

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

Poland

January 2014 Update

Author of the 2014 Update:
Zuzanna Warso
under the supervision of Adam Bodnar
Franet contractor: Helsinki Foundation for Human Rights

Authors of the 2010 Update:
Adam Bodnar
Aleksandra Gliszczyńska-Grabias
Katarzyna Sękowska-Kozłowska
Anna Śledzińska-Simon
under the supervision of Andrzej Rzepliński

Authors of the 2008 report:
Adam Bodnar
Piotr Kładoczny
Maria Niełacznna
Anna Śledzińska-Simon
under the supervision of Andrzej Rzepliński

DISCLAIMER: This document was commissioned under contract as background material for comparative analysis by the European Union Agency for Fundamental Rights (FRA) for the project 'Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU, Comparative legal analysis, Update 2015'. The information and views contained in the document do not necessarily reflect the views or the official position of the FRA. The document is made publicly available for transparency and information purposes only and does not constitute legal advice or legal opinion.

Contents

Executive summary	1
A. Implementation of Employment Directive 2000/78/EC	9
A.1. Methods of implementation of Directive 2000/78/EC	9
A.2. Antidiscrimination law	12
A.3. Plenipotentiary for equal treatment	16
A.4. Human Rights Defender (Ombudsperson) and its legal position	18
B. Freedom of movement	21
B.1. Situation of Polish citizens returning to Poland after moving to another EU Member State in order to enter into a civil partnership	23
C. Asylum and subsidiary protection	26
D. Family reunification	29
E. Freedom of assembly	30
F. Criminal law	34
F.1. Protection against hate speech.....	34
F.2. Physical violence against LGBT people	38
G. Transgender issues	42
G.1. Legal situation	42
G.2. Recent initiatives	45
H. Miscellaneous	47
H.1. Educating about LGBT issues	47
H.2. The draft law on same-sex couples (registered partnerships).....	49
H.3. Limited access to advertising agencies and other services	51
H.4. Collection of personal data by the police.....	52
H.5. Public statements by politicians.....	53
I. Intersex	56
J. Good practices	58
Annex 1 – Case law	60
Annex 2 – Statistics	76

Executive summary

Implementation of Employment Directive 2000/78/EC

The area of employment and occupation appears to be the sole field where effective legal remedies are accessible to persons discriminated against on the grounds of their sexual orientation. Both the Labour Code (*Kodeks Pracy*)¹ as well as the Act on labour market institutions (*Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy*)² explicitly name “sexual orientation” as one of the prohibited grounds of discrimination. Moreover, NGOs can join court proceedings on behalf of a victim of discrimination.³ There is, unfortunately, no official statistical data that would show the size of the NGO involvement.

In 2011 the new Law on equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*)⁴ came into force. The Law reflects only the minimum requirements of protection set up by EU Equality Directives. The plans to amend the Law in order to extend the protection against discrimination on the grounds of sexual orientation and cover the fields of access to goods and services, social protection, and education face strong opposition. Regrettably there is no data on the number of court cases concerning discrimination on the grounds of sexual orientation. However, according to the studies by NGOs, this type of case constitutes only 1 per cent of all discrimination cases.⁵

According to the new Law, two public bodies were granted competences in the field of equality: the Human Rights Defender/Ombudsperson (HRD) (*Rzecznik Praw Obywatelskich*, RPO) and the Government Plenipotentiary for Equal Treatment (GPET) (*Pełnomocnik Rządu do Spraw Równego Traktowania*). One of the tasks of the GPET is elaborating the National Action Plan for Equal Treatment. Neither GPET nor HRD can impose sanctions. The two institutions receive individual complaints, address other public bodies and urge them to take action.

Despite the explicit prohibition of discrimination on the grounds of sexual orientation in the field of employment and occupation, there are still challenges related to safeguarding equal treatment. According to the new Law on equal treatment the Human Rights Defender was endowed with the role of an independent equality body. However, the full implementation of its tasks encounters obstacles due to the fact that their imposition was not followed by the

¹ Poland, Labour Code (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*), 26 June 1974.

² Poland, Act on labour market institutions (*Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy*), 20 April 2004.

³ Poland, Code of Civil Proceedings (*Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego*), 17 November 1964.

⁴ Poland, The Act on the implementation of certain European Union’s provisions concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania.*), 3 December 2010.

⁵ Poland, Polish Society of Antidiscrimination Law (PSAL) (*Polskie Towarzystwo Prawa Antydyskryminacyjnego*, PTPA) (2013), *Prawo antydyskryminacyjne w praktyce sądów powszechnych*, available at: www.ptpa.org.pl/public/files/Prawo%20antydyskryminacyjne%20w%20praktyce%20s%C4%85dowej%281%29.pdf, accessed on 6 May 2014.

attribution of dedicated financial resources. Moreover, the legal basis for HRD's actions was not properly adjusted for it to be able to fully react to infringements of the equal treatment principle in relations between individuals.

Freedom of movement

In general, LGBT third country-nationals who are registered partners of Polish citizens are not in the position to benefit from the freedom of movement. Polish law⁶ does not recognise such a freedom for partners in the same-sex partnerships which were registered in other Member States. As a result, neither the children, nor other family members of LGBT third-country nationals who are partners of Polish citizens, can benefit from freedom of movement.

After the strategic litigation of cases that concerned third-country nationals who were registered partners of Polish citizens some progress has recently been made with regard to the issue of entering Polish territory. The guidelines established by the Border Guard Commander-in-Chief (*Komendant Główny Straży Granicznej*) now recommend issuing a 15-day visa for the third-country nationals who are registered partners of Polish citizens and wish to enter Poland.⁷

There still exist, however, obstacles for Polish nationals who wish to enter into a same-sex partnership or marriage in a Member State where such a possibility is available. In order to obtain a certificate stating that he or she is not married to anyone else, a Polish national has to provide the civil registry office (*urząd stanu cywilnego*) with the name of the future spouse. Some civil registry offices refuse to issue a certificate if the name suggests that the future spouse is going to be of the same sex.⁸

It is important to highlight that a same-sex partnership registered abroad does not have any legal significance in Poland, and the registered partners are treated as unmarried (single) under the Polish law. They do not have the same rights as married couples and their partnership lacks any kind of legal recognition or protection.

Asylum and subsidiary protection

Since 2008 foreigners who could be, in their country of origin, persecuted or harassed because of their sexual orientation or gender identity are provided protection from the risk of being returned home.⁹ Polish law, however, does not contain any provisions granting the refugee status to LGBT partners as family members of asylum seekers.

⁶ Poland, The Act on entry to Polish territory, residence on and exit from this territory by European citizens and their family members (*Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin*), 14 July 2006.

⁷ Poland, Helsinki Foundation for Human Rights (*Helsinkińska Fundacja Praw Człowieka*) (2013), Letter from the Chief Border Guard, available at: www.hfhr.pl/wp-content/uploads/2013/06/SG-HFPC-18_06_2013.pdf, accessed on 6 May 2014.

⁸ Poland, Rzeczpospolita (2009), 'PE: Polscy geje skarżą urzędy stanu cywilnego', available at: www.rp.pl/arttykul/268475.html, 25 February 2009, accessed on 6 May 2014.

⁹ Poland, The Act on granting protection to foreigners on the territory of Poland (*Ustawa z dnia 13 czerwca 2003 o udzielaniu ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej*), 13 June 2003.

There is no official data about the number of people who apply for a refugee status based on the fear of persecution on the grounds of sexual orientation. Data on specific cases is gathered by NGOs who offer assistance to asylum seekers.¹⁰

Despite a growing recognition that a well-founded fear is a valid ground for granting the refugee status, there is still, however, a lack of understanding of the LGBT asylum seekers' situation. The practices of institutions handling asylum cases show that asylum seekers are expected to provide evidence of their sexual orientation and gender identity. Moreover, officials often misjudge the situation in the country of origin and do not seek assistance of experts in that regard.¹¹

Family reunification

The provisions of Council Directive 2003/86/EC have been implemented into the Act on Foreigners (*Ustawa o cudzoziemcach*).¹² However, the definition of a family member included in that Act does not cover registered LGBT partners. Therefore, the provisions on family reunification, which apply to “family members” - as defined by the Act - do not cover LGBT partners. In the new Act on Foreigners,¹³ which entered into force in May 2014,¹⁴ the provisions on family reunifications and the definition of a family member have remained unchanged.

The new Act in a different provision refers, however, to the European Convention on Human Rights¹⁵ and allows for granting a residence permit to a person who “leads a family life” (*prowadzi życie rodzinne*) – as defined by the Convention – with a Polish, EU or EFTA citizen living in Poland.

According to the European Court of Human Rights (ECtHR) the concept of a “family life” covers same-sex partnerships - in *Schalk and Kopf v Austria*¹⁶ the ECtHR recognized that same-sex couples enjoy the right to “respect for family life” protected by Article 8 of the Convention. Due to the reference to the concept of a “family life” which is broader than the definition of a “family member” included in the Act, a residence permit should now be granted also to LGBT partners. It is yet, however, too early to say how the provision will be applied in practice.

¹⁰ Poland, President of the Office for Foreigners (*Urząd ds. Cudzoziemców*) (2014) Reply to freedom of information request no. BSZ – 0351-387/14/TB, 17 February 2014; Council for Refugees (*Rada ds. Uchodźców*) (2014) Reply to freedom of information request no. DSWRU-5/10/14, 18 February 2014; Ministry of Internal Affairs (*Ministerstwo Spraw Wewnętrznych*) (2014) Reply to freedom of information request no. DPM-WPM-0667-2/2014/RS, 7 March 2014.

¹¹ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2012), *Prawa osób LGBT w Polsce*, Warszawa, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) available at: www.kph.org.pl/publikacje/prawa_osob_lgbt.pdf, accessed on 11 June 2014.

