexual orientation is also a ground of discrimination. Yet, ranking the cited grounds of discrimination by rate of incidence, sexual orientation is only 14<sup>th</sup>.

The Ministry of Justice Affairs also referred to a 2007 research project on xenophobic and racist expressions conducted with scientists from Tartu University and Tallinn University.<sup>73</sup> One of the questions (no. 61) posed in that research was: People of what specific background would you not want to work with? One of the possibilities was homosexuals. The question’s

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<sup>72</sup> Estonia/*Sotsiaalministeerium* [Ministry of Social Affairs] (08.02.2008) *Vastust Teie 11.01.08 kirjale* [Response to 11.01.08 letter].

<sup>73</sup> Estonia/*Justiitsministeerium* [Ministry of Justice] (30.01.2008) *Vastus küsimustele* [Response to questions].

purpose was to measure tolerance of background factors other than nationality.

<b>Background</b>	<b>Respondents of Estonian nationality</b>	<b>Respondents of Russian nationality</b>	<b>Total</b>
Homosexuals	37.8	48.2	41
Former prostitutes	27.1	40	31
People with criminal background, former prisoners	62.6	66.2	63.7
Drug addicts	77.4	89.3	81
HIV, AIDS carriers	51.9	52.9	52.2
People with physical disabilities	2.1	7.6	3.8
People of other nationalities	3.5	1	10.8
No such people	13.7	4	10.9
Hard to say	1.3	2.9	1.8

**Table 1.** Statistics of answers by respondents of Estonian and Russian nationalities. *Ministry of Justice, Vastus küsimustele [Response to questions] (30.01.2008).*

Those over 65 are more intolerant (only 5 per cent answered that there are no people who they would not want to work with). People 25-44 are more tolerant towards homosexuals. Men, as compared to women, are less tolerant towards homosexuals (48.9 per cent of men and 28.6 per cent of women). People with higher education are more tolerant (20.5 per cent answered 'no such people').

On the subject of same-sex marriages and adoption, the Ministry of Social Affairs referred to 2006 Eurostat Eurobarometer research that showed 21 per cent of Estonians thought that same-sex marriages should be allowed everywhere in Europe and 14 per cent would have given homosexuals the right to adopt.<sup>74</sup>

The discussion over the possible future Partnership Law was ongoing throughout 2009. The discussion developed due to the publication of a study from the Ministry of Justice over the legal status and situation of non-marital cohabitations.<sup>75</sup> The study concentrated on non-marital cohabitations in general, analysed the problems arising from that and

<sup>74</sup> Estonia/Sotsiaalministeerium [Ministry of Social Affairs] (08.02.2008) *Vastust Teie 11.01.08 kirjale* [Response to 11.01.08 letter].

<sup>75</sup> Estonia/Justiitsministeerium (2009) *Mitteabieluline kooselu ja selle õiguslik regulatsioon.*

different solutions to them. The study does not reach a specific conclusion but does bring out the benefits of registered partnerships.

There are no laws in Estonia which are similar or comparable to the institutional homophobia that surfaced in Lithuania. In contrast, the Ministry of Social Affairs has referred to the current national study curriculum set by the *Haridus- ja Teadusministeerium* [Ministry of Education and Science], which, in the opinion of the Ministry of Social Affairs gives a clear basis for discussions on sexual minorities.<sup>76</sup> The curriculum foresees that one of the aims of the human study classes be the increase of pupils' tolerance of other people's differences and their understanding of the nature of sexuality.

Although there are no laws as such that could be defined as an institutional homophobia, the Gender Equality and Equal Treatment Commissioner has referred to a decree by one local municipality.<sup>77</sup> The local municipality amended one of its decrees concerning social benefits payable to resident-families of the municipality to explicitly exclude same-sex cohabiting couples. The case preceding the amendment was referred to the Commissioner but since the subject matter is not within her competence, she was forced to reject it. The facts of the case are summarised in Annex 1.

The detailed circumstances of the case are confidential until the decision on the appeal is published; the facts are very similar to the case reported in media in 2009.<sup>78</sup> The municipality referred to in media was Viimsi, a neighbouring municipality to Tallinn.

