

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

The Netherlands

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Executive summary

Implementation of Employment Directive 2000/78/EC

In the Netherlands, the principle of non-discrimination is firmly enshrined in various realms of the law, including Article 1 of the Constitution, the Penal Code, the General Equal Treatment Act (GETA), and since 2009 also in the law on health and safety at work. The Netherlands is one of few EU Member States which ratified Protocol 12 to the European Convention on Human Rights.

The GETA outlaws any direct or indirect ‘distinction’ between people on several grounds including ‘heterosexual or homosexual orientation’, including bisexual orientation. The concept of ‘distinction’ also includes harassment, sexual harassment and instruction to make a distinction. The GETA covers employment, liberal professions, organisations of employees, employers or professionals, and the provision of goods or services. The GETA employs the terminology ‘hetero- or homosexual orientation’, to refer to what Directive 2000/78/EC calls ‘sexual orientation’. The Dutch version of the Directive speaks of ‘seksuele geaardheid’. The Dutch government opted for the term ‘gerichtheid’ (orientation) rather than ‘voorkeur’ (preference) or ‘geaardheid’ (inclination), as the term ‘orientation’ expresses better that not only individual emotions are covered, but also concrete expressions thereof. Another major reason for the government’s preference for the term ‘hetero- or homosexual orientation’ over ‘preference’ or simply ‘sexual orientation’ was that the latter term could possibly include ‘paedophile orientation’. ‘Bisexual orientation’ is covered by the notion ‘hetero- or homosexual orientation’. Discrimination on the ground of ‘transsexuality’ and ‘transvestism’ is regarded as a form of sex discrimination. In December 2008 the government introduced a bill to bring the definitions of direct and indirect discrimination more in line with Directive 2000/78/EC. An Act to this effect was passed by Parliament on 7 November 2011.¹

Excluded from the GETA used to be ‘requirements which, in view of the private character of the employment relationship, may reasonably be imposed on the employment relationship’, but the government brought this exception more in line with Directive 2000/78/EC.

The GETA does not apply to legal relationships *within* churches and other associations of a spiritual nature. The European Commission has informed the government that this exception is too wide, because it does not contain the boundaries required by Article 4(2) of Directive 2000/78/EC. The government has not been willing to make any changes in this respect.

¹ The Netherlands, Law Gazette (*Staatsblad*) (2011), Act of 7 November 2011 to amend the General Equal Treatment Act, the Civil Code, the Act on Equal Treatment on the ground of handicap or chronic illness, the Act on Equal Treatment on the ground of Age in Employment and the Act on Equal Treatment of Men and Women – adaptation of definitions of direct and indirect distinction and some other stipulations to terminology in Directive (*Wet van 7 november 2011 tot wijziging van de Algemene wet gelijke behandeling, het Burgerlijk Wetboek, de Wet gelijke behandeling op grond van handicap of chronische ziekte, de Wet gelijke behandeling op grond van leeftijd bij de arbeid en de Wet gelijke behandeling van mannen en vrouwen (aanpassing van definities van direct en indirect onderscheid en enkele andere bepalingen aan richtlijnterminologie)*).

The GETA contains an exception for institutions founded on religious principles. They may impose ‘requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post’, unless these requirements lead to a distinction based ‘on the sole fact’ of (for example) homosexual orientation. The European Commission criticised the absence of legitimacy and proportionality as conditions for these requirements. The government announced legislation that would make the wording of this exception slightly more in line with Directive 2000/78/EC. A bill was being debated in the Lower House of Parliament which proposes to remove the ‘sole fact’ construction in the end of 2013. There is no result yet.

Discriminatory contractual provisions are void, and discriminatory dismissal is voidable. In addition the general sanctions of private and administrative law apply. Doubts have been expressed as to whether the range of sanctions available is in conformity with the requirement that sanctions be ‘effective, proportionate and dissuasive’.

Also on some other points it could be argued that the current legal framework fails to meet some of the requirements imposed by EU law. These include the exception for institutions based on political principles, and the definition of harassment.

The GETA does not contain an exception to justify positive action schemes with respect to sexual orientation.,

The Act on the Netherlands Institute for Human Rights (*Wet College voor de Rechten van de Mens*) established the Netherlands Institute for Human Rights (In the following text, the Equal Treatment Commission and its successor will be referred to as the NIHR). Its predecessor, the Equal Treatment Commission, was incorporated in the NIHR. The Act entered into force on 1 October 2012. The NIHR is a body which, among other things, protects human rights, among which the right to equal treatment. The Institute is therefore still – partly- a semi-judicial independent body, the decisions of which are non-binding but nevertheless authoritative. The NIHR can hear and investigate cases, may conduct an investigation on its own initiative, conducts surveys and issues reports and recommendations. Victims can choose to take a case either to the NIHR or to court or to both.

Interest organisations, too, can take legal action in court or ask the NIHR to start an investigation. Several gay and lesbian groups have been recognised as having standing.

Since 2009 a new law requires all local authorities to give their citizens access to an anti-discrimination bureau or similar provision.

Case law shows that a trend which started in the previous reporting period, has continued: it is possible for municipalities to require that registrars marry same-sex partners and even fire them if they are not willing to do so. Moreover, there have been cases which show that judicial bodies recognise sexual harassment and victimisation, which have always been hard to prove. This seems to be a trend, too.

Freedom of movement

When it comes to the legal situation regarding partners of EU citizens in the context of the freedom of movement, Dutch law makes no distinction between same-sex partners and different-sex partners. Neither does Dutch law make a distinction between couples of two EU citizens and couples of an EU citizen and a third country national partner. Dutch law provides for registered partnership and civil marriage for both same-sex and different-sex couples, but

foreign same-sex partners of Dutch citizens do not always enjoy full freedom of movement in other Member States. This has not changed in the past few years, apart from the fact that more Member States have recognised same-sex marriage, so that it is possible for more same-sex Dutch couples to move to other Member States.

Asylum and subsidiary protection

It is standing policy and standing jurisprudence in the Netherlands that an LGBT asylum seeker is eligible for refugee status and thus for a residence permit. Furthermore, an LGBT asylum seeker can be eligible for a residence permit, if s/he has substantial grounds for believing that s/he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return. In the third place Ministers have the discretion to give protection to asylum seekers when they feel that not granting asylum would result in exceptionally dire circumstances.

Same-sex partners and other family members of a refugee to whom asylum has been granted, can also qualify for a residence permit on asylum grounds.

The Dutch immigration authorities do not use technical contraptions to assess a person's sexual attraction to members of either sex.

On the basis of case law, it is no longer possible for the government to state that it is insufficient ground for asylum if a refugee cannot express his or her homosexuality in his or her country of origin in the same way as in the Netherlands. It has therefore become easier for LGBT asylum seekers to obtain a residence permit in the Netherlands.

Family reunification

Non-EU family members of Dutch citizens and of lawfully residing foreigners have a right to a residence permit for the purpose of family reunification. The law makes no distinction between same-sex and different-sex partners. This has not changed in the past few years.

Freedom of assembly

In general there is no obligation to give prior notice of a planned demonstration, but city councils may adopt byelaws specifying in what situation a prior notice of a demonstration is required. No demonstration in favour of tolerance of LGBT people has been stopped from taking place since 1983, apart from one minor case in 2007.

For several decades demonstrations/manifestations in favour of tolerance of LGBT people have been taking place. The authors of this report are not aware of any demonstration against tolerance of LGBT people in the Netherlands in the period 2000-2014.

In 1982 a large-scale demonstration in favour of tolerance of LGBT people was violently disturbed. These disturbances led to various new policy initiatives on LGBT matters, both locally and nationally. After 1982 incidental disturbances have taken place. This has not changed in the past few years.

Hate speech and criminal law

The Dutch Penal Code outlaws defamation of a group of people on grounds of heterosexual or homosexual orientation. Discriminatory treatment of an individual, and public incitement of hatred, discrimination or violent action against persons on the ground of their sex or heterosexual or homosexual orientation is also a crime.

In addition, the Dutch Civil Code provides for a civil tort procedure against derogatory speech, which has been invoked several times in the LGBT context.

Neither the Penal Code nor the Code of Criminal Procedure identify homophobic motivation as an aggravating factor in sentencing. However, the Instruction on Discrimination for the Public Prosecution Service requires the public prosecutor to increase the sentence s/he demands by 50 to 100 per cent in the case of an offence with a discriminatory aspect. Furthermore, there are examples of cases in which the court takes a (anti-homosexual) discriminatory aspect of an offence into account in sentencing. This is still the case in 2014.

Transgender issues

In Dutch law discrimination on the ground of 'transsexuality' and discrimination on the ground of 'transvestism' are regarded as forms of sex discrimination, which is prohibited by most of the anti-discrimination laws (mentioned above) that also cover sexual orientation discrimination. The main exception is the penal provision on discriminatory defamation of a group of people, which does not cover defamation on grounds of 'sex'.

The Civil Code provides that courts may authorise a person to change his/her sex in his/her birth certificate. Conditions are the physical transformation into the new sex (as far as this is possible and sensible from a medical and psychological point of view) and permanent sterilisation. In 2009 the government announced legislation to abolish the sterilisation requirement.

The civil courts have the competence, once an appeal for a change of sex has been granted and if so requested, to order the change of the applicant's first names.

On 18 December 2013 Parliament passed an Act to the effect that transgenders who want to have their sex and names changed in official documents, such as their birth certificate, can turn to the Register Office if they are convinced of their decision and if they submit a report by an expert who is of the same opinion. This Act will probably come into force on 1 July 2014. This is a major change for transgenders in the Netherlands.

By law, the costs of surgical treatment to adjust primary sexual characteristics, are covered by the standard health insurance. The non-coverage of costs of surgical treatment to adjust secondary sexual characteristics has been a topic of legal and political controversy for a long time.

Like lesbian, gay and bisexual people, transgender people can be regarded as members of a social group and can thus be eligible for refugee status. While awaiting a final decision in their case, asylum seekers are excluded from medical treatments with the purpose of change of sex. This is still the case in 2014.

Miscellaneous

In the past years the Dutch media reported an increase in violence against LGBT people, although there are no precise statistics in this respect. The number of incidents of homophobic discrimination reported to anti-discrimination bureaus increased in the period 2002-2012. Not all victims report their case, and a higher number of reports may be the result from increased publicity. Police reports also show an increase of incidents (2009-2012). This seems to be a trend.

In Dutch law there has never been an explicit prohibition on information about (or 'promotion' of) homosexuality.

Good practices

One important achievement in tackling discrimination on grounds of sexual orientation in Dutch law is the gender neutrality of marriage, registered partnership and rules on *de facto* cohabitation. More and more parenting rights have or will become gender neutral, too. On 19 November 2013, Parliament passed an Act stipulating that lesbian couples no longer need to go to court to establish the legal parenthood of two mothers. The Act will enter into force on 1 April 2014.

The NIHR has developed a highly sophisticated case law. It helps to strengthen legal protection against discrimination on grounds of sexual orientation. Increasingly this is also true for discrimination on grounds of gender identity.

Since 1986 the government has periodically issued a policy paper on 'homosexual emancipation policy', with gradually more specific attention for transgender issues.

Within the police forces, networks have been set up representing the interests and expertise of LGBT people within and outside the police. Special telephone numbers and/or websites which have been linked are available for people wanting to report a homophobic offence.

The police and the Public Prosecution Service have developed systems to improve the registration of offences and crimes with a discriminatory aspect. To discuss, tackle and monitor reported discrimination incidents, they have had (since 2008) regular regional meetings with the anti-discrimination bureaus.

Several teaching materials aimed at making homosexuality the subject of discussion in secondary education have been developed. Sexual diversity has become part of the primary objectives of primary and secondary education.

Major research has been carried out in recent years by the Netherlands Institute for Social Research. Although the climate for LGBs in the Netherlands is relatively tolerant LGBs suffer from discrimination in the workplace and they are treated badly in public.

Continuing research, national and local initiatives and attention for good practices by civil society seem to be a trend.

Intersexuality

Intersex is covered by law implicitly. On the one hand, intersex persons sometimes rely on Article 1:28 of the Civil Code, which makes it possible to change sex. However, this Article deals with person who belonged to one gender in the first place, and want to belong to another gender in the second place (transsexuals). At present, they have to have surgery, among other things, to change sex. This is not, usually what intersex persons want or need. They already have the characteristics of both genders, although sometimes hidden. Article 1:24 of the Civil Code is therefore more appropriate to rely on for intersex persons. It lays down that the birth certificate of a person may be changed if it is clear that there was an evident mistake originally. The person in question needs a medical statement, but no more than that. This situation applies to intersex persons in particular, although they are not mentioned in so many words.

1 Implementation of Employment Directive 2000/78/EC²

1.1 Main features of implementation

In the Netherlands, the principles of equality and non-discrimination are firmly enshrined in various realms of the law. Of particular importance are the *Grondwet* [Constitution], the *Algemene wet gelijke behandeling (Awgb)* [General Equal Treatment Act (GETA)], the *Wetboek van Strafrecht* [Penal Code] and specific additional statutory non-discrimination acts and provisions. Sexual orientation discrimination is covered – explicitly or implicitly – by almost all these prohibitions.³ Family law is of obvious significance as well, since Dutch law provides for registered partnership and civil marriage for both same-sex and different-sex couples. Moreover, since the Netherlands’ constitutional system adheres to a ‘monist theory’ of international law (provided in Articles 93 and 94 of the Constitution), international equality guarantees binding upon the Netherlands automatically filter into the national legal system.⁴ In this connection it may be noted that the Netherlands is one of few EU Member States which ratified Protocol 12 to the European Convention on Human Rights (ECHR).

The Dutch Constitution since 1983 has contained a non-discrimination clause (second sentence of Article 1): Discrimination on grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.⁵ The wish in Parliament also to cover anti-homosexual discrimination was the main reason for inserting the words ‘or any other grounds whatsoever’.⁶ As confirmed in case law the ‘other grounds’ do indeed include sexual orientation.⁷

Article 429^{quater}(1) of the Penal Code makes it a criminal offence to ‘discriminate against persons on the grounds of their race, religion, beliefs, sex or heterosexual or homosexual orientation’, but only if a person does this in the execution of a ‘profession, business or official capacity’.⁸ Most employers fall under one of these three categories. Complicity in activities with the aim of discrimination on any of these grounds, or financial or any other material support of such discrimination is punishable under Article 137f of the Penal Code. For the purposes of this provision, Article 90^{quater} of the Code defines *discrimination* as ‘any form of distinction or any act of exclusion, restriction or preference that intends or may result in the destruction or infringement of the equal exercise, enjoyment or recognition of human rights and fundamental freedoms in the political, economic, social or cultural field, or in any other area of society’.⁹

² The 2008 version of this report was written by Nelleke Koffeman, together with Rick Lawson, Tom Barkhuysen, Janneke Gerards, Maarten den Heijer, Rikki Holtmaat and Kees Waaldijk, all working at Leiden Law School. In 2010 this report was updated by Kees Waaldijk. In 2014 this report was updated by Jacky Nieuwboer.

³ See K. Waaldijk (2004) ‘The Netherlands’, in: K. Waaldijk and M. Bonini-Baraldi (eds) *Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden, available at: <http://hdl.handle.net/1887/12587> (12.02.2010); hereafter cited as: Waaldijk (2004).

⁴ R. Holtmaat (2007) *Netherlands country report on measures to combat discrimination*, Report for the European Network of Legal Experts in the non-discrimination field, Brussels: Migration Policy Group, p. 3, available at: www.migpolgroup.com/publications_detail.php?id=223 (12.02.2010); hereafter cited as: Holtmaat (2007).

⁵ The Netherlands, Constitution (*Grondwet*), Article 1, sentence 2, 17.02.1983.

⁶ See K. Waaldijk (1986/1987) ‘Constitutional Protection Against Discrimination of Homosexuals’, in: *Journal of Homosexuality*, Vol. 13-2/3, p. 59-60, available at: <http://hdl.handle.net/1887/3607> (12.02.2010).

⁷ The Netherlands, Amsterdam Court of Appeal (*Gerechtshof Amsterdam*), NJCM-Bulletin 1989, 305 at 315, 10.12.1987, available at: <http://hdl.handle.net/1887/4078>.

⁸ The Netherlands, Criminal Code (*Wetboek van Strafrecht*), Article 429^{quater}(1), 1 January 2006.

⁹ The Netherlands, Criminal Code (*Wetboek van Strafrecht*), Article 90^{quater}(1), 1 January 2006.

Furthermore, the ground of sexual orientation is covered by the General Equal Treatment Act (GETA) of 1994.¹⁰ In 2004, the 1994 Act was amended by the *EG- Implementatiewet Awgb* [EC Implementation Act GETA].¹¹ Currently, the government is preparing a bill to incorporate several author laws into the GETA. At the same time several changes in content and terminology will and have been made, including some of those discussed below.¹²

As of 1 August 2009 discrimination is also covered by the law on health and safety at work. Article 3(2) of that law requires every employer to take measures to prevent (or if prevention is impossible, to reduce) ‘psycho-social work pressure’.¹³ Article 1(3) now includes direct and indirect discrimination in the definition of the latter term. Articles 33 and 34 enable the inspectors for health and safety at work to impose a fine of up to €9,000 for any breach of Article 3.

The GETA outlaws any (direct or indirect) ‘distinction between people on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’ (Article 1), in the field of employment (Article 5), in the field of the liberal professions (Article 6), by organisations of employees, employers or professionals (Article 6a) and in providing goods or services, in concluding, implementing or terminating agreements thereon and in providing educational or careers guidance (Article 7).¹⁴ According to Articles 1 and 1a of the GETA, the concept of ‘distinction’ includes harassment, sexual harassment and instruction to make a distinction.

In contrast to EU law or any other realm of Dutch anti-discrimination law, the GETA is centred around the concept of distinction (*onderscheid*) in lieu of discrimination (*discriminatie*). The difference between the two concepts is that ‘distinction’ is a ‘neutral’ and ‘discrimination’ a ‘pejorative’ notion. The usage of the correct terminology was the subject of discussion during the implementation of Directives 2000/43/EC and 2000/78/EC and remains a subject of discussion.¹⁵ The government indicated that although legally it is not necessary to change the wording of the GETA in this respect, it will nevertheless prepare amending legislation so that the word ‘discrimination’ will be used in future.¹⁶ Preparations have taken place in the context of a draft bill on the integration of the various Acts on equality law. This draft bill is not ready yet to be introduced in Parliament in the end of 2013, so that the term ‘distinction’ is still being used.¹⁷

The GETA employs the terminology ‘hetero- or homosexual orientation’, to refer to what Directive 2000/78/EC calls ‘sexual orientation’. The Dutch version of the Directive speaks of ‘*seksuele geaardheid*’. The Dutch government opted for the term ‘*gerichtheid*’ (orientation) rather than ‘*voorkeur*’ (preference) or ‘*geaardheid*’ (inclination), as the term ‘orientation’ expresses better that not only individual emotions are covered, but also concrete expressions thereof. Another major reason for the government’s preference for the term ‘hetero- or

¹⁰ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 01.09.1994.

¹¹ The Netherlands, EC Implementation Act GETA (*EG-Implementatiewet Awgb*), 01.04.2004.

¹² The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2009/10), Parliamentary Documents (*Kamerstukken*) (2009-2010) 27017, no. 57, pp. 2-3.

¹³ The Netherlands, Labour Conditions Act (*Arbeidsomstandighedenwet*), 25 October.1999.

¹⁴ Waaldijk (2004), pp. 345-346. Article 7 also covers the provision of any goods and services that are not related to employment.

¹⁵ See R. Holtmaat (2006) ‘Discriminatie of onderscheid’ in: M. L. M. Hertogh and P. J. J. Zoontjens (eds) *Gelijke behandeling: principes en praktijken*. Evaluatieonderzoek Algemene wet gelijke behandeling, Wolf Legal Publishers, Nijmegen, pp. 15-45.

¹⁶ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) (2008-2009) 28481, no. 5, p. 3.

¹⁷ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents (*Kamerstukken*) (2013-2014), 28481, no. 22.

homosexual orientation' over 'preference' or simply 'sexual orientation' was that the latter term could possibly include 'paedophile orientation'.¹⁸ 'Bisexual orientation' is covered by the notion 'hetero- or homosexual orientation'.¹⁹ Discrimination on the ground of 'transsexuality' and 'transvestism' is regarded as a form of sex discrimination.²⁰

Article 1(b) of the GETA defines 'direct distinction' as 'distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status'.²¹ Article 1(c) of the GETA defines 'indirect distinction' as any 'distinction on the grounds of other characteristics or behaviours than those referred to in Article 1(b) that results in a direct distinction'.²² An Act was passed by Parliament on 7 November 2011 to make the wording more similar to that of Directive 2000/78/EC. 'Direct distinction' now means that a person is treated differently than another is, has been or would be treated on any of the grounds. There will be 'indirect distinction' where an apparently neutral provision, criterion or practice will affect persons having a particular sexual orientation (and other grounds) disproportionately, in comparison with other persons.²³

The GETA does not provide for specific court procedures. Normal procedures of civil or administrative law can be used to enforce the equal treatment standards. All of these procedures lead to a legally binding decision. In practice, in most cases the equality norm is interpreted through a procedure before the NIHR, the officially designated equality body.²⁴ Compared to civil and administrative court procedures, this is a low threshold procedure. This means inter alia that no legal representation is required and that no fees need to be paid. On the other hand, the opinions of the NIHR are non-binding.²⁵

1.1.1 Scope of the GETA

Article 5(1) of the GETA prohibits distinctions in the context of employment. No distinctions shall be made with regard to the following areas: (a) public advertising of employment and procedures leading to the filling of vacancies; (b) the services of an employment agency (inserted by the 2004 EC Implementation Act); (c) the commencement or termination of an employment relationship; (d) the appointment and dismissal of civil servants; (e) terms and conditions of employment; (f) permission for staff to receive education or training during or prior to the employment relationship; (g) promotions; and (h) working conditions (inserted in 2004 by the EC Implementation Act). Article 6 of the GETA covers the liberal professions (*het vrije beroep*) and Article 6a (added by the EC Implementation Act) covers membership and

¹⁸ Holtmaat (2007), p. 16.

¹⁹ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (1991/2), Parliamentary Documents (*Kamerstukken*) (1991-1992) 22014, no. 10, p. 13.

²⁰ For transsexualism see Gerechtshof Leeuwarden [Leeuwarden Court of Appeal], 13.01.1995, Nederlandse Jurisprudentie 1995, 243 and e.g. NIHR, 17.02.1998, opinions 1998-12, and NIHR.

²¹ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), Article 1(b), 01.09.1994.

²² The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), Article 1(c), 01.09.1994.

²³ The Netherlands, Law Gazette (*Staatsblad*) (2011), Act of 7 November 2011 to amend the General Equal Treatment Act, the Civil Code, the Act on Equal Treatment on the ground of handicap or chronic illness, the Act on Equal Treatment on the ground of Age in Employment and the Act on Equal Treatment of Men and Women – adaptation of definitions of direct and indirect distinction and some other stipulations to terminology in Directive (*Wet van 7 november 2011 tot wijziging van de Algemene wet gelijke behandeling, het Burgerlijk Wetboek, de Wet gelijke behandeling op grond van handicap of chronische ziekte, de Wet gelijke behandeling op grond van leeftijd bij de arbeid en de Wet gelijke behandeling van mannen en vrouwen (aanpassing van definities van direct en indirect onderscheid en enkele andere bepalingen aan richtlijnterminologie)*).

²⁴ The Netherlands, The Netherlands Institute of Human Rights (*College voor de Rechten van de Mens*) (2014), 'Missie en Ambitie', available at: www.mensenrechten.nl/over-ons/missie-en-ambitie.

²⁵ Holtmaat (2007) Summary, p. 5. See also Chapter 1.2. below.

involvement in organisations of employees, employers or professionals and benefits attached to these.²⁶

Article 7 of the GETA makes it unlawful to make a distinction (on the ground of sexual orientation etc) ‘in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or careers guidance’. It specifies that this prohibition only applies if such a distinction is made: ‘(a) in the course of carrying on a business or practising a profession; (b) by the public sector; (c) by institutions which are active in the fields of housing, social services, health care, cultural affairs or education; or (d) by private persons not engaged in carrying on a business or practising a profession, insofar as the offer is made publicly’.²⁷ One implication of this is that administrative decisions and most other unilateral governmental acts do not fall under the scope of Article 7.²⁸

The EC Implementation Act of 2004 extended the GETA to the fields of social protection, social security and social advantages, but the new prohibition (Article 7a) is limited to distinctions on the ground of race. For other grounds, such as sexual orientation, this field will remain subject only to the penal, constitutional and international prohibitions of discrimination.

The GETA does not apply to legal relations within religious communities, independent sections or associations thereof and within other associations run on a spiritual basis and excludes the application of equal treatment norms to ‘ministers of religion’ (priests, rabbis, imams, et cetera). These are considered to be internal affairs of these (religious) organisations. The rationale for this lies in the principle of *freedom of religion* and in the *division between state and church*.²⁹

Article 5(3) provides that the prohibition of employment discrimination does not apply when ‘the employment relationship is of a private nature, the difference in treatment relies on a characteristic which, among others things, has to do with sexual orientation, and the characteristic due to the nature of the specific occupational activity or the context in which it is carried out, is a genuine and determining requirement, provided that the aim is legitimate and the requirement is proportionate to the aim.

1.1.2 Justifications

The GETA contains a ‘closed’ system of justification grounds for direct discrimination: justifications for unequal treatment are explicitly and exhaustively listed within this Act.³⁰ For cases of indirect discrimination Article 2(1) of the GETA provides for an open system of justification. Not prohibited are indirect ‘distinctions’ that are ‘objectively justified by a legitimate aim and where the means to achieve that aim are appropriate and necessary’.³¹

In the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious, philosophical or political principles may impose ‘requirements which, having regard to the

²⁶ Waaldijk (2004), pp. 354-355

²⁷ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 01.09.1994, available at: www.mensenrechten.nl (23.01.2014).

²⁸ J. H. Gerards and A. W. Heringa (2003) *Wetgeving Gelijke Behandeling*, Deventer: Kluwer, pp. 72- 73, with references to NIHR opinions.

²⁹ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), Article 3, 01.09.1994.

³⁰ Holtmaat (2007), p. 43

³¹ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 01.09.1994, available at: www.mensenrechten.nl (23.01.2014).

institution's purpose, are necessary for the fulfilment of the duties attached to a post'.³² The text suggests that requirements other than a particular religion or belief may be imposed. That suggestion also follows from the stipulation in Article 5(2) that 'these requirements may not lead to a distinction based

on *the sole fact of* political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status'.³³ The requirements that are set on this basis need to be closely linked to the nature and content of the job. This means that only functions that are related to the 'mission' of the organisation can be exempted from the equal treatment norm (i.e. the exception is not applicable when it concerns a gardener for a church). It is also a requirement that the organisation applies a consistent policy in this respect.³⁴

In essence, the 'sole fact' construction has played an important role with regard to the question of whether a Christian school may lawfully refuse to employ a cohabiting homosexual in a teaching position. It is stated clearly in the Parliamentary Documents that the 'sole fact' that a person is homosexual, may *in se* not lead to the refusal to hire such a person or to dismiss him/her.³⁵ However, this may be different if 'additional circumstances'³⁶ are taken into account.³⁷ The Directive's wording in Article 4(2) seems not to allow the sexual orientation of a person to play any role, since only the religion or belief of the person concerned may be taken into account with regard to the ethos of the organisation. Examples given by the government during the parliamentary discussions and by the NIHR in its opinions regarding 'additional circumstances' are all related to behaviour or circumstances that relate to the religious ethos of the organisation.³⁸

In Dutch law positive action schemes are – to a certain extent – only possible with respect to sex, race and disability and not with respect to sexual orientation,³⁹ while the text of Article 7 of Directive 2000/78/EC extends to all grounds of discrimination, including sexual orientation.

The above has not changed in the past few years.

1.1.3 (Prior) gaps in implementation

In the context of the implementation of Directives 2000/43/EC and 2000/78/EC it was argued that the Dutch legislation is in some regards falling short of EU requirements.⁴⁰ The European Commission shared this opinion and delivered the Netherlands a reasoned opinion on the basis of Article 226 of the EU Treaty for failure to fulfil the obligations of Directive 2000/78/EC.⁴¹

A first possible gap in the implementation of the Employment Directive concerned the definition of indirect discrimination. In the GETA this definition was limited to apparently neutral provisions and practices that make some distinction on other grounds than those prohibited; provisions and practices that make no distinction at all fall outside this definition, which

³² The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), Article 5(2c), 01.09.1994

³³ Waaldijk (2004), pp. 364-365.

³⁴ The Netherlands, Netherlands Institute of Human Rights (*College voor de Rechten van de Mens*), opinion 1996-118, 23.12.1996.

³⁵ The Netherlands, Senate (*Eerste Kamer der Staten-Generaal*) (1992/3), Parliamentary Documents (*Kamerstukken*) (1992-1993) 22014, no. 212c, p. 10-11.

³⁶ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (1990/1), Parliamentary Documents (*Kamerstukken*) (1990- 1991) 22014, no. 5, p. 41.

³⁷ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (1990/1), Parliamentary Documents (*Kamerstukken*) (1990-1991) 22014, no. 3, p. 18-19.

³⁸ In a 2007 opinion the NIHR interpreted the term 'additional circumstances' restrictively.

³⁹ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), Article 2(3), 01.09.1994.

⁴⁰ Holtmaat (2007) Summary, p. 2; Waaldijk (2004), pp. 373-374.

⁴¹ European Commission (2008), *Reasoned Opinion of the European Commission*, 2006/2444, C(2008) 0115, 31.01.2008.

therefore can be regarded as being not fully in accordance with Article 2(2b) of the Directive.⁴² That was also the opinion of the European Commission, which stated that the Directive requires that people who are being disadvantaged by neutral provisions, should be able to challenge those provisions.⁴³ This would be remedied by the amendment proposed by the government in 2008.⁴⁴

On 7 November 2011 an Act to this effect was passed by Parliament.⁴⁵

Secondly, the internal affairs of churches and other spiritual congregations and the profession of priests, rabbis, imams etc. are completely exempted from the provisions of the GETA, because Article 3 of the GETA says that this Act does not apply to: '(a) legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature; (b) the office of minister of religion'.⁴⁶ This *unconditional* exemption of harassment and other forms of discrimination can be said to be incompatible with Articles 2(5), 4(1) and 4(2) of the Directive.⁴⁷ Other experts concluded that Article 3 of the GETA is in line with the exceptions that are possible under the EC Directives.⁴⁸ The Dutch government disagreed and still disagrees with the European Commission whether or not the exemption of Article 3 of the GETA is compatible with Article 4(2) of the Directive. The Commission called it a 'general' exception, and stipulated that national legislation should clearly indicate the boundaries required by Article 4(2) of the Directive,⁴⁹ whereas the government stressed that the exception is limited to the internal affairs of churches etc., and that therefore – given the freedom of religion and the separation of church and state – no legislative changes are necessary.⁵⁰

No changes have been made as to the date of the update of this report (end of 2013, beginning of 2014).

There are no plans to amend these stipulations either.⁵¹

Furthermore, there are the exemptions (see Chapter 1.1.2 above) for organisations based on religion or belief (Article 5(2) GETA). Insofar as these exemptions leave some scope for discrimination on grounds other than religion or belief, they can be regarded as incompatible with Article 4 of the Directive.⁵² Furthermore, the

⁴² Waaldijk (2004), pp. 352 and 373

⁴³ European Commission (2008), *Reasoned Opinion of the European Commission*, 2006/2444, C(2008) 0115, 31.01.2008, p. 4

⁴⁴ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) (2008-2009) 31832, nos. 1-4.