¹² Poland, Act on Foreigners (*Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach*), 13 June 2003.

¹³ Poland, Act on Foreigners (*Ustawa z dnia 12 grudnia 2013 o cudzoziemcach*), 12 December 2013.

¹⁴ Poland, Act on Foreigners (*Ustawa z dnia 12 grudnia 2013 o cudzoziemcach*), 12 December 2013.

¹⁵ Council of Europe (1950) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

¹⁶ European Court of Human Rights (ECtHR), *Schalk and Kopf v Austria*, no. 30141/04, 24 June 2010.

Freedom of assembly

In the past, Poland witnessed many significant problems with regard to the organisation of assemblies by the LGBT community. These obstacles led to a number of crucial court rulings by the Polish Constitutional Court (*Trybunał Konstytucyjny*)¹⁷, the Supreme Administrative Court (*Naczelny Sąd Administracyjny*)¹⁸ and the ECtHR¹⁹ that highlighted the importance of the freedom of assembly. Currently, there are no obstacles to registering an assembly in support of LGBT rights.

Nevertheless, there are still cases of violence towards the participants of LGBT assemblies. The use of homophobic banners by counter-demonstrators and inadequate reactions of the police can also be observed. Moreover, the judgment of the European Court of Human Rights in the case *Bączkowski v. Poland* has not yet been properly implemented with regard to the appeal procedure.²⁰

In 2012 changes to the Act on Assemblies (*Ustawa Prawo o Zgromadzeniach*)²¹ were introduced. They allow prohibiting several assemblies to take place at the same time, if there is a risk of violence. According to NGOs and the Human Rights Defender these changes disproportionately limit the freedom of assembly.²²

Hate speech and criminal law

Homophobic hate speech remains a problem in the Polish political life and in the society in general. However, there are no specific provisions that would protect the members of sexual minorities. Victims of homo- or transphobic hate-speech are protected only by general provisions of the Criminal Code²³ and the Civil Code²⁴. The work on the draft laws that would amend the Criminal Code and extend the protection against hate speech to cover sexual minorities is pending.²⁵

Because of the specificity of the Polish law, there have been attempts to use other ways to seek legal protection from homophobia, e.g. by means of a private indictment (*prywatny akt oskarżenia*) or the path offered by the civil law, i.e. a lawsuit for protection of personal rights (*dobra osobiste*). Their effectiveness is however limited, since the protection they offer does not cover statements which target the LGBT community as a group, only acts targeted at individuals.²⁶ Due to the fact that there are no provisions that explicitly prohibit homophobic

¹⁷ Poland, Constitutional Tribunal (*Trybunał Konstytucyjny*), case K 21/05, 18 January 2006.

¹⁸ Poland, Supreme Administrative Court (*Naczelny Sąd Administracyjny*), case I OSK 329/06, 25 May 2006.

¹⁹ European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

²⁰ European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

²¹ Poland, The Act on Assemblies (*Ustawa Prawo o Zgromadzeniach*), 5 July 1990.

²² Poland, Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*) (2014) *Opinia w sprawie ustawy Prawo o Zgromadzeniach*, 17 April 2014, available at: www.hfhr.pl/wp-content/uploads/2014/04/HFPC_TK_amicus_17042014.pdf, accessed on 6 May 2014.

²³ Poland, Criminal Code (*Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny*), 6 June 1997.

²⁴ Poland, Civil Code (*Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny*), 23 April 1964.

²⁵ Poland, Association „The Diversity Workshop” (*Stowarzyszenie „Pracownia Różnorodności”*) (2013), ‘Ciąg dalszy sejmowych prac nad nowelizacją kodeksu karnego’, 11 March 2014, available at: www.spr.org.pl/2014/03/11/ci%C4%85g-dalszy-sejmowych-prac-nad-nowelizacj%C4%85-kodeksu-karnego/, accessed on 11 June 2014.

²⁶ Poland, *Moje Miasto* (2012), ‘Związki homoseksualne jak zoofilia? Rzeczpospolita nie musi przepraszać’, 27

hate speech, there exist no official statistics concerning the size of the problem in Poland.

Moreover, neither the Criminal Code nor any other provision of the Polish law explicitly considers homo- or transphobic motivation to be an aggravating circumstance of a crime. Since sexual orientation is not listed in any of the provisions of the Criminal Code, the Ministry of Justice does not collect statistics regarding physical violence on the ground of sexual orientation.²⁷ The only data available is that collected by LGBT organisations. According to studies done by NGOs, as well as press reports, many members of the LGBT community, including public persons, are subject to verbal or physical violence.²⁸ Moreover, most hate crimes against LGBT persons are not reported to the police, mostly for fear of secondary victimization.²⁹ In addition LGBT organisations also become subject to violent attacks.³⁰

Transgender issues

The situation of transgender persons is still a legal limbo. Although Polish Constitution³¹ prohibits any kind of discrimination, only few legal acts of lower level explicitly ban discrimination on the ground of sex or sexual orientation. Moreover, there is still no act that would comprehensively regulate the legal situation of transgender persons in Poland.

Undergoing the transition process requires lengthy and costly procedures that differ depending on the health care institution. Most elements of the therapy are not financed by the National Health Fund (*Narodowy Fundusz Zdrowia*)³² and the sex reassignment surgery is possible only after a declaratory judgment of the court. The judgment is available when there have already been irrevocable changes towards the formation of the opposite sex.

January 2012, available at: www.mmwarszawa.pl/401070/2012/1/27/związki-homoseksualne-jak-zoofilia-rzeczpospolita-nie-musi-przepraszac, accessed on 6 May 2014.

²⁷ Poland, Ministry of Justice (*Ministerstwo Sprawiedliwości*) (2014) Reply to freedom of information request no. DSD-II-061-33/14, 27 February 2014.

²⁸ Poland, Stowarzyszenie Lambda Warszawa, Kampania Przeciw Homofobii (2003) *Raport o dyskryminacji i nietolerancji ze względu na orientację seksualną w Polsce*, Warszawa, Stowarzyszenie Lambda Warszawa, Kampania Przeciw Homofobii; Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2009) *Raport o homofobicznej mowie nienawiści w Polsce*, Warszawa, Campaign Against Homophobia (*Kampania Przeciw Homofobii*); Poland, M. Makuchowska, M. Pawłęga, (2012), *Sytuacja społeczna osób LGBT. Raport za lata 2010-2011*, Warsaw: Kampania Przeciw Homogobii, available at: www.kph.org.pl/publikacje/Raport_badania_LGBT_do_netu.pdf, accessed on 6 May 2014; Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2007) *Social situation of bisexual and homosexual people in Poland –2005 and 2006 report*, available at: www.kph.org.pl/publikacje/sytuacja_bi_homo_2007_EN.pdf, accessed on 6 May 2014.

²⁹ Poland, M. Makuchowska, M. Pawłęga, (2012), *Sytuacja społeczna osób LGBT. Raport za lata 2010-2011*, Warsaw: Kampania Przeciw Homogobii, available at: www.kph.org.pl/publikacje/Raport_badania_LGBT_do_netu.pdf, accessed on 6 May 2014.

³⁰ Poland, *Gazeta Wyborcza*, (2013), 'Groził Kampanii przeciw Homofobii. Podłożę wam bombę', available at: wyborcza.pl/1,75248,14869790,Groził_Kampanii_przeciw_Homofobii_Podloze_wam_bombe.html, accessed on 6 May 2014. Poland, *Gazeta Wyborcza*, (2013), 'Bomba w Krytyce Politycznej. Jest dochodzenie Policji', available at: warszawa.gazeta.pl/warszawa/1,34862,14864266,_Bomba__w_Krytyce_Politycznej__Jest_dochodzenie_policji.html, accessed on 6 May 2014.

³¹ Poland, Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej), 2 April 1997.

³² Poland, The Law on Health Services Financed from the Public Resources (*Ustawa z dnia 27 sierpnia 2004 o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*), 27 August 2004.

The procedure for legal gender recognition is based on the jurisprudence of the Supreme Court. In the course of the proceedings the transgender person has to file a suit against their parents.³³ In a recent judgment the Supreme Court³⁴ held that, apart from his or her parents, the person who wishes their legal gender to be corrected should also bring an action against his or her spouse and children.

At the same time Polish transgender persons are receiving more public attention. Since 2010 the Human Rights Defender has intervened several times in cases concerning transgender persons.³⁵ Moreover there seem to be a growing consensus and increasing political will to introduce a comprehensive law on legal gender recognition. In January 2013 a draft “Gender Accordance Act” (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*) was submitted to the Parliament.³⁶ One of the crucial innovations it entails is a change in the procedure from litigious to non-litigious. Simultaneously the Government is preparing its own proposal that would establish a procedure for legal gender recognition by means of amending different legal acts.³⁷

Miscellaneous

In the past homophobic attitudes were present among the authorities responsible for the field of education. This issue remains to be a problem - the research conducted by NGOs proves that LGBT and anti-discrimination topics are still ignored by school curricula and teaching programmes.³⁸

Furthermore, the question of same-sex registered partnerships is still unresolved. Even though several draft laws have been discussed in the Parliament, there seems to be a lack of political will to move forward with this issue.³⁹

Similarly, no progress has been made with regard to the legislation on the prohibition of discrimination on the ground of sexual orientation in accessing goods and services.⁴⁰ Moreover, the regulations regarding the protection of data collected by the police⁴¹ still do not provide full protection of data concerning sexual orientation.

³³ Poland, Supreme Court (*Sąd Najwyższy*), case III CZP II8/95, 22 September 1991.

³⁴ Poland, Supreme Court (*Sąd Najwyższy*), I CSK 146/13, 6 December 2013.