The same case was referred to the Chancellor of Justice, where Chancellor is already mentioning the name of the municipality – Viimsi. The Chancellor of Justice found the initial refusal to provide social benefits to be void.<sup>79</sup> The Viimsi municipality accepted the opinion but went on to amend the decree so as to exclude same-sex cohabiting partnerships and rejected the couple's second application as well. The applicants turned to

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<sup>76</sup> Estonia/Sotsiaalministeerium (01.2010) *Teemauuringu homofobia ja diskrimineerimise kohta seksuaalse sättumuse alusel vastused* [Answers to Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation] no 15.1-1/90.

<sup>77</sup> Estonia/Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik (11.01.2010) *Teemauuring homofobia ja diskrimineerimise kohta seksuaalse sättumuse alusel* [Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation] no 3-1/005.

<sup>78</sup> A. Haas (11.10.2009) 'Viimsi vald ahistab lesbipaari lapsi', in *Ekspress.ee*, available at: <http://www.ekspress.ee/news/paevauudised/eestiudised/viimsi-vald-ahistab-lesbipaari-lapsi-taispikk-lugu.d?id=27692079> (13.02.2010); M. Tamm (20.10.2009) 'Viimsi vallavalitsus jätkab vaidlust samasooliste perega', in *Tallinna Postimees*, available at: <http://www.tallinnapostimees.ee/?id=177489> (13.02.2010); A. Lohk (19.10.2009) 'Viimsi lesbipaar seljatas kohtus neile toetuse keelanud valla', in *Õhtuleht*, available at: <http://www.oh tuleht.ee/index.aspx?id=351370> (13.02.2010).

<sup>79</sup> Estonia/Õiguskantsler (11.02.2010) *Vastus küsimustikule nr 5-3/1000177*.

the court. The local municipality lost in the first instance and appealed. As yet, there are no results from the appeal.



## I. Good practices

There are no significant good practices to report on. However, one worth mentioning is the recent practice of the Gender Equality Department of the Ministry of Social Affairs. The Department has opted for a wider notion of gender equality issues and participates actively in the issues of sexual minorities.<sup>80</sup> In 2009, the Department consulted with different LGBT organisations and the representative of the Department delivered a presentation at the Gay Pride Baltic in Riga. The Department worked on increasing competence in the field, which was previously ignored by the state.

There are several instances in which Estonian law goes beyond the EU acquis. The Gender Equality and Equal Treatment Commissioner has capacity to deal with cases of sexual orientation discrimination, albeit limited to work-related instances as explained in the first chapter. The Commissioner is also inhibited in her work due to limited resources available to her, which is discussed in detail in the Thematic Legal Study on the impact of the Race Equality Directive in Estonia. Homophobic hate speech has been criminalised along with other discriminatory aspects in the Penal Code, however there have been no instances of its application, which has prompted the Ministry of Justice to review and specify the provision in future.<sup>81</sup> The Ministry of Justice has also published a study on the legal regulation concerning non-married cohabiting couples, discussing in detail also same-sex couples.<sup>82</sup> Also, the new national study curriculum set by the *Haridus- ja Teadusministeerium* [Ministry of Education and Science] gives a clear basis for discussions on sexual minorities.<sup>83</sup>

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<sup>80</sup> Estonia/Sotsiaalministeerium (01.2010) *Teemauuringu homofoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel vastused* [Answers to Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation] no 15.1-1/90.

<sup>81</sup> Estonia /Justiitsministeerium [Ministry of Justice] (04.02.2010) *Vastus FRALEX-i küsimustikule* [Reply to FRALEX questionnaire]

<sup>82</sup> Estonia/Justiitsministeerium (2009) *Mitteabieluline kooselu ja selle õiguslik regulatsioon*.

<sup>83</sup> Estonia/Sotsiaalministeerium (01.2010) *Teemauuringu homofoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel vastused* [Answers to Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation] no 15.1-1/90.

## Conclusions

It is difficult to draw any definite conclusions from the research conducted, as the amount of available information is insufficient for informed analysis. As most laws that provide specific rights for LGBTs are relatively recent, there has not been enough time for practices to be developed.

As a result of the research, the team has found that Estonia has finalised the implementation of all relevant EU legislation. However, whether this actually will have positive impact in the status and rights of LGBTs remains to be seen.

Although Estonia's very modern section on fundamental rights goes beyond those of many other countries, the rest of the body of laws is in need of development. For example, the Estonian legal system still does not recognise unmarried couples or couples in civil unions or registered partnerships. This severely affects the rights of LGBTs in areas of freedom of movement, asylum and subsidiary protection, including family reunification. Estonian lawmakers have explicitly excluded LGBT marriages from the definition of marriage.