⁴⁵ The Netherlands, Law Gazette (*Staatsblad*) (2011), Act of 7 November 2011 to amend the General Equal Treatment Act, the Civil Code, the Act on Equal Treatment on the ground of handicap or chronic illness, the Act on Equal Treatment on the ground of Age in Employment and the Act on Equal Treatment of Men and Women – adaptation of definitions of direct and indirect distinction and some other stipulations to terminology in Directive (*Wet van 7 november 2011 tot wijziging van de Algemene wet gelijke behandeling, het Burgerlijk Wetboek, de Wet gelijke behandeling op grond van handicap of chronische ziekte, de Wet gelijke behandeling op grond van leeftijd bij de arbeid en de Wet gelijke behandeling van mannen en vrouwen (aanpassing van definities van direct en indirect onderscheid en enkele andere bepalingen aan richtlijnterminologie)*).

⁴⁶ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 01.09.1994, available at: www.mensenrechten.nl (23.01.2014).

⁴⁷ Waaldijk (2004), p. 373.

⁴⁸ B. P. Vermeulen (2006) 'Kerkgenootschap en geestelijk ambt', in: M. L. M. Hertogh and P. J. J. Zoontjens (eds) *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 247-248.

⁴⁹ European Commission (2008), *Reasoned Opinion of the European Commission*, 2006/2444, C(2008) 0115, 31.01.2008, pp. 5-6.

⁵⁰ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) (2008-2009) 27017, no. 6, pp. 3-4.

⁵¹ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents Lower House (*Kamerstukken*) (2012-2013), 28481, no. 21.

⁵² Waaldijk (2004), p. 373. See also Holtmaat (2007), p. 47, arguing that the sole fact construction is compatible with the Directive

European Commission was of the opinion that Article 5(2) of the GETA should specify that a ‘double test’ needs to be met, i.e. that the aim must be legitimate and that the requirement must be proportionate to that aim. According to the Commission the Netherlands did therefore not comply with Article 4(1) and 4(2) of the Directive. However, it was not certain that the European Commission disapproved strongly, because in the *dictum* of its reasoned opinion it did not explicitly mention its objection to Article 5(2) of the GETA.⁵³

In any event, the government indicated in September 2009 that it was preparing a bill to make the wording of the exceptions of Article 5(2) more similar to that of Article 4 of the Directive.⁵⁴ For this it was considering a wording suggested by the Council of State:⁵⁵ ‘A difference in treatment on grounds of requirements that are related to religion or belief, made by an organisation (or school) based on religion or belief, shall not be discrimination, if – because of the nature of the specific occupational activities or of the context in which they are carried out, and in light of the organisation’s ethos and the good faith and loyalty necessary for its realisation – these requirements constitute a genuine, legitimate and justified occupational requirement.’ To that the government would want to add, that such a difference in treatment should apply the constitutional provisions and should not justify discrimination on another ground.⁵⁶ Such a wording would indeed be more like that of the Directive, but it would still be wider than permitted by Article 4(2) of the Directive, which only speaks of differences of treatment ‘based on a person’s religion or belief’, whereas the new Dutch exception would cover differences of treatment ‘based on requirements that are related to religion or belief’. Although the issue remains highly controversial and no changes have been made as to the date of the update of this report (end of 2013, beginning of 2014), the latest coalition has agreed to remove the ‘sole fact’ construction and amend Article 5(2) in the sense described above.⁵⁷ The bill concerned was supposed to be discussed in the Lower House of Parliament in the end of 2013,⁵⁸ but this has not happened so far.

Conditional exceptions exist not only for organisations based on religion or belief, but also for political organisations (Article 5(2b) of the GETA). It has been argued that it has not been demonstrated that these exceptions are necessary for the protection of the freedom of association of political organisations as meant in Article 2(5) of the Directive.⁵⁹ In its reasoned opinion the European Commission did not deal with this exemption.⁶⁰

Furthermore, the former exception of Article 5(3) of the GETA for ‘requirements which, in view of the private nature of the employment relationship, may reasonably be imposed on the employment relationship’,⁶¹ could be considered to be too wide compared to Article 4(1) of

⁵³ European Commission (2008), *Reasoned Opinion of the European Commission*, 2006/2444, C(2008) 0115, 31.01.2008, pp. 6-7.

⁵⁴ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) 28481, no. 6, p. 3.

⁵⁵ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) 28481, no. 7, p. 18.

⁵⁶ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) 28481, no. 6, p. 3.

⁵⁷ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents Lower House (*Kamerstukken*) (2012-2013), 32476, no. 6.

⁵⁸ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents Lower House (*Kamerstukken*) (2012-2013), 28481, no. 21.

⁵⁹ Waaldijk (2004), p. 373. See also, however, P. J. J. Zoontjes (2006) ‘Gelijkheid, verenigingsvrijheid en privacy’, in: M.L.M. Hertogh and P.J.J. Zoontjes (eds) *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 175-216. The latter author concludes that Articles 5 and 7 GETA are compatible with European law

⁶⁰ European Commission (2008), *Reasoned Opinion of the European Commission*, 2006/2444, C(2008) 0115, 31.01.2008

⁶¹ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 01.09.1994, available at: www.mensenrechten.nl (23.01.2014).

Directive 2000/78/EC.⁶² The government indicated in December 2008 that it would prepare legislation to make the text of Article 5(3) more in line with that of the Directive; the word ‘reasonably’ would be replaced with a criterion including legitimacy and proportionality.⁶³ An Act to this effect was passed by Parliament on 7 November 2011 (see for the new text of the Article in question Chapter 1.1.1.).⁶⁴

As is pointed out in Chapter 1.2.3. Sanctions (below), one may conclude that the Directive’s requirement that sanctions be ‘effective’, ‘dissuasive’ and ‘proportionate’ seems not to be met by the Dutch legislation.

A further possible gap in implementation concerns harassment. Before the implementation of Directives 2000/43 and 2000/78/EC, ‘harassment’ was not defined as a concept in Dutch equal treatment legislation. Post-implementation, ‘harassment’ is explicitly defined as a form of ‘distinction’. The current definition of ‘harassment’ in the GETA requires that an applicant establishes: (1) that the harassment is ‘ground-related’, *and* (2) that it has the purpose or effect of violating the person’s dignity, *and* (3) that it has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. In all, this test is stricter than that adopted by the NIHR in its pre-implementation case law. Hence, the Dutch approach falls short of the *non-regression clause* in Article 8(2) of the Employment Equality Directive.⁶⁵

On 30 May 2013 the European Commission dismissed the case against the Netherlands about the failure to fulfil the obligations of Directive 2000/78 /EC.⁶⁶

1.2 The Netherlands Institute for Human Rights, formerly the Equal Treatment Commission

1.2.1 Mandate of the NIHR

The Act on the Netherlands Institute for Human Rights (*Wet College voor de rechten van de mens*) establishes the NIHR. It was adopted on 24 November 2011 and came into force on 1 October 2012. The former Equal Treatment Commission, a semi-judicial independent body whose case law is *non-binding* but nevertheless authoritative,⁶⁷ was incorporated in the NIHR. Neither the parties nor the courts are bound by the opinions of the NIHR. If the NIHR finds discrimination to have occurred, but the discriminator chooses not to follow the opinion of the

⁶² European Commission (2008), *Reasoned Opinion of the European Commission*, 2006/2444, C(2008) 0115, 31.01.2008.

⁶³ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) 28481, no. 5, p. 5.

⁶⁴ The Netherlands, Law Gazette (*Staatsblad*) (2011), No 544, Act of 7 November 2011 to amend the General Equal Treatment Act, the Civil Code, the Act on Equal Treatment on the ground of handicap or chronic illness, the Act on Equal Treatment on the ground of Age in Employment and the Act on Equal Treatment of Men and Women – adaptation of definitions of direct and indirect distinction and some other stipulations to terminology in Directive (*Wet van 7 november 2011 tot wijziging van de Algemene wet gelijke behandeling, het Burgerlijk Wetboek, de Wet gelijke behandeling op grond van handicap of chronische ziekte, de Wet gelijke behandeling op grond van leeftijd bij de arbeid en de Wet gelijke behandeling van mannen en vrouwen (aanpassing van definities van direct en indirect onderscheid en enkele andere bepalingen aan richtlijnterminologie)*)

⁶⁵ Holtmaat (2007) Summary, p. 3

⁶⁶ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents Lower House (*Kamerstukken*) (2012-2013), 28481, no. 21.

⁶⁷ The Netherlands, Act on the Netherlands Institute for Human Rights (*Wet College voor de rechten van de mens*), 24 November 2011, Article 10.

NIHR, or if the NIHR finds that discrimination did not take place, the aggrieved victim may go before a court to ask for a binding remedy (e.g. an order to obtain damages). It is also possible to go to court without first going to the NIHR.

The NIHR can hear and investigate cases on the basis of a written request from: (a) someone who thinks that a prohibited distinction is being or has been made to his or her disadvantage; (b) natural or legal persons who want to know whether they themselves are making a prohibited distinction; (c) a court or other adjudicator who has to decide on an allegation of prohibited distinction; (d) a works council or employee participation body which thinks that a prohibited distinction is being made in the relevant company or organisation; or (e) an association or foundation promoting the interests of persons protected by the Act.⁶⁸

Besides this, the NIHR may conduct an investigation on its own initiative. The mandate of the NIHR, just as in the case of the Equal Treatment Commission, covers conducting surveys and issuing reports and recommendations as well. In short, the NIHR (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination.⁶⁹

The mandate of the NIHR does *not* cover the task of assisting victims of discrimination. This latter function is seen as contradictory to the main task of the NIHR, which is to hear and investigate cases of (alleged) discriminatory practices or behaviour.⁷⁰ Since January 2005 the predecessor of the NIHR had the power to refer parties to an external mediator. As from its existence in 2012 the NIHR has had this power, too. The NIHR is financing mediation in disputes that fall within the scope of the NIHR.⁷¹

1.2.2 The procedure before the NIHR

No legal representation in cases before the NIHR is required. Both under the ordinary civil and administrative law procedures and the NIHR procedure, organisations (NGOs and other associations) have legal standing.⁷² (See Chapter 1.3. Civil society organisations). Moreover, the procedure before the NIHR is free of charge. There are no strict rules of evidence in a NIHR procedure; the NIHR applies the shift of the burden of proof described in Article 10 of Directive 2000/78/EC.⁷³ So do the regular courts.⁷⁴

1.3 Sanctions

According to Article 8(1) of the GETA, discriminatory dismissals and victimisation dismissals are ‘voidable’ (*vernietigbaar*).⁷⁵ This applies with regard to both public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages. S/he can also claim to be reinstated in the job. Contractual provisions which are in conflict with the GETA shall be null and void (Article 9 of the GETA).⁷⁶

⁶⁸ Holtmaat (2007) Summary, p. 5

⁶⁹ Holtmaat (2007) Summary, p. 5

⁷⁰ Holtmaat (2007) Summary, p. 5

⁷¹ See the ETC’s mediation brochure (in English) at: www.cgb.nl/artikel/publications (14.02.2010).

⁷² Holtmaat (2007) Summary, p. 5.

⁷³ Waaldijk (2004), p. 370.

⁷⁴ The Netherlands, Amsterdam District Court (*Rechtbank Amsterdam*), ECLI:NL:RBAMS:2013:BZ4174, 13 March 2013, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2013:BZ4174>

⁷⁵ The Netherlands, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), article 8(1), 01.09.1994.

⁷⁶ Holtmaat (2007), p. 61.

In addition to these specific and general voiding provisions, the general sanctions of administrative law (in the case of public employment), and of contract and tort law (in the case of private employment or provision of goods and services) apply. These include payment of damages and court orders under a *dwangsom* [*astreinte*].⁷⁷

One expert maintained that ‘Dutch courts are very restrictive in granting damages that are not strictly material damages (e.g. wages not paid). Immaterial damages (e.g. hurt feelings) will be only minimally compensated for.’⁷⁸

Article 429*quater*(1) of the Penal Code threatens with imprisonment of up to two months or a fine of up to 8,100 euros anyone who (in an official capacity, in a profession or in a business) discriminates on the ground of sexual orientation, sex, etc.. Complicity in activities with the aim of discrimination on the grounds of sexual orientation, sex, etc., or financial or any other material support of such discrimination is punishable under Article 137f of the Penal Code with imprisonment of up to three months or a fine of up to 4,050 euros.

Articles 11(2), 11(3) and 13 of the Act on the Netherlands Institute for Human Rights mention some additional sanctions. Sanctions under these articles are initiated by the NIHR, not by the courts. Under Article 11(2), the NIHR may make recommendations (in an opinion) to the party found to have made an unlawful distinction. Under Article 11(3) the NIHR may also forward its findings in an opinion to the Ministers concerned, to organisations of employers, employees, professionals, public servants, or consumers, and to relevant consultative bodies.⁷⁹ Under Article 13(1) the NIHR may bring legal action with a view to obtaining a judicial ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.⁸⁰ This power must be regarded in light of the fact that the NIHR’s opinions are not binding. The NIHR and its predecessor have, however, never made use of this possibility.⁸¹

Doubts have been expressed as to whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement of Directive 2000/78/EC that sanctions be ‘effective, proportionate and dissuasive’.⁸² One problem is that the NIHR cannot impose sanctions. Most discriminatory acts (such as a discriminatory termination of a contract) are not automatically void, but need to be contested in court. Another problem is that the equal treatment legislation itself hardly mentions any sanctions. Victims have to know which sanctions normal civil law and administrative law contains. Therefore, it has been proposed in legal doctrine to include the sanctions (that are available under civil and administrative law) in, formerly, the GETA in order to clarify this point for both the victims and perpetrators of discrimination.⁸³

⁷⁷ Waaldijk (2004), p. 369.

⁷⁸ Holtmaat (2007), p. 62.

⁷⁹ The Netherlands, The Netherlands Institute of Human Rights (*College voor de Rechten van de Mens*), opinion 2009-31, 20.04.2009, and opinions 2009-107 and 2009-108, 16.11.2009.

I of this report

⁸⁰ Holtmaat (2007), p. 61.

⁸¹ Holtmaat (2007), p. 63. See Chapter 1.3. for the role of organisations in the procedure before the NIHR.

⁸² Holtmaat (2007), p. 61; Waaldijk (2004), p. 369; R. Holtmaat (2001) ‘Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag’, in: T. Loenen et al. (eds) *Gelijke Behandeling: Oordelen en Commentaar 2000*, Deventer: Kluwer, pp. 105-124; and I. P. Asscher-Vonk (1999) ‘Sancties’ & ‘Conclusie Juridische Analyse’, in: I. P. Asscher-Vonk and C. A. Groenendijk.

⁸³ See e.g. Asscher-Vonk (1999) *idem*, p. 233.

1.4 Civil society organisations

Under Article 3:305a and 3:305b of the Dutch *Burgerlijk Wetboek* [Civil Code] and Article 1:2(3) of the *Algemene wet bestuursrecht* [General Act on Administrative Law] interest organisations can take legal action in court, provided that they are an association or foundation with full legal powers according to the law, and provided that their statutory goals cover this particular interest.⁸⁴ From time to time they offer support to individuals starting their own procedure.

When organisations bring a claim on their own behalf, they do not need to represent a concrete victim; even when the claim they file relates to discrimination against identified or identifiable victims, they do not need the victim's authorisation.

Organisations also have the right to ask the NIHR to start an investigation. The interest group must again have full legal powers (it must be an association or foundation according to the law) and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts (Article 10(2e) of the Act on the Netherlands Institute for Human Rights, an article that was formerly laid down in the GETA).⁸⁵ However, the alleged victims need to be informed, and can stop the NIHR from starting an investigation (Article 10(3) of the the Act on the Netherlands Institute for Human Rights).

Several gay and lesbian interest groups, and also several general anti-discrimination foundations, have been recognised as having standing. In the LGBT context they were the following: Stichting Landelijk Koördinatiepunt Groepen Kerk en Homoseksualiteit [the national coordinating foundation on church and homosexuality]; Nederlandse Vereniging tot Integratie van Homoseksualiteit COC [Dutch Association for the Integration of Homosexuality COC]; Nederlandse Vereniging tot Integratie van Homoseksualiteit COC Zwolle [Zwolle branch of the Dutch Association for the Integration of Homosexuality COC]; Stichting Bureau Discriminatiezaken Den Haag [The Hague Anti-discrimination Bureau] and Stichting Meldpunt Discriminatie Amsterdam [Amsterdam Anti-discrimination Bureau].⁸⁶ All these bodies may apply to the NIHR asking an opinion. In practice, COC asked for an opinion twice about the prohibition for homosexual men to donate blood to blood banks in 1998 and 1999. Anti discrimination bureaus have asked for an opinion about 170 times in some twenty years, which amounts to an average of eight or nine applications a year. They often apply to the NIHR in the general interest of LGBT people, for example when the national unemployment bureau discriminates them. If the opinions are in favour of the interest groups mentioned, the LGBT people benefit as a whole.⁸⁷

The local and regional Anti-Discrimination Bureaus are partly subsidised by the government, as is their association and expertise centre (which is called *Art.1* after the non-discrimination provision in Article 1 of the Constitution). One of their tasks is assisting victims of discrimination. They are not formally designated bodies in the sense of Article 13 of the Racial Equality Directive, but they do have this function in practice.⁸⁸

⁸⁴ Holtmaat (2007), pp. 59-60.

⁸⁵ Holtmaat (2007), p. 60.

⁸⁶ The Netherlands, The Netherlands Institute of Human Rights (*College voor de Rechten van de Mens*), opinion 97-135, 19 December 1997; opinion 98-137, 15 December 1998; opinion 199-36, 27 April 1999; opinion 02-24, 15 March 2002; opinion 2007-36, 08 March 2007; opinion 2007-100, 15 June 2007.

⁸⁷ The Netherlands, Netherlands Institute for Human Rights (*Nederlands College voor de Rechten van de Mens*) (1998), Opinions 1998-37 and 1999-36, available at: www.mensenrechten.nl, accessed on 24 April 2014.

⁸⁸ Holtmaat (2007) Summary, p. 5.

According to a new law every local authority had to give its citizens – by the end of 2009 – access to a ‘anti-discrimination provision’.⁸⁹ This could be an existing local or regional Anti-Discrimination Bureau. The law stipulates two tasks for each anti-discrimination provision: independent assistance to persons complaining about discrimination in the sense of several other laws, including the GETA and the Penal Code, and registration of all such complaints that they receive. For this registration the Minister for the Interior prescribes a standard form.⁹⁰

1.5 Case law

The first reported Dutch case law on dismissals on grounds of sexual orientation (in the sense of an individual characteristic or having a same-sex relationship) dates from 1950.⁹¹ In these early cases, however, up to the 1970s, the court did not consider the dismissal to be contrary to any written or unwritten rule.

In two cases that were decided in the 1980s (so before the anti-discrimination legislation of 1994 came into force) the courts avoided saying anything about the acceptability of the alleged sexual orientation discrimination. Both cases dealt with the non-renewal of a temporary employment contract for teachers in Catholic education who were very open about their lesbian and gay orientation. In the first case the court did not consider the school bound to give reasons for the non-renewal; in the second case the court did not consider it relevant that the employer based their decision not to renew the contract on the fact that the teacher openly lived in a homosexual relationship.⁹²

The first positive decision from a Dutch court about a claim of sexual orientation discrimination in employment was given in 1982 (so even before the constitutional prohibition of discrimination came into force in 1983).⁹³ The case was brought by a gay man who had been discharged from the military on the grounds of ‘unsuitability because of illness’. In fact, the military authorities had relied heavily on the man’s homosexuality in concluding that he was ‘ill’. The court ruled that ‘unsuitability because of illness’ may not be derived from the sole fact of homosexual orientation.⁹⁴

From the 1990s the role of the courts shifted to issues of same-sex partnership and parenting (a trend which had started in the 1970s).⁹⁵

A striking trend which started in 2008 concerns registrars who refuse to marry same-sex couples. In 2008, the NIHR was of the opinion that there was no breach of the GETA when municipalities required that registrars were willing to marry same-sex couples, even if they had conscientious

⁸⁹ The Netherlands, Municipal anti-discrimination agency act (*Wet gemeentelijke antidiscriminatievoorzieningen*), 25 June 2009.

⁹⁰ The Netherlands, Regulation of the Minister of the Interior and Kingdom Relations of 19 January 2010, nr. 2010-0000023760, CZW/WSG, for the definition of the registration form for discrimination complaints and the withdrawal of the stimulation regulation for the professionalisation of anti discrimination agencies (ADB's) (*Regeling van de Minister van Binnenlandse Zaken en Koninkrijksrelaties van 19 januari 2010, nr. 2010-0000023760, CZW/WSG, tot vaststelling van het registratieformulier voor klachten over discriminatie en intrekking van de Stimuleringsregeling professionalisering antidiscriminatiebureaus (ADB's)*), 19 January 2010.

⁹¹ The Netherlands, Rotterdam District Court (*Rechtbank Rotterdam*), 14 November 1950; The Netherlands, Utrecht District Court (*Rechtbank Utrecht*), 29 July 1955; Haarlem District Court (*Rechtbank Haarlem*), 12.04.1957; Arnhem District Court (*Rechtbank Arnhem*), 28 May 1970; Leeuwarden District Court (*Rechtbank Leeuwarden*), 29 February 1972.

⁹² The Netherlands, 's-Hertogenbosch District Court (*Rechtbank 's-Hertogenbosch*), 16 July 1982; Maastricht District Court (*Rechtbank Maastricht*) 2401/1985, 21 May 1987.

⁹³ The Netherlands Central Appeals Court (*Centrale Raad van Beroep*), 17 June 1982.

⁹⁴ See A. Mattijssen (1992) ‘Wie niet waagt, die niet wint. Homodiscriminatie en civielrecht’ in: M. Moerings and A. Mattijssen (eds) *Homoseksualiteit en recht*, Arnhem: Gouda Quint, p. 21

⁹⁵ Waaldijk (2004), pp. 346-347.

objections. This was confirmed by a Regional Court in 2013, which said that municipalities had a wide margin of appreciation in this respect, even when they wanted to fire a registrar who was unwilling to marry same-sex couples. It therefore seems to be standing practice now that registrars must be willing to marry same-sex couples as well as other couples in the Netherlands.⁹⁶ This corresponds to legislative developments. On 3 August 2012 a bill was introduced in Parliament to stop allowing Dutch registrars to refuse to marry same-sex couples (Parliamentary Documents Lower House (2011-2012) 33344, no. 1). The bill is now in its final stage of being considered in the Upper House of Parliament.

Another trend is that the NIHR seems to be increasingly willing to accept claims about sexual harassment and victimisation. It used to be very difficult to prove cases such as these, but in the past few years the NIHR has been of the opinion that there was breach of the GETA in spite of this problem⁹⁷ It may therefore become easier for LGBT people to prove these situations..

The table in Annex 1 contains relevant case law since the adoption of Directive 2000/78/EC, i.e. since 2000.

⁹⁶ The Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2008), Opinion 2008-40, 14 April 2008, available at: www.mensenrechten.nl (accessed 01.05.2014); The Netherlands, The Hague Regional Court (*Rechtbank Den Haag*), case no. ECLI:NL:RBDHA:2013:14133, 23 October 2013.

⁹⁷ The Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2010 and 2012), , Opinion 2010-135, 16 September 2010, and Opinion 2012-39, 29 February 2012, available at: www.mensenrechten.nl (accessed 01.05.2014).

2 Freedom of movement

When it comes to the legal situation regarding partners of EU citizens in the context of the freedom of movement, Dutch law makes no distinction between LGBT partners and non-LGBT partners. Neither does Dutch law make a distinction between couples comprising two EU citizens and couples comprising an EU citizen and a third country national partner.

2.1 Same-sex partners of EU citizens in the Netherlands

From 1975, unmarried different-sex and same-sex partners have been recognised for purposes of immigration to the Netherlands (and later for an increasing number of other purposes).⁹⁸ In addition, since 1998 Dutch law has provided for registered partnership for both same-sex and different-sex couples.⁹⁹ And in 2001 civil marriage was opened up for same-sex couples.¹⁰⁰

Both same-sex partners and different-sex partners of EU citizens (either married or registered partners), and their family members, have a right to residence (Article 8.7, *Vreemdelingenbesluit* [Aliens Decree]), implementing Directive 2004/38/EC). Apart from spouses and registered partners, family members are: (a) the blood relative in the direct descending line of the EU citizen or his/her spouse or registered partner, provided the blood relative has not reached the age of 21 or is financially dependent on the spouse or on the registered partner and (b) the blood relative in the direct ascending line who is financially dependent on the EU citizen or on his/her spouse or registered partner (Article 8.7(2), Aliens Decree).

Furthermore family members who are financially dependent on or live with the EU citizen in the country of origin and family members who, due to serious health problems, are in serious need of personal care by the EU citizen, may also have a right to residence on the basis of Article 8.7(3) of the Aliens Decree.

In addition, the unmarried and unregistered partner (same-sex or different-sex) with whom the EU citizen is in a duly attested stable long-term relationship has a right to residence. The same goes for the minor children of this partner (Article 8.7 (4), Aliens Decree). Until 2009 the relationship could be attested by the partners signing a *relatieverklaring* [declaration of relationship].¹⁰¹ As of 31.01.2009 the partners should normally also produce evidence either that they have or recently had a joint household for at least six months, or that they have a child together.¹⁰²

No detailed figures are available on how many same-sex partners of EU citizens are annually allowed (or refused) to reside in the Netherlands. However, for a recent study a sample of 336 cases were examined involving successful applications of non- EU citizens claiming residence in the Netherlands on the basis of EU law, because their spouse/partner was a EU (or EEA or Swiss) citizen. It was found that 15 of these cases involved a same-sex partner. The sample of 336 represented around 10 per cent of all such cases having been decided in the years 2005-

⁹⁸ K. Waaldijk (2005) More or less together: levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine EuroEuropean countries, Paris: Institut National d'Études Démographiques, p. 147, available at: <http://hdl.handle.net/1887/12585> (12.02.2010).

⁹⁹ The Netherlands, Act of 5 July 1997 to amend book 1 of the Civil Code and of the Code of Civil Procedure in relation to the addition of stipulations regarding the registered partnership (*Wet van 5 juli 1997 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering in verband met opnemings daarin van bepalingen voor het geregistreerd partnerschap*), 5 July 1997.

¹⁰⁰ The Netherlands, Act on the Opening up of Marriage (*Wet openstelling huwelijk*), 21.12.2000.

¹⁰¹ The Netherlands, Aliens Circular (*Vreemdelingencirculaire*), Article B7/5, 10 June 2009.

¹⁰² The Netherlands, Aliens Circular (*Vreemdelingencirculaire*), Article A1/4.10, 10 June 2009.

2008. It should be noted however that only for two thirds of all honoured applications of that period the study could establish both the citizenship of the sponsor and the type of (family) relationship between applicant and sponsor. Furthermore, the number of successful applications increased from around 900 in 2005 to around 2,500 in 2008, while the annual number of rejected applications increased similarly from around 100 to around 300 during that period.¹⁰³ Taking all that into account, it could be estimated – very tentatively – that in these four years perhaps over 200 same-sex partners were admitted to the Netherlands under Directive 2004/38/EC.

No detailed figures are available on how many same-sex partners of EU-citizens are annually allowed to reside (or be refused to reside) in the Netherlands as far as the past few years are concerned. Moreover, contrary to the past reporting period, no research has been found in this field about details about the past few years. As the legislation in this area has not changed and there has been no relevant case law, it is expected that the previous trend has been continued. This means that same-sex partners from the EU Member States are, in general, allowed to reside in the Netherlands.

2.2 Same-sex partners of Dutch citizens in other Member States

The Dutch recognition of same-sex marriage and registered partnership *should* lead to the conclusion that this enables LGBT partners of Dutch citizens to benefit from freedom of movement in other Member States. However, daily practice in several Member States proves that this is not the reality.¹⁰⁴ The only international treaty in this field, the 2007 Convention on the Recognition of Registered Partnership, has so far only been signed by Portugal, and signed and ratified by Spain.¹⁰⁵ The Kingdom of the Netherlands has actively contributed to the realisation of this treaty,¹⁰⁶ but has not yet signed, let alone ratified it.

The *Wetenschappelijk Onderzoeks- en Documentatiecentrum (WODC)* [Scientific Research and Documentation Centre] of the Ministry of Justice commissioned an evaluation of the legislation introducing registered partnership and of the *Wet openstelling huwelijk* [Act on the Opening Up of Marriage].¹⁰⁷ The research was carried out by researchers from the University of Utrecht who came to the conclusion that the legal recognition of same-sex marriages and registered partnerships abroad, even within the European Union, is problematic. For example, it was unclear whether the Dutch same-sex marriage and/or same-sex registered partnership would be recognised at all in Italy. In other EU Member States, such as Germany and Switzerland, Dutch same-sex marriages were not recognised as a marriage, but as a registered or civil

¹⁰³ A. Schreijenberg et al. (2009) *Gemeenschapsrecht en gezinsmigratie. Het gebruik van het gemeenschapsrecht door gezinsmigranten uit derde landen*, The Hague: Ministry of Justice, pp. 11, 16, 29, 31 and 83; available at: www.wodc.nl/onderzoeksdatabase/neveneffecten-van-toepassing-

¹⁰⁴ Germany, Administrative Court Karlsruhe (*Verwaltungsgericht Karlsruhe*), AZ 2 K 1420/03, 09 September 2004, available at: www.lsvd.de/bund/lpartg/vgkarlsruhe.pdf (13.02.2010).

¹⁰⁵ International Commission on Civil Status (2007), Convention 32 of the International Commission on Civil Status, 22 March 2007, available at: www.ciec1.org (02.02.2014).

¹⁰⁶ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2007/8), Parliamentary Documents (*Kamerstukken*) (2007-2008) no. 3078, 16 July 2008.

¹⁰⁷ K. Boele-Woelki et al. (2007) *Huwelijk of geregistreerd partnerschap?, Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap*, Deventer: Kluwer.

partnership.¹⁰⁸ The same seems to be the case in the Czech Republic, Finland, Luxembourg and Slovenia.¹⁰⁹ Hungary, too, introduced a form of registered partnership.¹¹⁰ Since in 2009 marriage has been opened up to same-sex couples in Sweden (and also in Norway), Dutch same-sex marriages will now be fully recognised there, as they already were in Belgium and Spain. In the meantime, same-sex marriage has been opened up to same sex couples in Denmark, Iceland and Portugal as well. There is strong opposition in Greece and Italy. In 2013, the German Parliament debated about this subject.¹¹¹ In France, same-sex marriage was opened up on 29 May 2013, as it was in the UK on 13 March 2014.¹¹² Foreign same-sex marriage will be recognized in the UK from that date onwards. After couples having given notice of their marriage on that date, the first weddings took place on 29 March 2014 in the UK. An Irish expert suggested in the past (by email) that in Ireland the same-sex spouse of a Dutch citizen could be admitted under the rules (implementing Directive 2004/38/EC) for the ‘partner with whom the Union citizen has a durable relationship, duly attested’, although their marriage would not be recognised as such, and not for most other purposes. However, Ireland recently introduced civil partnership for same-sex couples, so that it is expected that on this basis, too, Dutch same-sex partners are welcomed there.¹¹³

On the basis of these data on legislative developments in other Member States, there is a trend that Dutch same-sex partners are increasingly recognised within the EU, so that there is an increasing freedom of movement. There has been no relevant case law.

¹⁰⁸ Boele-Woelki et al. (2007) idem, p. 190

¹⁰⁹ Boele-Woelki et al. (2006) ‘The evaluation of same-sex marriages and registered partnerships in the Netherlands’, in: Yearbook of Private International Law, Vol. 8, p. 31, available at: <http://igitur-archive.library.uu.nl/law/2009-0226-200927/UUindex.html> (13.02.2010).

¹¹⁰ Scherpe, J.M. (2013), ‘The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights’, *The Equal Rights Review*, Vol. 10, p. 84, available at: www.equalrightstrust.org/ertdocumentbank/ERR10_sp1.pdf.

¹¹¹ Scherpe, J.M. (2013), ‘The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights’, *The Equal Rights Review*, Vol. 10, p. 84, available at: www.equalrightstrust.org/ertdocumentbank/ERR10_sp1.pdf.

¹¹² The United Kingdom, Department for Culture, Media and Sport (2013), First Same Sex weddings to happen from 29 March 2014, news release, available at: www.gov.uk/government/news/first-same-sex-weddings-to-happen-from-29-march-2014.