³⁵ Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2011) Letter to the Minister of Labour and Social Policy, 26 April 2011, available at: www.sprawy-generalne.brpo.gov.pl/pdf/2011/04/673031/1561741.pdf, accessed on 6 May 2014; Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2012) Letter to the Minister of Justice, 21 March 2012, available at: www.rpo.gov.pl/sites/default/files/1633035.pdf, accessed on 6 May 2014.

³⁶ Poland, Draft Gender Accordance Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*), 3 January 2013.

³⁷ Poland, Council of Ministers (*Rada Ministrów*) (2014) Projekt założeń projektu ustawy o zmianie ustawy Kodeks postępowania cywilnego, ustawy – Kodeks rodzinny i opiekuńczy, ustawy o zawodach lekarza i lekarza dentyisty oraz niektórych innych ustaw, 31 January 2014, available at:

<http://legislacja.rcl.gov.pl/docs//1/207482/207483/207484/dokument104214.pdf>, accessed on 11 June 2014.

³⁸ Poland, Association „The Diversity Workshop” (*Stowarzyszenie „Pracownia Różnorodności”*), (2013), *Szkola milczenia*, available at: www.spr.org.pl/2013/01/23/szko%C5%82a-milczenia-wie%C5%84czy-projekt-weryfikacji-podr%C4%99cznik%C3%B3w/, accessed on 6 May 2014.

³⁹ Poland, Tvpparlament.pl (2013), ‘Debata nad projektami o związkach partnerskich’, 25 January 2013.

⁴⁰ Poland, The Act on the implementation of certain European Union’s provisions concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania.*), 3 December 2010.

⁴¹ Poland, The Act on Police (*Ustawa z dnia 6 kwietnia 1990 r. o Policji*), 6 April 1990.

The topic of LGBT issues is becoming more visible in the political debate. LGBT rights attract more attention, which sometimes leads to hostile reactions. There are cases of homophobic statements made by politicians. Despite the reactions of LGBT organisations, sanctions are imposed only rarely.

Intersex

Sources related to the situation of intersex people in Poland are very limited. The general prohibition of discrimination included in the Polish Constitution, as well as the open catalogue of grounds for discrimination in the Labour Code,⁴² should guarantee protection to intersex persons. There is, however, no case law that would illustrate this issue. Intersex discrimination is not mentioned in the national non-discrimination policies or guidelines either.

In Poland children cannot remain without a gender. Moreover, there is no formal procedure of ascribing a temporary gender.

Intersex children undergo surgical interventions, however there are no specific procedures for their treatment and the general rules apply. The consent of the patient – and in the case of minor patients or persons incapable of expressing their wishes the consent of the legal representative or sometimes of the guardian-in-fact or guardianship court – is the main basis for a physician to act. Currently the parents decide whether to perform a medical intervention on an intersex child.⁴³

According to the recently proposed “Gender Accordance Act” (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*)⁴⁴ it would be forbidden to execute without a consent any kind of irreversible medical interventions aimed at reassigning the external or internal sex characteristics on intersex persons unless the matter is absolutely necessary to save the person’s life or health. Those persons could agree to undergo irreversible medical interventions once they reach the age of 13.

Good practices

There are examples of positive practices that may lead to the improvement of the LGBT community’s situation in Poland. Many of them, however, lack an evaluation or a review mechanism. At the same time, it is positive that representatives of the civil society become more involved in the design or implementation of certain activities, e.g. training programmes or manuals.⁴⁵

The presence of LGBT issues in the training for the police is more significant than in other

⁴² Poland, Labour Code (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*), 26 June 1974.

⁴³ Poland, Pilonis H., Dzieci bez płci, Medonet.pl, available at: www.medonet.pl/zdrowie-na-co-dzien,artykul,1645975,5,dzieci-bez-plci,index.html, accessed on 6 May 2014.

⁴⁴ Poland, Draft Gender Accordance Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*), 3 January 2013.

⁴⁵ Poland, Informative Base of Police (*Informacyjny serwis policyjny*) (2013), *Po pierwsze człowiek*, available at: isp.policja.pl/isp/prawa-czlowieka-w-poli/aktualnosci/4344,dok.html, accessed on 6 May 2014.

areas within public administration. The fact that the training programmes on hate speech and hate crimes refer also to sexual orientation is positive, bearing in mind the fact that Polish criminal law does not recognise homo- or transphobic motivation as an aggravating circumstance of a crime.

Recently, the problem of hate speech has attracted more attention in the public debate. There are some initiatives to fight it, both online and outside the Internet.

A. Implementation of Employment Directive 2000/78/EC

A.1. Methods of implementation of Directive 2000/78/EC

Until the beginning of 2011, Directive 2000/78/EC was implemented into the Polish national law by means of three legal acts:

- Act of 26 June 1974 Labour Code (*Kodeks Pracy*),⁴⁶ which was amended in 2003 in order to implement Directive 2000/78/EC and 2000/43/EC;⁴⁷
- Act of 20 June 2004 on the Promotion of Employment and Institutions of the Labour Market (*Ustawa o promocji zatrudnienia i instytucjach rynku pracy*);⁴⁸
- Act of 17 November 1964 Civil Procedure Code (*Kodeks Postępowania Cywilnego*),⁴⁹ which was amended in 2004 in order to implement Directives 2000/78/EC and 2000/43/EC.⁵⁰

The Labour Code was amended through the insertion of a new chapter on equal treatment in employment (Chapter IIa) and the general principle in Article 11³ stating that any discrimination in employment, direct or indirect, particularly due to sex, age, disability, race, religion, nationality, political opinions, membership of trade unions, beliefs, sexual orientation or part-time employment is prohibited. This general principle is further enshrined in Article 18^{3a} in Chapter IIa of the Labour Code.

Before the amendment of 2003, Article 18^{3a} referred explicitly to “women and men”. Currently, it includes a prohibition of discrimination of “employees,” without differentiating between men and women, and refers to different grounds of discrimination. According to Article 18^{3a} paragraph 1 employees should be treated equally with respect to entering into employment contracts or their termination, terms and conditions of employment, promotion to higher positions and access to skills development training, irrespective of their sex, age, disability, race, religion, nationality, political opinions, membership of trade unions, beliefs, sexual orientation or part-time employment.

In further paragraphs, Article 18^{3a} includes definitions of direct discrimination, indirect discrimination, harassment and victimisation. These definitions – with some minor exceptions (noted below) – are in compliance with Directive 2000/78/EC.

According to Article 18^{3a} paragraph 3, direct discrimination takes place when an employee is or could be treated, on one of the discriminatory grounds (including sexual orientation), less favourably than another employee in a comparable situation. Article 2 (2) (a) of

⁴⁶ Poland, Labour Code (*Ustawa z dnia 26 czerwca 1974 Kodeks pracy*), 26 June 1974.

⁴⁷ Poland, The Act amending the Labour Code (*Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy - Kodeks pracy oraz o zmianie niektórych innych ustaw*), 14 November 2003.

⁴⁸ Poland, The Act on employment promotion and labour market institutions (*Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy*), 20 April 2004.

⁴⁹ Poland, Code of Civil Proceedings (*Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego*), 17 November 1964.

⁵⁰ Poland, The Act amending the Code of Civil Proceedings (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw*), 2 July 2004.

Directive 2000/78/EC, however, refers to a hypothetical situation of how another person “would be treated in a similar situation”. Thus Directive 2000/78/EC uses the example of “another person” as a comparison, while under the Labour Code the reference is given to an employee and his/her hypothetical treatment in a comparable situation. In practice this discrepancy may cause certain problems in litigation.

Article 18^{3a} paragraph 4 deals with indirect discrimination. According to the first wording of this provision, a discriminatory practice in case of indirect discrimination could be allowed if it was justified by “other objective criteria”. It should be noted that, according to Article 2 (2) (b) (i) of Directive 2000/78/EC, unequal treatment may be allowed only if the provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Furthermore, the Labour Code implemented the basic exception from the general principle of non-discrimination too broadly. According to Article 4 Section 1 of Directive 2000/78/EC, a difference in treatment may be justified, “where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”. However, the Labour Code did not refer to a “genuine and determining occupational requirement.” Instead, according to Article 18^{3b} paragraph 2 point 1 of the Labour Code, a refusal to employ a person on one of the discriminatory grounds did not violate the principle of equality in employment if “it was justified due to the type of work, terms and conditions of its performance or professional requirements expected from employees.” Furthermore, there was no principle of proportionality included in this provision (as in Directive 2000/78/EC – “objective is legitimate and the requirement is proportionate”).

In 2008 Article 18^{3a} paragraph 4 and Article 18^{3b} paragraph 2 point 1 were amended in order to comply with the Directive. The new wording of Article 18^{3a} paragraph 4 mirrors that of the relevant provision in the Directive. Currently, according to Article 18^{3a} paragraph 4, unequal treatment may be allowed if the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Article 18^{3b} paragraph 2 point 1 of the Labour Code was also amended in 2008 and it currently refers to the principle of proportionality, and states that the refusal to employ someone on one of the discriminatory grounds does not violate the rule of equal treatment only if the type and conditions of the job make a specific feature a genuine and decisive professional requirement.

As regards the Act of 20 June 2004 on the Promotion of Employment and Institutions of the Labour Market, the implementation of Directive 2000/78/EC has been ensured through a new set of obligations of employment agencies. According to Article 19c, an employment agency cannot discriminate against people for whom it is seeking employment or other payable activity on the grounds listed in Directives 2000/43/EC and 2000/78/EC, including sexual orientation.