Protection against hate speech, provided by law, needs to be put into practice to create an environment that raises public awareness of LGBT rights.

In great need of clarification and development is legislation related to transsexuals and gender/sex change. The present dispersed regulation does not sufficiently protect their interests.

A positive aspect is the adoption of the Equal Treatment Act. However, the act has been in force for less than 14 months and resources for its effective implementation have been lacking.

There have been no instances of similar developments to the legislation adopted by Lithuania.

Unfortunately there is no good practice to report, which would be innovative and could serve as models for other Member States and the European Union institutions in the context of the present study.

## Annexes

### Annex 1 – Presentation of Case Law

#### Implementation of Employment Directive 2000/78/EC

<b>Case title</b>	Conciliation procedure for resolution of discrimination dispute (case no. 12/071719) <sup>84</sup>
<b>Decision date</b>	[Confidential according to § 35 <sup>8</sup> of the Chancellor of Justice Act (25.02.1999)]
<b>Reference details</b>	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
<b>Key facts of the case</b>	The Ministry of Social Affairs forwarded an application to the Chancellor of Justice in which the Applicant claimed that he/she had been discriminated on the grounds of his/her sexual orientation and/or his/her gender (the case involved a transsexual person). The Applicant submitted his/her application to work for two companies, but both companies refused to hire him and the applicant claims it was because of his/her transsexuality. The Chancellor of Justice requested that the Applicant specify his/her request, because the Applicant had not clearly expressed a request to initiate conciliation proceedings. The Chancellor of Justice turned to the Respondents with a request to participate in the conciliation proceedings and present their explanations and statement regarding the case as described by the Applicant.
<b>Main reasoning/argumentation</b>	[Confidential according to § 35 <sup>8</sup> of the Chancellor of Justice Act (25.02.1999)]
<b>Key issues (concepts, interpretations) clarified by the case</b>	[Confidential according to § 35 <sup>8</sup> of the Chancellor of Justice Act (25.02.1999)]

<sup>84</sup> Estonia/*Õiguskantsleri kantselei* (04.02.2008) *Vastus teabenõudele* [Response to request for information] no. 5-3/0800287.

<b>Results (sanctions) and key consequences or implications of the case</b>	The Respondents did not wish to participate in the conciliation proceedings, therefore, the Chancellor of Justice terminated the proceedings in the present case.
<b>Case title</b>	Statement on regularisation of same-sex family relations (no. 6-1/060166/0600782)
<b>Decision date</b>	01.2006
<b>Reference details</b>	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
<b>Key facts of the case</b>	An Applicant turned to the Chancellor of Justice, claiming that homosexual individuals are discriminated against in § 12 of the Constitution, because they have not been afforded the protection as guaranteed by § 26 and § 27 of the Constitution.
<b>Main reasoning/argumentation</b>	The Application included a claim that homosexual, unlike heterosexual, individuals are discriminated against, because they are not allowed to enter into a legally recognised and protected family relationship.
<b>Key issues (concepts, interpretations) clarified by the case</b>	The Chancellor of Justice found that unequal treatment is justified. A marriage between a man and a woman is a sustainable unit, which can have common descendants and who thereby provide continuity of the society. This differentiates relationships between different and same-sex couples and constitutes a circumstance by which unequal treatment is substantiated. The Chancellor of Justice also stated that the lack of a right for homosexual couples to demand regulation of same-sex relationships derives from international or European Union legal norms, which form a part of the Estonian legal system. Enabling partnerships for same-sex individuals has so far been left to state political decisions.
<b>Results (sanctions) and key consequences or implications of the case</b>	The Chancellor of Justice found that unequal treatment is justified.
<b>Case title</b>	Clarification on refusing the application (no. 14-1/071238/0705697)
<b>Decision date</b>	08.08.2007

<b>Reference details</b>	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
<b>Key facts of the case</b>	An Applicant turned to the Chancellor of Justice, requesting proceedings against a publicly expressed opinion that incited denigration of the gay movement.
<b>Main reasoning/argumentation</b>	Two paramount human rights collide in this particular case. On the one hand, the Constitution emphasises everyone's right to freedom of expression; on the other hand, it is an important aspect of the Constitution that everyone should respect and honour other people's rights and freedoms while exercising their own rights and freedoms and fulfilling their obligations.
<b>Key issues (concepts, interpretations) clarified by the case</b>	The Chancellor of Justice did not initiate proceedings based on the Application, because according to § 19 (1) of the Law of the Chancellor of Justice, everyone has the right to turn to the Chancellor of Justice to review whether any holder of public office has violated human rights. The case described by the Applicant concerned a dispute between two private individuals, for the settlement of which the Chancellor of Justice lacks competence.
<b>Results (sanctions) and key consequences or implications of the case</b>	Since the Applicant did not wish to initiate the conciliation, the proceedings in this application were terminated.