¹¹³ Scherpe, J.M. (2013), ‘The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights’, *The Equal Rights Review*, Vol. 10, p. 84, available at: www.equalrightstrust.org/ertdocumentbank/ERR10_sp1.pdf.

3 Asylum and subsidiary protection

3.1 Sexual orientation as ground for asylum

It is standing policy and standing case law in the Netherlands that the definition of being persecuted for reasons of membership of a particular social group in the sense of Article 1A of the UN Convention relating to the Status of Refugees includes being persecuted for reasons of sexual orientation (*Vreemdelingen-circulaire* [Aliens Circular] C2/3.2).¹¹⁴ This corresponds to what is laid down in Article 10/1d of the Recast Qualification Directive 2011/95/EU. An asylum seeker who is granted refugee status, is eligible for a residence permit for a fixed period (Article 29(1a), *Vreemdelingenwet* [Aliens Act]). In order to qualify for refugee status the asylum seeker must have a well-founded fear of persecution due to his/her sexual orientation. Such persecution can also exist in countries that do not criminalise homosexuality. Punishment on the basis of a penal provision that only affects homosexuals is considered an act of persecution.¹¹⁵ However, the sole criminalisation of homosexual acts or of being an LGB person in a certain country does not automatically lead to the conclusion that an LGB person coming from that country is a refugee. The criminal sanction must attain a certain gravity in order to justify recognition as a refugee.¹¹⁶ Since November 2008 the Aliens Circular considered homosexuals from Afghanistan and homosexuals from Iraq to constitute a ‘risk group’; consequently a lesser degree of evidence regarding the gravity of their persecution was required from them.¹¹⁷ In the beginning of 2014, the State Secretary for Security and Justice wrote to Parliament that he would in the future consider Afghan LGB asylum seekers as a vulnerable minority group. The details of their individual stories of persecution therefore carry less weight than usual in the asylum procedure. It is assumed that they cannot invoke the protection of the authorities and that they cannot flee to a place inside the country.¹¹⁸ In the beginning of 2014 the Aliens Circular specified that Iraqi LGB asylum seekers would be regarded as a group which is systematically being persecuted in the sense of Article 1A of the UN Convention relating to the Status of Refugees for reasons of sexual orientation. On this basis they will, in principle, receive a residence permit for a fixed period (Article 29(1a), Aliens Act (*Vreemdelingen-circulaire*)).¹¹⁹

The Aliens Circular also specifies that LGB asylum seekers should not be required to hide their sexual orientation in their country of origin. On 27.06.2009 another point was added: whenever homosexual acts are criminalised in the country of origin, the asylum seeker should not be required to have invoked the protection of the authorities there.¹²⁰ At the moment, the Aliens Circular states that it is an insufficient ground for asylum if the refugee cannot express his homosexuality in his or her country of origin in the same way as in the Netherlands. It may be expected from him or her to observe a certain degree of restraint in expressing his or her homosexual orientation in order to prevent serious violations of his or her fundamental rights. This restraint should not go so far that s/he cannot in a meaningful way give shape to his or her sexual orientation.¹²¹ This shows that the Minister has a discretionary power to grant asylum or not. The

¹¹⁴ The Netherlands, Judicial Division of the Council of State (*Afdeling Rechtspraak Raad van State*), A-2.1113, 13 August 1981.

¹¹⁵ The Netherlands, Aliens Circular (*Vreemdelingen-circulaire*), Article C2/3.2, 10 June 2009.

¹¹⁶ The Netherlands, District Court 's-Gravenhage (*Rechtbank 's-Gravenhage*), ECLI:NL:RBSGR:2004:AR6786, 12 October 2004.

¹¹⁷ The Netherlands, Aliens Circular (*Vreemdelingen-circulaire*), Article C2/3.2, 10 June 2009.

¹¹⁸ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2014), Parliamentary Documents (*Kamerstukken*) (2013-2014) 19637, no. 1772.

¹¹⁹ The Netherlands, Aliens Circular (*Vreemdelingen-circulaire*), C2/3.2 and C7/13.3.1, 10 June 2009

¹²⁰ The Netherlands, Aliens Circular (*Vreemdelingen-circulaire*), Article C2/2.3, 10 June 2009.

¹²¹ The Netherlands, Aliens Circular (*Vreemdelingen-circulaire*), Article C2/2.3, 10 June 2009.

policy described above will have to be changed on the ground of a judgement by the Court of Justice of the European Union (see below and Annex 1).¹²²

An LGBT asylum seeker can also rely on Article 29(1b) of the Aliens Act if s/he can show substantial grounds for believing that s/he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return, in the meaning of Article 3 of the ECHR, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) or (with regard to torture) Article 3 of the Convention Against Torture (CAT).

The situation of LGBT people in the country of origin can no longer be a reason for so-called protection for humanitarian reasons.¹²³ Since 18 October 2006 protection for humanitarian reasons was applied to Iranian LGBT people.¹²⁴ This policy was installed after the Minister had first temporarily suspended all expulsions of Iranian homosexual asylum seekers (*besluit- en vertrek moratorium*).¹²⁵

As from 1 January 2014, the State Secretary decided to grant the Iranian LGBT asylum seekers the same level of protection as before. In the earlier situation, the Minister considered that they could not be required to return to their country of origin. They will therefore now be eligible for a residence permit for a fixed period (Article 29 (1a) Aliens Act), unless their individual story of persecution shows that they will not be persecuted in the sense of the UN Convention relating to the Status of Refugees or risk that Article 3 of the ECHR will be violated.¹²⁶

Although the legislation seems to have become stricter (for example, protection on the ground of humanitarian reasons is no longer possible and LGBT persons have to prove they were persecuted on the basis of their individual story), Parliament has insisted that the scope of protection in the Netherlands should remain the same before and after the legislative changes. It is standing policy and standing case law that LGBT persons, in practice, belong to a particular social group, as laid down by the Recast Qualification Directive. The trend therefore is that the scope of protection has not changed in the past few years, as shown by the decision of the State Secretary to grant Iranian LGBT asylum seekers the same level of protection from 1 January 2014 as before.

Same-sex partners and other family members of a refugee can also qualify for a *verblijfsvergunning asiel* [residence permit on asylum grounds]. This concerns the spouse or minor child of the refugee and the alien who as a partner or adult child is dependent on the refugee to such an extent that he belongs to his family for that reason. There is no case law in this field, probably because the law is fairly recent (1 January 2014). These family members should have been a member of the family of the refugee at the time of his entry into the country and they should have accompanied him at the time or have joined him within three months after the refugee has been granted a residence permit for a fixed time. It may also be granted if an authorization for temporary stay has been applied for the family member within those three months.¹²⁷ The family member no longer needs to have the same nationality as the refugee.

The trend is that the law has become more lenient for family members, as it is no longer necessary for them to have the same nationality. Moreover, it is possible for them now to have

¹²²Court of Justice of the European Union (CJEU), joined cases C-199/12, C100-12 and C-201/12, *Minister voor Immigratie en Asiel v X, Y and Z*, 07 November 2013.

¹²³ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents (*Kamerstukken*) (2013-2014) 19637, no. 1774

¹²⁴ The Netherlands, Aliens Circular (*Vreemdelingencirculaire*), Article C24/12.3.11, no longer in existence.

¹²⁵ The Netherlands, Decree for the implementation of a decision and departure moratorium for homosexual asylum seekers from Iran (*Besluit instelling besluitmoratorium en vertrek moratorium homoseksuele asielzoekers Iran*), 28 September 2005.

¹²⁶ The Netherlands, Ministry for Security and Justice (*Ministerie van Veiligheid en Justitie*) (2014), Country specific asylum policy Iran (*Landgebonden asielbeleid Iran*), Letter from the State Secretary for Security and Justice to the Lower House of Parliament, 29 January 2014, ref.no. 470828.

¹²⁷ The Netherlands, Aliens Act (*Vreemdelingenwet*), Article 29 (1, 2 opening sentence and a and b, 4), 23 november 2000.

become a family in a third country, i.e. not their country of origin, which means that families created in a refugee camp, for example, are recognised as well.

No detailed figures are available on how many times claims of asylum seekers are based on persecution because of homosexual orientation. However, in one study 712 applications for asylum received in the first quarter of 2007 were examined. This sample covered 13 countries of origin, and represented 7 per cent of all 9,750 applications of that year. The study found that 18 cases in the sample involved (alleged) persecution because of homosexual orientation, i.e. 2.5 per cent. The study suggests that the percentage will be lower for the total of 9,750 applications, because some of the selected countries (such as Iran) were specifically chosen for this study because of the likelihood of homosexual asylum seekers coming from there.¹²⁸ The study discovered that it would be relatively easy, through a search in the computer files of the immigration authority, to find all applications of homosexual and transsexual asylum seekers, and get a complete picture. However, such an analysis has not been made.¹²⁹ Therefore the total number of applications on this ground can only be estimated tentatively: perhaps 100 to 200 per year.

Of the 18 applications in the sample, nine were successful, including two on grounds not related to homosexual orientation, plus five as a result of the special policy with respect to Iranian homosexuals. Seven applications were rejected. Two other cases were still pending.¹³⁰ It seems that rejected applications quite often end up being contested in court, sometimes successfully. This includes cases where the immigration authority was not convinced that the asylum seeker is indeed homosexual and/or that the story of persecution was truthful. To better enable immigration officers to assess the credibility of what asylum seekers tell them about this, a special instruction has been drafted (*Hoorinstructie homoseksuelen*).¹³¹

Consultation with several people in the field confirmed that the Dutch immigration authorities do not use technical contraptions to assess a person's sexual attraction to members of either sex. There were objections to the current hearings and their outcomes, too, however. On the one hand, the government is said to assume that homosexual asylum seekers who did not come out in the open in their country of origin did not run any risks, whereas on the other hand they were expected to reveal their homosexuality in the first hearings. In view of their vulnerable position and the fact that they may never have come out of the closet it was proposed in literature to make it possible for them to make their revelations at a later stage.¹³² The Minister for Immigration and Asylum met these objections by instructing the immigration officers to give credit to a statement about homosexuality made at a later stage, if they find that this statement is truthful. The fact that the asylum seeker did not come out in the open straightaway should no longer be used against him or her.¹³³

¹²⁸ The Netherlands, Immigration and Integration Service Information and Analysis Centre (*IND Informatie- en Analysecentrum*) (2008), Evaluation of the gender related aliens policy in the Netherlands (*Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland*), The Hague, Ministry of Justice, pp. 15-16, available at: www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp (01.02.2010)

¹²⁹ The Netherlands, Immigration and Integration Service Information and Analysis Centre (*IND Informatie- en Analysecentrum*) (2008), Evaluation of the gender related aliens policy in the Netherlands (*Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland*), The Hague, Ministry of Justice, p. 19, available at: www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp (01.02.2010)

¹³⁰ The Netherlands, Immigration and Integration Service Information and Analysis Centre (*IND Informatie- en Analysecentrum*) (2008), Evaluation of the gender related aliens policy in the Netherlands (*Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland*), The Hague, Ministry of Justice, p. 74, available at: www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp (01.02.2010)

¹³¹ The Netherlands, Immigration and Integration Service Information and Analysis Centre (*IND Informatie- en Analysecentrum*) (2008), Evaluation of the gender related aliens policy in the Netherlands (*Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland*), The Hague, Ministry of Justice, pp. 33 and 76, available at: www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp (01.02.2010).

¹³² Jansen, S. and Spijkerboer, T (2012), 'Say it loud – en vlug een beetje', *Asiel en Migrantenrecht*, No. 9, pp. 456-463.

¹³³ The Netherlands, Government gazette (*Staatscourant*) (2012), 19403, WBV 2012/21, 27 September 2012.

As stated earlier on, Dutch Ministers have a discretionary power to give protection to asylum seekers. According to research by Zemblu, a Dutch current affairs television programme, the Minister of Immigration and Asylum did not use this option of discretion in the period October 2010 to April 2012 to the same extent as former ministers over similar periods.¹³⁴ In literature, the discretionary power of the Minister was challenged. It implies that it may be required from a homosexual asylum seeker to practice his homosexuality in his or her country of origin, without being able to come out of the closet completely. There should, according to the authors, be a clear rule that homosexual asylum seekers are regarded as refugees in the sense of Article 1A of the UN Convention on the Status of Refugees for reasons of sexual orientation.¹³⁵

In 2012, the Council of State submitted preliminary questions to the Court of Justice of the European Union concerning the higher appeal cases of three homosexual asylum seekers (from Senegal, Uganda and Sierra Leone).¹³⁶ All three were not granted asylum by the Minister, because he was of the opinion that they would be safe in their country of origin if they observed some restraint in expressing their sexual orientation. The Council of State asked the EU Court of Justice to provide clarity about the European Qualification Directive concerning the minimum standards for the qualification of non-EU nationals as refugees.¹³⁷ In July 2012, the Minister of Immigration and Asylum did grant asylum to the Ugandan asylum seeker, because it was pointed out that he had to hide his homosexuality in Uganda for his own safety, which is a ground for protection according to the Dutch policy.¹³⁸ The Minister made a commitment to the Lower House of Parliament on 20 June 2012 to amend the rules to make it clear that LGBT asylum seekers cannot be sent home and be told to hide their sexual orientation or gender identity by the Dutch government, resulting in the text referred to in the beginning of this Chapter, which says that it is an insufficient ground for asylum if the refugee cannot express his homosexuality in his or her country of origin in the same way as in the Netherlands. It may be expected from him or her to observe a certain degree of restraint in expressing his or her homosexual orientation in order to prevent serious violations of his or her fundamental rights. This restraint should not go so far that s/he cannot in a meaningful way give shape to his or her sexual orientation.¹³⁹

The Minister's intentions as such were in line with the judgement of the Court of Justice of the European Union of 7 November 2013. The Court answered the preliminary questions and stated that homosexuals are a specific group, as referred to in Directive 2004/83/EC, Article 10, subsection a, under d. It may not be expected from a homosexual asylum seeker to hide his or her sexual orientations in his country of origin or to observe a certain restraint (see Annex 1).¹⁴⁰ The Judiciary Division of the Council of State gave a follow-up on 18 December 2013 in the cases of the Senegalese asylum seeker and the asylum seeker from Sierra Leone, judging that the State Secretary could not require from the asylum seekers that they observed a certain restraint in their way of life. Appeals were allowed, decisions nullified (see Annex 1).¹⁴¹ The Minister has acknowledged that he should change his policy.

¹³⁴ The Netherlands, Vara (2012), Going into hiding with illegals (*Onderduiken met illegalen*), TV programme, 18 May 2012.

¹³⁵ Jansen, S. and Spijkerboer, T. (2012), 'De draaideurkast', *Asiel en Migrantenrecht*, no. 07, pp. 320-329.

¹³⁶ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), case nos. 201109928/T1/V2, 201106615/1/T1/V2 and 201012342/T1/T2, 18 April 2012,

¹³⁷ The Netherlands, Council of State (*Raad van State*) (2012), Council of State asks questions to Court of Justice about homosexual aliens (*Raad van State stelt vragen aan Hof van Justitie over homoseksuele vreemdelingen*), web page, 18 April 2012, available at: www.raadvanstate.nl/pers/persberichten/tekst-persbericht.html?id=411 (1 May 2014).

¹³⁸ The Netherlands, COC (2012), 'Homoseksuele asielzoeker uit Oeganda mag blijven', press release, 5 July 2012, available at: www.coc.nl/dopage.pl?thema=any&pagina=viewartikel&artikel_id=4765.

¹³⁹ The Netherlands, House of Parliament (*Tweede Kamer der Staten-Generaal*) (2011), Parliamentary Documents Lower House (*Kamerstukken*) (2011-2012) 19637,1569.

¹⁴⁰ Court of Justice of the European Union (CJEU), joined cases C-199/12, C100-12 and C-201/12, *Minister voor Immigratie en Asiel v X, Y and Z*, 07 November 2013.

¹⁴¹ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak Raad van State*), case nos. 201109928 and 201012342/1/V2, 18 December 2013

4 Family reunification

On the basis of Article 3.13 to 3.15 of the Aliens Decree, (non-EU) family members of Dutch citizens and of lawfully residing foreigners have a right to a residence permit for the purpose of family reunification or family formation. The law makes no distinction between same-sex and different-sex partners or between their family members. Family members in the sense of this article are: (a) the adult person who is, according to Dutch Private International Law, legitimately married to the foreigner or who is, according to Dutch law, the registered partner of the foreigner, (b) the adult person who has a lasting and exclusive relationship with the foreigner, provided that certain requirements are met, and (c) the minor natural or legitimate child of the foreigner who, in the Minister's opinion, is actually a family member of that foreigner and already was so in the country of origin and who comes under the legitimate authority of the foreigner.¹⁴² Thus, Article 4(3) of the Council Directive 2003/86/EC on the right to family reunification is implemented in Dutch law.

Not many figures are available on the number of same-sex partners that have successfully applied for family reunification/formation. However, a study of the period July 2003 to February 2006 yielded some figures. Over that period of 32 months there were 23,407 successful applications for a provisional residence permit for a spouse or partner. The study found that 461 of these cases involved same-sex partners, i.e. 2 per cent. Same-sex partners were much more often involved in the 8,296 cases where the sponsor was a Dutch citizen (3.4 per cent or 282 permits) than in the 15,111 cases where the sponsor was a foreigner (1.2 per cent or 179 permits). It should be noted however that the total number of successful applications between 01.07.2003 and 01.11.2004 was more than 50 per cent higher than that between 01.11.2004 and 01.03.2006.¹⁴³ This is probably due to the increased income and age requirements for family formation that took effect on 1.11.2004. Since then the sponsor needed to be at least 21 years of age, and needed to have an income equal to at least 120 per cent of the minimum wage.¹⁴⁴

However, on the date of the update of this report, the same stipulations, in conjunction with Article 3.74 of the Aliens Decree, lay down that the sponsor needs to have an income equal to 100% of the minimum wage. An exception is made for old age pensioners and persons who are, according to the Minister, unfit to work, and for students. This stipulation was the result of a judgement by the Court of Justice of the European Union dated 4 March 2010, which said that the 120 per cent requirement was unlawful.¹⁴⁵ The trend is therefore that a larger group of persons will be able to benefit from family reunification, as the requirements for the sponsors have become less strict. There have been no other relevant case law or trends.

¹⁴² The Netherlands, Aliens Decree (*Vreemdelingenwet*), Article 3.1, 23 November 2000.

¹⁴³ H. Muermans and J. Liu (2009) 'Gezinsvorming in cijfers', in: *Internationale gezinsvorming begrensd? Een evaluatie van de verhoging van de inkomens- en leeftijdseis bij migratie van buitenlandse partners naar Nederland*, The Hague: Ministry of Justice, pp. 25, 29, 31 and 175, available at: www.wodc.nl/onderzoeksdatabase/de-gevolgen-van-de-aanscherping-van-het-gezinsvormingsbeleid.aspx?cp=44&cs=6799 (01.02.2010).

¹⁴⁴ The Netherlands, Aliens Decree (*Vreemdelingenwet*), former Articles 3.15 and 3.22, 23 November 2000.

¹⁴⁵ Court of Justice of the European Union (CJEU), c-578/08, *Chakroun v Minister of Foreign Affairs*, 4 March 2010.

5 Freedom of assembly

In the Netherlands the right to freedom of assembly is protected in Article 9 of the Dutch Constitution. Moreover, since the Netherlands' constitutional system adheres to a 'monist theory' of international law, Article 11 of the ECHR may be directly applied by national courts. The practical consequences of the constitutional right to assembly are covered by the *Wet Openbare Manifestaties* (WOM) [Public Demonstrations Act].¹⁴⁶

5.1 Regulation of public demonstrations

There is no obligation to seek permission for a planned gathering for the public expression of a religion or conviction or any other public assembly or demonstration (hereinafter called *demonstration*). Neither is there a general obligation to give prior notice of a planned demonstration. In more detail, Article 4(3) WOM prohibits the city council from asking for prior information about the content of a demonstration. However, for security reasons, the city council may adopt byelaws specifying in which situation a prior notice of a demonstration is required (Article 4(1), WOM). Furthermore, knowledge of the topic (as opposed to the content) of the demonstration might be necessary in order to estimate the risk of counter-demonstrations and to determine the size of the police presence required.¹⁴⁷ A preventive ban on a demonstration can only be justified in very exceptional cases of *force majeure*, i.e. cases in which it is expected that maintenance of public order, notwithstanding a substantial police presence and a substantial administrative effort, cannot be guaranteed.¹⁴⁸ The mayor has the power to give participants in a demonstration instructions (Article 6, WOM). S/he also has the power to give orders to end a demonstration immediately (Article 7, WOM). The above-mentioned legislation has not changed in the past few years, so that it is still possible that both demonstrations in favour of tolerance and against LGBT people take place. In practice, demonstrations in favour of LGBT people take place on a regular basis, whereas no examples are known of the opposite. There has been no case law in the past few years.

5.2 Demonstrations in favour of tolerance of LGBT people

For some decades several demonstrations/manifestations in favour of tolerance of LGBT people have taken place every year in the Netherlands. The most prominent are the We Are Amsterdam Gay Pride (formerly known as Gay Pride Amsterdam) and Pink Saturday (*Roze Zaterdag*). The latter has taken place in a different city each year since 1978. Over the years, the protest character of this demonstration has been transformed into a parade with the aim of increasing LGBT tolerance. The number of participants grew from 2,000 in 1978 to 45,000 in 2008.¹⁴⁹ In 2013, there were 55,000 participants in Utrecht.¹⁵⁰ Pink Saturday was even been openly supported by the former Dutch Queen.¹⁵¹ Other large-scale manifestations which aim to increase the tolerance of homosexuality include the Midsummer Canal cultural festival

¹⁴⁶ The Netherlands, Public Demonstrations Act (*Wet Openbare Manifestaties*), 20 april 1988.

¹⁴⁷ J. P. Loof (2007) 'De burgemeester en de demonstratievrijheid. Over beginselen van behoorlijke besluitvorming inzake betogingen', in: De Gemeentestem, nrno. 7280, pp. 467-481

¹⁴⁸ The Netherlands, Maastricht District Court (*Rechtbank Maastricht*), LJN AB0754, 22 March 2001.

¹⁴⁹ See www.ihlia.nl/dutch/algemeen/collectie/dossier_roze_zaterdag (22.01.2010).

¹⁵⁰ The Netherlands, Nu.nl (2013), 55.000 visitors for Pink Saturday Utrecht (*55.000 bezoekers voor Roze Zaterdag Utrecht*), news release, available at: www.nu.nl/binnenland/3513680/55000-bezoekers-roze-zaterdag-utrecht.html (accessed 1 May 2014).

¹⁵¹ Trouw (2007), 'Pro-homo brief van Beatrix', 15 September 2007).

(*MidzomerGracht festival*) in Utrecht,¹⁵² and the Pink May Party (*RozeMeifeest*) in Nijmegen.¹⁵³

Apart from these demonstrations with a festive atmosphere, each year on 4 May (National Remembrance Day for War Victims), special attention is paid to LGBT people. In the cities of Amsterdam and The Hague special LGBT remembrance meetings take place at the so-called *homomonumenten*.¹⁵⁴ Furthermore, at different locations in the country a wreath remembering LGBT victims is often laid at a Second World War memorial.

From time to time demonstrations of a more occasional character took place. In April 2007, for example, COC Nederland, the main NGO active in the field of gay and lesbian rights, organised a demonstration against the so-called ‘*weigerambtenaren*’, civil servants who refuse to marry same-sex couples.¹⁵⁵ In addition, during the week of the International Day against Homophobia, COC Nederland organised a ‘Poland Week’, to protest against the increasing homophobia in Poland and in support of the Warsaw Pride that was to take place on 19 May 2007. Protest demonstrations were held on 15 May in The Hague in front of the Polish Embassy and on 17 May in Amsterdam in the central square, the Dam. A demonstration against Ugandan anti-LGB laws took place on 28 November 2012.¹⁵⁶ On 8 April 2013 there was a major demonstration against Russian anti-LGB laws in Amsterdam when the Russian President Putin visited the Netherlands. There were thousands of participants, according to some it was the largest demonstration of this nature worldwide.¹⁵⁷ COC Nederland, organizing these demonstrations, also organized a demonstration on 7 February 2014 in favour of the position of LGBTs in Russia, at the same time as the opening of the Olympic Games over there.¹⁵⁸

The overview presented in the table in Annex 2 of demonstrations in favour of tolerance of LGBT people does not claim to be exhaustive. See also Chapter 7.4. Transgender and freedom of assembly.

5.3 Demonstrations against tolerance of LGBT people

The authors of this report are not aware of any demonstration against tolerance of LGBT people in the Netherlands in the period 2000-2014.

¹⁵² The Netherlands, Midzomergracht Festival (2014), ‘Midzomergracht Festival’, available at: www.midzomergracht.nl (11 June 2014).

¹⁵³ See www.rozemeifeest.nl.

¹⁵⁴ The Netherlands, Homomonument (2014), ‘Homomonument’, available at www.homomonument.nl (11 June 2014).

¹⁵⁵ Katholiek Nederland, ‘Homomanifestatie tegen weigerambtenaren’, press release, available at: www.katholiek nederland.nl (07.02.2010).

¹⁵⁶ The Netherlands, COC (2012), Wednesday Evening demonstration anti-gay law Uganda (*Woensdagavond demonstratie anti-homowet Oeganda*), website, available at: www.coc.nl/internationaal/woensdagavond-demonstratie-anti-homowet-oeganda (accessed 1 May 2014).

¹⁵⁷ The Netherlands, COC (2013), Largest demonstration ever for Russian LGBT rights (*Grootste demonstratie ooit voor Russische LHBT-rechten*), website, available at: www.coc.nl/algemeen/grootste-demonstratie-ooit-voor-russische-lhbt-rechten (accessed 1 May 2014).

¹⁵⁸ The Netherlands, COC (2014), COC organises burning protest during opening of the Winter games (*COC organiseert vlamvend protest tijdens opening Winterspelen*), website, available at: www.coc.nl/internationaal/coc-organiseert-vlamvend-protest-tijdens-opening-winterspelen (accessed 1 May 2014).

5.4 Refusals or bans of demonstrations

Although in the 1970s and 1980s there were private parties claiming in court that a demonstration in favour of tolerance of LGBT people should be banned,¹⁵⁹ no authorisation for such a demonstration has been refused in recent decades, apart from one minor recent case. In 2007 the city council of Amsterdam refused a licence for the original plans for five festivities, mainly street parties, forming part of We Are Amsterdam Gay Pride. Since not *all* activities of the Gay Pride are regarded as demonstrations within the meaning of the Public Manifestations Act, but rather as a public event, a so-called event licence was required on the basis of Article 2.11 of the general municipal byelaws of the municipality of Amsterdam. The refusal was due to the fact that the Amsterdam Soccer Tournament was due to take place the same week. The police and the city council feared that the city centre of Amsterdam would become overcrowded, which could lead to disturbances.¹⁶⁰

5.5 Disturbances at demonstrations

During Pink Saturday in 1982, which took place in Amersfoort, onlookers called the demonstrating LGBT people names and pelted them with stones. The pictures of this violence caused a stir in the country. The disturbances gave cause for various new policy initiatives on LGBT matters, both at national and at local level. Since that date, for example, the police have had a positive obligation to protect LGBT people from ‘queer bashers’, instead of banishing LGBT people from gay ‘cruising’ areas in public places (*homo-ontmoetingsplekken*).¹⁶¹

Since 1982 some isolated disturbances have taken place. Recently, during the We Are Amsterdam Gay Pride of 2007, on two occasions a total of four gay men were violently attacked.¹⁶² Furthermore, a wreath at the *homo-monument* was destroyed and thrown into the canal. The police arrested two young men for this act.¹⁶³ Otherwise, the LGBT network *Roze in Blauw* [Pink in Blue] of the Amsterdam police did not receive any reports of LGBT-related violence during the 2007 Gay Pride.¹⁶⁴ During the 2008 events, no incidents were reported according to the Pride organisers, and the only incident that was reported during the 2009 events was that ‘homos go to hell’ had been chalked on a bridge.¹⁶⁵ See Chapter 8. Miscellaneous for more information about violence against LGBT people.

¹⁵⁹ The Netherlands, Judicial Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State Algemene kamer, hoger beroep), R737, 11 April 1979; Judicial Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State Algemene kamer, hoger beroep), 3.314, 08 January 1981.

¹⁶⁰ The Netherlands, ProGay (2010), ‘Politiek kiest voor voetbal-hooligans boven homo-feesten’, 14 February 2010, available at: www.progay.nl/nieuws.html?id=14.

¹⁶¹ See www.coc.nl/dopage.pl?thema=any&pagina=algemeen&algemeen_id=171 (22 January 2010).

¹⁶² The Netherlands, COC (2007), ‘Homo’s mishandeld tijdens Gay-Pride’, press release, 06 August 2007, available at: www.coc.nl/geloof-cultuur/amsterdam-homos-mishandeld-tijdens-gay-pride (11 June 2014).

¹⁶³ *Algemeen Dagblad* (2007), ‘Homohaar leidt tot agressie bij Gay Pride in Amsterdam’, 07 August 2007).

¹⁶⁴ See www.politie-amsterdam-amstelland.nl (25.01.2008).

¹⁶⁵ See www.weareproud.nl/nieuws.html (22.01.2010).

6 Hate speech and criminal law

6.1 Hate speech in criminal law

Article 137c of the Dutch Penal Code outlaws public expressions about a group of people, that are insulting on grounds of their heterosexual or homosexual orientation (or on grounds of their race, religion or belief, or since 2006 on grounds of their physical or mental disability). It should be noted, however, that anti-homosexual verbal abuse more often falls within the terms of Article 266 of the Penal Code, which makes it a crime to insult someone. Article 266 does not require that the insult is discriminatory. It includes an exception for commenting on the promotion of public interests.

The sanction provided by Article 137c is imprisonment of up to one year or a fine of up to 8,100 euros. If the offence is committed in pursuance of an individual's profession, as habitual practice, or by two or more persons together, the sanction may amount to two years' imprisonment or a fine of 20,250 euros. The maximum sanction of Article 266 is three months' imprisonment or a fine of 8,100 euros.

Public incitement of hatred, of discrimination or of violence against persons on grounds of their heterosexual or homosexual orientation is punishable under Article 137d of the Penal Code. The sanctions for this offence are similar to those under Article 137c. Article 137d also covers the grounds of race, religion, belief and disability, and also sex.

On the basis of Article 137e of the Penal Code a person who – for any reason other than that of giving factual information – publishes a statement which s/he knows or should reasonably suspect to be insulting to a group of people on the grounds of their heterosexual or homosexual orientation (or race, religion, belief or disability), or which s/he knows or should reasonably suspect to incite hatred of or discrimination against people or violence against their person or property on the grounds of their heterosexual or homosexual orientation (or race, religion, belief, disability or sex), is liable to a term of imprisonment of not more than six months or a fine of 8,100 euros maximum.¹⁶⁶ If the offence is committed in pursuance of an individual's profession, as habitual practice, or by two or more persons together, the sanction may amount to a one year imprisonment or a fine of 20,250 euros. If the offence is committed in pursuance of an individual's profession, the offender may be disqualified from the practice of his or her profession.

The tables in Annex 1 give an overview of the most important case law in the field of criminal hate speech. Not all cases have been published, and until recently no statistics were available regarding specific grounds of discrimination.

In 2007, in response to questions from the Parliamentary Standing Committee on Justice, the Minister of Justice commissioned research on criminal discrimination (*strafbare discriminatie*).¹⁶⁷ The study found that over the years 2000-2005 a total of 682 discrimination cases reached a criminal court, resulting in convictions in 89 per cent of the cases. In addition to that, a fine was agreed in some 200 cases that did not go to court.¹⁶⁸ The numbers of cases and convictions per year have not changed much over 2000-2005,¹⁶⁹ and are also fairly stable over

¹⁶⁶ The Netherlands, Penal Code (*Wetboek van Strafrecht*), Article 137e, 3 March 1881.

¹⁶⁷ Brants, C., Kool, R., Ringnalda, R., Ministry of Justice (2007), *Strafbare discriminatie*, The Hague, Ministry of Justice.