Furthermore, in order to implement Article 9 Section 2 of Directive 2000/78/EC, the amendments to the Civil Procedure Code have been adopted. According to Article 61 of the Code, non-governmental organisations may sue on behalf of any victim of discrimination (irrespective of their nationality) claiming damages resulting from the violation of equal treatment. In addition, non-governmental organisations may join civil proceedings which

concern the claims of discrimination. This provision is of a more general nature and may have application in all discrimination cases pending before civil courts, not only those related to employment. By joining proceedings, a non-governmental organisation has almost the same powers as a party to the proceedings – it may file legal briefs (including amicus curiae briefs), request evidence and appeal against the judgment.

The preliminary condition for bringing a lawsuit on behalf of a victim of discrimination is his/her consent to be represented by the organisation. Similarly, the consent is required when the organisation only wants to join the proceedings. Secondly, the organisation concerned should have the protection of equality and non-discrimination as one of the objectives written in its founding charter.

The provisions on the participation of non-governmental organisations in civil proceedings were amended in 2011.⁵¹ According to NGOs, the position of non-governmental organisations, after the amendments, has been weakened.⁵² Currently non-governmental organisations which join proceedings concerning discrimination could be charged with the costs of actions which they have taken in the course of proceedings.

There is no information available regarding the number of organizations actually engaging in civil proceedings on behalf or in support of complainants. The Ministry of Justice (*Ministerstwo Sprawiedliwości*) does not gather data on how often the organizations make use of this possibility or on the impact of their involvement.⁵³

In 2013 the Polish Society of Antidiscrimination Law (PSAL) (*Polskie Towarzystwo Praw Antydyskryminacyjnego*, PTPA) published the results of research concerning, among others, the cooperation between courts and NGOs.⁵⁴ The Association sent a questionnaire to 48 organisations who, at the time of the survey, formed the Coalition for Equal Opportunities (*Koalicja na Rzecz Równych Szans*) and whose aim was to fight discrimination. Out of 48 organizations 18 replied to the survey. 8 organizations that participated in the research declared that they became party to the proceedings. Half of them did it more than 10 times. 4 of the organizations engage in cases concerning discrimination on the grounds of sexual orientation.

There is no data on how the involvement of NGOs impacts victims and court decisions. However, the experience of NGOs active in the field of anti-discrimination law proves that, besides providing assistance in a particular case, the involvement of organizations in court proceedings may be of strategic importance, and may bring a more general effect. For example, in the case concerning the stepping into a lease of a deceased gay partner, the involvement of the Helsinki Foundation for Human Rights (HFHR) (*Helsinkińska Fundacja*

⁵¹ Poland, The Act amending the Code of Civil Proceedings (*Ustawa z dnia 16 września 2011 r. o zmiany ustawy – Kodeks postępowania cywilnego*), 16 September 2011.

⁵² Poland, Coalition for Equal Opportunities [*Koalicja na Rzecz Równych Szans*], Letter to the Ombudsperson concerning the amendments to the civil code procedure, available at www.ptpa.org.pl/public/files/Kpc%20koalicja.pdf, accessed on 6 May 2014.

⁵³ Poland, Ministry of Justice [*Ministerstwo Sprawiedliwości*], Information obtained upon a motion to access to public information, 25 April 2014.

⁵⁴ Poland, Polish Society of Antidiscrimination Law (PSAL) [*Polskie Towarzystwo Prawa Antydyskryminacyjnego*, PTPA] (2013), *Prawo antydyskryminacyjne w praktyce sądów powszechnych*, available at: www.ptpa.org.pl/public/files/Prawo%20antydyskryminacyjne%20w%20praktyce%20s%C4%85dowej%281%29.pdf, accessed on 6 May 2014.

Praw Człowieka, HFPC) contributed considerably to the fact that the case reached the Supreme Court (SC) (*Sąd Najwyższy*, SN).⁵⁵

As regards other legal acts, consideration should be given to implementing Directive 2000/78 into laws governing professions of public trust, such as attorneys, legal advisors, notaries, architects etc.

A.2 Antidiscrimination law

The works on the new antidiscrimination law, which was being prepared by the Ministry of Labour (*Ministerstwo Pracy*), were initiated in 2007. However, it was not until December 2010 that the law was finally adopted.

On 3 December 2010 the Polish Parliament adopted the Law to implement certain provisions of the European Union on equal treatment (*Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*).⁵⁶ The new law entered into force on 1 January 2011. It is aimed at implementing the following EU Directives: Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

The law implements anti-discrimination regulations concerning gender equality, sexual orientation, race and ethnicity, age, disability, religion or belief, creed, nationality. The law includes the following concepts of discrimination: direct discrimination, indirect discrimination, harassment, sexual harassment, and unequal treatment understood as direct discrimination, indirect discrimination, harassment or sexual harassment, or any less favourable treatment based on a person's rejection of or submission to such conduct, as well as instruction to discriminate against persons on the grounds covered by the law. According to the new law, any person (physical or legal) who was subject to unequal treatment is entitled to compensation. In such cases, the regulations of the Polish Civil Code will be applied. According to the new law, two public bodies were granted competences in the field

⁵⁵ Poland, Polish Society of Antidiscrimination Law (PSAL) [*Polskie Towarzystwo Prawa Antydyskryminacyjnego*, PTPA] (2013), *Prawo antydyskryminacyjne w praktyce sądów powszechnych*, available at: www.ptpa.org.pl/public/files/Prawo%20antydyskryminacyjne%20w%20praktyce%20s%C4%85dowej%281%29.pdf, accessed on 6 May 2014.

⁵⁶ Poland, The Act on the implementation of certain European Union's provisions concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*.), 3 December 2010.

of equality: the Human Rights Defender/Ombudsperson (HRD) (*Rzecznik Praw Obywatelskich*, RPO) and Government Plenipotentiary for Equal Treatment (GPET) (*Pełnomocnik Rządu do Spraw Równego Traktowania*).

As regards sexual orientation, Article 8.1 of the law stipulates as follows:

“It is prohibited to treat unequally persons on the grounds of sex, race, ethnic origin, nationality, religion, belief, creed, disability, age or sexual orientation with regard to:

- 1) access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience
- 2) conditions for access to and carrying out of self-employment or access to occupation or employment
- 3) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
- 4) access and conditions of using of labour market instruments regulated in the law from 20 April 2004 on promotion of employment and labour market institutions, that are offered by labour market institutions and labour market instruments and labour market services offered by other entities that act for employment, development of human resources and counteracting unemployment.”

One of the main challenges is to amend the law in order to extend the protection against discrimination on the grounds of sexual orientation and cover the fields of access to goods and services, social protection, and education.

On 21 June 2013, the first parliamentary reading was held of the draft law on amending the Act on implementation of certain provisions of the European Union on equal treatment. The draft law was presented as a joint motion by two opposition parties, the Palikot’s Movement (*Ruch Palikota*) and the Democratic Left Alliance (*Sojusz Lewicy Demokratycznej*).⁵⁷ It aims to ensure an equal level of protection against discrimination for all grounds of discrimination. As noted above, the currently applicable law only reflects the minimum requirements of protection set up by EU Equality Directives and, because of its limitations in both the substantive and procedural dimension, has been subject to strong criticism by non-discrimination NGOs, academics and the Human Rights Defender.⁵⁸

The draft law introduces an open catalogue of discriminatory grounds, such as sex, race, ethnic origin, nationality, religion, belief, disability, age, sexual orientation, gender identity, gender expression. It provides for the protection against discrimination in the areas of life defined by both the Employment Equality Directive 2000/78/EC and the Racial Equality Directive 2000/43/EC. The draft law includes new concepts of discrimination: discrimination by association, discrimination by assumption, and multiple discrimination. It lays down the requirement of higher compensation in the case of multiple discrimination. The proposed

⁵⁷ Poland, Draft law on amendment of the act on implementation of certain provisions of the European Union on equal treatment (*Projekt ustawy z dnia 10 października 2012 o zmianie ustawy o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania oraz o zmianie niektórych innych ustaw*), 10 October 2012.

⁵⁸ Poland, Onet.pl (2013) ‘Organizacje równościowe apelują o zmiany w ustawie równościowej’, 7 June 2013; Poland, Lex.pl (2012), ‘Ewa Łętowska: nie będzie pożytku z ustawy równościowej’, 5 June 2012; Poland, Lex.pl (2012), ‘RPO: ustawa równościowa nie chroni przed dyskryminacją’, 5 June 2012.

legislation aims to prohibit any form of harassment in the media. In addition, the draft law contains an obligation for all governmental bodies and local authorities to carry out equality programmes (relevant for the scope of their statutory duties). It also clarifies that the exception provided for organisations with an ethos based on religion or belief concerns only the grounds of religion or belief. The currently applicable law is unclear in this matter and allows for unequal treatment on the grounds other than religion or belief.

The draft law faced strong criticism from the right-wing political parties and conservative media, which argued that it limited the freedom of speech and freedom of religion, introduced “homosexual propaganda” and contributed to the “promotion of gender ideology”.⁵⁹ The draft law also met with critical opinions of the legal services of the Polish Parliament, which claimed that it exceeded the requirements of the EU legislation and may constitute a potential violation of economic freedom.⁶⁰

Despite this, the draft law was approved by the majority of the Lower House of the Parliament (Sejm) in its first reading and was referred to the Parliamentary Committee for Justice and Human Rights (*Komisja Sprawiedliwości i Praw Człowiek*) for further legislative work. On 8 October 2013 the Special Subcommittee was created for the purpose of detailed legislative work on the draft law. In March 2014 a group of NGOs gathered in the Coalition for Equal Opportunities (*Koalicja na Rzecz Równych Szans*) urged the Subcommittee to accelerate its work.⁶¹

The first session of the Subcommittee took place on 22 April 2014. Several NGOs participated in the meeting. Apart from 4 organisations from the Coalition for Equal Opportunities, a number of pro-life organisations were present, as well as organisations who act on behalf of multi-child families or oppose what they refer to as “gender ideology”. During the debate representatives of the pro-life and “anti-gender” organisations stated that the draft law was a “smokescreen for the sexualisation of children”, its goal was to promote “gender ideology” and it was an element of conducting in Poland a “sexual revolution”. Representative of the association “Stop Sexualization, Hands off our Children” (*Stowarzyszenie Stop Seksualizacji, Ręce Precz od Naszych Dzieci*) said that by introducing the notion of “sexual expression” the draft promotes, in fact, incest and sexual intercourse with animals, since, just as homosexuality, such activities are a sexual expression.⁶²

In 2011 the Act on radio broadcasting and television (*Ustawa o radiofonii i telewizji*) was amended.⁶³ According to the new wording of provision 16 point 3 § 2 it is prohibited to

⁵⁹ Poland, Rzeczpospolita (2013), ‘Mniejszość wprowadza dyktaturę’, 16 September 2013, available at: www.rp.pl/artukul/1048406-Mniejszosc-wprowadza-dyktature.html, accessed on 6 May 2014.