<b>Case title</b>	Application in regard to discrimination on receiving social benefits
<b>Decision date</b>	No date (the full response is confidential and the summary does not include the date)
<b>Reference details</b>	<i>Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik</i> [Gender Equality and Equal Treatment Commissioner]
<b>Key facts of the case</b>	Applicant called the local municipality to ask about the conditions for social benefits for a family where parents are not married. The municipality responded that the status of marriage is unimportant. When the applicant went on to apply for the benefit, the municipality announced that same-sex cohabitations are not considered families for the purposes of social benefits. The applicant was cohabiting with a same-sex partner and their three children from previous relationships.
<b>Main reasoning/argumentation</b>	The case is not in the competence of the Commissioner, since it concerns social benefits. The Commissioner can only review applications concerning discrimination based on sexual orientation when it arises from employment relations. The Commissioner did however explain the following: By adopting the Equal Treatment Act, Estonia has implemented the mere minimum of the norms from EU Council Directive 2000/78/EC. This is a result of the discussions in the Parliament, since the original draft of the Act foresaw prohibition of discrimination of every minority group in every area of law. The present case is a great example of how the present solution in the Equal

	Treatment Act causes problems and creates a so-called hierarchy between the types of discrimination.
<b>Key issues (concepts, interpretations) clarified by the case</b>	The competence of the Commissioner depends on the particular type of discrimination in question.
<b>Results (sanctions) and key consequences or implications of the case</b>	The Commissioner rejected the application and recommended the applicant to turn to the Chancellor of Justice. The applicant did and the Chancellor sent a notification to the local municipality, which ignored it and changed the decree so as to exclude same-sex cohabiting partnerships. The applicants turned to the court. The local municipality lost in the first instance and appealed. No result from there yet.

<b>Case title</b>	No name (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
<b>Decision date</b>	2008 (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
<b>Reference details</b>	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
<b>Key facts of the case</b>	Applicant turned to the Chancellor asking to confirm whether §1 of the Family Law Act (stating that marriage can only be contracted between a man and a woman) is in conformity with the Constitution.
<b>Main reasoning/argumentation</b>	The Chancellor had already given an opinion on the topic in 2006, where he found that restricting marriage to heterosexual couples is justified distinction. Since the Ministry of Justice was planning to research the subject matter at the same time the application was submitted to the Chancellor in 2009 then the Chancellor found it unnecessary to duplicate the procedure and asked for the opinion from the Ministry. The minister was of the opinion that such differentiation is not discriminatory but it is problematic that there is no regulation concerning sexual minorities. The subject matter would be analysed within 2009.
<b>Key issues (concepts, interpretations) clarified by the case</b>	The Chancellor will not duplicate the work of another public authority.
<b>Results (sanctions) and key consequences or implications of the case</b>	The research on non-marital co-habitations, regulation concerning such co-habitations and their legal situation, was completed in 2009 and the research paper is available at: <a href="http://www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf">http://www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf</a> (13.02.2010).

<b>Case title</b>	No name (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
<b>Decision date</b>	2009 (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
<b>Reference details</b>	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
<b>Key facts of the case</b>	The applicant requested the opinion of the Chancellor on the compatibility of § 10 of the Equal Treatment Act with Directive 2000/78/EC. While discussing the draft of the Act, the representatives of the religious organisations were of the opinion that it allowed them not to employ or relieve from work persons from sexual minorities.
<b>Main reasoning/argumentation</b>	The Chancellor conducted an abstract normative review and found the eventual wording of § 10 of the Act to be compatible with both the Estonian constitution and Directive 2000/78/EC.
<b>Key issues (concepts, interpretations) clarified by the case</b>	This was the first time the Chancellor of Justice reviewed § 10 of the Equal Treatment Act.
<b>Results (sanctions) and key consequences or implications of the case</b>	None