¹⁶⁸ Brants, C., Kool, R., Ringnalda, R., Ministry of Justice (2007), *Strafbare discriminatie*, The Hague, Ministry of Justice, pp. 95 and 100

¹⁶⁹ Brants, C., Kool, R., Ringnalda, R., Ministry of Justice (2007), *Strafbare discriminatie*, The Hague, Ministry of Justice, p. 100

the period 1995-2008.¹⁷⁰ Over that longer period the average annual number of instances of criminal discrimination (on any ground) that were registered by the police has been almost 500.¹⁷¹

The study on criminal discrimination further analysed the files of 229 cases (i.e. all cases that went to court in the years 2000-2004 in five regional courts, including those in the three largest cities of the Netherlands). This showed that all but 6 of these 229 cases were about hate speech (i.e. the crimes of Articles 137c, 137d and 137e of the Penal Code). In 215 of these cases the ground of discrimination could be established: sex was the ground in 3 cases, homosexuality in 7, race/colour/religion/nationality in 175, other grounds in 13, and multiple grounds in 17 cases.¹⁷² Assuming that the latter will have included some cases also affecting sexual orientation, it could be tentatively concluded that around 5 per cent of all adjudicated hate speech crimes were homophobic in nature.

An inventory of all instances of discrimination reported to the police, concludes that in 2008 somewhere between 12 and 17 per cent of these 2240 instances concerned homosexuality.¹⁷³ Unfortunately, the inventory does not specify what proportion of these instances could be classified as homophobic speech in the sense of Articles 137c, 137d and 137e of the Penal Code. The inventory also covers many instances where (in the sense of Article 266 of the Penal Code) someone got insulted in anti-homosexual terms, without necessarily being (seen as) LGBT. So for various reasons it is difficult to compare the 2008 data with those over 2000-2004. Hate speech was also included (but not counted separately) in the even wider inventory made by the 'Art.1' (the national association against discrimination) of complaints registered by the anti-discrimination bureaus. Over the years 2004-2006 some 4 per cent of all complaints concerned sexual orientation, a proportion that went up to 6 per cent in 2007 and 5 per cent in 2008.¹⁷⁴ See also Chapter 8.1. Violence against LGBT people.

A report by a division of the Public Prosecution Service, the National Expertise Centre on Discrimination (*Landelijk Expertise Centrum Discriminatie*) provides the following details for the past few years. Acts of discrimination: 2008 – 232 acts, 2009 -160 acts, 2010 -170 acts, 2011 – 169, 2012 -114 acts. The figures on acts having to do with the discrimination of homosexuals are as follows: 2008 – 11 acts – 4 per cent, 2009 – 8 acts – 4 per cent, 2010 – 14 acts – 10 per cent, 2011 – 15 acts – 7 per cent and 2012 – 20 acts – 13 per cent.¹⁷⁵

The figures cover acts of discrimination as they have been registered by the PPS and the courts, on the basis of Articles 137c, 137d, 137e, 137f and 137g of the Penal Code. There is a discrepancy with police figures (see under Chapter 6.3), but it should be taken into account that the figures in this Chapter 4 do not cover regular crimes with a discriminatory motive, and the police figures do. It is expected that a system which does record these crimes will be in force in the end of 2013 or the beginning of 2014. The gap between the figures is also explained by the fact that a number of police reports provide insufficient information for the PPS to actually

¹⁷⁰ S. N. Kalidien and A. Th. J Eggen (eds) (2009) *Criminaliteit en rechtshandhaving 2008 – Ontwikkelingen en samenhangen*, The Hague: Ministry of Justice/WODC and CBS [Statistics Netherlands], pp. 443 and 480; available at: www.wodc.nl/onderzoeksdatabase/cenrno-2008.aspx (13.02.2010).

¹⁷¹ Kalidien and Eggen (2009) *idem*, p. 357. For further analysis of these and other statistics, see also M. Davidović and P. R. Rodrigues (2008) 'Opsporing en vervolging in 2007', in: J. van Donselaar and P. R. Rodrigues (eds) *Monitor Racisme & Extremisme. Achtste Rapportage*, Amsterdam: Pallas Publications, pp. 199-228, available at: www.monitorracisme.nl/content.asp?PID=12&LID=1 (01.02.2010).

¹⁷² C. Brants, R. Kool and R. Ringnalda (2007) *Strafbare discriminatie*, The Hague: Ministry of Justice/ WODC, pp. 108-116, available at: www.wodc.nl/onderzoeksdatabase/strafmaat-discriminatiezaken.aspx (14.02.2010).

¹⁷³ F. Tas and W. de Wit (2009) *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague: Ministry of the Interior, pp. 10 and 17, available at: www.minbzk.nl/actueel?ActItemId=120677 (13.02.2010).

¹⁷⁴ W. Dinsbach, M. Coenders and I. Boog (2009) *Kerncijfers 2008 – Landelijk overzicht van discriminatieklachten geregistreerd bij antidiscriminatiebureaus en meldpunten in Nederland*, Rotterdam: Art.1, available at: www.art1.nl/artikel/6881-Kerncijfers (13.02.2010).

¹⁷⁵ The Netherlands, Public Prosecution Service (*Openbaar Ministerie*) (2013), *Figures in the picture, discrimination figures 2012 (Cijfers in Beeld, discriminatiecijfers 2012)*, Amsterdam, Public Prosecution Service, p 21.

prosecute.¹⁷⁶ The significant decrease in 2012 could partly be explained by the fact that victims of discrimination turn to the Anti-Discrimination Bureaus, which solve the problem to their satisfaction.

Of these acts, 65 per cent concern hate speech (13 incidents of the total number of acts), in 25 per cent of the cases there is an accumulation with a (threat of) violence (4 facts) and 2 acts concern hate in writing (10 per cent). It should be noted that the absolute numbers are relatively small, so that no general conclusions can be drawn from these numbers.¹⁷⁷ The acts reported take place especially in the neighbourhood, the street and locations open to the public (also see Chapter 8.1.).¹⁷⁸

This corresponds to the trend in case law, which also concerns hate speech and hate crimes in neighbourhoods and in the street and locations open to the public. There were two cases about two brothers who discriminated their homosexual neighbours, using terminology as “dirty gays” and “buggers”. They said: “Get at these dirty homosexuals” in the garden. They were found guilty¹⁷⁹. A man was found guilty after having been accused of hitting, kicking and calling two homosexuals names in a park in Amsterdam.¹⁸⁰ Attention is being paid to this problem by the government, both on a national level and on a local level (there are projects about safe neighbourhoods, see Chapter 8.1). Another case was about a politician who made a statement about homosexuals in public. However, in this case the Appellate Court judged that the politician made his statement in the context of a public discussion about a case of general interest. Freedom of expression prevailed over the non-discrimination principle.¹⁸¹

6.2 Hate speech in civil law

Article 6:162 of the Civil Code provides for a civil tort procedure. In the LGBT context, this article has been invoked several times to challenge hate speech. In 1987 COC Nederland unsuccessfully instituted civil proceedings against the Roman Catholic archbishop on this basis. The court of appeal ruled that, although the archbishop could have chosen his words more carefully, his statement that homosexuality is an abnormality of Creation was not needlessly hurtful.¹⁸² In 1990 civil proceedings were successfully instituted against a married couple who had distributed flyers stating (amongst other things) that AIDS was caused by homosexual conduct and that homosexuals deserved the death penalty.¹⁸³

Where anti-LGBT hate speech in employment or in the provision of goods or services takes the form of harassment, the sanctions of tort, contract or anti-discrimination law may apply; see Chapter 1.3. Sanctions.

¹⁷⁶ The Netherlands, Public Prosecution Service (*Openbaar Ministerie*) (2013), Figures in the picture, discrimination figures 2012 (*Cijfers in Beeld, discriminatiecijfers 2012*), Amsterdam, Public Prosecution Service, pp. 6, 7 and 14.

¹⁷⁷ The Netherlands, Public Prosecution Service (*Openbaar Ministerie*) (2013), Figures in the picture, discrimination figures 2012 (*Cijfers in Beeld, discriminatiecijfers 2012*), Amsterdam, Public Prosecution Service, p. 46.

¹⁷⁸ The Netherlands, Public Prosecution Service (*Openbaar Ministerie*) (2013), Figures in the picture, discrimination figures 2012 (*Cijfers in Beeld, discriminatiecijfers 2012*), Amsterdam, Public Prosecution Service, p. 23.

¹⁷⁹ The Netherlands, Maastricht Regional Court (*Rechtbank Maastricht*) (2012), , case nos. 03/703621 and 03-853069, ECLI:NL:RMBMAA:2012:BV6179 and ECLI:NL:RMBMAA:2012:BV6181, 17 February 2012

¹⁸⁰ The Netherlands, Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) (2011), case no. 23-003278-11, ECLI:NL:GHAMS:2011:BU8317, 15 December 2011.

¹⁸¹ The Netherlands, Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) (2013), case no. 23-0042266-12, ECLI:NL:GHAMS:2013:BZ3787, 11 March 2013.

¹⁸² The Netherlands, Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) (1987), NJCM 14-3, 305 - 331, 10 December 1987, available at: <http://hdl.handle.net/1887/4078> (13 February 2010).

¹⁸³ The Netherlands, Supreme Court (Hoge Raad) (1991), 02 February 1990.

6.3 Homophobic motivation as aggravating factor in sentencing

Neither the Penal Code nor the *Wetboek van Strafvordering* [Code of Criminal Procedure] provide for homophobic motivation as an aggravating factor in sentencing. However, since 2003 the *Aanwijzing Discriminatie* [Instruction on Discrimination] of the Public Prosecution Service has been in force.¹⁸⁴ On the basis of this instruction, the public prosecutor must increase the sentence s/he demands in his/her closing speech by 50 to 100 per cent in the case of an offence with a discriminatory background relating to race, religion, belief, disability or sexual orientation. Since 2007 the instruction also requires the police to use a uniform registration format for all incidents of criminal discrimination that are reported to the police or that the police discovers. This registration does not only cover the specific crimes of Articles 137c to 137g and 429*quater* of the Penal Code, but also any other crime committed with a discriminatory aspect. The instruction also indicates how data from this registration must be reported (also regionally).

The first year for which a (national) report on this basis has been produced is 2008, during which 2240 incidents were registered. Although for a third of these incidents no ground of discrimination had been recorded, the report concludes that up to 380 incidents (i.e. 17 per cent) could be classified as sexual orientation discrimination.¹⁸⁵

For most incidents, the sexual orientation of the victim(s) is not known. Of the 70 incidents where the victim was recorded as being homosexual, a third concerned threatening behaviour, a third (also) concerned physical violence, and in two thirds of the incidents the victim had (also) been insulted.¹⁸⁶ The report does not specify in which of these cases the discriminatory background could, should or would be considered as an aggravating factor in sentencing.

Data about 2009 and 2010 are provided by a subsequent report.¹⁸⁷ In 2009, a total of 2212 incidents were reported to the police, 428 of which had to do with sexual orientation (19.3 per cent).¹⁸⁸ In 2010, 661 facts out of a total of 2438 had to do with sexual orientation (26.1 per cent).¹⁸⁹ There are no details about the forms of discrimination. The 2012 report does not give clear figures for the various grounds on which discrimination has taken place, but it does state that there have been 2802 incidents, 1314 of which concerned discriminatory utterances and 1488 of which were of a discriminatory nature.¹⁹⁰ The 2013 report is more detailed about the year 2011 as well: in 2011 there were 623 cases which had to do with sexual orientation, which is 27 per cent of the total number of incidents.¹⁹¹

In 2012, there was a total number of 3292 incidents, a 17 per cent increase in comparison with 2011. This is explained by the fact that more attention was paid to the reporting of incidents and more publicity was generated in this respect.¹⁹² Incidents having to do with sexual orientation amounted to

¹⁸⁴ The Netherlands, Public Prosecution Service (*Openbaar Ministerie*) (2007, 2011), *Discrimination Instruction (Aanwijzing Discriminatie)*, available at: [www.om.nl/algemene_onderdelen/uitgebreid_zoeken/@155214/aanwijzing/\(09.02.2014\)](http://www.om.nl/algemene_onderdelen/uitgebreid_zoeken/@155214/aanwijzing/(09.02.2014))

¹⁸⁵ F. Tas and W. de Wit (2009) *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague: Ministry of the Interior, pp. 10, 17 and 28, available at: www.minbzk.nl/actueel?ActItemId=120677 (13.02.2010).

¹⁸⁶ Tas en De Wit (2009) *idem*, p. 18

¹⁸⁷ De Wit, W and Sombekke, E. (2011), *POLDIS 2010 – Criminaliteitsbeeld discriminatie*, Nijmegen, ITS, Radboud Universiteit Nijmegen.

¹⁸⁸ De Wit, W and Sombekke, E. (2011), *POLDIS 2010 – Criminaliteitsbeeld discriminatie*, Nijmegen, ITS, Radboud Universiteit Nijmegen, pp. 5 and 9.

¹⁸⁹ De Wit, W and Sombekke, E. (2011), *POLDIS 2010 – Criminaliteitsbeeld discriminatie*, Nijmegen, ITS, Radboud Universiteit Nijmegen., pp. 5 and 9.

¹⁹⁰ Tierolf, B. and Hermens, N. (2012), *POLDIS rapportage 2011*, Utrecht, Verwey-Jonker Instituut, p. 6.

¹⁹¹ Tierolf, B., Hermens, N., Drost, L. and Van der Vos, L. (2013), *POLDIS rapportage 2012, Met themarapportage antisemitisme*, Utrecht, Verwey-Jonker Instituut, p. 12.

¹⁹² Tierolf, B., Hermens, N., Drost, L. and Van der Vos, L. (2013), *POLDIS rapportage 2012, Met themarapportage antisemitisme*, Utrecht, Verwey-Jonker Instituut, p. 12, p. 6 and p. 11.

a number of 1143 facts, 36 per cent of the total number. This is a 9 per cent increase as to the percentage of 2011, which is due to an actual increase of reports, partly thanks to greater willingness to report incidents of this nature.¹⁹³

In 2012 a (new) distinction was made between the various forms of discrimination on the basis of, among other things, sexual orientation. The incidents can be distinguished as follows: insult – 626 incidents, discrimination – 225 incidents, battery and assault – 178 incidents, destruction – 106 incidents, threatening behaviour – 124 incidents, theft – 20 incidents, robbery – 4 incidents and other – 76 incidents.¹⁹⁴

There are examples of cases in which the court takes a discriminatory aspect of an offence into account in sentencing.¹⁹⁵ However, it seems difficult to draw any firm conclusions from this practice, because a discriminatory aspect is often not the only relevant aspect in sentencing. Furthermore, it is often not possible to identify to what extent various elements contributed to the level of final sentence imposed. However, in the above-mentioned case of the man who was found guilty after having been accused of hitting, kicking and calling two homosexuals names in a park in Amsterdam, the court decided that his punishment should be doubled because of the gravity of the crime.¹⁹⁶

¹⁹³ Tierolf, B., Hermens, N., Drost, L. and Van der Vos, L. (2013), *POLDIS rapportage 2012, Met themarapportage antisemitisme*, Utrecht, Verwey-Jonker Instituut, p. 12, p. 11.

¹⁹⁴ The Tierolf, B., Hermens, N., Drost, L. and Van der Vos, L. (2013), *POLDIS rapportage 2012, Met themarapportage antisemitisme*, Utrecht, Verwey-Jonker Instituut, p. 22

¹⁹⁵ The Netherlands, The Hague District Court (*Rechtbank 's-Gravenhage*) (2006), LJV AX9566, 14 April 2006; Maastricht District Court (*Rechtbank Maastricht*) (2007), LJV BA4620, 08 May 2007; Roermond District Court (*Rechtbank Roermond*) (2009), LJV BK8235 and BK7698, 23 December 2009; Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) (2011), ECLI:NL:GHAMS:2011: BU8317, 15 December 2011.

¹⁹⁶ The Netherlands, Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) (2011), case no. 23-003278-11, ECLI:NL:GHAMS:2011:BU8317, 15 December 2011

7 Transgender issues

In Dutch law discrimination on the ground of ‘transsexuality’ is regarded as a form of sex discrimination.¹⁹⁷ Moreover, the NIHR issued an opinion stating that discrimination on the ground of ‘transvestism’ is also to be regarded as a form of sex discrimination.¹⁹⁸ Discrimination on grounds of gender identity or gender expression is therefore covered by the GETA, by some anti-discrimination provisions in the Penal Code (see Chapter 7.5. below), by a few other prohibitions of sex discrimination, by the provision in the law on health and safety at work (see Chapter 1.1.), by the law on local anti-discrimination provisions (see Chapter 1.4.), and by Article 1 of the Constitution. Regrettably, even the standard form prescribed under the latter law for the registration of discrimination complaints does not mention gender identity/expression explicitly.

7.1 Legislation regarding change of sex

Article 1:28 of the Civil Code provides that courts may allow an individual to change his/her sex in his/her birth certificate. For this to be granted it is necessary that the requesting person is, as far as possible and sensible from a medical and psychological point of view, physically transformed into the new sex.¹⁹⁹ Secondly, the permanent incapability to beget a child or to give birth to a child is an express condition for a legal change of sex. Organisations take a firm stand against this which they consider to be a humiliating requirement.²⁰⁰ The Commissioner for Human Rights of the Council of Europe (recalling the Yogyakarta Principles) has called for the abolition of both the absolute infertility requirement and the physical transformation requirement.²⁰¹ On 15 June 2009 the Minister of Justice informed Parliament that he is preparing a bill to amend Article 1:28.²⁰² From the letter it was not clear whether this would only involve the sterilisation requirement, or also the physical transformation requirement.

Article 1:28a of the Civil Code contains the formal requirements for a request for change of sex. The requesting person must submit a copy of his/her birth certificate as well as a medical certificate from an expert recognised by law. The expert must be confident that the person requesting a change of sex has the conviction to belong to the opposite sex on a permanent basis. Furthermore, the expert must inform the court on the medical certificate whether, and if so to what extent, the requesting person has been physically transformed into the opposite sex. In the third place, the expert must declare that the requesting person is no longer capable of begetting a child or giving birth to a child.

¹⁹⁷ The Netherlands, Leeuwarden Court of Appeal (*Gerechtshof Leeuwarden*) (1995), 1995-243, 13 January 1995; The Netherlands, Netherlands Institute of Human Rights (*College voor de Rechten van de Mens*) (1998, 2000, 2006), opinion 1998-12, 17 February 1998; opinion 2000-73, 07 November 2000; opinion 2006-33, 09 March 2006.

¹⁹⁸ The Netherlands, Netherlands Institute of Human Rights (*College voor de Rechten van de Mens*) (2007), opinion 2007-201, 15 November 2007.

¹⁹⁹ The Netherlands, 's-Hertogenbosch Court of Appeal (*Gerechtshof 's-Hertogenbosch*) (2007), LJN BA5428, 24 April 2007.

²⁰⁰ The Netherlands, COC Nederland en Movisie (2007), *Beleidsvisie Homo-, lesbisch, biseksueel en transgenderbeleid, Visie van de Nederlandse homobeweging op de in het coalitieakkoord uitgezette lijn*; Utrecht, Movisie; Spits (2007), ‘Transgenders “vermist”’, emancipatienota laat groep in de kou staan’, 13 November 2007.

²⁰¹ Council of Europe (2009), *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to the Netherlands 21-25 September 2008*, CommDH(2009)2, Strasbourg, 11 March 2009, p. 33, available at: www.coe.int/t/commissioner/Activities/visitsbycountry_en.asp (07.02.2010).

²⁰² The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary Documents (*Kamerstukken*) (2008-2009) 27017, no. 53.

On 18 December 2013 Parliament passed an Act which changed all this. On the basis of Article 28(1) of the Civil Code anyone who is sixteen years or older can apply to the Registry Office of the municipality where his or her birth certificate is laid down to have it altered. The only requirements which should be met are that s/ he should submit a statement issued by an expert, which was not issued prior to six months of the application (Article 28a(1) of the Civil Code). The statement should declare that the person requesting a change of sex has the conviction to belong to the opposite sex and s/he has shown the expert that s/he has understood the scope and meaning of this situation and that s/he still wants to change the record in his or her birth certificate. The expert does not issue the statement if he has good reasons to doubt the thoroughness of the applicant's conviction. It is expected that this Act will enter into force on 1 July 2014.²⁰³

In the following, this section of the present report will go into the question how the present legislation has been put into practice in case law. In general, judicial bodies recognise the need of transsexuals to change sex.

In April 2007 the Court of Appeal of 's-Hertogenbosch ruled that the applicant's physical change of sex was not yet sufficiently complete for a change of sex to be granted in his birth certificate within the meaning of Article 1:28 of the Civil Code. The court based its decision upon the finding that hormonal treatments had only started in September 2006 and surgery was yet to take place.²⁰⁴

In 2005 an individual who felt intersexual or asexual, neither male nor female, requested that his sex be crossed out in his birth certificate. The Supreme Court dismissed this claim in 2007, ruling that it falls within the *margin of appreciation* of national states under Article 8 of the ECHR to require that a person's sex in his/her birth certificate is either male or female and not gender-neutral. According to the court, the general interest outweighed the individual interest in this respect.²⁰⁵

A woman, formerly a man, wanted to be recognised as the parent of her child. Both at the time of conception and birth, the woman was no longer a man. She requested to be regarded as the father. Although this request was rejected, she was regarded as the parent of the child, in addition to the birth mother.²⁰⁶

Another case was about a man whose contract of employment was not prolonged after he had told his employer that he would go through surgery to change his sex. His employer had checked, among other things, how long the man would not be able to work after the operation. The NIHR judged that the employer had discriminated the man on the ground of sex.²⁰⁷

When a woman tried to book a stay at a hotel in which she had stayed before, her application was rejected because other guests and their family members had complained about the way she had discussed her sexuality with them the previous time. The NIRH found that this was

²⁰³ The Netherlands, Law Gazette (*Staatsblad*) (2014), Law of 18 december 2013 for the amendmend of Book 1 of the Civil Code and the Municipal registration Act relating to the amendmend of the conditions for an authority to change the registration of sex in the birth certificate (*Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte*)

²⁰⁴ The Netherlands, 's-Hertogenbosch Court of Appeal (*Gerechtshof 's-Hertogenbosch*) (2005), LJNBA5427, 22 May 2005.

²⁰⁵ The Netherlands, Supreme Court (*Hoge Raad*) (2007), LJN AZ5686, 30.03.2007.

²⁰⁶ The Netherlands, Leeuwarden Court of Appeal (*Gerechtshof Leeuwarden*) (2010), case no. 200.058.760/01, ECLI:NL:GHLEE:2010:BO8039, 23 December 2010.

²⁰⁷ The Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2012) opinion 2012-166, 1 November 2012.

a form of direct discrimination by the hotel. It should not have given in to the other guests and their family members.²⁰⁸

A transsexual who worked as a coach of asylum seekers and whose agreement of employment had finished, was not hired again for the same job after she had started to dress like a woman, in stead of a man. Her employer said there would be too much of a risk in the interaction with asylum seekers due to their different cultural backgrounds. The NIHR did not find this acceptable. It held that the transsexual had been discriminated.²⁰⁹

Information obtained from the *Raad voor de Rechtspraak* [Council for the Judiciary] (by e-mail of 25.02.2010 and by e-mail of 18.02.2014) indicates that the annual number of (positive or negative) court decisions on requests of people wishing to change the sex in their birth certificate under Article 1:28 of the Civil Code seemed to be rising, from 57 in 2004 to 107 in 2011, but in 2012 and 2013 there was a decrease (83 and 76 respectively) (see Annex 2 – Statistics).

By law, the costs of surgical treatment to adjust primary sexual characteristics, are covered by the standard health insurance.²¹⁰ The non-coverage for surgical treatment to adjust secondary sexual characteristics is a topic of legal and political controversy. In September 2008 a court ruled that a local authority was right in refusing to give a transitioning transsexual a special social security allowance to meet these costs.²¹¹ In November 2009 the NIHR came to the conclusion that the refusal of a health insurance company to pay for the breast implants for a male-to-female transsexual amounted to indirect sex discrimination, because the costs for breast amputation (for example for female-to-male transsexuals) were being covered. However, the NIHR considered this indirect discrimination to be justified, because the exclusion of breast implants from the insurance coverage is explicitly mentioned in the government's rules and regulations.²¹² The Minister for Health was in consultation about the issue with *Transgender Netwerk Nederland* and with the *College voor Zorgverzekeringen* [Health Insurances Board].²¹³

However, this has not resulted in any change so far. On 13 April 2010 the Minister for Health stated that he would maintain the existing situation.²¹⁴ On 23 June 2011 a Member of Parliament filed a motion in order to make it possible for transgender people to be depilated and to have breasts implanted (secondary sexual characteristics), but this motion was withdrawn on 28 June 2011.²¹⁵ On 30 November 2012 a Member of Parliament tried to amend the annual budget for 2013 for public health, with a proposal to allow 250,000 euros for transgender people for these secondary sexual characteristics. This proposal was rejected.²¹⁶

Research has shown that the position of transgender persons is difficult. A recent report, in which 450 transgenders participated, showed that two thirds were lonely and one fourth was extremely

²⁰⁸ The Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2013), opinion 2013-65, 30 May 2013.

²⁰⁹ The Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2013), opinion 2013-104, 8 August 2013.

²¹⁰ The Netherlands, Health Insurance Regulation (*Besluit zorgverzekering*), Article 2.4(1b), 28 juni 2005.

²¹¹ The Netherlands, 's Hertogenbosch District Court (*Rechtbank 's Hertogenbosch*) (2008), LJN BF1834, 22 September 2008.

²¹² The Netherlands, Netherlands Institute of Human Rights (*College voor de Rechten van de Mens*) (2009), opinions 2009-107 and 2009-108, 16 November 2009, available at: www.mensenrechten.nl/artikel/publications (14.02.2010).

²¹³ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2009/10), Parliamentary Documents (*Kamerstukken*) (2009-2010) 27017, no. 56, p. 3.

²¹⁴ The Netherlands, Minister of Health, Welfare and Sport (*Minister van Volksgezondheid, Welzijn en Sport*), Letter to the Lower House of Parliament, 13 April 2010, ref. no. Z/VU-2996958.

²¹⁵ The Netherlands, House of Representative (*Tweede Kamer der Staten-Generaal*) (2011), Parliamentary Documents (*Kamerstukken*) (2010-2011), 27017, no. 82.

²¹⁶ The Netherlands, House of Representative (*Tweede Kamer der Staten-Generaal*) (2012), Parliamentary Documents (*Kamerstukken*) (2012-2013) 33400 XVI, no. 25.

lonely. Half of transgender persons have psychological problems and 14 per cent is psychologically seriously unhealthy. Among the rest of the populations, these percentages are 14 per cent and 2 percent respectively. More than two thirds have contemplated ending their lives, in comparison with 8 per cent of the Dutch population in general. 21 per cent have actually made a suicide attempt in comparison with 2 per cent of the Dutch population in general. In the year prior to the research 42 per cent of the participants encountered one or more negative reactions to their being a transgender. Most of these reactions were mere incidents, but 12 per cent experienced this at least once a month. Most reactions took place in public, 38 per cent. One fourth of the transgender persons said they were subjected to pejorative glances, 19 per cent said they were made ridiculous, 12 per cent were called names and 11 per cent were excluded. 5 per cent were threatened and 2 per cent were attacked. Finally, 5 per cent were sexually harassed and the property of 2 per cent was destroyed. At work and at school, too, transgender persons were regarded in a pejorative way.²¹⁷

The same research shows that 60 per cent of the transgenders is satisfied with the lives they lead, especially those that have gone through a transition (85 per cent).²¹⁸

The Free University Medical centre (*VUmc*) in Amsterdam, the main centre performing operations on transgender persons in the Netherlands (85 per cent), recently announced that it did not have enough funding in 2014 to treat new patients. In the past three years the number of patients increased by 200 per cent. Annually 400 adults want to be operated and 200 children wish to start treatment. The *VUmc* receives 3,000,000 euros from health care insurers in 2014, but it needs at least 10,000,000 euros. 2,000 patients who have already filed a request can be treated.²¹⁹

Several Members of Parliament asked the Minister of Health about this issue. She said on 5 February 2014 that the insurers owed a duty of care to these patients and that the insurers would get in touch with the *VUmc*. In 2013 the number of intakes and operations increased by 72 per cent and 34 per cent respectively and this will continue in 2014. There are possibilities to be treated in the Leiden University Medical Centre as well, though, as well as abroad. Moreover, the Dutch Health Care Authority also monitors this issue.²²⁰

7.2 Legislation regarding change of names

The civil courts have the competence, once an appeal for a change of sex has been granted and if so requested, to order the change of the applicant's first names (Article 1:28b(2), Civil Code). In this respect, the court has to judge whether the interest for the granting of the request is sufficiently substantial. In addition the requested name must meet the general requirements of the law on first names (Article 1:4, Civil Code). On 18 December 2013 Parliament passed an Act which enables the Registry Offices of the municipalities to change the first names of an applicant when it has been determined that the data on his or her sex in his or her birth certificate should be changed (Article 1:28b(2) in conjunction with Article 28(a) of the Civil Code, which will probably come into force on 1 July 2014).²²¹ The civil courts will therefore not play a role any more.

²¹⁷ The Netherlands, Keuzenkamp, S. (2012), *Worden wie je bent*, The Hague, Sociaal en Cultureel Planbureau, pp. 11-12.

²¹⁸ The Netherlands, Keuzenkamp, S. (2012), *Worden wie je bent*, The Hague, Sociaal en Cultureel Planbureau, p. 12.

²¹⁹ The Netherlands, NOS (2014), 'VUmc: tijdelijke stop transgenders', news release, 4 January 2014, available at: <http://nos.nl/artikel/593422-vumc-tijdelijke-stop-transgenders.html> (accessed 1 May 2014).

²²⁰ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents (*Kamerstukken*) (2013-2014), Annexes to the discussions, nos. 1125 and 956.

²²¹ The Netherlands, Law Gazette (*Staatsblad*) (2014), Law of 18 december 2013 for the amendmend of Book 1 of the Civil Code and the Municipal registration Act relating to the amendmend of the conditions for an authority to change the registration of sex in the birth certificate (*Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte*).

The following case is interesting. In 2002 a Luxembourg national petitioned to the Regional Court of The Hague for a change of sex and names. The request for change of sex was granted under Dutch law. The change of names was problematic due to the fact that the applicant did not have Dutch nationality and, under rules of Dutch Private International Law the applicable law was that of Luxembourg, which at the time of procedures did not allow for a change of name in the situation at issue. Nevertheless, referring to the Goodwin judgement of the European Court of Human Rights, the regional court ruled that a change of sex is a change of status within the meaning of Article 1 of the Convention on the recording of surnames and forenames in civil status registers (Istanbul 1958)²²² and ordered the change of the applicant's names.¹⁶⁶

The NIHR, too, was of the opinion that the first names of a transsexual should be changed on university diploma. Originally, his names were female, but he changed sex through surgery. The university, relying on the relevant law, said it only issued diplomas once, to combat fraud. The NIHR felt the legal stipulation did not exclude the issue of new diplomas in special circumstances, and this was one of them. The university had to issue a new diploma with the new male names on it.²²³

With the new prospective legislation in view, it is expected that this is a trend which will be continued.

7.3 Transgender and asylum

Like lesbian, gay and bisexual people, transgender people can be regarded as members of a social group within the meaning of Article 1A of the UN Convention relating to the Status of Refugees. Therefore, persecution on the basis of gender identity can amount to a ground for asylum on the basis of Article 29(1a) of the Aliens Act 2000.