⁶⁰ Poland, The Sejm of the Republic of Poland (*Sejm Rzeczypospolitej Polskiej*) (2013), *Opinia prawna i merytoryczna do poselskiego projektu ustawy o zmianie ustawy o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania oraz niektórych innych ustaw, druk nr 1051* available at: orka.sejm.gov.pl/rexdomk7.nsf/Opdodr?OpenPage&nr=1051, accessed on 6 May 2014.

⁶¹ Poland, Coalition for Equal Opportunities (*Koalicja na Rzecz Równych Szans*) (2014), *Stanowisko Koalicji*, 5 March 2014, available at: ptpa.org.pl/public/files/stanowisko_Koalicji.pdf, accessed on 6 May 2014.

⁶² Poland, *Gazeta Wyborcza* (2014), ‘Przeciwnicy gender chcą pracować nad ustawą równościową. „Ona promuje kazirodztwo!”’ available at: wyborcza.pl/1,75248,15845368,Przeciwnicy_gender_chca_pracowac_nad_ustawa_rownosciowa_.html, accessed on 6 May 2014.

⁶³ Poland, The Act amending the Act on broadcasting and television (*Ustawa z dnia 25 marca 2011 o zmianie ustawy o radiofonii i telewizji*), 25 March 2011, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20110850459>, accessed on 6 May 2014.

broadcast commercials that would consist content discriminatory on the ground of sexual orientation. Until today there were, however, no complaints based on this provision.⁶⁴ The prohibition applies only to commercials and not to other types of broadcast.

Case law

The Ministry of Justice (*Ministerstwo Sprawiedliwości*), responsible for the collection of statistical data on the number of court proceedings concerning discrimination, does not disaggregate the data according to the ground of discrimination.⁶⁵ Therefore, it is impossible to ascertain the actual number of cases of discrimination on the ground of sexual orientation, or to identify the trends over the years. Regrettably no relevant case-law could be found in the official database of the Ministry of Justice either. The primary source of knowledge on the case-law concerning the implementation of the Employment Directive remains to be the experience and the reports by NGOs active in the field of LGBT rights.

The cases of discrimination on the ground of sexual orientation constitute a small number of all discrimination cases. The study of case files conducted by the Polish Society of Antidiscrimination Law (PSAL) (*Polskie Towarzystwo Prawa Antydyskryminacyjnego*, PTPA) showed that cases of unequal treatment on the ground of sexual orientation constituted only 1 per cent of all discrimination cases.⁶⁶

An important case is currently pending before the District Court for Warszawa Śródmieście (*Sąd Rejonowy dla Warszawy Śródmieście*).⁶⁷ It concerns a gay man who worked as a bodyguard for one of the Polish security companies. The man was dismissed from his job because of his participation in the Equality Parade in Kraków. The employer justified his decision to terminate the employment by saying that he did not want to “work with faggots”. An important issue from the point of view of the European anti-discrimination law is that the basis of employment was not a traditional employment contract (as laid down in the Labour Code) but a “civil contract”. The lawsuit was lodged under the Act on the implementation of certain European Union’s provisions concerning equal treatment. The case will help to clarify whether a non-traditional employment contract falls within the scope of protection provided by Polish antidiscrimination law.

Despite critical opinions on the anti-discrimination law, NGOs active in the field of LGBTI rights conclude that the existing provisions offer, at least to some extent, protection against unequal treatment on the grounds of sexual orientation in the area of employment.⁶⁸

⁶⁴ Poland, Reply from the National Council of Radio Broadcasting and Television to the public information request of the Helsinki Foundation for Human Rights of 21 February 2014.

⁶⁵ Poland, Ministry of Justice (*Ministerstwo Sprawiedliwości*) (2014) Reply to freedom of information request no. DSD-II-061-33/14, 27 February 2014.

⁶⁶ Poland, Polish Society of Antidiscrimination Law (PSAL) (*Polskie Towarzystwo Prawa Antydyskryminacyjnego*, PTPA) (2013), *Prawo antydyskryminacyjne w praktyce sądów powszechnych*, available at: www.ptpa.org.pl/public/files/Prawo%20antydyskryminacyjne%20w%20praktyce%20s%C4%85dowej%281%29.pdf, accessed on 6 May 2014.

⁶⁷ Poland, District Court for Warszawa Śródmieście VI Civil Department (*Sąd Rejonowy dla Warszawy Śródmieście*), VI C 402/13, 2 April 2014.

⁶⁸ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2012), *Prawa osób LGBT w Polsce*, Warszawa, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) available at: www.kph.org.pl/publikacje/prawa_osob_lgbt.pdf, accessed on 11 June 2014.

There are still, however, exceptions and instances where courts fail to use correctly the principles of the anti-discrimination law. For example, in a case of discrimination on the ground of sexual orientation observed by the Campaign Against Homophobia (*Kampania Przeciw Homofobii*) the courts of both instances failed to reverse the burden of proof.⁶⁹

A.3. Plenipotentiary for equal treatment

The first body responsible for the implementation of Directives 2000/78/EC and 2000/43/EC was the Office of the Plenipotentiary for the Equal Status of Women and Men (*Urząd Pełnomocnika do spraw Równego Statusu Kobiet i Mężczyzn*), headed by Magdalena Środa. It was created in December 2001 and the Plenipotentiary had the rank of Secretary of State in the Chancellery of the Prime Minister (*Sekretarz Stanu w Kancelarii Prezesa Rady Ministrów*). The Office had a fairly comprehensive policy regarding the issue of discrimination of sexual minorities. Unfortunately, the Office was never transformed into an equality body. After the elections in October 2005, the Office of the Plenipotentiary for the Equal Status of Women and Men was dismantled. Following the phasing out of the Office of the Plenipotentiary, certain competences under Directives 2000/78/EC and 2000/43/EC have been taken over by non-independent bodies:

- the Undersecretary of State in the Ministry of Labour, Joanna Kluzik- Rostkowska, who supervised (within her sphere of competences) the Department for Women, Family and Counteracting Discrimination (*Wydział do spraw Kobiet, Rodziny i Przeciwdziałania Dyskryminacji*);
- a special department in the Ministry of Internal Affairs dealing with racial and ethnic discrimination and the protection of national and ethnic minorities.

The field of discrimination in employment as regards disability was the competence of the Government Plenipotentiary for Disabled Persons (*Pełnomocnik do spraw Osób Niepełnosprawnych*), both during the period of functioning of the Plenipotentiary for Equal Status of Women and Men and following the liquidation of this office. Following the elections in October 2007, the above structure was not changed.

On 8 March 2008, Prime Minister decided to appoint Ms. Elżbieta Radziszewska as the Governmental Plenipotentiary for the Equal Legal Status (*Pełnomocnik Rządu ds. Równego Statusu Prawnego*). On 22 April 2008 the formal establishment of the Office of the Plenipotentiary took place under the official name of Government Plenipotentiary for Equal Treatment (GPET) (*Pełnomocnik Rządu do Spraw Równego Traktowania*).⁷⁰ Plenipotentiary had the rank of Secretary of State in the Chancellery of the Prime Minister and was

⁶⁹ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2012), *Prawa osób LGBT w Polsce*, Warszawa, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) available at: www.kph.org.pl/publikacje/prawa_osob_lgbt.pdf, accessed on 11 June 2014

⁷⁰ Poland, Regulation of the Council of Ministers on the Government Plenipotentiary for the Equal Treatment (*Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania*), 22 April 2008.

responsible for the coordination of the governmental policies with respect to equality including actions against discrimination on the ground of sexual orientation. GPET, next to the Human Rights Defender, was one of the two bodies granted competences in the field of equality according to the law adopted to implement certain provisions of the European Union on equal treatment.⁷¹ On 18 November 2011 Agnieszka-Kozłowska Rajewicz was nominated for the office of the Plenipotentiary.

One of the obligations of the Plenipotentiary is elaborating the National Action Plan for Equal Treatment and presenting it to the Council of Ministers (The Government) (*Rada Ministrów*). The National Action Plan must consist of goals and priorities in the field of equal treatment, in particular: raising awareness on equal treatment, methods of counteracting discrimination and cooperation with non-governmental organisations and other social partners in the area of equality. It should be planned and implemented with regard to all grounds of discrimination regulated in the law: gender, race, ethnic origin, nationality, religion, belief, creed, disability, age and sexual orientation.