<b>Case title</b>	No name (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
<b>Decision date</b>	2009 (the case was summarised without date and reference numbers in the response from the Chancellor of Justice to request for information)
<b>Reference details</b>	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
<b>Key facts of the case</b>	Applicant called to Viimsi municipality to ask about the conditions for social benefits for a family where parents are not married. The municipality responded that the status of marriage is unimportant. When the applicant went on to apply for the benefit, the municipality announced that same-sex cohabitations are not considered families for the purposes of social benefits. The applicant was cohabiting with a same-sex partner and their three children from previous relationships. The applicant turned to the Gender Equality and Equal Treatment Commissioner who rejected it because the subject matter (social benefits) was not in her competence.

<b>Main reasoning/argumentation</b>	The administrative act of Viimsi, which refused social benefits to the same-sex couple, is void. In addition, Viimsi violated the procedural rules of administrative acts, referring to legal acts that have no relevance and not referring to legal acts that do have relevance. Viimsi municipality also violated the obligation to refer to the right to appeal. The Chancellor proposed Viimsi to review the application again and make a new decision.
<b>Key issues (concepts, interpretations) clarified by the case</b>	Legal acts by public authorities referring to a family and including also families, where parents are not married, must also accept families, where parents are of the same sex. Otherwise there is a discrimination based on sexual orientation.
<b>Results (sanctions) and key consequences or implications of the case</b>	Viimsi municipality accepted the opinion of the Chancellor and made a new decision, which was again a rejection of the application. The applicant turned to the administrative court, which found a violation. Viimsi appealed.



## Freedom of Assembly

<b>Case title</b>	Recommendation to observe legality and good governance (no. 7-4/071025/00706331)
<b>Decision date</b>	09.2007
<b>Reference details</b>	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
<b>Key facts of the case</b>	An Applicant turned to the Chancellor of Justice in regard to the activities of the Northern Police Prefecture in the preparation of the public meeting of Tallinn Pride. After two failed attempts to contact the Northern Police Prefecture by e-mail (19.03.2007 and 01.06.2007) to ask clarifications on requirements, propositions and wishes from police in regard to the planned event on 11.08.2007 and proposing to meet to discuss this in more detail, the Police finally responded on 22.06.2007 to the official enquiry (sent on 18.06.2007). The Police declared that the event cannot be organised in Tallinn Old Town as proposed by the organisers due to previous experiences and possible threats to public order and to safety of the participants. Also was noted that the event would disturb the constitutional right of other citizens to freedom of movement in the Old Town. The Police suggested a meeting with the organisers after they have found another place for the event. On 5.07.2007, the Police set additional requirements to the organisation of public meeting, which concerned traffic safety.
<b>Main reasoning/argumentation</b>	<p>The Chancellor starts his reasoning by emphasising the importance of the freedom of assembly and expression for a democratic society, reminding that these freedoms ensure the pluralism of opinions in social and political discussions. He states that, from one side, state must refrain from interfering into the freedom of assembly, but, on the other side, state must also take positive measures to protect legal demonstrations from counter-demonstrations etc. This is especially important in case of persons of minority or who express unpopular views [para. 35]. The Chancellor rejects the position of the Police that the Pride Parade is an event in private interest and, therefore, it is the obligation of the organiser to provide the security - “If the police arrives then things are already bad. Well organised event is such where the police do not have to come at all.” (para 36)</p> <p>The Chancellor also rejects the police’s opinion that by using audio technology, the event turns from public meeting to public event (para 43). He reminds that the essential conditions of the concept of public meeting are multiplicity of participants, common goal, which is not merely social (eg entertaining concert, public gathered to see an accident etc), and internal connection (para 40).</p> <p>Considering that the freedom of assembly is a fundamental freedom, “the enjoyment of that right cannot be made dependent on conditions that make that enjoyment considerably more difficult or practically impossible. The requirement to involve security firm is undoubtedly considerable obstacle, since it brings with it additional</p>