Furthermore a transgender person can rely on Article 29(1b) of the Aliens Act if s/he can show substantial grounds for believing that s/he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return, in the meaning of Article 3 of the ECHR, Article 7 of the ICCPR or Article 3 of the CAT. In Dutch case law, eligibility for protection as a refugee or subsidiary protection beneficiary is often jointly examined.²²⁴

The protection that has been applied to Iranian LGBT people since 1 January 2014, explicitly includes transgender asylum seekers.²²⁵

The Aliens Circular contains specific guidance with respect to homosexual asylum seekers from eight countries, but only for one country the guidance specifically also covers transsexuals (Iraq, in the same sense as the LGBs).²²⁶

While awaiting a final decision in their case, asylum seekers are excluded from medical treatments with the purpose of change of sex.²²⁷ In 1995 it was agreed with the Amsterdam VU

²²² International Commission on Civil Status (*Commission Internationale de l'Etat Civil*), *Convention No. 4 on the Changes of Surnames and Forenames*, Strasbourg, International Commission on Civil Status, available at: www.ciec1.org (13.02.2010).

²²³ The Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2010), opinion 2010-175, 30 November 2010.

²²⁴ The Netherlands, The Hague District Court (*Rechtbank Den Haag*) (2002), LJN AF4586, 14 October 2002.

²²⁵ The Netherlands, State Secretary for Security and Justice (*Staatssecretaris voor Veiligheid en Justitie*) (2014), Letter to the House of Representatives, 29 January 2014, ref.no. 470828.

²²⁶ For example, 's-Gravenhage Regional Court, location Amsterdam, 22.01.2004, LJN AO3931.

²²⁷ The Netherlands, Aliens Circular (*Vreemdelingencirculaire*), Article C24/12.3.11, 10 June 2009.

Hospital that if an asylum seeker requests change of sex treatment, no treatment will be started before it is certain that the treatment will be completed in the Netherlands.²²⁸

7.4 Transgender and freedom of assembly

The law on freedom of assembly as indicated in Chapter 5 Freedom of Assembly, applies in the transgender context.

The authors of this report are not familiar with demonstrations against tolerance of transgender persons in the period 2000-2014.

There are several interest groups for transgender people in the Netherlands. Since 2006 they work together in *Transgender Netwerk Nederland*²²⁹, which received a government subsidy of €200,000 over the period 2008-2010.²³⁰ It is not clear whether TNN still gets subsidies, as it has not responded to a request for information,²³¹ and government documents do not provide any details either. Manifestations in favour of tolerance of transgender include the *Transfusion Festival*, which took place on 11 November 2007 in Amsterdam, and will be repeated on 22 May 2010,²³² and the *Netherlands Transgender Film Festival*. The latter has been organised biannually since 2001 and shows film and video productions that contribute to understanding and generate discussions on transgender issues.²³³ Moreover, since a few years an event to mark the *International Transgender Day of Remembrance* to remember all those people who have been violently attacked or murdered because of their being transgender, is also being organised each year in November in one of the main Dutch cities.²³⁴ See also Chapter 5.2. Demonstrations in favour of tolerance of LGBT people.

7.5 Transgender and criminal law

Defamation on the grounds of sex is not penalised by the Penal Code. As discrimination on the grounds of transsexuality is regarded as discrimination on the grounds of sex, defamation against transgender people will not be prosecuted on the basis of Article 137c or 137e of the Penal Code, as illustrated by the case law discussed below. However, public incitement of hatred, discrimination or violence on the basis of sex (including transsexuality), however, is outlawed by Articles 137d and 137e of the Penal Code (see paras 111-112 above), and actual discrimination on grounds of sex (including transsexuality) is prohibited by Articles 137f and 429*quater* of the Penal Code (see para. 33 above).

In 1995 a report was made to the police of defamation and incitement of hatred against transsexuals by a Dutch singer who wrote the song '*Hij is een transseksueel*' ['He is a transsexual']. The public prosecutor dropped the case against him. An appeal against the non-prosecution before the Court of Appeal was dismissed. The Court ruled that, although the

²²⁸ The Netherlands, Aliens Circular (*Vreemdelingencirculaire*), Article C7/13.3.1, 10 June 2009.

²²⁹ The Netherlands, Health Insurance Regulation (*Besluit Zorgverzekering*), Article 3b.1, 21 November 2008.

²³⁰ The Netherlands, Immigration and Integration Service Information and Analysis Centre (*IND Informatie- en Analysecentrum*) (2008), Evaluation of the gender related aliens policy in the Netherlands (*Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland*), The Hague, Ministry of Justice, pp. 33 and 49, available at: www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp (01.02.2010).

²³¹ E-mail request sent on 23 January 2014.

²³² The Netherlands, Transgender Netwerk Nederland, 'Transgender Netwerk', available at: www.transgendernetwerk.nl (10.02.2014).

²³³ The Netherlands, Transfusion Festival, 'Transfusion Festival', available at: www.transfusionfestival.nl (22.01.2010).

²³⁴ The Netherlands, National Contact Group Transvestism and transsexuality (*Vereniging Landelijke Kontaktgroep Travestie en Transseksualiteit*), available at: www.lkgent.nl (13.02.2010) and www.transgenderdor.org (10.02.2014).

statements in the lyrics of the song were insulting for transsexuals as a group, Article 137c of the Penal Code (the defamation clause) does not include transsexuality as a discrimination ground. With regard to legislative history, the Court considered that the description of the offence was explicitly limited to the grounds mentioned. Furthermore, the Court was of the opinion that the lyrics of the song did not incite hatred (within the meaning of Article 137d) against transsexuals. The author of the song was not prosecuted.²³⁵

²³⁵ The Netherlands, Leeuwarden Court of Appeal (*Gerechtshof Leeuwarden*) (1995), 1995/243, 13 January 1995.

8 Miscellaneous

8.1 Violence against LGBT people

In the past years the Dutch media reported an increase in violence against LGBT people. There were some incidents that attracted great (international) media attention, including the assault on a gay American tourist attending the Dutch Queen's Day festivities in 2005 and the violent attacks on gay visitors to the 2007 We Are Amsterdam Gay Pride (see Chapter 5.5. Disturbances at demonstrations in the Netherlands). These news reports created the impression that physical homophobic violence has increased in the Netherlands in the past years. This led to several policy and research initiatives (see also Chapter I. Good Practices).

The police and the public prosecution service have improved the way crimes with a homophobic (or other discriminatory) background are being registered and reported (see Chapter 6.3. Homophobic motivation as aggravating factor in sentencing). The first reports based on these registrations, however, did not indicate any precise number of incidents of anti-LGBT discrimination that are violent in character. The reports suggested that a large part of all 380 reported anti-LGBT incidents in 2008 are incidents of physical violence or threatening behaviour.²³⁶ The LGBT network of the Amsterdam police force also made figures available about LGBT-related incidents.²³⁷ These figures (251 in 2007, 300 in 2008, 371 in 2009) are much higher (in proportion) than the national figures.²³⁸ The difference can be partly explained by different definitions, and partly by a greater experience of the Amsterdam network in recognising the anti-LGBT background of reported incidents. Researchers of the University of Amsterdam took a close look at the 251 incidents of 2007. They concluded that 201 of these can be classified as anti-homosexual violence, including 79 incidents of verbal violence, 38 of serious threatening behaviour, 17 of robbery, and 67 incidents of physical violence. They also observe that the latter number has been growing since 2006.²³⁹ Figures released by the LGBT network of the police indicated that in 2008 the Amsterdam police recorded 54 incidents of anti-homosexual physical violence, and in 2009 no less than 82 such incidents.²⁴⁰

In 2012 a (new) distinction was made between the various forms of discrimination on the ground of, among other things, sexual orientation. The incidents can be distinguished as follows: insult – 626, discrimination – 225, assault and battery – 178, destruction – 106, threatening behaviour – 124, theft – 20, robbery – 4 and other -76 (also see 6.3).²⁴¹

²³⁶ The Netherlands, Police Academy of the Netherlands (*Politieacademie*) (2008), *Rapportage homofoob geweld – Politiegegevens Periode 1 januari – 1 juli 2008*, Apeldoorn, Police Academy of the Netherlands, available at: www.politie.nl/LHP/publicaties.asp (13.02.2010); and Tas, F. and De Wit, W. (2009), *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague, Ministry of the Interior, pp. 18 and 25, available at: www.minbzk.nl/actueel?ActItemId=120677 (13.02.2010).

²³⁷ L. Buys, G. Hekma and J.W. Duyvendak (2009) *Als ze maar van me afblijven – Een onderzoek naar antihomoseksueel geweld in Amsterdam*, Amsterdam University Press, p. 40, available at: <http://amsterdam.nl/?ActItemId=156860> (13.02.2010); and a press release of 19.01.2010 issued by the LGBT organisation COC Amsterdam, available at: www.eenveiligamsterdam.nl/thema's/thema's/overlast/geweld_tegen_homo's (23.01.2010).

²³⁸ Tas, F. and De Wit, W. (2009), *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague, Ministry of the Interior, pp. 18 and 25, available at: www.minbzk.nl/actueel?ActItemId=120677 (13.02.2010).

²³⁹ L. Buys, G. Hekma and J.W. Duyvendak (2009) *Als ze maar van me afblijven – Een onderzoek naar antihomoseksueel geweld in Amsterdam*, Amsterdam University Press, p. 41, available at: <http://amsterdam.nl/?ActItemId=156860> (13.02.2010).

²⁴⁰ See the aforementioned press release issued by COC Amsterdam.

²⁴¹ The Netherlands, Tierolf, N. Hermens, L. Drost and L. van der Vos (2013), *POLDIS rapportage 2012, Met themarapportage antisemitisme*, Utrecht, Verwey-Jonker Instituut, p. 22.

Furthermore it may be noted that the number of incidents of homophobic discrimination reported to anti-discrimination bureaus rose from 127 in 2002 (3 per cent of the total number of complaints of discrimination), to 236 in 2008 (5 per cent of the total number of complaints of discrimination).²⁴² However, it seems difficult to draw firm conclusions from these statistics, since not all victims report their case. On the other hand, greater publicity of the anti-discrimination bureaus may have led to a higher number of reports.²⁴³

A further rise took place in 2009 (336) and 2010 (475, 7.8 per cent of the total number of the complaints). There was a slight decrease in 2011 (450, 7.0 per cent of the total number of complaints).²⁴⁴

Another report by Statistics Netherlands (*Centraal Bureau voor de Statistiek*) shows that there were 431 complaints of discrimination on the ground of sexual orientation in municipalities in 2011 (also 7 per cent of the total number of discrimination complaints). There is an overlap with the complaints filed above, but it is not clear whether all complaints filed with antidiscrimination bureaus have been taken into account.²⁴⁵

In general, there seems to be a trend here, i.e. in increase in complaints in the course of the years.

The scale of the problem of violence against LGBT people, cannot only be assessed on the basis of reported incidents, but also on the basis of research. One survey found that among 776 homosexual respondents 3.3 per cent indicated that they had been assaulted as a consequence of their homosexual orientation and 11.8 per cent that they had been threatened with physical violence as a consequence of their homosexual orientation.²⁴⁶ The Ministry of Justice commissioned a review of existing literature on the topic, which was presented to Parliament in December 2009. The review lists three common reasons of victims of anti-LGBT violence for not reporting it to the police: doubts regarding the expertise of the police, the tendency to play down what has happened, and the wish not to become known as LGBT. Another conclusion is that in particular knowledge about anti-lesbian and anti-transgender violence is limited.²⁴⁷

In 2013, the police carried out research into violence against LGBT people on the basis of police registrations from 1 January 2009 until 1 September 2013. 769 registrations of crimes involving violence or threatening behaviour were extracted from the files. This amounts to three incidents a week on average. 31.5 per cent of the incidents consisted of simple assault and 6.7 per cent of the incidents consisted of grievous bodily harm (GBH), manslaughter or murder.²⁴⁸ Simple assault and threatening behaviour decreased in 2011, but increased in 2012. GBH, manslaughter and murder

²⁴² Van San, M. and De Boom, J. (2006), *Geweld tegen homoseksuelen*, Rotterdam, RISBO, pp. 28-29, available at: www.politieenwetenschap.nl/pdf/geweld_tegen_homoseksuelen.pdf (13.02.2010).

²⁴³ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2007/8), Parliamentary Documents (*Kamerstukken*) (2007-2008), no. 130, pp. 279-280.

²⁴⁴ The Netherlands, Coenders, M., Kik, J., Schaap, E., Silversmith, J. and Schriemer, R. (2012), *Kerncijfers 2011, Overzicht van discriminatieklachten en -meldingen geregistreerd bij antidiscriminatievoorzieningen*, Leeuwarden/Nijmegen, National federation of anti discrimination bureaus and Cooperating Anti discrimination agencies (*Landelijk Brancheorganisatie van Antidiscriminatiebureaus (LBA) and Samenwerkende Antidiscriminatievoorzieningen (SAN)*), p. 7.

²⁴⁵ The Netherlands, Statistics Netherlands (*Centraal Bureau voor de Statistiek*) (2012), *Discrimination Complaints and Results (Discriminatieklachten en uitkomsten)*, The Hague/Heerlen, Centraal Bureau voor de Statistiek.

²⁴⁶ van San and J. de Boom (2006) *Geweld tegen homoseksuelen*, Rotterdam: RISBO, pp. 37-39, available at: www.politieenwetenschap.nl/pdf/geweld_tegen_homoseksuelen.pdf (13.02.2010).

²⁴⁷ J. Schuyf (2009) *Geweld tegen homoseksuele mannen en lesbische vrouwen – Een literatuurstudie naar praktijk en bestrijding*, Utrecht: Movisie, pp. 53 and 58; available at: www.wodc.nl/onderzoeksdatabase/aard-en-omvang-van-homofob-geweld.aspx?cp=44&cs=6796 (13.02.2010). See also Parliamentary Documents Lower House (2009-2010) 27017, nrno. 58.

²⁴⁸ The Netherlands, National Police Unit (*Landelijke Eenheid Politie*) (2013), *Anti-gay violence in the Netherlands (Anti-homogeweld in Nederland, Analyse van (dreiging van) fysiek anti-homogeweld)*, Driebergen, National Police Unit, p. 10.

increased in 2011, but decreased in 2012²⁴⁹. It is a trend that the majority of cases concern simple assault and threatening behaviour. It is a trend that considerably more incidents took place in summer than in winter and that most incidents took place during the weekend (40.8 per cent) and during the night, with a peak between 3 and 5 a.m. 59.8 per cent of the incidents took place in Amsterdam. This may be explained by the fact that the Amsterdam region has its own active gay police network, which also pro-actively registers and codes 'gay' incidents.

Moreover, the city is popular among gays, among whom gay tourists. It also has the largest number of gay bars in the country. Following Amsterdam, relatively many incidents take place in Utrecht, Nijmegen, Amstelveen and Haarlem.²⁵⁰

In the Dutch media, a lot of attention was paid in 2012 to gay couples bullied in or even out of their neighbourhoods (see Annex 1). The Ministers for Immigration, Integration and Asylum, and of Security and Justice discussed the issue with mayors and other representatives of the cities in which these situations occurred. They agreed to use all current opportunities to prevent and stop the bullying of LGBT persons and to explore current possibilities such as the tackling of group defamation, the use of anonymous witnesses and evictions. The government would report on developments in the annual discrimination letter (*voortgangsbrief discriminatie*) to the Lower House of Parliament in the autumn of 2012²⁵¹, and did so on 18 December 2012. The National Platform Harassment in the Neighbourhood (*Landelijk Platform Woonoverlast*) was instructed to take into account discriminatory issues when incidents occurred. It has become part of the Gay Straight Alliance (GSA) Safe Neighbourhoods (*Gay Straight Alliance Veilige Wijken*) to promote social acceptance and security in all areas. In the new GSA, RADAR and Art. 1 (an antidiscrimination bureau and the national expertise and knowledge centre on discrimination) co-operate with among others *COC Nederland*, the LGBT police network Pink in Blue (*Roze in Blauw*) and the National Co-operation between Focus Neighbourhoods (*Landelijk Samenwerkingsverband Aandachtswijken, LSA*). There is a focus on the prevention of discrimination in the neighbourhood and citizens' trust in the approach of this issue.²⁵² The government co-operates with 41 so-called frontrunner municipalities for the specific emancipation of LGBTs. This will continue in 2014 and will then be assessed. Depending on the results of the assessment new municipalities will be approached as well.²⁵³

In 2006 the Netherlands Institute for Social Research / SCP carried out research into social acceptance of homosexuality in the Netherlands. The researchers concluded that homosexuality is widely accepted, but still needs special attention and policy. Several groups (young people, religious people and immigrants) tend to adopt a negative attitude towards homosexuality. According to the SCP, homosexuality remains a private matter: people expect more 'reserved behaviour' from homosexuals than from heterosexuals in public places.²⁵⁴

In 2014, the SCP published another major report about, among others, LGBTs in the Netherlands (see Chapter I.6, Good Practices-Research).

²⁴⁹ The Netherlands, National Police Unit (*Landelijke Eenheid Politie*) (2013), Anti-gay violence in the Netherlands (*Anti-homogeweld in Nederland, Analyse van (dreiging van) fysiek anti-homogeweld*), Driebergen, National Police Unit, p. 11.

²⁵⁰ The Netherlands, National Police Unit (*Landelijke Eenheid Politie*) (2013), Anti-gay violence in the Netherlands (*Anti-homogeweld in Nederland, Analyse van (dreiging van) fysiek anti-homogeweld*), Driebergen, National Police Unit, p. 11.

²⁵¹ The Netherlands, Minister of Security and Justice and Minister for Immigration, Immigration and Asylum (*Minister van Veiligheid en Justitie en Minister for Integratie, Immigratie en Aziel*) (2012), Letter to the House of Representatives (*Tweede Kamer der Staten-Generaal*), Parliamentary Document (*Kamerstuk*) No.27017/92, 6 March 2012.

²⁵² The Netherlands, House of Representatives (Tweede Kamer der Staten-Generaal) (2013), Parliamentary Documents (*Kamerstukken*) (2012-2013), 30950, no. 47.

²⁵³ The Netherlands, House of Representatives (Tweede Kamer der Staten-Generaal) (2013), Parliamentary Documents (*Kamerstukken*), 30420, no. 180.

²⁵⁴ Keuzenkamp, S. and Bos, D. (2007), *Out in the Netherlands. Acceptance of homosexuality in the Netherlands*, The Hague, The Netherlands Institute for Social Research/SCP, available at: www.scp.nl/english/Publications (13.02.2010).

8.2 No ban on information about homosexuality

In Dutch law there has never been an explicit prohibition on information about (or ‘promotion’ of) homosexuality.

There is a provision which aims to protect children from seeing certain sexual and/or violent expressions. Article 240a of the Penal Code makes it a crime to offer or show to a child under 16 a picture, object or data carrier, if the picture can be considered harmful to children under 16. Texts are not covered by the prohibition. It seems very unlikely that this prohibition has been used to specifically punish the offering or showing of pictures of a homosexual nature. While there are examples of cases of men sending sexually explicit pictures of themselves to boys under the age of 16, the homosexuality of the offender is not considered relevant in these cases.

9 Good practices

9.1 Genderneutrality

One of the most important achievements in tackling discrimination on grounds of sexual orientation in Dutch law is the gender neutrality of marriage (since 2001), registered partnership (since 1998) and rules on *de facto* cohabitation (since the 1970s). This gender-neutrality indisputably advances the emancipation of LGBT people. Increasingly it also applies to parenting rights (joint parental authority since 1998, most forms of adoption since 2001, automatic joint parental authority since 2002, intercountry adoption since January 2009).²⁵⁵ In December 2009 the government presented a draft-bill to make it possible for lesbian partners to become joint parents without having to go to court for an adoption.²⁵⁶ That bill would reduce the last remaining difference between same-sex and different-sex couples in family law. On 19 November 2013, Parliament passed an Act stipulating that lesbian couples no longer need to go to court to establish the legal parenthood of two mothers.²⁵⁷ The Act will enter into force on 1 April 2014.

The opening up of marriage to same-sex couples in 2001 led to the simultaneous abolition of the rule that married people could not get their legal sex changed. And the incremental recognition of same-sex parenting has contributed to making it feasible, as promised by the government in 2009, to abolish the rule that a change of legal sex is only available to people who are permanently incapable of giving birth or begetting a child (see para. 123 above).

9.2 The Netherlands Institute for Human Rights

The Dutch NIHR as such, its existence and functioning, can be regarded as good practice. Its existence has helped to make legal protection against discrimination on grounds of sexual orientation adequate, extensive and easily accessible. Increasingly this is also true for discrimination on grounds of gender identity and expression. The NIHR has developed a highly sophisticated case law and it may be regarded as one of the leading bodies in this field in Europe. Its work is being complemented by the local and regional anti-discrimination bureaus (see paras 75-76 above), by the Inspectorate for Health and Safety at Work (see para. 35 above) and by the Education Inspectorate (see below).

9.3 Government policy on LGBT emancipation

Since more than 20 years the Dutch government has had an explicit *homo- emancipatiebeleid* [policy on homosexual emancipation]. In November 2007 the government issued its policy

²⁵⁵ Waaldijk, K. (2005), *More or less together: levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine EuroEuropean countries*, Paris, Institut National d'Études Démographiques, p. 147, available at: <http://hdl.handle.net/1887/12585> (12.02.2010).

²⁵⁶ See press release of Ministry of Justice of 14.12.2009, available at: <http://english.justitie.nl/currenttopics/pressreleases/> (13.02.2010). The text of the draft-bill is available at: www.internetconsultatie.nl/ouderschapsduomoeder (13.02.2010).

²⁵⁷ The Netherlands, Senate (*Eerste Kamer der Staten-Generaal*) (2013), Parliamentary Documents Upper House (*Kamerstukken*) (2013-2014), 33032, no. 6; The Netherlands, COC (2012), Law on lesbian parenthood closer (*Wet lesbisch ouderschap stap dichterbij*), Web page, 26 June 2012, available at: www.coc.nl/dopage.pl?thema=any&pagina=viewartikel&artikel_id=4756 (accessed 1 May 2014).

paper on this topic for the period 2008-2011.²⁵⁸ The main purpose of this policy is the advancement of social acceptance of LGBT people in the Netherlands. In the policy paper the government announced that it had five goals for the aforementioned period: (a) to ensure that homosexuality can be a topic of discussion in all population groups; (b) to tackle the problem of violence and harassment against LGBT people; (c) to stimulate the setting up of civil society organisations, at both local and national level; (d) to contribute to an LGBT-friendly environment in schools, in the workplace and in sport; and (e) to fulfil an active role in the international and European field. Combating discrimination on grounds of sexual orientation is one of the official priorities of the human rights policy of the Minister of Foreign Affairs. This led to several initiatives at the United Nations, at the Council of Europe, and bilaterally.²⁵⁹

On 1 October 2009 the Minister of Education, Culture and Research, who is responsible for the government's LGBT emancipation policy, sent a letter to Parliament describing the main aspects of current and new policy with regard to transgender issues.²⁶⁰

In an answer to a question from a Member of Parliament, the Minister of Security and Justice stated that the Minister was planning a national campaign to improve reporting among LGBT victims of discrimination and hate crimes. The Minister would report on new developments here, and within the LGBT police network Pink in Blue (*Roze in Blauw*), in the autumn of 2013.²⁶¹ A campaign was started in the end of 2013 by the police. It will take place during six months and consists of, among other things, a banner on the homepage of gay.nl and advertisements in for example the LGBT magazines *Gaykrant*, *Gay&Night* and *Zij aan Zij*. In addition, the Ministers of the Interior and the Commonwealth, Security and Justice and Social Affairs and Employment want to start a campaign with an even wider scope in order to stimulate the reporting of discrimination in 2014. So far, the website hatecrimes.nl was integrated into the website politie.nl and linked to the website discriminatie.nl. Anyone who reports an incident is phoned by the police unit in question for a good follow-up and a good way to process the report.²⁶²

Finally, the Minister of Education, Culture and Science published her plans with regard to LGBT emancipation in a new strategy document on 13 May 2013. In the document, she announced among other things that the cabinet would prevent municipalities from employing new marriage registrars who refuse to marry same-sex couples (a bill which is now being discussed in the Upper House of Parliament, see Chapter 4); that the cabinet will remove a phrase in the General Equal Treatment Act (GETA) which allows religious schools to reject teachers or students because of specific homosexual behaviour (though not because of sexual orientation in itself, the so-called 'sole fact construction'); that the cabinet will examine whether the ban on discrimination on the grounds of gender identity and expression can be integrated in the GETA; that the Minister will ask the blood bank Sanquin to examine whether men who have sex with men should be able to donate blood; that the Minister will decide in 2014 whether municipalities should be added to the group of 41 frontrunner municipalities with which she co-operates in order to promote the emancipation of LGBTs in particular; that the Minister will lobby at European and at international level for a more common and proactive approach

²⁵⁸ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2007/8), Parliamentary Documents (*Kamerstukken*) (2007-2008) 27017, no. 3.

²⁵⁹ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2008/9), Parliamentary documents (*Kamerstukken*) (2008-2009) 31263, no. 27.

²⁶⁰ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2009/10), Parliamentary Documents (*Kamerstukken*) (2009-2010) 27017, no. 56.

²⁶¹ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Report of the 99th meeting (*Verslag van de 99e vergadering, 25 juni 2013*), available at <http://www.tweedekamer.nl/kamerstukken/verslagen/verslag.jsp?vj=2012-2013&no=99&version=2>

²⁶² The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents (*Kamerstukken*) (2013-2014) 30950, no. 30950, p. 2, p. 5 and p. 7.

towards LGBT rights.²⁶³ The LGBT interest organisation COC Nederland has criticised the plans and suggested additions, such as more emphasis on the creation of Gay Straight Alliances in schools, the creation of a master plan on transgender emancipation and additional measures to improve LGBT safety.²⁶⁴

All government policies involve beneficiaries or other stakeholders, such as COC Nederland, and the results are assessed on a regular basis in Parliament. These policies may be transferred to other EU Member States.

9.4 Police

In response to the lack of willingness among homosexuals to report homophobic offences, the police force of Amsterdam established the *Roze in blauw* [Pink in Blue] network, consisting of LGBT police officers. The network represents the interests of LGBT people within and outside the police. Victims of homophobic offences can call a specific telephone number to report crimes against LGBT people.²⁶⁵

In August 2008 the *Landelijk Homonetwerk Politie* [National LGBT Network Police] was founded, which, among other things, aims to contribute expertise and information to others in the police force (including the Police Academy), to stimulate all police regions start a regional Pink in Blue network, and to support the European Gaypolice Association (EGPA). Regional networks now exist in 11 of the 25 police regions of the Netherlands.²⁶⁶

In March 2008 two police forces started to make it easier to report homophobic and transphobic incidents. This can now also be done online. The project also covers incidents resulting from discrimination on grounds of race, religion or belief. The pilot of this *Hate Crimes* project ran until the end of 2011.²⁶⁷

In order to get a better overview of the level of homophobic aggression in the Netherlands, the police and the National Expertise Centre for Diversity (LECD) of the Public Prosecution Service developed a system to improve the registration of offences and crimes with a discriminatory aspect. Moreover, the Public Prosecution Service introduced a new information management system that provides for the option to specify the grounds of discrimination involved in an offence or crime.²⁶⁸

An important phenomenon is the *Regionaal Discriminatieoverleg* [Regional Discrimination Meeting]. Since 2008 this meeting of the public prosecutor who is specifically responsible for discrimination cases, the police, and the anti-discrimination bureau of the region, must take place at least twice a year in each region. It is its task to discuss all discrimination incidents

²⁶³ The Netherlands, Minister of Education, Culture and Science (*Minister van Onderwijs, Cultuur en Wetenschap*) (2013), Letter to the House of Representatives, Head line letter Emancipation Policy 2013-2016 (*Hoofdlijnenbrief Emancipatiebeleid 2013-2016*), ref.no. 477641, 13 May 2013,

²⁶⁴ The Netherlands, COC (2013), COC wants more ambitious LGBT emancipation policy from Bussemaker (*COC wil van Bussemaker ambitieuzer LHBT-emancipatiebeleid*), news release, 13 May 2013, available at: www.coc.nl/politiek-2/coc-wil-van-bussemaker-ambitieuzer-lhbt-emancipatiebeleid.

²⁶⁵ Van San, M. and De Boom, J. (2006), *Geweld tegen homoseksuelen*, Rotterdam: RISBO, p. 24, available at: www.politiewetenschap.nl/pdf/geweld_tegen_homoseksuelen.pdf (13.02.2010).

²⁶⁶ See www.politie.nl/lhp/ (13.02.2010).

²⁶⁷ The Netherlands, Police (*Politie*) (2010), 'Hatecrimes.nl', available at: www.hatecrimes.nl (07.02.2010).

²⁶⁸ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2007/8), Parliamentary Documents (*Kamerstukken*) Appendix (2007-2008). no. 130, pp. 279-280.

reported to one of the three parties, to agree on steps to be taken to deal with these incidents, to signal trends, to make suggestions for policy changes, and to facilitate reporting.²⁶⁹

9.5 Education

One of the goals of the policy paper on ‘homosexual emancipation policy’ was to contribute to an LGBT-friendly environment in schools. Although it is part of the mandate of the Education Inspectorate to ask for a school policy for LGBT students and staff, schools were not legally obliged to pursue a security policy (‘veiligheidsbeleid’) specifically focused on LGBT people.²⁷⁰ However, the General Teachers’ Union *AOB*, called for specific policy on homosexuality in secondary schools.²⁷¹

In addition, the organisations, *COC Nederland* and *Art.1*, developed teaching materials aimed at making homosexuality a subject for discussion in secondary education. These teaching packs were warmly welcomed by local government. For instance, on 20 November 2007 (the International Day of the Rights of the Child) *Art.1* launched its schools project [*ÉÉN*]. In January 2008 a pilot with the teaching pack ‘*Spreek je uit!*’ [‘Speak out!’] started in The Hague and, in the province of Limburg, the campaign ‘*Vrolijke Scholen*’ was launched, which aims to inform schools about how to be more gay-friendly.²⁷²

In December 2009 the Lower House of Parliament adopted a resolution noting that many schools do not pay sufficient attention in their teaching to sexuality and sexual diversity, and considering that teaching on those topics is of great importance for safety at school and for tolerance and acceptance of homosexuality. The resolution asked for the inclusion of teaching on sexuality and sexual diversity in the official *Kerndoelen* [Primary Objectives] of primary and secondary education. In response the Minister for Education promised in February 2010 that he would make the Primary Objectives more explicit in this respect.²⁷³

Since 1 December 2012, a change in Core Goals (*Kerndoelen*) – used by the government to enforce mandatory educational objectives in schools – has obliged primary and secondary schools to educate pupils on sexual diversity issues.²⁷⁴ On 25 June 2013 the House of Representatives adopted a motion to monitor implementation for the next five years.²⁷⁵ The Minister of Education, Culture and Science stated in a letter to the Lower House of Parliament that teachers may require professional

²⁶⁹ The Netherlands, Public Prosecution Service (*Openbaar Ministerie*) (2007), Discriminatio Instruction (*Aanwijzing Discriminatie*), 29.10.2007, available at: www.om.nl/organisatie/beleidsregels/overzicht/discriminatie (13.02.2010).

²⁷⁰ The Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2006), opinion 20006-13, 27 January 2006.

²⁷¹ The Netherlands, General Education Federation (*Algemene Onderwijsbond*) (2010), ‘De Algemene Onderwijsbond’, available at: www.aob.nl (05.02.2010).

²⁷² The Netherlands, Gay and School (2010), ‘Gay and School’, available at: www.gayandschool.nl (05.02.2010).

²⁷³ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2009/10), Parliamentary Documents (*Kamerstukken*) (2009-2010) 27017, nos. 59 and 66.

²⁷⁴ The Netherlands, Law Gazette (*Staatsblad*) (2012), Decision of 21 November 2012 fixing the date of entry into force of the Decision of 21 September 2012 amending the Decision on a renewed key objectives for primary education, the Decision on key objectives for lower secondary education, the key objectives expertise centers, the Decision on key objectives of primary education in BES islands and the Decision on the lower secondary education in BES islands associated with adjustment of the key objectives in the area of sexuality and sexual diversity (*Besluit van 21 november 2012, houdende vaststelling van het tijdstip van inwerkingtreding van het Besluit van 21 september 2012 tot wijziging van het Besluit vernieuwde kerndoelen WPO, het Besluit kerndoelen onderbouw VO, het Besluit kerndoelen WEC, het Besluit kerndoelen WPO BES en het Besluit kerndoelen onderbouw VO BES in verband met aanpassing van de kerndoelen op het gebied van seksualiteit en seksuele diversiteit*).