In 2012 the Plenipotentiary carried out consultations with the civil society and academia on priorities and methods in the field of combating discrimination and promoting equal treatment principle.⁷² In 2013 the Plenipotentiary continued the work on the National Action Plan for Equal Treatment for years 2013-2015 (*Krajowy Program Działań na rzecz Równego Traktowania na lata 2013-2015*). The draft Plan was presented by the Plenipotentiary in February 2013 and submitted for public and inter-ministerial consultations.⁷³ The draft Plan was divided into six priorities: a) anti-discrimination policy, b) equal treatment on the labour market and in social security, c) combating violence, d) equal treatment in education, e) equal treatment in healthcare, f) equal treatment in access to goods and services. The draft Plan was consulted by more than 50 equality NGOs –members of the Coalition for Equal Opportunities, which proposed a number of changes.⁷⁴ The draft Plan faced heavy criticism from the ministries for, among other things, being overly extensive. It included, for example, activities which aimed to level-up protection against discrimination against LGBT people (including in the area of hate crimes).⁷⁵ Following the criticism from the ministries, the draft Plan was made more general and concise (mostly with regard to LGBT protection).⁷⁶ No

⁷¹ Poland, The Act on implementation of the European Union's provisions concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010.

⁷² Poland, The Government Plenipotentiary for Equal Treatment (*Pelnomocnik Rządu ds. Równego Traktowania*) (2012) Reply to interpellation no. 5743, 13 July 2012, available at: www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=0F205957, accessed on 6 May 2014.

⁷³ Poland, The Government Plenipotentiary for Equal Treatment (*Pelnomocnik Rządu ds. Równego Traktowania*) (2013) Text of the draft National Action Plan for Equal Treatment 2013-2015, 20 February 2013, available at: www.rownetraktowanie.gov.pl/sites/default/files/krajowy_program_20.02.13.pdf, accessed on 6 May 2014.

⁷⁴ Poland, Coalition for Equal Opportunities (*Koalicja na Rzecz Równych Szans*) (2013) Uwagi Koalicji na rzecz równych szans do projektu Krajowego Programu Działań na rzecz Równego Traktowania na lata 2013-2015, 19 March 2013, available at: ptpa.org.pl/public/files/Uwagi_Koalicji_na_Rzecz_Rownych_Szans-Calosc.pdf, accessed on 6 May 2014.

⁷⁵ Poland, The Prime Minister Chancellery (*Kancelaria Prezesa Rady Ministrów*) (2013) Opinions to the draft National Action Plan for Equal Treatment 2013-2015, 21 February 2013, available at: bip.kprm.gov.pl/kpr/bip-kancelarii-prezesa/projekty-aktow-prawnych/2311,Krajowy-Program-Dzialan-na-rzecz-Rownego-Traktowania-na-lata-2013-2015.html, accessed on 6 May 2014.

⁷⁶ Poland, The Prime Minister Chancellery (*Kancelaria Prezesa Rady Ministrów*) (2013) The draft of National Action Plan for Equal Treatment, 4 June 2013, available at: bip.kprm.gov.pl/kpr/bip-kancelarii-prezesa/projekty-aktow-prawnych/2311,Krajowy-Program-Dzialan-na-rzecz-Rownego-Traktowania-na-lata-2013-2015.html, accessed on 6 May 2014.

funds were planned for the National Action Plan for Equal Treatment. On 7 October 2013 the draft Action Plan was approved by the Committee of the Council of Ministers (*Komitet Rady Ministrów*) and was referred to the Council of Ministers for its approval.⁷⁷ The National Action Plan for Equal Treatment 2013-2016 was published in December 2013.⁷⁸

As regards the number of individual cases handled by the GPET, between 2011 and 2013 (before 2011 such data was not collected) the office received in total 83 complaints concerning discrimination on the ground of sexual orientation – 26 in 2011, 31 in 2012 and 26 in 2013. Only the data from 2013 is disaggregated according to areas of discrimination. In 2013 5 cases were related to activities of governmental administration, 10 to public life, 3 to education and 3 to media. In addition, in 2013, the Plenipotentiary received one case in each of the following areas: employment, trade and services, financial issues, law enforcement, sport. However, based on the available information, it is impossible to establish in how many cases discrimination was confirmed.⁷⁹

A.4. Human Rights Defender (Ombudsperson) and its legal position

As mentioned above, Article 18 of the Act on the implementation of certain European Union's provisions concerning equal treatment passed in 2010 vested the implementation of tasks related to enforcement of the equal treatment principle in the HRD and the GPET.⁸⁰

HRD, which is a constitutional organ appointed for five years, may undertake certain interventions before the courts with respect to discrimination cases. HRD may join any court proceedings (civil or criminal), when it is necessary for the protection of constitutional rights and freedoms. This applies also to discrimination cases. In the course of the intervention, the HRD may present a legal opinion or brief and support arguments of the claimant or assist the court in reaching a correct resolution. In practice HRD rarely uses the possibility of intervention in court proceedings. Furthermore, the HRD may accede to any constitutional complaint submitted to the Constitutional Court (*Trybunał Konstytucyjny*, TK), as well as ask for an abstract review of unconstitutional laws. HRD, similarly to the GPET, cannot impose any sanctions, but addresses other institutions and urges them to take necessary actions.

Since its appointment as the independent equality body, HRD gathers statistical data on the number of complaints it receives. In the period between 2011 and 2013 the HRD received

⁷⁷ Poland, The Prime Minister Chancellery (*Kancelaria Prezesa Rady Ministrów*) (2013) 'Komitet Stały Rady Ministrów przyjął Krajowy Program Działań na rzecz Równego Traktowania', Press release, 7 October 2013, available at: rownetraktowanie.gov.pl/aktualnosci/komitet-staly-rady-ministrow-przyjal-krajowy-program-dzialan-na-rzecz-rownego, accessed on 6 May 2014.

⁷⁸ Poland, The Prime Minister Chancellery (*Kancelaria Prezesa Rady Ministrów*) (2013) 'Rząd zapoznał się z programem na rzecz równego traktowania', Press release, 11 December 2013, available at: rownetraktowanie.gov.pl/aktualnosci/rzad-zapoznal-sie-z-programem-na-rzecz-rownego-traktowania, accessed on 6 May 2014.

⁷⁹ Poland, The Government Plenipotentiary for Equal Treatment (*Pełnomocnik Rządu ds. Równego Traktowania*) (2014) Reply to freedom of information request no. BRPT4452-11(1)14/PO, 24 February 2014.

⁸⁰ Poland, The Act on the implementation of certain European Union's provisions concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010.

420 cases that concerned discrimination on the grounds of sexual orientation – 334 cases in 2011, 21 cases in 2012, and 65 cases in 2013. According to the information received from the office of the Human Rights Defender most of the cases from 2011 concerned the same incident. Based on the available information, it is impossible to establish in how many cases discrimination was confirmed. In the same period HRD received 36 complaints concerning discrimination on the grounds of gender identity – 12 cases in 2011, 4 cases in 2012 and 20 cases in 2013.⁸¹

It is important to note certain practical difficulties related to the appointment of HRD as the equality body. The law provides that the Human Rights Defender should, among others, carry out analysis, monitoring and support of equal treatment, conduct independent research on discrimination, and prepare and publish reports and guidelines on problems related to discrimination. The full implementation of these new tasks could encounter obstacles of both financial and legal nature.

For once, experts point out that the imposition of new tasks was not followed by the attribution of dedicated financial resources.⁸² In the 2011 information on the activity of the HRD in the area of equal treatment, the HRD noted that in the course of legislative works the financial impact analysis of the regulation was not carried out. It was assumed that the costs of new tasks would be covered from the HRD's budget. As a result, no additional funds were assigned to the HRD in 2011 and the Office did not have sufficient staff and resources at its disposal to implement the new tasks to the fullest degree.⁸³ In the 2012 annual information, the HRD noted that additional resources for the implementation of new tasks were assigned, however the amount is not specified.⁸⁴ Given the above, the need to properly endow equality bodies with funds for performance of tasks in the area of equality should constantly be emphasized.

What is more, the legal basis for HRD's actions was not adjusted for it to be able to fully react to infringements of the equal treatment principle in relations between individuals.⁸⁵ As a rule, HRD intervenes in vertical relations between individuals and bodies, organizations and institutions obliged to abide by and enforce human rights and fundamental freedoms.⁸⁶ HRD usually engages in cases of systemic importance which concern pressing 'issues' rather than individuals. Pursuant to Article 11 (2) of the Law on the Human Rights Defender (added by the Antidiscrimination Law),⁸⁷ in the implementation of the principle of equal treatment

⁸¹ Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2014) Reply to freedom of information request no. I.0134.2.2014.AM, 24 February 2014.

⁸² Poland, Szulecka M., *Niefunkcjonowanie prawa antydyskryminacyjnego w odniesieniu do cudzoziemców w praktyce*, [in:] Klaus W. (ed.), *Różni ale równi. Prawo a równe traktowanie cudzoziemców w Polsce*, Warsaw 2013, p. 59, available at: interwencjaprawna.pl/wp-content/uploads/rozni-ale-rowni.pdf, accessed on 6 May 2014.

⁸³ Poland, Rzecznik Praw Obywatelskich (2012) *Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej*, Warszawa, Biuro Rzecznika Praw Obywatelskich.

⁸⁴ Poland, Human Rights Defender (2013) *Informacja o działalności Rzecznika Praw Obywatelskich w roku 2012 oraz o stanie przestrzegania wolności i praw człowieka i obywatela*, Warszawa, Biuro Rzecznika Praw Obywatelskich.

⁸⁵ Poland, Szulecka M., *Niefunkcjonowanie prawa antydyskryminacyjnego w odniesieniu do cudzoziemców w praktyce*, [in:] Klaus W. (ed.), *Różni ale równi. Prawo a równe traktowanie cudzoziemców w Polsce*, Warsaw 2013, p. 59, available at: <http://interwencjaprawna.pl/wp-content/uploads/rozni-ale-rowni.pdf>, accessed on 6 May 2014.