	<p>(possibly considerable) costs for the organiser of the meeting.” (para 67)</p> <p>The Chancellor then goes on to admit that the freedom of assembly is subject to restrictions for the legitimate aim of protecting public order and security of participants when prescribed by law. And although the general obligation to ensure public order is on the police, the organiser of the meeting also has an obligation to take care that the meeting is peaceful and safe (para 69). However, it derives from the meaning of the legislation that the obligations of the organiser are restricted merely with the participants. And the participants are those who actively express the views the meeting intends to promote. Mere observers cannot be considered participants, although it might be difficult to draw the line (para 69-70). Previous negative assessment by the police on the safety of the planned meeting cannot be a basis for refusing the approval to the meeting. This also applies to not fulfilling the requirement to involve a security firm. Such a requirement can only be considered advisory (para 72). “Prohibiting a meeting because of that reasons should be <i>ultima ratio</i> and based on very compelling reasons” (para 73).</p> <p>The Chancellor concluded that considering the circumstances of the specific case, the requirement to involve a security firm was not illegal but this requirement could also not have been legally binding (para 74). The Chancellor admits that the practice does not provide a clear-cut solution as to where the obligations of the organisers of the meeting end and where the obligations of the police start. The uncertainty is further increased by the legal uncertainty of the Public Assembly Act. This is the reason why cooperation between public authorities and individuals is essential. Obviously, the finding of appropriate solutions is always dependent on the other side – organiser of the meeting – but the police can certainly help considerably with its openness, helpfulness and goodwill. (para 79)</p>
<b>Key issues (concepts, interpretations) clarified by the case</b>	The Chancellor clarified the concept of public meeting. He also clarified the obligations of the police in regard to public meeting and its participants.
<b>Results (sanctions) and key consequences or implications of the case</b>	The Chancellor concluded that although the requirement by <i>Põhja Politseiprefektuur</i> [Northern Police Prefecture] to parade organisers to use a private security firm to guarantee participants' safety is in itself legal, the refusal of the organisers to fulfil the require cannot be a ground for refusing to allow the parade to take place.

## Annex 2 – Statistics

### Implementation of Employment Directive 2000/78/EC

- Statistical information regarding the work of the equality body concerning discrimination on the ground of sexual orientation (official)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total complaints of discrimination on the ground of sexual orientation	0	0	0	0	0	0	1 (family law)	2 (freedom of speech; employment)	1 (family law)	3 (social benefits; religious organisations exemption)
Total number of cases of confirmed discrimination	0	0	0	0	0	0	0	0	0	0
Sanctions/compensation payments issued	0	0	0	0	0	0	0	0	0	0

- Case statistics and complaint data (tribunal, courts, equality bodies, etc.) regarding Employment Directive 2000/78/EC concerning the ground of sexual orientation (official)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	1	0	2 (social benefits; religious organisations exemption)
Total finding of discrimination confirmed (by equality body, tribunals, courts, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	0	0	0
National total number of sanctions/compensation payments issued (by courts, tribunals, equality bodies, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	0	0	0
National range of sanctions/compensation payments (by courts, tribunals, equality bodies, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	0	0	0

## Freedom of Assembly

- Statistical information on freedom of assembly (official)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of demonstrations in favour of tolerance of LGBTs, gay pride parades, etc.	0	0	0	0	1	1	1	1	0	0
Number of demonstrations against tolerance of LGBTs	0	0	0	0	0	0	0	0	0	1

## Criminal Law, Hate Speech

- Statistical information on criminal law, hate speech (official)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of court cases regarding homophobic hate speech initiated	0	0	0	0	0	0	0	0	0	0
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	0	0	0	0	0	0	0	0	0	0
Range of sanctions issued for homophobic hate speech	0	0	0	0	0	0	0	0	0	0

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing	0	0	0	0	0	0	0	0	0	0

## Transgender Issues

- Statistical information on transgender issues (official)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of name changes effected owing to change of gender <sup>85</sup>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Number of persons who changed their gender/sex in your country under the applicable legislation <sup>86</sup>	7	1	4	6	6	8	2	7	2	0

<sup>85</sup> Telephone conversation with Ms Eve Mitin, Advisor to the Minister of Interior on name changes, legal questions on preparing vital records (18.02.2008).

<sup>86</sup> E-mail from Hedy Eeriksoo, Health Care Department of the Ministry of Social Affairs, *Euroopa Komisjoni homofoobia uurimus* (18.02.2008); and e-mail from Ülle Jordan, Health Care Department, Ministry of Social Affairs, *RE: statistika soovahetusoperatsioonide kohta* (15.02.2010). These numbers refer only to the number of cases for which permission to undergo the medical procedures was granted. There is no statistical information on whether these individuals actually undertook the procedures.