²⁷⁵ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013) Parliamentary Documents (*Kamerstukken*) (2012-2013) 30420, no.185; The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013) Parliamentary Documents (*Kamerstukken*) (2012-2013) *Stemmingsuitslagen*, 25 June 2013

development. The Minister will explore possibilities for encouraging in-service teacher training and attention to LGBT issues in initial teacher training programmes.²⁷⁶

As from 1 August 2013 this has also been applied to secondary special education. In a letter dated on 17 December 2013 the Minister of Education, Culture and Science recognized that there was low tolerance of LGBT pupils in primary and intermediary vocational education (vmbo and mbo). Two-thirds of the pupils in primary vocational schools is confronted with negative responses, one-fourth of the LGBT students in intermediary vocational schools do not want to express their sexual orientation due to negative reactions. The Minister monitors the effects of, for example, theatre shows by COC Nederland and discussions afterwards, but she feels it is not necessary to take further steps at this stage.²⁷⁷

In addition, schools' obligations with regard to the prevention and tackling of bullying in general (not only LGBT-related) will be intensified. Schools will be obliged to have an integrated anti-bullying policy which has been proven to be effective. The education inspectorate will actively monitor the compliance of schools. The Ministry of Education is currently working on a legislative proposal regarding these changes.²⁷⁸

Just like other government initiatives, beneficiaries and stakeholders, in this case particularly schools, are involved in this project. It seems that the government is a frontrunner in this field. Government projects are assessed regularly in Parliament. Other governments within the EU could follow this example.

9.6 Research

At the request of the government, the Netherlands Institute for Social Research (*Sociaal en Cultureel Planbureau*, SCP) published the report 'Acceptance of Homosexuality in the Netherlands 2011' (*Acceptatie van homoseksualiteit in Nederland 2011*) as well as a separate study on social safety for homosexuals in the workplace. The indicator developed by SCP shows that the percentage of the Dutch population with negative attitudes towards homosexuality declined from 15 per cent in 2006 to 10 per cent in 2010. Among orthodox religious groups, percentages were higher than average. Data from surveys of school-age children suggest that their attitudes are more negative than among older birth cohorts.²⁷⁹ The report 'Just Getting On with the Job?' (*Gewoon aan de slag?*) is based on 'convenience samples' of gays and lesbians. The report draws a summary of what is known about the lack of safety and negative reactions as experienced by sexual minorities, especially at work. It also focuses on the effects for their functioning and well-being.²⁸⁰

In 2013 the SCP published a report on discrimination against LGB people in the workplace. According to the authors, it was the first quantitative, large-scale, nationally representative survey carried out in the Netherlands among LGB employees. Over 9,000 employees completed the (online or written) survey, in which 3 per cent of male employees and 2.1 per cent of female employees reported being exclusively attracted to members of their own sex (the LG employees), and 2.3 per

²⁷⁶ The Netherlands, Minister of Education, Culture and Science (*Minister van Onderwijs, Cultuur en Wetenschap*) (2013), Letter to the House of Representatives, Head line letter Emancipation Policy 2013-2016 (*Hoofddlijnenbrief Emancipatiebeleid 2013-2016*), ref.no. 477641, 13 May 2013,

²⁷⁷ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013) Parliamentary Documents (*Kamerstukken*) (2013-2014) 30420, no. 205.

²⁷⁸ The Netherlands, Minister of Education, Culture and Science (*Minister van Onderwijs, Cultuur en Wetenschap*) (2013), Letter to the House of Representatives (*Tweede Kamer der Staten-Generaal*), ref.no. 491567, 25 March 2013,

²⁷⁹ Keuzenkamp, S. (2011), *Acceptatie van homoseksualiteit in Nederland 2011*, The Hague, Sociaal en Cultureel Planbureau.

²⁸⁰ Keuzenkamp, S. and Oudejans, A. (2011), *Gewoon aan de slag?*, The Hague, Sociaal en Cultureel Planbureau.

cent of male and 4 per cent of female employees attracted to both sexes. The report concludes that there are more similarities than differences between lesbian, gay and heterosexual employees in job perception, social treatment and well-being. In contrast, bisexual employees reported more problems. The report recommends devoting more attention to this group, though this may be complicated by limited available information. A good diversity policy and climate is important for all employees. Although the climate seems to be quite tolerant towards LGB employees at work, roughly half of the respondents reported that jokes are sometimes made about LGB people.²⁸¹

In 2014 the SCP published a report on the experiences of discrimination in the Netherlands at the request of the Minister of Social Affairs and Employment. In 2013 12,000 people completed a questionnaire on this subject. Questions were asked about discriminatory experiences in public spaces, while going out, on the labour market, in contacts with institutions such as the police, the municipality and health care centres and in education. Discrimination experienced on the ground of sexual orientation was reported relatively rarely, due to the small share of LGBs in the population (3 per cent consisted of homosexual men, 1 per cent of lesbian women, 6 per cent of bisexual men and 15 per cent of bisexual women). In the Netherlands homosexuality is accepted to a high degree, certainly in comparison with other countries. 29 per cent of the homosexual men and 14 per cent of the homosexual women were confronted with problems at work in particular in 2013. However, homosexual employees are not bullied at work to a greater extent than heterosexual employees. One-fourth of the homosexual men and women are treated badly in public. 14 per cent of the bisexual men and women are treated badly in public.²⁸²

It is a good practice that may be transferred to other EU Member States for governments to commission bodies such as the SCP do do regular research, directly involving LGBT persons and giving it a follow-up every few years. This research is assessed by Parliament every time it is carried out.

9.7 Civil Society

A monitoring study, called the Monitor LGBT-emancipation local policy measures & Lantern award (*Monitor lokaal LHBT-emancipatiebleid & Lantaarnprijs*), was developed by Movisie, the Netherlands centre for social development, in order to assess the local implementation of LGBT policies. The biannual monitor has been published since 2003. Municipalities are requested to fill in a questionnaire on their intentions, plans and the implementation of policies concerning the emancipation of LGBT people. Each municipality receives a score on each question in the questionnaire. The municipality that has the best overall score receives the Lantern Award (*Lantaarnprijs*). In 2011, this was Amsterdam. A promising smaller municipality receives the Golden Flashlight Award (*Gouden Zaklantaarn*).

The questionnaire and the results of the 2011 Monitor are published in a hand-out called the Pink Guide for Municipalities (*Roze gemeentegids*), that also includes advice, practical examples and background information for municipalities and local interest groups on the LGBT emancipation policies, in areas such as the elderly, youth, migrants, social security, education and sport.

Movisie, together with *COC Nederland*, has also recently developed a project to strengthen young LGBT persons. A site was developed with among other things a test, stories by experienced LGBT persons and references to professional help. Moreover, a digital leaflet was made (I wish I were dead

²⁸¹ Kuyper, L. (2013), *Seksuele oriëntatie en werk. Ervaringen van lesbische, homoseksuele, biseksuele en heteroseksuele werknemers*, The Hague, Sociaal Cultureel Planbureau.

²⁸² Andriessen, I., Fernee, H and Wittebrood, K. (2014), *Ervaren discriminatie in Nederland*, The Hague, Sociaal Cultureel Planbureau), pp. 60 and 61.

(*Ik wou dat ik dood was*)). It was distributed among professionals who work with youngsters. The attempt to prevent suicide complements the attempts to combat bullying at schools.²⁸³

These initiatives directly involve the beneficiaries and stakeholders. As they focus on the grassroots of society (local initiatives in the field of the protection of LGBT people and youngsters) they are innovative and may be transferred to other EU Member States. They are assessed by those taking these initiatives on a regular basis.

²⁸³The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents (*Kamerstukken*) (2012-2013) 30420, no. 180, p. 24.

10 Intersex

10.1 Are intersex people specified (or is the ground of ‘intersex’ included) under national non-discrimination legislation and/or in legal cases/jurisprudence and/ or in non-discrimination policies?

10.1.1 Is discrimination on ground of ‘intersex’ covered by the law?

Intersex is covered by law implicitly. On the one hand, intersex persons sometimes rely on Article 1:28 of the Civil Code, which makes it possible to change sex. However, this Article deals with persons who belonged to one gender in the first place, and want to belong to another gender in the second place (transsexuals). At present, they have to have surgery, among other things, to change sex. This is not, usually, what intersex persons want or need. They already have the characteristics of both genders, although sometimes hidden. Article 1:24 of the Civil Code is therefore more appropriate to rely on for intersex persons. Article 1:24 of the Civil Code lays down that the birth certificate of a person may be changed if it is clear that there has been an evident mistake, originally. The person in question needs a medical statement, but no more than that. This situation applies to intersex persons in particular, although they are not mentioned in so many words.

The first case on intersex is pending at the Netherlands Institute for Human Rights. An intersex person filed a complaint about depilation being compensated by the insurance industry in the case of transsexuals, whereas it is denied to her (although she also has male characteristics, she presents herself as a female). It is expected that the case is covered by the articles on sex discrimination and the prohibition to discriminate on this ground when entering into an agreement in the General Equal Treatment Act (articles 1 and 7, subsection 1, of the General Equal Treatment Act – *Algemene wet gelijke behandeling*).

Moreover, there have been two cases in which intersex played a part before the regular courts. In the first case, a person claimed to be neither a man nor a woman. In the birth certificate he was registered as being male. Later on, he was operated upon to become a woman, but this operation was reversed. The person in question has the conviction to be neither male nor female. He applied to the Almelo District Court with the question to erase his gender in his birth certificate and leave it blank. This request was denied on 21 March 2001 and on 19 November 2004. The applicant alleges that the deletion of the gender specification is possible on the basis of Article 1:24 of the Civil Code, which makes it possible to improve registration on the basis of an evident mistake. He also relies on the stipulations in the European Convention on Human Rights, in which the right to a private life is acknowledged. According to the applicant, there is a positive duty to acknowledge the identity of a person who is neither male nor female. The applicant appeals against the denial of his request at the Arnhem Court of Appeal. This Court states that Article 1:24 of the Civil Code makes it possible to improve registration at the Register Office in the case of an evident mistake. The fact that the applicant has found out that he is neither a man nor a woman after years of experience and awareness is not a reason to regard the original registration as an evident mistake. On the basis of Article 1:28-28c of the Civil Code it is possible to adapt the registration in the birth certificate on other conditions, such as a change of gender (transsexuals), but this is not the case here. It is possible on the ground of Article 1:19d of the Civil Code to lay down that the gender of the child cannot be determined, but it is not possible to leave it out altogether. Moreover, there is no international tendency to recognize intersex in the way that the applicant interprets it.²⁸⁴ On 30 March 2007 the Supreme Court

²⁸⁴ The Netherlands, Arnhem Court of Appeal (*Gerechtshof Arnhem*) (2005), Case no. ECLI:NL:GHARN:2005:AU7290, 15 November 2005, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARN:2005:AU7290>.

pronounced judgment in this case. It stated that Article 1:28 of the Civil Code is meant for transsexuals. Article 1:24 of the Civil Code, which is about the evident mistake, is meant for persons who have come to the conclusion, in the course of time, that they do not belong to the gender registered, but to the opposite gender. Article 1:19d, which makes it possible to state that the gender of a child is not clear, offers the opportunity to erase this on the ground of Article 1:24 of the Civil Code when the gender becomes clear. All this does not apply to the appellant. There is no room in his request within the scope of the law to leave out the appellant's gender. Moreover, there is no general international tendency to protect persons who are intersexual in this respect either. The general interest prevails over the appellant's private interest.²⁸⁵

In the second case, the applicant applies to the Alkmaar District Court. The applicant was registered as being male at the time of birth, but has found out that her female characteristics are dominant. She wants a change of the birth certificate, relying on Article 1:28 of the Civil Code. The Court considers that this article is meant for transsexuals and requires for example an operation. The applicant does not want to follow this procedure. However, it is also possible to rely on an evident mistake in her birth certificate (Article 1:24 of the Civil Code). This is the case when at the time of birth both male and female characteristics were present, and it was very difficult to determine the gender of the child. An operation is not necessary, according to the Minister of Education, Culture and Science (*Minister van Onderwijs, Cultuur en Wetenschap*). Although in this case the female characteristics were hidden at the time of birth, subsequent opinions by the medical profession have made clear that they do exist. The gender of the applicant may therefore be changed into female.²⁸⁶

10.1.2 Is intersex discrimination covered under national non-discrimination policies? If so, how?

In November 2006 the Yogyakarta principles were drawn up. They confirmed the application of international human rights law on sexual orientation and gender identity. In March 2008 the then Minister of Foreign Affairs, Maxime Verhagen, said the government subscribed to this.²⁸⁷ This makes it possible to draw up legislation in this field, at a certain stage, protecting intersex persons.²⁸⁸ On the basis of questions by two Members of Parliament in 2011, the Minister of Education, Culture and Science, also on behalf of the State Secretary of Security and Justice and the Minister of Internal Affairs and the Commonwealth, stated her views on intersex issues. According to the Minister, the birth certificate may be changed on the basis of Article 1:24 of the Civil Code if it turns out that an intersexual person is male rather than female or female rather than male due to an evident mistake. Surgery is not necessary. The Minister points out that medical specialists should prevent operations which are carried out too soon and which are not necessary. The Minister is a firm proponent of the physical integrity and the autonomy of the individual. Once the birth certificate is changed, the passport of the person in question will be changed as well (Article 47, subsection 1, under e, of the Act on Passports).²⁸⁹ The Minister of Education, Culture and Science stated in a letter on

²⁸⁵ The Netherlands, Supreme Court (*Hoge Raad*) (2007), case no. ECLI:NL:HR:2007:AZ5686, 30 March 2007, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2007:AZ5686>.

²⁸⁶ The Netherlands, Alkmaar District Court (*Rechtbank Alkmaar*) (2012), case no. ECLI:NL:RBALK:2012:BW5452, 28 March 2012, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBALK:2012:BW5452>.

²⁸⁷ The Netherlands, Minister of Foreign Affairs (*Minister van Buitenlandse Zaken*) (2008), Statement by Maxime Verhagen at the 7th session of the Human Rights Council, Geneva, 3 March 2008, available at: www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2010/02/10/statement-by-maxime-verhagen-at-the-7th-session-of-the-human-rights-council-geneva-3-march-2008.html.

²⁸⁸ E-mail correspondence of 12 January 2014 with the Netherlands Network Intersex/DSD (*NNID, Nederlands Netwerk Intersekse/DSD*)

²⁸⁹ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2011), Parliamentary Documents (*Kamerstukken*) (2010-2011), Annex to the Discussions, no. 2266, <https://zoek.officielebekendmakingen.nl/zoeken/resultaat/?zkt=Uitgebreid&pst=ParlementaireDocumenten&vrt=paspoort+geslacht&zkd=InDeGeheleText&dpr=Alle&spd=20140224&epd=20140224&aannr=2266&kmr=EersteKamerderStatenGeneraal|TweedeKamerderStatenGeneraal|VerenigdeVergaderingderStatenGeneraal&sdt=KenmerkendeDatum&par=Ag>

emancipation to the Lower House of Parliament on 10 May 2013 that there has been a recent focus on the position of intersex persons. The combat against discrimination, the protection of physical integrity and the persons' autonomy are important issues. There should not be unnecessary medical interventions. The Minister will check whether these issues should be considered in the context of emancipation policies.²⁹⁰

10.1.3 Is it allowed in the respective EUMS that children remain without a gender marker/identification on their birth certificates, and if so, until which age and under which conditions?

It is allowed that children remain without a gender marker/identification on their birth certificates, i.e. it may be registered that their gender cannot be determined (Article 1:19d of the Civil Code). If the gender of the child is unclear, the birth certificate of the child states that its gender could not be determined. Within three months of the date of birth a new birth certificate should be drawn up, the first one being destroyed, in which the gender of the child should be mentioned on the ground of a medical statement. If no medical statement is submitted or if the gender cannot be determined yet, the new birth certificate mentions that it has not been possible to determine the gender of the child.

There is no time limit to change this, but the idea is that, once the person in question knows what his or her true gender identity is, he or she can change the registration on the basis of Article 1:24 of the Civil Code.²⁹¹

10.2 Are surgical and medical interventions performed on intersex people in your country?

Surgical and medical interventions are performed on intersex people in the Netherlands.

10.2.1 Legal base and medical protocols

The integrity of the human body is recognised in the Constitution (Article 11 of the Constitution). It is therefore only possible to operate on persons after treatment has been proposed and they (or their parents) have consented to it (Article 7:450, subsection 1 of the Civil Code). These Articles incorporate the Act on the Agreement on Medical Treatment (*Wet op de Geneeskundige Behandelovereenkomst*).

It is recognised by physicians that early operations took place for a long time (until the 1990s). Children were operated upon as quickly as possible in order to stimulate the attachment between parents and child and because it was felt that the child would benefit from a clear gender, usually female. However, in the past fifteen or twenty years much more has become known about intersex (the term Differences of Sex Development, DSD has been used since 2005) and it is now attempted to delay far-reaching operations as much as possible, until the child may ask for it himself or herself.

enda|Handeling|Kamerstuk|Aanhangsel+van+de+Handelingen|Kamervragen+zonder+antwoord|Niet-dossierstuk|Bijlage&dst=Onopgemaakt|Opgemaakt|Opgemaakt+na+onopgemaakt&isp=true&pnr=1&rpp=10.

²⁹⁰ The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Parliamentary Documents (*Kamerstukken*), (2012-2013) 30420, no. 180, p. 10.

²⁹¹ The Netherlands, District Court Alkmaar (*Rechtbank Alkmaar*) (2012), case no. ECLI:NL:RBALK:2012:BW5452, 28 March 2012, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBALK:2012:BW5452>.

It is felt that it is also important to inform the child step by step from the age of about ten. Five academic clinics are doing research in the field of DSD to improve treatment.²⁹²

Physicians and surgeons base their actions on general guidelines, defined in 2005 by a Chicago Consensus Meeting of experts in the field, although they are not generally prescribed. According to a urologist and paediatrician at the Erasmus Medical Centre (*Erasmus Medisch Centrum*) in Rotterdam these general guidelines are adhered to.²⁹³ DSD Netherlands, the Association for persons with an XY-DSD (XY-Differences of Sex Development) and their parents (*DSD Nederland, Vereniging voor mensen met een XY-DSD – XY-Differences of Sex Development – en hun ouders*) confirms that multidisciplinary teams assess the situation of intersex persons, that this happens on an individual basis with differing outcomes due to the great varieties within DSD and that guidelines differ in the different (thirty or so) hospitals that do so. Surgery is only performed on medical grounds.²⁹⁴

The guidelines say that gender assignment must be avoided prior to expert evaluation in newborns. Evaluation and long-term management must be performed at a centre with an experienced multidisciplinary team. All individuals should receive gender assignment. No single evaluation protocol can be recommended in all circumstances, as there are many forms of intersex. When there is surgery, the emphasis should be on functional outcome, rather than a strictly cosmetic appearance. Although it is generally felt that surgery that is performed for cosmetic reasons in the first year of life relieves parental distress and improves attachment between the child and the parents, the systematic evidence for this belief is lacking. No cosmetic operations should take place. Some operations should take place in early life, such as the separation of ovarian and testicular tissue, as they are technically difficult. There should be psychosocial management. The generalization that the age of 18 months is the upper limit of imposed gender reassignment should be treated with caution and viewed conservatively.²⁹⁵

10.2.2 Is the fully informed consent of the parties concerned required by law or by protocol – and who are those interested parties considered to be (parents/guardians etcetera)?

The fully informed consent of the parties concerned is required. Partly by the guidelines laid down by the Chicago Consensus Meeting in 2005, relying on US courts which assume that parents know what is best for their child when parental authority applies to consent for the child (substituted judgment), so that parental decisions are relied on. The guidelines also rely on the situation in the UK: courts can intervene with orders made requiring or preventing a specific action related to the child. Age is not a barrier to informed consent, providing that a minor demonstrates an understanding of the issues sufficient to have the capacity to consent. Colombian law is relied on as well. Parents cannot consent for children over five years of age, as by then, children are deemed to have identified with a gender and so are considered to be autonomous.²⁹⁶

Although physicians/surgeons are affected by these guidelines, there are stipulations in Dutch law that are more specific, although they are of a general nature and do not specifically refer to intersex persons. Article 7:447, subsection 1 of the Civil Code says that a minor who is sixteen years old is competent to enter into an agreement about treatment of his own person. Article 7:448, subsections

²⁹² Volkskrant (2010), 'Kiezen om te leven als man, als vrouw of allebei tegelijk', 22 May 2010, available at: www.volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/982973/2010/05/22/Kiezen-om-te-leven-als-man-als-vrouw-of-allebei-tegelijk.dhtml.

²⁹³ E-mail correspondence of 10 January 2014, with K.P. Wolffenbuttel, urologist specialized as a paediatrician.

²⁹⁴ Telephone interview of 14 January 2014 with DSD Netherlands.

²⁹⁵ Hughes, I.A., Houk, C., Ahmed S.F. and Lee, P.A. (2006), 'Consensus statement on management of intersex disorders', *Journal of Pediatric Urology*, Vol. 118, No. 2, pp. 148-162.

²⁹⁶ Hughes, I.A., Houk, C., Ahmed S.F. and Lee, P.A. (2006), 'Consensus statement on management of intersex disorders', *Journal of Pediatric Urology*, Vol. 118, No. 2, pp. 148-162

1 and 2, of the Civil Code says that the physician should clearly inform the patient about the situation and the treatment. If the patient has not reached the age of twelve years, the physician does so in such a way that the patient can understand what is happening. Article 7:450 of the Civil Code says that consent is required for treatment. If a minor is twelve years old, but not sixteen yet, the consent of the parents or guardians is also required. However, treatment may still take place if it is apparently necessary to prevent serious harm to the patient and if he maintains his decision in spite of that fact that his parents or guardians do not consent. Article 465, subsection 1 of the Civil Code says: If the patient is not twelve years old yet, the physician owes his duties to the parents or guardian. In brief, the patient should give informed consent as from the age of twelve.

There are several Articles in the Civil Code of a general nature which also apply to the situation in which intersex persons find themselves. Article 7:450 of the Civil Code says that consent is required for treatment. If a minor is twelve years old, but not sixteen yet, the consent of the parents or guardians is also required. However, treatment may still take place if it is apparently necessary to prevent serious harm to the patient and if he maintains his decision in spite of that fact that his parents or guardians do not consent. Article 465, subsection 1 of the Civil Code says: If the patient is not twelve years old yet, the physician owes his duties to the parents or guardian.

Article 7:450, subsection 3 of the Civil Code: "If a patient who is sixteen years of age or older cannot be deemed to reasonably assess his interest, the physician and a person as referred to in subsection 2 or 3 of article 465 follow up the apparent views of the patient, done in writing when he was still able to reasonably assess his interests, implying a refusal to be treated. The physician may deviate from this if he has substantive reasons." Article 7:465, subsection 3 of the Civil Code says: "If a patient who is of age cannot be deemed to reasonably assess his interests, and when he is not a ward of the court or has no mentor, the physician owes his duties to the person who has been put into charge in writing by the patient. If there is no such person, or if he does not act: the spouse is addressed, unless the person does not wish so, or, if there is no such person, the parent, brother or sister of the patient, unless this person does not wish so." In brief, the consent of parents or guardians is required until the patient is twelve years old; it is also required after that until he is sixteen years old and when a patient cannot be deemed to assess his own interests, others are granted the right to consent.

Annex 1 – Case law

Case law Chapter 1. Implementation of Directive 2000/78/EC

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 1

Case title	Dismissal of a homosexual employee.
Decision date	12.08.2003
Reference details	<i>NIHR, Oordeel</i> [opinion] 2003-113.
Key facts of the case (max. 500 chars..)	The applicant was appointed by the respondent as an assistant in an accommodation project for people with a serious disability. On the applicant's first working day the project manager received complaints against him from three residents. One of the residents referred to the homosexual orientation of the applicant. On the same day the respondent dismissed the applicant. Subsequently the respondent examined the complaints, which did not result in the finding of concrete objections.
Main reasoning/argumentation	The NIHR considers there to be a strong suspicion that the homosexual orientation of the applicant was a contributory factor in his dismissal. The respondent did not succeed in refuting this suspicion, as it had not been proven that the reluctant attitude of the residents was based on mere objective reasons. This was even more cogent in respect of the fact that the respondent took action and dismissed the applicant the same day, without providing the applicant the opportunity to react and without any further inquiry.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The NIHR concluded that the respondent had discriminated against the applicant on the grounds of his sexual orientation.

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 2

Case title	Breaking off negotiations.
Decision date	17.08.2004
Reference details	<i>NIHR, Oordeel</i> [opinion] 2004-104.
Key facts of the case	The applicant owned an architectural firm, as did the respondent. The applicant and respondent entered into negotiations on a cooperation agreement. The progress of these negotiations was confirmed in writing. In one of the six meetings that took place, the respondent asked the applicant whether he lived together with a man with whom he had a homosexual relationship. The applicant gave an affirmative answer to this question. A few days later, he received a fax notifying him of the fact that, due to an insufficient basis for trust, the respondent wished to break off negotiations.
Main reasoning/argumentation	The NIHR considered that the short time span between the confirmation of his homosexual relationship by the applicant and the breaking off of the negotiations, as well as the fact that the applicant could reasonably have assumed that the respondent was favourable to the cooperation agreement, were good reasons to suspect discrimination on the grounds of sexual orientation. Furthermore, the NIHR considered that there can be no correlation between the professional (un)suitability of the applicant and his (non-) openness about his sexual orientation.
Key issues (concepts, interpretations) clarified by the case	The respondent had argued that the GETA was not applicable (and thus the NIHR not competent) as the two firms were to merge. However, the NIHR ruled that the motion for a merger, had the negotiations continued, would most probably have resulted in an employment agreement or another type of work relationship, with a certain authority relationship between the respondent and the applicant. Therefore, in the NIHR's opinion, the negotiations were to be considered as advertisements for job vacancies and procedures leading to the filling of vacancies within the meaning of Article 5(1) of the GETA.
Results (sanctions) and key consequences or implications of the case	Held: breach.

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 3

Case title	Determination of a pension premium.
Decision date	30.03.2006
Reference details	<i>NIHR, Oordeel</i> [opinion] 2006-56.
Key facts of the case	The applicant applied for a survivor's pension on behalf of his male partner. It was not contested that the respondent (the insurance company) did not make use of different tables for male-male and female-female relationships. When determining the premium the respondent used the male-female relationship as a starting point.
Main reasoning/argumentation	The NIHR was of the opinion that because the respondent took the sex of the beneficiary of the pension into account in the calculation of the premium and the fact that the respondent used a different sex than that of the beneficiary as a starting point, the respondent had made a direct distinction on the grounds of the sexual orientation of the applicant.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The applicant requested the NIHR to arrange that the respondent would determine the premium on the basis of a different table. Furthermore, the applicant requested reimbursement of the (in his view) surplus of the paid premium. However, the NIHR reiterated that its mandate is restricted to judging the question of whether or not the determination of the premium was discriminatory.

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 4

Case title	Exclusion from participation in a dancing competition.
Decision date	26.07.2006
Reference details	<i>President van de Rechtbank Den Haag</i> [President of Den Haag Regional Court], <i>LJN</i> : AY5005.
Key facts of the case	Two homosexual applicants were excluded from participation in a dancing competition organised by the Dutch General Dance Sport Federation.
Main reasoning/argumentation	In a <i>Kort Geding</i> (fast civil court procedure for urgent matters), the President of the Court ruled that the Dutch General Dance Sport Federation did not unlawfully exclude a homosexual couple from participation in national dancing contests. Although this constituted direct sex discrimination, it was justified under the clause in Article 2(2) of the GETA which allows for 'gender-specific requirements'.
Key issues (concepts, interpretations) clarified by the case	In the case of sporting competitions, a gender-specific requirement could be, on the basis of a decree by the government, the fact that there is a relevant difference in physical strength between men and women. The Court ruled that it had not been sufficiently established that the distinction was made on grounds of sexual orientation (although the NIHR had previously held that it was (see below)). In this respect the Court noted that homosexual people can participate in dancing contests, provided that they are prepared to dance with a partner of the opposite sex.
Results (sanctions) and key consequences or implications of the case	The Court held: no breach. Earlier, the NIHR had held that the exclusion of this couple was direct discrimination on the grounds of sex, as well as direct discrimination on the grounds of sexual orientation, for which there was no legally acceptable justification (opinion 2004-116 of 21.09.2004).

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 5

Case title	Exclusion of homosexual staff from a privately-run educational institution.
Decision date	15.06.2007
Reference details	<i>NIHR, Oordeel</i> [opinion] 2007-100.
Key facts of the case	A privately-run educational institution publicly stated that its personnel policy was that homosexuality did not correspond with the principles of the school and that overtly gay teachers would not be employed by the school. One aspect of the principles of the school was the conviction that an intimate, sexual relationship is reserved for a husband and wife in a monogamous marriage. The <i>Stichting Meldpunt Discriminatie Amsterdam</i> [Amsterdam Anti-discrimination Bureau] lodged a complaint against the school.
Main reasoning/argumentation	The NIHR held that, through its personnel policy and the explanations given, the school made a direct distinction on the grounds of homosexual orientation. The exception in law for privately-run educational institutions was not applicable in this case, since the school made a distinction on the grounds of the <i>sole fact</i> of homosexual orientation.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	Held: breach In addition, the NIHR ordered the respondent to formulate policy principles for the purpose of concrete situations and also to present these policy principles or the proposed application thereof in a concrete situation to the Commission.

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 6

Case title	Refusal of IVF treatment to a woman in a lesbian relationship
Decision date	20.04.2009
Reference details	<i>NIHR, Oordeel</i> [opinion] 2009-31.
Key facts of the case	A woman wants to have children, using the semen of a male relative of her female spouse. When IVF-treatment appears necessary, the hospital informs them that it does not provide such treatment to women who are using donated semen. The women consider this to be indirectly discriminatory for women in a lesbian relationship. They also have heard elsewhere that in the case of different-sex couples this hospital does not adhere strictly to its policy not to use donated semen.
Main reasoning/argumentation	The NIHR notes that the distinction made by the hospital between donated semen and semen from a male intimate partner, leads to a particular disadvantage for lesbian women, but the NIHR considers this indirect distinction to be objectively justified by the Dutch legislation implementing Commission Directive 2006/17/EC (regarding certain technical requirements for the donation, procurement and testing of human tissues and cells). However, the NIHR also considers that the hospital has not proven that reports about its use of donated semen for women in a different-sex relationship are inaccurate, and therefore concludes that the hospital discriminates directly on grounds of sexual orientation.
Key issues (concepts, interpretations) clarified by the case	The case draws attention to a possibly unintended effect of (the implementation of) the definition of ‘partner donation’ in Commission Directive 2006/17/EC as ‘donation of reproductive cells between a man and a woman who declare that they have an intimate physical relationship’, in combination with the very strict rules on the donation of semen that falls outside that definition.
Results (sanctions) and key consequences or implications of the case	Held: breach of Article 7 of the General Equal Treatment Act. In addition, the NIHR uses its competence to forward this opinion to the Minister of Health, indicating that it seems that the law-makers have mainly thought about heterosexual relationships, and that the effect seems to be that single and lesbian women with a fertility problem have less hospitals to go to.