⁸⁶ Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2012) Letter to the Government Plenipotentiary for Equal Treatment N° RPO-687085-I/12/KW/MW, 28 May 2012, available at: www.sprawy-generalne.brpo.gov.pl/pdf/2011/10/687085/1647153.pdf, accessed on 6 May 2014.

⁸⁷ Poland, The Act on Human Rights Defender (*Ustawa z dnia 15 lipca 1987 o Rzeczniku Praw Obywatelskich*), 15

between private individuals, the Defender can undertake one kind of actions, namely it can “limit itself to pointing the measures available to the applicant.” It seems justified to express concerns that safeguarding the principle of equal treatment in relations between private individuals may be impeded in the face of limited available measures in that particular dimension.

Over the last couple of years there were proposals to strengthen the equality bodies in Poland. In 2012 the draft act on the Commissioner for Protection against Discrimination was presented to the Parliament by one of the opposition parties – the Democratic Left Alliance.⁸⁸ The bill establishes an independent equality body competent to fight discrimination on the grounds of gender, race, ethnic origin, religion or belief, disability, age and sexual orientation in both public and private spheres of social life. The draft law went beyond the already existing law on HRD, who plays the role of national equality body but with competences limited only to cases to which the state is a party. On 28 June the Parliamentary Legislative Committee claimed the draft law unconstitutional. The parliamentary expert opinions⁸⁹ to the draft law underlined that the proposal is controversial, since its implementation requires allocating additional financial resources, which would be difficult taking into account the situation of Poland’s state budget. It is recommended in the opinions that in order to make the equality body effective, the law from 3 December 2010 to implement certain provisions of the European Union on equal treatment should first be changed. Since 2012 no progress as regards the draft law has been made.

July 1987.

⁸⁸ Poland, The draft Act on the Commissioner for Protection against Discrimination (*Projekt ustawy o Rzeczniku do spraw Przeciwdziałania Dyskryminacji*), 25 January 2012.

⁸⁹ Poland, The Sejm of the Republic of Poland (*Sejm Rzeczypospolitej Polskiej*) (2012), *Opinia merytoryczna do poselskiego projektu ustawy o Rzeczniku do Spraw Przeciwdziałania Dyskryminacji*, available at: orka.sejm.gov.pl/rexdomk7.nsf/Opdodr?OpenPage&nr=565, accessed on 6 May 2014.

B. Freedom of movement

LGBT third-country nationals who are partners of Polish citizens are not in the position to benefit fully from the freedom of movement, since Polish law does not assign any legal significance to a same-sex partnership registered abroad.

In Poland the right of family members of European Union citizens to move and reside freely within the territory of the Member States is guaranteed in the Act on entry to Polish territory, residence on and exit from this territory by European citizens and their family members (hereinafter “Law on Entry”) (*Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin*).⁹⁰

Article 2 Section 4 of the Law on Entry provides a legal definition of a family member. A family member is an alien who does or does not have a citizenship of the European Union and:

- is married to a European Union citizen;
- is her/his direct descendant or is a direct descendant of the spouse of the EU citizen, if under 21 or is their dependant; or
- is her/his direct ascendant or is a direct ascendant of the spouse of the sponsor if s/he is their dependant.

The Polish Law transposing Directive 2004/38/EC does not provide for the extension of the notion of “family members” as anticipated in Article 2 Section 2b of the Directive, which stipulates that a family member is also “the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.” The Polish legislation does not treat registered partnerships as equivalent to marriage.

Furthermore, while Article 3 Section 2 of Directive 2004/38/EC lays down a clear obligation for the host Member State to facilitate, in accordance with its national legislation, entry and residence for:

- any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen;
- the partner with whom the EU citizen has a durable relationship, duly attested.

⁹⁰ Poland, The Act on entry to Polish territory, residence on and exit from this territory by European citizens and their family members (*Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin*, 14 April 2006.

The Law on Entry does not envisage any mechanism facilitating entry and residence of the above-mentioned categories of family members not covered by the legal definition.

In 2013, after strategic litigation of the Helsinki Foundation of Human Rights in two cases and the rulings of the Regional Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*), the Border Guard Commander-in-Chief (*Komendant Główny Straży Granicznej*) established new guidelines on the issue of entering Polish territory.⁹¹

The first case concerned a gay man, a citizen of the Dominican Republic, who was denied entry to Poland.⁹² The man was travelling with his registered partner, a Polish citizen. Their partnership was registered in the UK. The Polish border guard refused to recognise the EU citizen's family member card issued in the UK arguing that the man did not have a visa to enter Poland. The Border guard also claimed that the institution of a registered partnership is not recognised in Poland, which entitles Polish authorities to prevent the person from entering Poland. The administrative court rejected this reasoning arguing that even though the Polish legal system does not recognise the institution of the registered partnership it is still possible to recognise the complainant's right of entry on the basis of Article 3 Section 2 of the Directive 2004/38/EC. The complainant was recognised as a partner with whom the Union citizen has a durable relationship, duly attested. The court interpreted the provisions of Article 3 Section 2b of the Directive 2004/38/EC as giving the right of entry to a registered partner who is not an EU citizen. The court noted that Poland had not properly implemented the Directive and that the provisions on the facilitation of entry for EU citizens' partners with whom EU citizens have a durable duly attested partnership should be applied directly.

The second case concerned a citizen of Philippines who was in a registered partnership with a Polish citizen.⁹³ The man was also denied entry to Poland. In the ruling the court held that the Border guard, in order to establish whether the two men remained in a durable partnership, should question them and evaluate their factual situation. Their decision should not be based solely on documents.

The guidelines established by the Border Guard Commander-in-Chief as a result of these court judgments emphasised the need to recognise the right of entry for all persons (irrespective of their sex) being in a partnership with Polish citizens provided that such persons are able to prove their partnership status. Currently, in such situation the Border Guard issues a 15-day visa.

Another type of problems encountered by partners in partnerships registered abroad concerns the refusal of Polish authorities to allow a third-country national to buy real estate in zones where permission is required, e.g. in border zones. One of the cases in which the Helsinki

⁹¹ Poland, Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*) (2013), Letter from the Chief Border Guard, available at: www.hfhr.pl/wp-content/uploads/2013/06/SG-HFPC-18_06_2013.pdf, accessed on 6 May 2014.

⁹² Poland, Regional Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*), IV SA/Wa 154/13, 15 March 2013.

⁹³ Poland, Rzeczpospolita (2013), 'WSA uchylił odmowę wjazdu do Polski Filipińczyka-geja', available at: <http://prawo.rp.pl/artykul/1012099.html>, accessed on 6 May 2014.

Foundation for Human Rights became involved concerned a citizen of Chile, who was a gay partner of a Polish citizen.⁹⁴ They entered into a registered partnership in the United Kingdom. The man wanted to purchase real estate on the Polish coast. According to the Polish law in the case of real estate in the border area, in order to receive a permit, the foreigner has to justify that there exists a “tie” between him and the Republic of Poland. The man argued that the relationship with a Pole constitutes this “tie”, but he was refused the permit. The Ministry of Interior (*Ministerstwo Spraw Wewnętrznych*), as a body of the second instance that oversees the decisions concerning the permits, upheld the refusal. The administrative court in Warsaw dismissed the complaint against the decision. According to the court, since Polish law does not recognize same-sex couples, the decision of the Ministry was correct. The case is now pending before the Supreme Administrative Court (*Naczelny Sąd Administracyjny*).

The court practice shows that LGBT third-country nationals who are partners of Polish citizens are not in a position to fully benefit from freedom of movement. Strategic litigation has led to some changes in the approach of the Border guard towards LGBT third-country nationals who enter Polish territory. However, Polish authorities still do not assign legal significance to gay partnerships registered abroad. Therefore, partners who stay in such relationship encounter multiple problems in many spheres of life. Moreover, as a result of this situation, neither the children, nor other family member of LGBT third-country nationals who are partners of Polish citizens, can count on benefiting from freedom of movement (this is, however, a hypothetical assertion, as there is no relevant case law that would illustrate this problem).

There are no official or unofficial statistics illustrating the existing practice, in particular the way the Law on Entry is interpreted and applied in relation to the LGBT people.

B.1. Situation of Polish citizens returning to Poland after moving to another EU Member State in order to enter into a civil partnership

It is also important to mention the situation of Polish citizens who take advantage of the right to move freely to the territory of another Member State where registered same-sex partnerships or marriage are legal. In order to register their partnership or marriage abroad, they usually need to present a certificate issued by the Polish civil registry office (*urząd stanu cywilnego*) stating that the person concerned is unmarried. For the purpose of the marriage a special type of certificate is issued, and in the procedure the applicant has to give the name of their future spouse. According to NGO representatives there were cases where civil status offices refused to issue a certificate when the name of the person suggested that he or she was of the same sex as the applicant.⁹⁵

⁹⁴ Poland, Regional Administrative Court in Warsaw (Wojewódzki Sąd Administracyjny w Warszawie), IV SA/Wa 2457/13, 29 January 2014.

⁹⁵ Poland, Rzeczpospolita (2009), ‘PE: Polscy geje skarżą urzędy stanu cywilnego’, available at: www.rp.pl/arttykul/268475.html, 25 February 2009, accessed on 6 May 2014.

A landmark judgment concerning this issue was passed by the Regional Administrative Court in Gdańsk (*Wojewódzki Sąd Administracyjny w Gdańsku*) in June 2008.⁹⁶ The case was lodged by a Polish female citizen who wished to register a partnership with a German female citizen under the provisions of German law which recognizes same-sex partnerships. The woman was refused a civil status certificate. The head of the civil registry office claimed that she did not have legal interest in obtaining such a certificate. The woman appealed to the governor of the voivodeship, but her appeal was dismissed. Finally, she lodged a complaint with the administrative court. The court overruled the decisions of the first and the second instances as contrary to the law. It stated that the law does not allow examining with whom or where an applicant wishes to contract the marriage or to test authenticity of her/his intentions. The only task of the body entitled to issue certificates is to examine if a person fulfils conditions stipulated by the Polish law. A citizen is entitled to receive such a certificate without substantiating her/his request and in any case her/his intentions cannot justify the refusal. The court also remarked that the assumption that the lack of intention to get married makes it impossible to receive the certificate would lead to a peculiar conclusion that organs of administration are entitled to examine the most personal intentions of the citizens. Such an entitlement would be contrary to the constitutional principle that the Republic of Poland shall be a democratic state ruled by law.