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 7

Case title	Vacancy for registrar only open to applicants willing to also marry same-sex couples
Decision date	15.04.2008
Reference details	<i>NIHR, Oordeel</i> [opinion] 2008-40.
Key facts of the case	When advertising vacancies for the position of registrar, a local authority had indicated that one of the requirements for the job was a willingness to also marry and register same-sex partners. The applicant considers himself to be excluded by this, because his belief makes it impossible for him to meet the requirement.
Main reasoning/argumentation	According to the NIHR the requirement particularly affects members of some sections of Christian, Islamic and other religious communities, and therefore amounts to indirect distinction on grounds of religion. However, the NIHR, considers it legitimate to aim for the application of existing provisions of family law and for the prevention of discrimination by civil servants. And it considers the requirement proportionate to those aims.
Key issues (concepts, interpretations) clarified by the case	With this opinion the NIHR, no longer follows two opinions of 15.03.2002 in which it considered such indirect discrimination on grounds of religion not objectively justified and therefore unlawful (opinions 2002-25 and 2002-26).
Results (sanctions) and key consequences or implications of the case	Held: no breach of the General Equal Treatment Act

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 8

Case title	Dismissal of a homosexual teacher
Decision date	02.02.2011
Reference details	<i>Kantonrechter 's-Gravenhage</i> [The Hague Regional Court] ECLI:NL:RBSGR:2011:BU3104
Key facts of the case (max. 500 chars..)	The Board of the Reformed primary school Dr. K. Schilder in Oegstgeest wants to annul the agreement of employment with one of its teachers. This teacher had left his wife in order to live together with another man. In the meantime, he is suspended.
Main reasoning/argumentation	The Court considers that the sole fact that the man has come out of the closet and lives together with another man now cannot be a reason for suspension and dismissal. Making a distinction is prohibited on this ground, also for a school of a certain denomination, which is Reformed and complies with the points of view of the church and the Synod. Contributory whether factors which justify such a distinction are lacking in this case. The school has not consulted the teacher in order to check he still adhered to the Christian foundation of the school.
Key issues (concepts, interpretations) clarified by the case	Sole fact of being homosexual no reason for Christian school to suspend and dismiss teacher. No contributory factors.
Results (sanctions) and key consequences or implications of the case	The Court reverses the suspension and does not allow a dismissal.

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 9

Case title	Intimidation of homosexual employee, no prolongation of agreement of employment unlawful
Decision date	16.09.2010
Reference details	<i>NIHR, Oordeel</i> [opinion] 2010-135.
Key facts of the case	The applicant was employed on a temporary basis by a company selling kitchens. He is homosexual and complains that colleagues made so-called effeminate movements when he was around. The assistant-manager asked the employee in a meeting whether he threw things the way he waved, making a so-called effeminate wave. The manager and other colleagues were present. The employee reported as being ill after this meeting, with psychological complaints. His agreement of employment was not prolonged. Although the employee had complained to the director of the company, the latter had not taken any measures..
Main reasoning/argumentation	The NIHR considered that the employee's dignity had been violated and that harmful circumstances had been created. Intimidation. The fact that the director did not take any measures afterwards violates the law. The fact that the agreement of employment had not been prolonged, has to do with the employee's illness, which was due to intimidation on the shop floor. Prohibited.
Key issues (concepts, interpretations) clarified by the case	The concept of intimidation is illustrated by this case and the cause and effect in the framework of the fact that his agreement of employment was not prolonged.
Results (sanctions) and key consequences or implications of the case	Held: breach.

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 10

Case title	Refusal to accept order to print a certain text on ball pens
Decision date	18.11.2010
Reference details	<i>NIHR, Oordeel</i> [opinion] 2010-169.
Key facts of the case	A foundation represents the interests of people with a homosexual or bisexual orientation. It wanted a company to print certain texts on ball pens. The company refuses to print these texts because it violated its religious beliefs.
Main reasoning/argumentation	The NIHR said that it was clear that the company did not refuse the foundation as a customer. It only refused to print certain texts. No breach.
Key issues (concepts, interpretations) clarified by the case	Company refusing to print texts on a product, but not refusing foundation as a customer.
Results (sanctions) and key consequences or implications of the case	Held: no breach

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 11

Case title	Victimisation after complaint to the NIHR, of homosexual who is given help by an intermediary to get work experience
Decision date	29.02.2012
Reference details	<i>NIHR, Oordeel</i> [opinion] 2012-39.
Key facts of the case	A foundation, acting as an intermediary, helps persons with social security benefits to get work experience. The man, who is a homosexual, works thanks to the foundation for a publisher. He complains about discrimination and intimidation to the NIHR. The foundation then lets him know that it would no longer help him awaiting the opinion of the NIHR as from 17 August 2011. On 25 October 2011 the foundation changed its mind and helped him again.
Main reasoning/argumentation	The decision of the foundation to help him no longer was the direct effect of his complaint to the NIHR. The man was therefore victimized.
Key issues (concepts, interpretations) clarified by the case	Clarification of victimization. The fact that the foundation no longer helped the man to get work experience is a direct effect of his complaint about discrimination. The fact that the foundation changed its mind does not make this any different.
Results (sanctions) and key consequences or implications of the case	Held: victimization

Chapter 1, Interpretation and/or implementation of Employment Directive 2000/78/EC, case 12

Case title	Registrar who refuses to marry same sex couples is fired. No right to be hired again.
Decision date	23.10.2013
Reference details	<i>Rechtbank Den Haag</i> [The Hague Regional Court], ECLI:NL:RBDHA:2013:14133

Key facts of the case	A registrar, appointed from 28 January 2011 till 1 February 2013 by the municipality of The Hague, is a Christian and states that he only acknowledges one sort of marriage, namely between man and woman. He was interviewed by a national newspaper on 27 October 2011. In this interview, he expressed his views. On 31 October 2011 he was interviewed on tv by PowNed. On 24 January 2012 the municipality fired him as from 1 February 2012. The registrar wants to be hired again, relying on his freedom of religion (among other things Article 9 of the ECHR). He is a conscientious objector. The municipality states, among other things, that it wants to treat everybody on an equal footing, and it relies, among other things, on case law by the ECtHR (ECtHR, 22 January 2008, E.B. v France, ECtHR 2008/44, paragraph 91). The registrar feels that his freedom of expression (Article 7 of the Constitution and Article 10 of the ECHR) has also been violated.
Main reasoning/argumentation	The court concludes that there is a clash of fundamental rights, namely the freedom of religion/expression and the right to non-discrimination. There is no order in these rights. On the basis of case law by the ECtHR (ECtHR, 15 January 2013, LJN: LBZ1190, Eweida and others, paragraph 104) the court judges that the municipality has a wide margin of appreciation. It has a clear policy on registrars who do not want to marry same sex couples and it wants to stimulate the acceptance of homosexuals. Policy is justified. Moreover, it is proportional. It is the core task of a registrar to marry people. As to the freedom of expression, the interviews with the registrar were not the reason for his dismissal. The discussions following the interviews were the reason.
Key issues (concepts, interpretations) clarified by the case	Municipalities have a wide margin of appreciation when firing a registrar who does not want to marry same sex couples.
Results (sanctions) and key consequences or implications of the case	Held: objection dismissed

Case law Chapter 2. Freedom of movement

Chapter 2, Freedom of movement, case law relevant to Directive 2004/38/EC, case 1

Case title	Dutch same-sex marriage not recognised in Germany.
Decision date	09.09.2004
Reference details	Germany/Verwaltungsgericht Karlsruhe [Administrative Court] /Aktenzeichen AZ 2 K 1420/03, available at: www.lsvd.de/bund/lpartg/vgkarlsruhe.pdf
Key facts of the case	A Dutch man and a Chinese citizen of the same sex married in the Netherlands in 2001. The Dutch man was employed in Germany and therefore had a residence permit for an indefinite period. His spouse had lived and studied in Germany since 1986 and was therefore repeatedly granted a student residence permit for a period of two years. Soon after the marriage, the student residence permit was to expire; the Chinese spouse submitted an application for the issuing of an <i>Aufenthaltserlaubnis-EG</i> [EU residence permit] for spouses of EU citizens for a period of five years. But as the Dutch marriage was not recognised, the permit was not granted.
Main reasoning/argumentation	The German court ruled that Dutch marriage between same-sex partners is not a lawful German marriage. Referring to the judgment of the European Court of Justice in the <i>Reed</i> case (ECJ 17.04.1986, C-59/86) the Court ruled that only a general, Europe-wide societal change could justify the extension of the term 'spouse'. In the Court's opinion the sole fact that the Netherlands and Belgium introduced same-sex marriage could not be regarded as such a societal change. The German court upheld the refusal to issue the residence permit.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The German court upheld the refusal to issue the residence permit.

Case law Chapter 3. Asylum and subsidiary protection

Chapter 3, Asylum and subsidiary protection, case law relevant to Article 10/1/d of Council Directive 2004/83/EC, case 1

Case title	Sexual orientation can be ground for asylum.
Decision date	13.08.1981
Reference details	<i>Afdeling Rechtspraak Raad van State</i> [Judicial Division of the Council of State], no. A-2.1113, <i>RV</i> 1981, 5.
Key facts of the case	The appellant was a homosexual Polish national whose asylum application was rejected by the State Secretary of Justice in 1980. The reason for this decision was that the appellant had no well-founded fear of persecution, since official reports had proved that homosexuality was not criminalised in Poland. The State Secretary acknowledged that gay people were victims of discrimination in Poland but did not consider this to be an act of persecution.
Main reasoning/argumentation	In appeal the Judicial Division of the Council of State ruled that it was sufficiently plausible that the appellant was exposed to discrimination by the authorities in his country of origin. However, in the court's opinion these discriminatory measures were not of such a serious nature that they could constitute persecution within the meaning of Article 1A of the UN Convention relating to the Status of Refugees.
Key issues (concepts, interpretations) clarified by the case	In this judgment the court ruled for the first time that the definition of being persecuted for reasons of membership of a particular social group in Article 1A of the UN Convention relating to the Status of Refugees includes being persecuted for reasons of sexual orientation.
Results (sanctions) and key consequences or implications of the case	This ruling was incorporated into the <i>Vreemdelingencirculaire</i> [Aliens Circular] C1/4.2.10.2.

Chapter 3, Asylum and subsidiary protection, case law relevant to Article 10/1/d of Council Directive 2004/83/EC, case 2

Case title	Sexual orientation accepted as a new fact in asylum procedure.
Decision date	03.10.2003
Reference details	<i>Afdeling Bestuursrechtspraak van de Raad van State</i> [Judicial Division of the Council of State], no. 200305027/1, <i>JV</i> 2004/3.
Key facts of the case	In previous admission procedures the appellant had been represented by his mother. As a result, the account of the reasons for his request for asylum merged into those of his mother. In July 2003, however, the appellant requested asylum in his own name, thereby putting forward his own account of the reasons for his request, including his personal fear of problems in his country of origin because of his homosexual orientation. The Regional Court considered this to be a repeat application and rejected his appeal.
Main reasoning/argumentation	The Judicial Division of the Council of State ruled that the Regional Court had failed to recognise that the grounds put forward by the appellant when requesting asylum in 2003 were sufficiently specific, were pre-eminently related to the personality of the appellant and had so far not been judged upon, either in previous decision-making or in court. The Judicial Division ruled that the appellant's homosexual orientation was a new fact that had emerged or a changed circumstance in the sense of Article 4:6(1) of the General Administrative Law Act.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The Judicial Division of the Council of State allowed the appeal, overturned the judgment of the Aliens Division of 's-Hertogenbosch Regional Court and referred the case back to the Regional Court.

Chapter 3, Asylum and subsidiary protection, case law relevant to Article 10/1/d of Council Directive 2004/83/EC, case 3

Case title	No investigation of the real risk in asylum procedure.
Decision date	12.10.2004
Reference details	<i>Vreemdelingenkamer Rechtbank 's-Gravenhage</i> [Aliens Division of 's-Gravenhage Regional Court], location 's-Hertogenbosch, AWB 02/3863, <i>LJN AR6786</i> .
Key facts of the case	A Somali asylum seeker stated in his application for asylum that the reason for fleeing his country of origin was his homosexual orientation. The Minister for Alien Affairs and Integration confined herself to the conclusion that there had not appeared to be a real risk of the applicant's being subjected to treatment in breach of Article 3 of the European Convention on Human Rights on his return to Somalia. However, this conclusion was not substantiated. The asylum seeker lodged an appeal.
Main reasoning/argumentation	The Court ruled that there was no evidence that the Minister had investigated whether homosexuality was criminalised in Somalia or whether actions against homosexuals took place. The fact that the Minister considered the account of the reasons for the appellant's request for asylum implausible, did not affect the foregoing conclusion, since the Minister did not question the appellant's homosexual orientation as such.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The appeal was allowed.

Chapter 3, Asylum and subsidiary protection, case law relevant to Article 10/1/d of Council Directive 2004/83/EC, case

Case title	Sexual orientation not accepted as a new fact in asylum procedure.
Decision date	14.04.2006
Reference details	<i>Afdeling Bestuursrechtspraak van de Raad van State</i> [Judicial Division of the Council of State], no. 200601113/1.
Key facts of the case	In this appeal to the Judicial Division of the Council of State the Minister for Alien Affairs and Integration stated that the court in interlocutory proceedings erroneously considered the sexual orientation of the asylum seeker underlying his application for asylum a new fact that had emerged or a changed circumstance in the sense of Article 4:6(1) of the General Administrative Law Act.
Main reasoning/argumentation	The Judicial Division of the Council of State ruled that the asylum seeker concerned could and should have put forward his sexual orientation in his first request for asylum, given the relevance of that information to the assessment of his application as well as the fact that he later declared that he had always been aware of his homosexual orientation. In the Court's opinion this conclusion was not affected by the fact that the asylum seeker concerned only engaged in a homosexual relationship after several years of residence in the Netherlands.
Key issues clarified by the Case	
Results (sanctions) and key consequences or implications of the case	The Court upheld the appeal by the Minister and overturned the judgment of the court in interlocutory proceedings.

Chapter 3, Asylum and subsidiary protection, case law relevant to Article 10/1/d of Council Directive 2004/83/EC, case 5

Case title	Sexual orientation can be ground for asylum, no restraint in home country can be required.
Decision date	07.11.2013
Reference details	Court of Justice of the European Union, nos. C-199/12, C-200/12 and C-201/12

Key facts of the case	<p>The Netherlands Council of State asked preliminary questions in cases 201109928/T1/V2, about an asylum seeker from Senegal, 201106615/1/T1/V2 about an asylum seeker from Uganda, and 201012342/T1/T2 about an asylum seeker from Sierra Leone. All of them are homosexuals. They applied for a residence permit for a fixed time (asylum) on the ground of sexual orientation. They argued that they should be seen as refugees because they were persecuted in their country of origin. The responsible Minister refused to give them residents permits, because the fear of persecution was not founded. The applicants from Senegal and Sierra Leone appealed to the The Hague Regional Court. The applicant from Uganda applied for summary proceedings. The The appeal of the asylum seeker from Sierra Leone is allowed. The application for summary proceedings is also successful; moreover, the Ugandan asylum seeker gets his residence permit. The Minister, according to the court, has not given enough reasons for his decision. The appeal of the asylum seeker from Senegal is rejected, because homosexuals are not according to the court, persecuted in Senegal. The Minister and the asylumseeker from Senegal appeal to the Judicial Division of the Council of State.</p> <p>The Council of State asks the Court of Justice of the European Union whether homosexuals are a specific group as referred to in Article 10, subsection 1, under d of the Directive 2004/83/EC and whether it may be expected from them to observe restraint in their country of origin.</p> <p>The Court of Justice of the European Union held that the homosexuals were covered by the Directive and that they could not be asked to observe restraint in their country of origin.</p>
Main reasoning/argumentation	<p>The Court of Justice of the European Union held that the homosexuals were covered by the Directive and that they could not be asked to observe restraint in their country of origin. They should not be regarded as being different from heterosexuals in this respect.</p>
Key issues (concepts, interpretations) clarified by the case	<p>The Court of Justice of the European Union held that the homosexuals were covered by the Directive and that they could not be asked to observe restraint in their country of origin.</p>
Results (sanctions) and key consequences or implications of the case	<p>Questions answered.</p>

Chapter 3, Asylum and subsidiary protection, case law relevant to Article 10/1/d of Council Directive 2004/83/EC, case 6

Case title	Sexual orientation can be a ground for asylum, no restraint in country of origin can be requested.
Decision date	18.12.2013
Reference details	<i>Afdeling Rechtspraak Raad van State</i> [Judicial Division of the Council of State], ECLI:NL:RVS:2013:2422 and no. 101012342/1/V2
Key facts of the case	The appellants were a homosexual Senegalese national whose asylum application was rejected by the State Secretary of Justice in 2011 and a homosexual from Sierra Leone, whose application was rejected on 18 March 2010. They finally turned to the Judicial Division of the Council of State, which asked preliminary questions to the European Court of Justice. The aliens relied on the fact that homosexuality was criminalized in their countries of origin and that they were requested by the State Secretary to observe restraint there to prevent persecution. The Court of Justice of the European Union had held that no more restraint could be required from homosexuals than from heterosexuals. The State Secretary has decided to adapt his policies in this respect. However, in this case he maintains his refusal to grant asylum because he feels the stories of the aliens were not truthful. They need not fear persecution on this ground. The Regional Court to which the aliens had applied had only judged this argument given by the State Secretary. The Judicial Division of the Council of State judges that not only the stories of the asylumseekers should have been checked, but the degree of protection by the authorities in the countries of origin should have been checked, too, just as the way they can function as homosexuals and the chances of persecution.
Main reasoning/argumentation	In appeal the Judicial Division of the Council of State ruled that the Regional Court should have judged the question whether the country the alien originated from protected homosexuals, how homosexuals can function in this country and how great the chance of persecution was. The State Secretary should not have asked the question whether persecution could have been prevented. The Regional Court had only judged the question whether the State Secretary regarded the stories told by the asylum seekers as truthful, with as a result that they did not need to fear persecution. Appeal allowed, decision annulled
Key issues (concepts, interpretations) clarified by the case	In this judgment the court applied the judgement by the Court of Justice of the European Union that no more restraint may be required to prevent persecution in the country of origin from homosexuals than from heterosexuals.
Results (sanctions) and key consequences or implications of the case	Held: appeal allowed, decision annulled.

Chapter 3, Asylum and subsidiary protection, case law relevant to Article 2/h of Council Directive 2004/83/EC

No relevant case law available.

Chapter 4, Family reunification, case law relevant to Article 4/3 of the Council Directive 2003/86/EC

No relevant case law available.

Case law Chapter 5. Freedom of assembly

Chapter 5, Freedom of assembly, case 1

Case title	Demonstration against statements by a bishop.
Decision date	11.04.1979
Reference details	<i>Voorzitter Afdeling Rechtspraak Raad van State</i> [President of the Judicial Division of the Council of State] <i>Weekoverzicht Raad van State, R.737.</i>
Key facts of the case	The appellants lodged an objection with the Mayor of Roermond against a planned demonstration. The aim of this demonstration was to protest against public statements against homosexuality previously made by the Bishop of Roermond. The appellants stated that the decision to grant the permit for the demonstration hampered them in the course of their profession of pastor. The mayor rejected the application.
Main reasoning/argumentation	The President considered that the mayor had guaranteed the scrupulousness of the decision-making process. In the President's opinion the mayor had justifiably considered that neither the aim of the demonstration (to protest against public statements against homosexuality previously made by the Bishop of Roermond) nor the appellants' expectation that as a result of the demonstration public order would be disturbed, could give cause to refuse the permit for the purpose of maintenance of public order.
Key issues (concepts, interpretations) clarified by the case	The President ruled furthermore that the suggestion that the demonstration might appear shocking could also not be grounds for refusing the permit, as allowance of such a ground would violate the right to the freedom of expression.
Results (sanctions) and key consequences or implications of the case	Appeal rejected.

Chapter 5, Freedom of assembly, case 2

Case title	Gay demonstration and encampment in Amersfoort.
Decision date	27.05.1982
Reference details	<i>Voorzitter Afdeling Rechtspraak Raad van State</i> [President of the Judicial Division of the Council of State], <i>AB</i> 1983/62.
Key facts of the case	The Mayor of Amersfoort had refused to grant a permit for the third demonstration in a row in favour of tolerance of gay people and an accompanying encampment on municipal territory. The mayor grounded this refusal in fear of intolerant behaviour by third parties.
Main reasoning/argumentation	The court ruled that, although the planned demonstrations and the accompanying encampment would lay a heavy burden upon the police and although it was plausible that traffic would be severely disrupted by the demonstration, the mere fear that intolerant behaviour by third parties towards the demonstrators would disturb public order could justify neither the refusal to grant a permit for a demonstration, nor the refusal to grant the encampment permit. The Court ruled that the decision was disproportionate.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The President made provisional arrangements, ordering the granting of a permit for both the third demonstration and the encampment.

Case law Chapter 6. Hate speech and criminal law

Chapter 6, Hate speech, case 1

Case title	Website contains remarks insulting to homosexuals.
Decision date	17.11.2006
Reference details	<i>Gerechtshof Amsterdam</i> [Amsterdam Court of Appeal], no. 23-000547-06, <i>LJN</i> : AZ3011.
Key facts of the case	The defendant maintained what he called a 'satirical website' on which he had made insulting remarks about Jews and homosexuals. The website featured a fictitious Christian internet community which, in talking about the Christian faith, made statements about homosexuals. For example, it was stated on the website that, in the writer's opinion, even the death sentence was a mild penalty for gay people.
Main reasoning/argumentation	The defence that the site was an example of artistic expression and that it contributed to public debate was dismissed by the Court of Appeal because the texts had exceeded the bounds of what is acceptable and were unnecessarily offensive.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The Court sentenced the defendant to a week-long suspended prison sentence with an operational period of two years and a fine of €500.

Chapter 6, Hate speech, case 2

Case title	Insulting character of a term depends on context in which it was used.
Decision date	06.01.2004
Reference details	<i>Hoge Raad</i> [Supreme Court], no. 01019/03, <i>LJN</i> : AN8498.
Key facts of the case	After being called to account for urinating in public, the defendant had called a police officer ' <i>homofiel</i> ' ('homosexual') during the lawful discharge/execution of his duties.
Main reasoning/argumentation	The Court ruled that an apparently neutral term such as ' <i>homofiel</i> ' ('homosexual') can be insulting if used in a certain context as a term of abuse and with the intention to insult . The police officer might reasonably take offence at the term, since no person can be required to accept, in this way and under these circumstances, statements concerning issues that belong to the very core of personal integrity, intimacy and privacy. According to the Court, in the given circumstance the purpose of the term ' <i>homofiel</i> ' ('homosexual') was to injure the police officer's reputation.
Key issues (concepts, interpretations) clarified by the case	This judgement gives a further specification of the term 'context' as introduced in the Supreme Court judgment of 19.12.2000 (no. 01926/99, <i>LJN</i> : AA9745, <i>Nederlandse Jurisprudentie</i> 2001, 101). In that earlier case the court had ruled that the terms ' <i>vuile homo's</i> ' ('dirty fags') and ' <i>vieze smerissen</i> ' ('dirty fuzz') were insulting given the context in which the terms were used <i>and</i> the combination of the words used.
Results (sanctions) and key consequences or implications of the case	On the basis of Article 266 of the Penal Code, the defendant was sentenced to a fine of 50 European, with an alternative imprisonment of one day. In a recent case the Regional Court of 's-Hertogenbosch ruled that, given the lack of a special context, the use of the term ' <i>homo</i> ' ('gay') in a remark to a police officer during the lawful discharge/execution of his duties did not have an insulting (thus deserving of punishment) character. (Regional Court 's-Hertogenbosch 21.08.2007,no. 01-

Chapter 6, Hate speech, case 3

Case title	Statements by imam El Moumni.
Decision date	18-11-2002
Reference details	<i>Gerechtshof 's-Gravenhage</i> [’s-Gravenhage Court of Appeal], no. 2200359302, <i>LJN</i> : AF0667.
Key facts of the case	In an interview in a television programme an imam stated the following (translation into English of remarks previously translated into Dutch): - homosexuality is harmful to Dutch society - homosexuality is a contagious disease (or abnormality); the translation of the word ‘ <i>marat</i> ’ was contested). The defendant was prosecuted for defamation and incitement of hatred.
Main reasoning/argumentation	The Court of Appeal ruled that the statements were to be judged in connection with the content and purpose of the interview as a whole. In the Court’s opinion that context and the resulting manifest intention took away the possible insulting character of the excerpts of the interview. In this context the Court considered it to be important that the contested excerpts served the purpose of indicating the defendant’s view (firmly rooted in Islamic religious conviction) of the sinful nature of the homosexual way of life.
Key issues (concepts, interpretations) clarified by the case	The Court ruled that, on the basis of the freedom of religion, the defendant had the right to propagate his views on homosexuality based on his religious beliefs. In the Court’s opinion the manner in which the defendant had propagated his views did not exceed the limits of acceptability. In this respect the Court attached weight to the contested translation of the word ‘ <i>marat</i> ’ and the fact that the defendant had stated in an extract from the interview that was not broadcasted that a Muslim must be respectful to every person.
Results (sanctions) and key consequences or implications of the case	Acquittal of the charge.

Chapter 6, Hate speech, case 4

Case title	Homosexual compared with thief by member of parliament.
Decision date	09.01.2001
Reference details	<i>Hoge Raad</i> [Supreme Court], no. 00945/99, <i>LJN</i> : AA9368.
Key facts of the case	In a written interview in a magazine the defendant, a member of parliament for a Christian party, had posed the rhetorical question: ‘Why would a practising homosexual be classed above a thief?’ (<i>‘Ja, waarom zou een praktiserend homoseksueel beter zijn dan een dief??’</i>). The Court of Appeal had acquitted the defendant. The Advocate-General appealed in cassation.
Main reasoning/argumentation	The Court of Appeal had ruled that the challenged passage in itself could be regarded as an insulting remark in the meaning of Article 137c of the Penal Code. However, in the Court’s opinion the context and the resulting intention took away the insulting character of the passage, as the context showed that the defendant, on the basis of his religious conviction, condemns homosexual practice as being sinful and in contravention of the biblical commandments. In that context the challenged passage does not affect the dignity of practising homosexuals.
Key issues (concepts, interpretations) clarified by the case	In the opinion of the Court of Appeal the challenged passage was merely used by way of illustration of the religious conviction of the defendant, which takes away the insulting character of the remark. As the manner in which the defendant propagated his views did not exceed the limits of acceptability, the defendant could successfully rely on his right to freedom of religion and expression. The Supreme Court ruled that the Court of Appeal had not made an incorrect interpretation of the law.
Results (sanctions) and key consequences or implications of the case	The Supreme Court barred the prosecution in its appeal against the acquittal of the charge as ruled by the Court of Appeal.

Chapter 6, Hate speech, case 5

Case title	Discrimination on the grounds of homosexuality by neighbours
Decision date	17.02.2012
Reference details	<i>Rechtbank Maastricht</i> [Maastricht Regional Court], nos. 03/703621-11 and 03-853069, ECLI:NL:RBMAA:2012:BV6179 and ECLI:NL:RBMAA:2012:BV6181
Key facts of the case	These two cases concern the two brothers who insulted their homosexual neighbours who were at home when the former threw a party in the early night of 5 July 2009. They used terminology as “dirty gays” and “buggers” and they said “Get at these dirty homosexuals” in the garden, so that their neighbours could hear it. They acted in a group.
Main reasoning/argumentation	In the Court’s opinion the remarks were particularly offensive and hurtful. It is unacceptable that the brothers behaved this way toward people who could not defend themselves. An additional factor is that other neighbours could hear the insults as well. The accused cannot hide themselves behind the fact that the group acted as a whole. Prejudice and intolerance as to homosexuals.
Key issues (concepts, interpretations) clarified by the case	Discrimination by neighbours, acting as a group.
Results (sanctions) and key consequences or implications of the case	Discrimination. Each of the brothers had to do community service for 24 hours. Each brother had to pay each of the neighbours 250 Euros of compensation. A 300 Euro penalty, as required by the Public Prosecution Service, would not have done justice to the gravity of the facts and to society.

Chapter 6, Hate speech, case 6

Case title	No hate speech by a politician
Decision date	11.03.2013
Reference details	<i>Gerechtshof Amsterdam</i> [Amsterdam Court of Appeal], no. 23-0042266-12, ECLI:NL:GHAMS:2013:BZ3787
Key facts of the case	Delano Felter leads the Republikeinse Moderne Partij (Republican Modern Party) in the context of municipal elections in Amsterdam. In an interview he made statements about homosexuals on 24 Februari 2010. The interview was revised by a broadcasting company and broadcast on 25 February 2010. On the basis of this broadcast homosexuals reported to the police, due to the fact that he insulted a group of people on the basis of their sexual orientation and that he incited people to hatred. The Regional Court judged that there was insufficient evidence.
Main reasoning/argumentation	In the Appellate Court's opinion the remarks were made by Felter in his capacity of a politician in the context of a public discussion about a case of general interest. He is covered by the protection of Article 10 of the European Convention on Human Rights. The remarks were value judgements which may be experienced as shocking, but they were not excessively shocking. Freedom of expression.
Key issues (concepts, interpretations) clarified by the case	Balance between discrimination and freedom of expression by a politician.
Results (sanctions) and key consequences or implications of the case	Acquittal

Chapter 6, Hate crimes, case 1

Case title	Assault and battery of gay people at a public 'gay cruising area'.
Decision date	14.04.2006
Reference details	<i>Rechtbank Gravenhage</i> [Gravenhage Regional Court], no. 09/926059-05, <i>LJN</i> : AX9566.
Key facts of the case	The defendant was part of a group of young people hanging around a skate ramp in a park. When a man passed the group, several members of the group called the man 'gay'. The defendant and another person threw beer bottles at the man and some of the group, including the defendant, ran after the man. Subsequently, the defendant stabbed the man in his back with a knife.
Main reasoning/argumentation	In the Court's opinion it counted strongly against the defendant and his co-perpetrators that the unsuspecting victim had to fear for his life and suffered severe pain and that the incident caused feelings of insecurity. Furthermore, a great cause for concern for the Court was the fact that the simple assumption that an individual was gay was the probable cause for the defendant and his co-perpetrators resorting to violence. Precisely because of the discriminating character of that violence, the Court saw reason to express in the sentence that was imposed that this and other such behaviour is not tolerated.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The defendant was convicted for complicity in attempted homicide and sentenced to one year in prison, of which six months suspended, with an operational period of two years.

Chapter 6, Hate crimes, case 2

Case title	' <i>Flikker tikken</i> ' ['Poof slapping'] Brunsummerheide.
Decision date	08.05.2007
Reference details	<i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/700602-, <i>LJN</i> : BA4620; <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/703577-06 <i>LJN</i> : BA4628; <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/703579-06, <i>LJN</i> : BA4623; <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/703580-06, <i>LJN</i> : BB0424 and <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/700754-06, <i>LJN</i> : BB0326.
Key facts of the case	These five cases concern the prosecution and conviction of five people for a jointly committed offence. The group conceived a plan to go ' <i>flikker tikken</i> '. This literally means 'poof slapping', in practice it meant the robbery of gay people at a car park known to the public as a 'gay cruising area'.
Main reasoning/argumentation	With regard to the sentence to be imposed, the Court attached weight to the fact that, by endeavouring to rob gay men at a remote, dark place, the defendants had shown themselves not to have even the slightest respect for a vulnerable group of people in society.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The five defendants were sentenced respectively to: A) Two months' juvenile detention, with an operational period of two years, 180 hours' community service and a 20-hour training order; B) Eighteen months' imprisonment of which six months suspended, with an operational period of two years; C) Thirty months' imprisonment of which six months suspended, with an operational period of two years; D) Eighteen months' imprisonment of which six months suspended, with an operational period of two years; E) Twenty-four months' imprisonment of which six months suspended, with an operational period of two years.

Chapter 6, Hate crimes, case 3

Case title	Discrimination on the grounds of homosexuality as motive for violence not proved.
Decision date	16.10.2007
Reference details	<i>Rechtbank Amsterdam</i> [Amsterdam Regional Court], no. 13/420862-07, <i>LJN</i> BB5743 and <i>Rechtbank Amsterdam</i> [Amsterdam Regional Court], no. 13/420863-07, <i>LJN</i> BB5734.
Key facts of the case	These two cases concern the participation of two defendants in a violent offence. The Court found that both defendants committed an act of violence in a public place, by punching the victim in the face.
Main reasoning/argumentation	In the Court's opinion the suggestion that the act of violence was the result of discrimination on the grounds of the sexual orientation of the victim and his friends was not sufficiently confirmed by the facts. It was true that the defendants used the words 'fag' and 'gay' and the Court considered it conceivable that these words were badly received by the victim and his friends. However, according to the Court this did not alter the fact that it was insufficiently proven that the defendants used the words with any other intention than they consistently declared to have had for the use of the words.
Key issues (concepts, interpretations) clarified by the case	Both defendants had stated that they did not use the words to insult the victim or his friends, but to express their surprise at the fact that the victim was wearing a so-called 'dog-tag' although he was not a soldier. The defendants considered this to be odd. Furthermore, the Court considered to be important the fact that there were no grounds to question the statement of the defendants that they only had knowledge of the fact that the victim and his friends were gay after the police had informed them following the incident.
Results (sanctions) and key consequences or implications of the case	The Court was of the opinion that there was no reason to differ from the punishment demanded by the public prosecutor, partly due to the fact that the incident had no discriminatory background. The defendants were sentenced to 45 days' imprisonment, respectively five months imprisonment and the payment of compensation of an amount of €6,089.22.

Chapter 6, Hate crimes, case 4

Case title	Discrimination of homosexuals; refusal to accept them as customers
Decision date	23.09.2010
Reference details	<i>Rechtbank Arnhem</i> [Arnhem Regional Court], location Wageningen, no. 05/720597-10, <i>ECLI:NL:RBARN:2010:BN8113</i>

Key facts of the case	The owner of a construction company received plans to reconstruct their house from two homosexual men who live together. He sent them an e-mail and asked the customer whether he had a male partner, followed by the remark: “Sorry, but if this is the case we really do not match. It violates my principles. I think our co-operation will too much suffer from this fact.” He also sends another email. In both e-mails he states that he cannot and does not want to enter into a business relationship with homosexuals. The owner of the company states that he only meant to say that their co-operation would suffer too much and that it was better to choose another company.
Main reasoning/argumentation	The court judges that the owner did not refer the couple to another construction company. He made clear that he did not expect a fruitful co-operation, asking his preliminary question about sexual orientation. Discrimination in the course of business.
Key issues (concepts, interpretations) clarified by the case	Discrimination in the course of business. Freedom of religion is limited in the context of discrimination.
Results (sanctions) and key consequences or implications of the case	Held: discrimination in the course of business. Fine 1,500 Euros, of which 750 Euros is conditional.

Chapter 6, Hate crimes, case 5

Case title	Discrimination of homosexuals; battery in a park
Decision date	15.12.2011
Reference details	<i>Gerechtshof Amsterdant</i> [Amsterdam Court of Appeal], no. 23-003278-11, ECLI:NL:GHAMS:2011: BU8317
Key facts of the case	Two friends sit on a bench in a park in Amsterdam. The accused joins them and asks whether they are homosexuals. When they confirm this, he starts to hit and kick them and call them names. When two police officers take action, the accused calls them names too, and resists being arrested. The two men want compensation for immaterial damage and file a complaint against the accused. The Amsterdam Regional Court sentences the man: two months of imprisonment, of which one is conditional, a trial period of two years and payment of 325 Euros compensation. The accused appeals, just like the Public Prosecution Service. The accused alleges that the first man who reported the battery only claimed in court that the battery involved the second man, too. Moreover, there are two police reports one of which has not been signed. All this means that the story of the men is not credible.

Main reasoning/argumentation	The Appellate Court feels there is enough evidence. The battery of the second man is clear on the basis of a medical statement. Enough evidence, moreover, that the accused has called the police officers names on purpose and resisted being arrested. The Appellate Court feels that the facts are so serious, that it doubles the punishment – aggravating circumstances..
Key issues (concepts, interpretations) clarified by the case	Gravity of battery of homosexuals
Results (sanctions) and key consequences or implications of the case	Accused is sentenced to four months of imprisonment, two of which are conditional, and a trial period of two years, compensation of 325 Euros.

Case law Chapter 7. Transgender issues

Chapter 7, Applicability of legislation on transgender issues, case 1

Case title	Redeployment after giving notice of change of sex.
Decision date	17.02.1998
Reference details	<i>NIHR, Oordeel</i> [opinion] 1998-12.
Key facts of the case	The applicant was employed by the respondent as an information desk assistant. In 1981 she changed sex. In 1994 she made this known to her work, leading to problems with some colleagues as a consequence. Subsequently, the respondent started a work reassignment procedure for the applicant.
Main reasoning/argumentation	The NIHR, considered that, as the applicant's change of sex played a part in the decision to redeploy the applicant, the respondent was responsible for the continuation of the discriminating behaviour of colleagues towards the applicant. By doing so, the respondent discriminated against the applicant on grounds of sex
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	Held: breach

Chapter 7, Applicability of legislation on transgender issues, case 2

Case title	Suspension of transsexual; not discrimination.
Decision date	17.11.2003
Reference details	<i>NIHR, Oordeel</i> [opinion] 2003-139.
Key facts of the case	The applicant was employed by the respondent. It was not contested that the applicant functioned properly for years, until the moment she presented herself as a woman. However, at a certain point the applicant was less productive due to a hormone treatment. It was also not contested that the specifically female presentation of the applicant played part in her suspension. The respondent went to great lengths to adjust the applicant's working environment to the transformation process.
Main reasoning/argumentation	In the NIHR's opinion, on the basis of the facts there were good reasons to suspect discrimination against the applicant by the respondent. However, with regard to the low level of productivity by the applicant, the respondent made a plausible case that this would not be accepted from any employee, because of the resulting negative influence on the team. Furthermore, with regard to the fact that the applicant stressed her femininity, the respondent had shown that the applicant held a representative post for which this would not have been acceptable from any employee.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The NIHR, concluded that the respondent refuted the suspicion of discrimination and did not discriminate against the applicant on the grounds of sex. Held: no breach.

Chapter 7, Applicability of legislation on transgender issues, case 3

Case title	Request for asylum by Romanian transsexual.
Decision date	22.01.2004
Reference details	<i>Rechtbank 's-Gravenhage</i> ['s-Gravenhage Regional Court], location Amsterdam, <i>AWB 02/94109, LJN AO3931</i> .
Key facts of the case	The applicant was a Romanian national seeking asylum in the Netherlands in 2002. The Court considered that the account of the reasons for the applicant's request for asylum provided a basis for the conclusion that the applicant had suffered several serious incidents on a systematic basis, even caused by police officers. In the Court's opinion this led to the conclusion that the applicant was the victim of a great number of discriminating acts that were related to the applicant's transsexuality.
Main reasoning/argumentation	Given the incidents the applicant had suffered, the Court ruled that it was not possible to uphold the respondent's conclusion that, as no information about the position of transsexuals in Romania was available, one could assume that this group did not suffer. The Court was of the opinion that, since the credibility of the applicant's statements was not contested, it could not simply be demanded of a person in a marginalised position to call upon the (higher) authorities for protection.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The appeal was allowed. The Court nullified the respondent's decision and ruled that the respondent should make a new order in respect of the appellant's application for asylum, with due observance of the present judgment.

Chapter 7, Applicability of legislation on transgender issues, case 4

Case title	Harassment and termination of employment after notice given of gender reassignment surgery.
Decision date	09.03.2006 and 16.12.2009 respectively
Reference details	<i>NIHR, Oordeel</i> [opinion] 2006-33. <i>Kantonoechter Harderwijk</i> [Harderwijk District Court], case 344701 CV EXPL 08-1698 (not published)
Key facts of the case	The applicant changed sex in 2004. She complained that since she had announced her gender reassignment surgery, she was no longer treated respectfully by her managers. The respondent stated that the applicant did not perform in accordance with the set requirements which gave cause to the termination of the employment. According to the respondent, this had nothing to do with the applicant's transsexuality.
Main reasoning/argumentation	The NIHR, considers that (given the comments about applicant's transsexuality made by the managers) the employer has failed to provide a discrimination-free work place, and that it seems evident that her transsexuality was a factor in the employer's decision to terminate the contract, because when requesting the competent court to terminate the employment contract, the respondent referred to the transsexuality and the appearance of the applicant. The District Court endorses the opinion of the NIHR, and adds that even if the managers did not intend to harass the employee, it still counts as harassment, because the comments made had the effect of violating her
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The NIHR, concludes that both during the employment and in the termination of the employment contract the employer had discriminated against the applicant on grounds of sex. Held: breach of Article 5(1h) and (1c), GETA. The District Court concludes that during the employment the applicant has been harassed on grounds of sex. Held: breach of the employer's duty of care to prevent harm to the employee (Article 7:658, Civil Code). Award of €10,000 in non-pecuniary damages, and €2,000 for extra-judicial costs, including those for the procedure at the NIHR

Chapter 7, Applicability of legislation on transgender issues, case 5

Case title	Hotel cancels reservation of a room where a party for transvestites was to take place.
Decision date	15.11.2007
Reference details	<i>NIHR, Oordeel</i> [opinion] 2007-201.
Key facts of the case	The applicant (<i>Stichting Meldpunt Discriminatie Amsterdam</i> [Amsterdam Anti-discrimination Bureau]) filed a complaint against a hotel. According to the applicant, the hotel cancelled the reservation of a room after it was discovered that the room would be used for a party for transvestites.
Main reasoning/argumentation	In the NIHR's opinion discrimination on the grounds of sex includes discrimination on the grounds of transvestism. Given the fact that the respondent could not refute the suspicion of discrimination to which the facts gave cause, the NIHR, concluded that the respondent had discriminated on the grounds of sex when cancelling the reservation of the room.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	Held: breach.

Chapter 7, Applicability of legislation on transgender issues, case 6

Case title	Breast implants for transsexuals not covered by health insurance
Decision date	16.11.2009
Reference details	<i>NIHR, Oordelen</i> [opinions] 2009-107 and 2009-108
Key facts of the case	In two very similar cases the health insurance companies of two male-to-female transsexuals have refused to pay for the costs of breast implants. The applicants claim that they have been discriminated by the insurance companies, because the latter do not refuse to pay the costs of female-to-male transsexuals for breast amputation.
Main reasoning/argumentation	The NIHR, considers that in the context of transsexuality breast implants and breast amputations are comparable medical treatment, and that the distinction made by the insurance companies between both treatments leads to a particular disadvantage for male-to-female transsexuals. Therefore there the insurance companies make an indirect distinction on grounds of sex. However, they are making this distinction because the current rules and regulations do not allow them to include breast implants in their basic health insurance policy. Therefore the the NIHR considers the indirect distinction to be objectively justified.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	Held: no breach of the General Equal Treatment Act. In addition, the the NIHR, uses it competence to forward these opinions to the Minister of Health, indicating that it does not seem rational to include breast amputations in the basic health insurance and to exclude breast implants from it.

Chapter 7, Applicability of legislation on transgender issues, case 7

Case title	Woman, formerly a man, wants to be recognized as parent of her child
Decision date	23.12.2010
Reference details	<i>Gerechtshof Leeuwarden</i> [Leeuwarden Court of Appeal], no. 200.058.760/01, ECLI:NL:GHLEE:2010:BO8039

Key facts of the case	A woman was formerly a man, but went through surgery to turn into a woman. She has requested the court to determine that she is the father, or the parent, of a child born after an IVF treatment of a woman with whom the appellant had had a relationship as early as before the surgery, with the sperm that she had had frozen prior to the surgery. The Regional Court had rejected the request, After the operation the birth certificate had been changed in the sense that “son” was changed into “daughter”. First names had been changed, too.
Main reasoning/argumentation	The Appellate Court considers that it cannot determine that the woman is the father of the child, as only a man can be seen as the father. Both at the time of the IVF treatment and at the time of the birth of the child the woman was no longer a man. Rejection of the request to regard her as the father. On the basis of decisions in European law and the developments in Dutch law (bill on dual motherhood) the Court finds that articles 8 and 14 of the European Convention on Human Rights are not complied with if the legal and biological tie between the woman and the child are not recognized. It therefore determines that the woman (in addition to the birth mother) is the parent of the child.
Key issues (concepts, interpretations) clarified by the case	Determination of the way in which a transgender should be the parent of his or her child.
Results (sanctions) and key consequences or implications of the case	Held: woman, formerly a man, is parent to child in addition to the birth mother.

Chapter 7, Applicability of legislation on transgender issues, case 8

Case title	No prolongation of temporary employment agreement before sex operation: discrimination.
Decision date	01.11.2012
Reference details	<i>NIHR, Oordeel</i> [opinion] 2012-166.
Key facts of the case	The applicant was employed by the respondent as a planner National and International Transport since 1 April 2010, on the basis of agreements of employment for a determined period of time. In February 2012 the applicant informed his director that he wanted to go through gender reassignment surgery in 2013. On 8 March 2012 the director told the applicant that he would not get a new agreement of employment. There are three e-mails, one of which says that the director of an employment agency recommends him to use as a reason not only the personal situation of the applicant, but the recession as well. In the third e-mail the respondent says he will follow this advice. The respondent also checked how long someone is absent in the case of a gender reassignment operation.
Main reasoning/argumentation	The NIHR is of the opinion that the e-mails show that a distinction on the basis of sex has been made. The respondent has not proved that his wish not to enter into another agreement of employment has nothing to do with the surgery.
Key issues (concepts, interpretations) clarified by the case	Effect of sex changing surgery on the decision not to enter into another agreement of employment.
Results (sanctions) and key consequences or implications of the case	The NIHR, concluded that the respondent did not refute the suspicion of discrimination. Held: breach.

Chapter 7, Applicability of legislation on transgender issues, case 9

Case title	Refusal of a transsexual guest in a hotel: discrimination
Decision date	30.05.2013
Reference details	<i>NIHR, Oordeel</i> [opinion] 2013-65
Key facts of the case	The applicant is a transgender who changed sex through surgery. The person taking care of the applicant asked the respondent, a hotel which gives care, whether the applicant could stay at the hotel for a week once again: the applicant had been there before. Initially, the applicant was accepted, but then she was rejected because other guests and their family members had complained about the way the applicant had discussed her transsexuality with them. This had been discussed with the applicant, but she had not changed her behaviour.
Main reasoning/argumentation	The NIHR is of the opinion that the respondent has directly discriminated the applicant, giving in to the discriminatory behaviour of the inhabitants of the hotel and their family members..
Key issues (concepts, interpretations) clarified by the case	Giving in to discriminatory behaviour of guests in a hotel leads to discrimination by the hotel itself.
Results (sanctions) and key consequences or implications of the case	Breach of the law: direct discrimination on the basis of sex.

Chapter 7, Applicability of legislation on transgender issues, case 10

Case title	Rejection of transsexual for a job. Discrimination
Decision date	08.08.2013
Reference details	<i>NIHR</i> , <i>Oordeel</i> [opinion] 2013-104
Key facts of the case	The applicant is transsexual and has dressed like a woman since August 2012. Since 2010 she worked as a coach of asylum seekers. The agreement of employment finished in July 2012. In September 2012 the respondent arranged a farewell party for all employees who were leaving. The applicant appeared as a woman there, which was new for some of her colleagues. In October 2012 she applied for her old job at a different location, run by the respondent. The manager made inquiries and let her know that she was regarded as too social for the job. In addition her sex change had been discussed. According to the applicant, the manager had said that this played a part, too. It was supposed to be too much of a risk in the interaction with asylum seekers due to their different cultural background. For that reason, no overt homosexuals were hired either.
Main reasoning/argumentation	The NIHR is of the opinion that the respondent did not see any problems at an earlier stage. The respondent has not proven that she did not function properly and there is no evidence that her transsexuality has not played a part..
Key issues (concepts, interpretations) clarified by the case	Discrimination by employer on the basis of transsexuality.
Results (sanctions) and key consequences or implications of the case	Breach of the law, discrimination on the ground of sex.

Chapter 7, Name change and/or sex change of transgender people, relevant case law, case 1

Case title	Request for crossing out sex in birth certificate rejected.
Decision date	30.03.2007
Reference details	<i>Hoge Raad</i> [Supreme Court], <i>LJN: AZ5686</i> .
Key facts of the case	The appellant felt inter- or asexual, neither male nor female, and requested that his sex be crossed out in his birth certificate. For his the claim appellant relied upon Article 1:24 of the Civil Code which provides for the possibility of supplementing incompleteness or correcting an error in a person's birth certificate.
Main reasoning/argumentation	The Supreme Court dismissed the appellant's claim, ruling that it comes within the <i>margin of appreciation</i> of national states under Article 8 of the ECHR to rule that a person's sex in his/her birth certificate is either male or female, but not gender-neutral. According to the court, the general interest outweighed the individual interest in this respect. Furthermore, the Court remarked that it was true that intersexuality was receiving increasing public attention. However, in the Court's opinion, no trend towards legal recognition of a neutral gender identity could be discerned.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The Court dismissed the appellant's appeal.

Chapter 7, Name change and/or sex change of transgender people, relevant case law, case 2

Case title	Change of sex not sufficiently completed.
Decision date	22.05.2005
Reference details	<i>Gerechtshof 's-Hertogenbosch</i> ['s-Hertogenbosch Court of Appeal], <i>LJN</i> BA5428
Key facts of the case	The appellant requested that his sex be changed in his birth certificate and subsequently that his name be changed. The Regional Court had dismissed his claim.
Main reasoning/argumentation	The Court ruled that the physical change of sex of the applicant was not yet sufficiently completed for a change of sex in his birth certificate to be granted within the meaning of Article 1:28 of the Civil Code. The court based its decision upon the finding that hormonal treatments had only started in September 2006 and surgery was yet to take place.
Key issues (concepts, interpretations) clarified by the case	Although the appellant presented himself as a woman in daily practice and bore a female forename, the Court ruled that his request for the change of name was rejected, as his sex in the birth certificate remained male. The Court considered the requested female names undesirable and also inappropriate within the meaning of Article 1:4 (2) of the Civil Code.
Results (sanctions) and key consequences or implications of the case	The Court rejected the appeal and upheld the judgment of the Regional Court.

Chapter 7, Name change and/or sex change of transgender people, relevant case law, case 3

Case title	Change of sex and names of Luxembourg national.
Decision date	14 October 2002
Reference details	<i>Rechtbank Den Haag</i> [Den Haag Regional Court], <i>LJN</i> : AF4586 and R. A. Lawson (2003) 'In de schaduw van Goodwin', in: <i>NJCM-Bulletin</i> , pp. 313-317
Key facts of the case	The applicant was a Luxembourg national who had resided in the Netherlands since 1990 where he changed sex. In 2001 the applicant appealed to the Regional Court of The Hague for a change of sex and names.
Main reasoning/argumentation	The Court granted the request for change of sex under Dutch law. The change of names was problematic due to the fact that the applicant did not have Dutch nationality. However, the court ruled that a change of sex is a change of status within the meaning of Article 1 of the Convention on the recording of surnames and forenames in civil status registers (Istanbul 1958) of the <i>Commission Internationale de l'Etat Civil (CIEC)</i> [International Commission on Civil Status (ICCS)] and ordered the change of applicant's names.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	The Court ordered the change of applicant's sex and names.

Chapter 7, Name change and/or sex change of transgender people, relevant case law, case 4

Case title	Change of sex and names in university diploma
Decision date	30.11.2010
Reference details	<i>NIHR, Oordeel</i> [Opinion] 2010-175
Key facts of the case	The applicant is a transsexual (from woman to man) and finished his university studies. He received a diploma with his original female first names. After that the man changed sex through surgery and his first names were changed, confirmed by the court. The man asked the university for a new diplomawith his present male first names. The university rejected this request because it only issues a diploma once. It does give him a statement with his study results with his present names.

Main reasoning/argumentation	The Equal Treatment Commission considers that the university has indirectly discriminated the man on the ground of sex. This affects transsexuals in particular. The university's reliance on the law, which results in issuing a diploma only once, is no justification. The law does not say that it is prohibited to issue a new diploma in certain circumstances. The university's wish to decrease the risk of fraud does not counterbalance the interest of the man, who needs a new diploma. A mere statement is not the same as a diploma and may lead to questions by future employers.
Key issues (concepts, interpretations) clarified by the case	Change of names in diplomas.
Results (sanctions) and key consequences or implications of the case	The NIHR's opinion is that a university diploma should be issued once again, with the male names of the man.

Chapter 7, Name change and/or sex change of transgender people, relevant case law, case 5

Case title	Request for change of sex in birth certificate allowed.
Decision date	28.03.2012
Reference details	<i>Rechtbank Alkmaar</i> [Alkmaar Regional Court], ECLI:NL:RBALK:2012:BW5452
Key facts of the case	The applicant was registered as male at the time of birth, but has found out that her female characteristics which are existing but which were hidden at the time of birth, are dominant. She wants a change of the birth certificate, relying on Article 1:28 of the Civil Code. She does not want to be operated upon, as required by this article.
Main reasoning/argumentation	The Court does not allow the request on the ground of Article 1:28 of the Civil Code, as this article is meant for transsexuals. It considers that Article 1:24 of the Civil Code is applicable, as this article allows the birth certificate to be changed if there has been an evident mistake (intersex, or DSD). This is the case when at the time of birth both male and female characteristics were present and it was very difficult to determine the gender of the child. In this case, subsequent medical opinions have made clear that female characteristics do exist. Birth certificate may be changed without a further operation.
Key issues (concepts, interpretations) clarified by the case	Change of birth certificate in the case of intersex (DSD).
Results (sanctions) and key consequences or implications of the case	The Court allowed the applicant's request.

Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the grounds of sexual orientation

No relevant case law available.

Annex 2 – Statistics

Chapter 1, Implementation of Employment Directive 2000/78/EC

NIHR	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010			2013
Total number of complaints received by the NIHR, on discrimination on grounds of sexual orientation ²⁹⁷	7	7	6	5	10	15	4	10	7	12	8	16	8	No data
Total number of opinions delivered by the Commission on complaints of discrimination on grounds of sexual orientation (plus – in brackets – the number of opinions on complaints of discrimination on grounds of gender identity)²⁹⁸	4 (+1)	4	2 (+2)	6 (+1)	3 (+2)	3	7 (+3)	5 (+1)	4 (+3)	2 (+2)	6 (one unaccounted for) (+2)	1	2 (+1)	1 (+1)
– employment	1 (+1)	2	1	4 (+1)	1	0	4 (+3)	2	3	1	2	1	2	1 (+1)
– education	0	0	0	0	0	0	0	0	0 (+2)	0	0 (+1)	0	0	0
– housing	0	0	0	0	0	0	0	0	0	0	0	0	0	0
– other goods and services	3	2	1 (+2)	2	2 (+2)	3	3	3 (+1)	1 (+1)	1 (+2)	3 (+1)	0	0 (+1)	0

²⁹⁷ See the annual reports of the Equal Treatment Commission, now the Netherlands Institute for Human Rights, for 2004 and 2008, 2009, 2010, 2011 and 2012, available at: www.mensenrechten.nl.

²⁹⁸ The 2010, 2011 and 2012 annual reports are available in English at [https://mensenrechten.nl/publicaties/zoek?categorie\[0\]=434555](https://mensenrechten.nl/publicaties/zoek?categorie[0]=434555).

NIHR	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total number of opinions delivered by the NIHR finding that there was indeed discrimination on grounds of sexual orientation (plus – in	2	0	0 (+2)	2	2 (+1)	3	2 (+2)	2 (+1)	1 (+1)	1	2 (+1)	1	0 (+1)	0 (+1)
– employment	0	0	0	1	1	0	2 (+2)	2	1	0	2	1	0	0 (+1)
– education	0	0	0	0	0	0	0	0	0 (+1)	0	0 (+1)	0	0	0
– housing	0	0	0	0	0	0	0	0	0	0	0	0	0	0
– other goods and services	2	0	0 (+2)	1	1 (+1)	3	0	0 (+1)	0	1	0	0	0 (+1)	0
National number of sanctions/compensation payments issued (compliance measures taken by defendant in sexual orientation cases, known by the NIHR,)²⁹⁹	1	1	1	1	0	1	3	3	0	?	1, possibly +1	0	?	?

²⁹⁹ This information is obtained from the NIHR. The NIHR explicitly remarked that this is not an exhaustive overview

Courts	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total number of judgments on complaints of discrimination on grounds of sexual orientation (or – in brackets – gender identity)	0	0	1	0	0	0	1	0	0	0 (+1)	0	3	1	0
– employment	0	0	0	0	0	0	0	0	0	0 (+1)	0	3	0	0
– goods and services	0	0	1	0	0	0	1	0	0	0	0	0	1	0
Total number of judgments finding that there was indeed discrimination on grounds of sexual orientation (or – in brackets – gender identity)	0	0	0	0	0	0	0	0	0	0 (+1)	0	1	0	0

Chapters 2, 3 and 4

The authors of this report submitted an official request (in writing, 16.01.2008) to the Ministry of Justice to provide the information as requested in the guidelines under Chapters 2, 3 and 4. The authors received a letter (dated 06.02.2008) from the Information and Analysis Centre of the Immigration and Naturalisation Service (INDIAC) stating that no such information was available, due to the simple fact that the Dutch authorities currently do not record this information. However, INDIAC notified the authors of the current preparation of evaluation research into the effects of the gender-related policy (including the LGBT policy) of the Immigration and Naturalisation Service. The results of that research and other recent studies have been included in this update (see the text of each of the three chapters). None of these studies give statistics per year. No recent studies by INDIAC have been found either.

Chapter 5, Freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc..	6	7	6	7	6	7	5	11	10	11
Number of demonstrations against tolerance of LGBT people	0	0	0	0	0	0	0	0	0	0

Chapters F, G and H

The authors of this report submitted an official request (in writing, 18.01.2008 and 22.01.2008) to the Ministry of Justice to provide the information as requested in the guidelines under Chapters 6 and 7. The authors received a letter (dated 27.02.2008) from the director of the Information Service of the Ministry of Justice indicating that the letters had been forwarded to the Council for the Judiciary and to public prosecution service. The Council for the Judiciary was later able to provide some figures and did so on 18.02.2014 by e-mail as well (see below). In 2010 and subsequent years also some figures regarding hate crimes were found (see Chapters 6.1., 6.3. and 8.1.).

Chapter 7, Requested changes of sex in birth certificates

source: email of 25.02.2010 and 18.02.2014 from <i>Raad voor de Rechtspraak</i> [Council for the Judiciary]	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of (positive or negative) court decisions on requests of people wishing to change the sex in their birth certificate under Article 1:28 of the Civil Code	57	60	56	79	76	86	96	107	83	76

Chapter 9, Statistics relevant to the impact of good practices

source: Statistics Netherlands, www.cbs.nl	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number of same-sex couples entering into registered partnership (possible since 01.01.1998)	3010	1757	1600	513	488	485	492	518	533	526	522	499	487	481	435
Number of same-sex couples entering into marriage (possible since 01.04.2001)	0	0	0	2414	1838	1499	1210	1150	1212	1371	1408	1358	1354	1355	1285

Table 1: Requirements for rectification of the recorded sex or name on official documents

	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment/ physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/ automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation)
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are use by medical committees established under the Law on Health Care
DE	✓		✓		✓	✓				Small solution: only name change
DE	✓		✓	✓	✓	✓	✓	✗ court decision and law		Big solution: rectification of recorded sex
DK	✓	✓				✓	✓	?		Rectification of recorded sex
DK			✓			✓				Change of name
EE	✓	✓				✓	✓	?		
EL					✓	✓	✓	?		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, also before legal recognition of gender reassignment
FR			✓	✓	✓	✓	✓	✓		Requirements set by case law, legal and medical procedures uneven throughout the country
HU						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1 January 2011 a marriage can be transformed into a registered partnership
IE									✓ (name change possible by Deed Poll and under Passports Act 2008)	Further changes expected following court case <i>Lydia Foy</i> (2007)

IT			✓	✓	✓	✓	✓	✓			
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.	
LU										No provisions in force, praxis varies.	
LV							✓	✓ Change of name is possible after gender reassignment		Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.	
MT	✓	✓	✓	✓	✓	✓	✓	(only unmarried, divorce not possible)		Requirements unclear, decided by Courts on an ad hoc basis	
NL	✓	✓	✓	✓	✓	✓	✓			An Act was passed by Parliament which leaves intact only the requirement for the intention to live in the opposite gender and the medical opinion (18 December 2013, the so-called Transgender Act). It is expected that the Act of Parliament will enter into force on 1 July 2014.	
PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice	
PT	✓		✓	✓	✓	✓	✓			Case-by-case decisions by courts, new act expected	
RO				✓	✓	✓	✓				
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board	
SI										No formalities for change of name	
SK							✓	?		Change of name granted simply upon application accompanied by a confirmation by the medical facility.	
UK										Change of name requires no formalities	
UK	✓	✓	✓				✓	✓		Rectification of the recorded sex	

Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates

the conditions for legal recognition of gender reassignment.
 ✓= applies; ?=doubt; ✕=removed; change since 2008

Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ³⁰⁰	All areas of RED*		
AT		✓		✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓		New anti-discrimination legislation adopted
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	
ES			✓		
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	

³⁰⁰ Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. Directive 2000/43/EC (Racial Equality Directive) covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ³⁰⁰	All areas of RED*		
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL	✓				
PT	✓				
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	
UK			✓	✓	The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality (Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force October 2010.
TOTAL	9	7	11	20	

Note: ✓ = Applies; ? = doubt; x = removed; **change since 2008**

Table 3: Discrimination on grounds of gender reassignment or identity in national legislation

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or <i>travaux préparatoires</i>
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to ‘gender identification’.
DE			✓	Constitutional amendment proposal by opposition (‘sexual identity’)
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to ‘other issues related to gender’.
EL			✓	
ES			✓	The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity.
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	
NL	✓			Case law and opinions of the Netherlands Institute for Human Rights (formerly: Equal Treatment Commission)
PL			✓	

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
PT			✓	
RO			✓	
SE	✓	✓		Discrimination on grounds of gender reassignment is still considered ‘sex’ discrimination. The new ground ‘transgender identity or expression’ now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the ‘gender reassignment’ protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under “medical supervision” and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.
TOTAL	10	3	15	

Note: ✓ = applicable; positive development since 2008

Table 4: Criminal law provisions on 'incitement to hatred' and 'aggravating circumstances' covering explicitly sexual orientation

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category 'group of people', but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		
EL		✓	Article 23 of Law 3719/2008 provides for an aggravating circumstance in cases of hate crime based on sexual orientation.
ES	✓	✓	
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category 'comparable group'. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category 'groups of society'. Penal Code was amended to include hate motivated crimes against 'certain groups of society'. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The Discrimination Instruction by the Public Prosecution Service recommends a 50%-100% higher sentence for common crimes with discriminatory aspects. ³⁰¹
PL			General provisions could extend to LGBT people
PT	✓	✓	
RO	✓	✓	Art. 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article 369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation. Homophobic intent is only considered an aggravating circumstance in the case of murder.
SK			LGBT people could fall under the category 'group of people'
UK (N-Ireland)	✓	✓	
UK (England & Wales.)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23.03.2010. It applies to Scotland as well.
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ✓ = applicable; positive development since 2008

³⁰¹ Netherlands, Public Prosecution Service (*Openbaar Ministerie*) (2007, 2011), Discrimination Instruction [*Aanwijzing Discriminatie*], available at: http://www.om.nl/algemene_onderdelen/uitgebreid_zoeken/@155214/aanwijzing/

Table 5 - Definition of ‘family member’ for the purposes of free movement, asylum and family reunification

Country Codes	Free movement ³⁰²		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of ‘family member’ includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of ‘family member’ includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DK	✓	✓	✓	✓	✓	✓	
EE							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
EL							
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations to this law have not been adopted, thus the meaning of the requirement that the ‘affective relationship’ be ‘duly attested’ remains to be clarified. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [del derecho de asilo y de la protección subsidiaria] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU <i>acquis</i> , confirms the notion that a family member includes the <i>de facto</i> partner having an affective relationship similar to marriage.
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities’ discretion, which may require additional conditions. No information available on refugees.
HU		✓		✓		?	Entry and residence rights for free movement are also granted for the unmarried <i>de facto</i> partner, subject to conditions.
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses.
IT							
LT							

³⁰² In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a ‘durable relationship’ may be proven for the purposes of Art. 3 (2) of the Free Movement Directive.

Country Codes	Free movement ³⁰²		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.
LV		✓					Article 3.4 of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile.
MT							
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓		✓		Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	
TOTAL	8	15	8	13	8	12	

Note: ✓ = applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.