The problem of issuing certificates to homosexual persons was broadly commented in the media. It resulted in an oral question to the European Commission addressed by Lidia Geringer de Oedenberg, Polish MEP who suggested that the refusal to issue a certificate breaches the basic human right to start a family as well as the fundamental principle of the European Union, namely the free movement of persons, and asked the Commission to clarify the matter.⁹⁷

The problem became the subject of a petition sent to the European Parliament in 2008 by the Campaign Against Homophobia (*Kampania Przeciw Homofobii*). The organization reported numerous cases of persons who faced obstacles while applying for a certificate in order to register a same-sex partnership abroad.⁹⁸ On 15 March 2011 HRD addressed a letter to the Ministry of Interior. HRD expressed concerns that the construction of the form that needs to be filled in order to obtain the certificate may lead to the discrimination of homosexual persons.⁹⁹ In a letter of 27 August 2013 to the Campaign against Homophobia the Minister of Interior (*Minister Spraw Wewnętrznych*) informed the organization about the plans to amend the law that should clarify the procedure of obtaining a new type of certificate which could be used for different purposes.¹⁰⁰

⁹⁶ Poland, Regional Administrative Court in Gdańsk (*Wojewódzki Sąd Administracyjny w Gdańsku*), III SA/Gd 229/08, 6 June 2008.

⁹⁷ European Parliament, Oral question of 10 July 2008, No. H-0575/08, available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bQT%2bH-2008-0575%2b0%2bDOC%2bXML%2bV0%2f%2fPL&language=PL, accessed on 6 May 2014.

⁹⁸ Poland, Campaign Against Homophobia [*Kampania Przeciw Homofobii*], Parlament Europejski zajmie się petycją KPH, available at: www.kph.org.pl/pl/allnews/15-kph/98-parlament-europejski-zajmie-si-petycj-kph, accessed on 6 May 2014.

⁹⁹ Poland, Human Rights Defender [*Rzecznik Praw Obywatelskich*], (2011) Letter to the Ministry of Internal Affairs, available at: www.sprawy-generalne.brpo.gov.pl/pdf/2010/11/660930/1553675.pdf, accessed on 6 May 2014.

¹⁰⁰ Poland, Campaign Against Homophobia [*Kampania Przeciw Homofobii*], (2013), Letter from the Ministry of Interior, available at www.kph.org.pl/pl/component/content/article/819-odpowied-z-msw-w-sprawie-zawiadcze-o-stanie-cywilnym-, accessed on 6 May 2014.

It should be noted that after the individual's return to Poland, the registered partnership does not have any legal significance and such persons are treated as unmarried (single) under Polish law. Same-sex partner registered abroad are treated as persons who are alien to each other, e.g. civil registry offices refuse to make a remark (*wzmianka*) in the civil status act, which reflects the personal and civil status of every citizen. The office claims that it cannot include information regarding an institution that is not recognized under Polish law.¹⁰¹ As a result partners, formally registered in other EU country, do not have equal rights as married couples in Poland. In September 2012 a complaint from two lesbians was lodged to the European Court of Human Rights (ECtHR). Two women have lived in a stable relationship since 2004. They rent a flat together and have a common household. In 2010 they entered into a civil partnership in Edinburgh under the Civil Partnership Act. They live permanently in Poland, where their partnership is not legally recognized. As a result they cannot enjoy special allowances for taking care of the sick spouse, tax benefits for spouses, or make use of joint taxation. Their complaint to the ECtHR concerns thus the lack of any kind of legal protection for same-sex couples in Poland. They argue that the lack of legal recognition of same-sex marriages by Polish law violates Article 8 and 14 of the ECHR.¹⁰²

It is important to highlight that Polish government protested against the EU Commission's propositions of a Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property implications of registered partnerships. The Government emphasized that issues falling under family law are within the exclusive competences of the Member States.¹⁰³

¹⁰¹ Poland, *Gazeta Wyborcza* (2013), 'Polka pisze petycję do Parlamentu Europejskiego. Powód? Brak ustawy o związkach partnerskich', available at: wyborcza.pl/1,75478,14817154,Polka_pisze_petycje_do_Parlamentu_Europejskiego__Powod_.html, accessed on 6 May 2014.

¹⁰² Poland, Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*), (2012), *Sprawa dot. ochrony praw par jedнопłciowych przed ETPCz*, available at: www.hfhr.pl/sprawa-dot-ochrony-praw-par-jedнопłciowych-przed-etpcz/, accessed on 6 May 2014.

¹⁰³ Poland, Bodnar A. Ślezińska-Simon A., (2014) *Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe*, in: Gallo D. Et al. (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions*, Berlin Heidelberg 2014.

C. Asylum and subsidiary protection

Until 2008 the Act on granting protection to foreigners on the territory of Poland (*Ustawa o udzielaniu ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej*),¹⁰⁴ which provides conditions for granting refugee status, did not explicitly protect people who were persecuted or harassed because of their sexual orientation or gender identity from the risk of being returned home (authorities were, however, allowed a margin of appreciation in order to avoid such a risk).¹⁰⁵ The law was, however, significantly amended in March 2008¹⁰⁶ in order to implement the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

According to Article 13 Section 1 “[a]n alien is granted the refugee status if owing to well-founded fear of being persecuted in his/her country of origin for reasons of race, religion, nationality, political opinion or membership of a particular social group is unable or unwilling to avail himself/herself of the protection of that country”. Article 13 Section 2 stipulates that refugee status is granted also to a minor child of a person who was granted refugee status if a child was born on Polish territory. While considering rights of homosexuals, Article 14 is the crucial one. This article lists factors that should be taken into account while the reasons for persecution are being assessed. According to Article 14 Section 2 “[d]epending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation; sexual orientation cannot be however understood to include acts considered to be criminal in accordance with Polish law.” Article 14 Section 3 stipulates that well-founded fear of being persecuted in the country of origin may exist even if someone does not possess particular features but these features are attributed to him/her by entities who commit persecutions. The law does not make any reference to persecutions due to gender identity, but it seems that Article 14 Section 1 may be applied in such a case. It stipulates that “a group shall be considered to form a particular social group where in particular that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society and its members share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.”

The Act on granting protection to foreigners on the territory of Poland offers three types of protection: refugee status, permission for tolerated residence (*zgoda na pobyt tolerowany*) and subsidiary protection (*ochrona uzupełniająca*). Subsidiary protection was introduced by the amendment of March 2008. It is granted if a person does not fulfil conditions prescribed

¹⁰⁴ Poland, The Act on granting protection to foreigners on the territory of Poland (*Ustawa z dnia 13 czerwca 2003 o udzielaniu ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej*), 13 June 2003.

¹⁰⁵ Poland, Rzepliński, A. (2008) *Legal Study on Homophobia and Discrimination on Ground of Sexual Orientation – Poland*, Warszawa, available at: http://fra.europa.eu/sites/default/files/fra_uploads/332-FRA-hdgs0-NR_PL.pdf, accessed on 11 May 2014.

¹⁰⁶ Poland, The Act amending the act on granting protection to foreigners on the territory of Poland (*Ustawa z dnia 18 marca 2008 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw*), 18 March 2008.

for the refugee status, but is under risk of a death sentence, execution, tortures, inhuman or degrading treatment, or his/her life would be at serious risk because of an armed conflict, if such a person was returned to his/her country of origin. Due to the amendment, the provision on tolerated residence was removed from Article 3. The amendment comes into force in May 2014.

Polish law does not contain any explicit provisions granting refugee status to LGTB partners as family members in the context of asylum or subsidiary protection.

There is no official data concerning the number of people who apply for a refugee status based on the fear of persecution on the grounds of sexual orientation.¹⁰⁷ In order to obtain information for the purposes of this report, the authors over the years contacted several NGOs and other institutions that provide social and legal aid to aliens and refugees.

The authors were informed by the Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*) that the NGO was contacted by a Chechen refugee (from Ingushetia), who was not accepted in her community and in the family due to her gender identity. Afraid of losing her life, the woman left the country. On 3 January 2007 she submitted an application for a refugee status in Poland. Due to the complexity of the case, the proceedings took several months. On 1 October 2007 the President of the Office for Foreigners (*Urząd ds. Cudzoziemców*) granted the woman a refugee status.

The authors were also informed by the Halina Nieć Centre for Legal Aid (Halina Nieć Centre) (*Centrum Pomocy Prawnej im. Haliny Nieć*) about the case of a national of Moldova who claimed that he was discriminated against in his country of origin due to his sexual orientation. After being denied the refugee status by the Office for Foreigners in 2007, he appealed to the Council for Refugees (*Rada ds. Uchodźców*). His appeal was, however, dismissed by the Council which upheld the decision not to grant the refugee status.¹⁰⁸

In May 2009 Campaign Against Homophobia reported two cases of homosexuals seeking asylum in Poland in order to avoid persecution caused by their sexual orientation.¹⁰⁹ One of the cases concerned a citizen of Vietnam who arrived legally in Poland in 2005. In 2009 he applied for the refugee status claiming that in his country of origin he was persecuted due to his sexual orientation. He was denied protection.¹¹⁰ Another case concerned a homosexual couple from Belarus. Both men felt persecuted in their country of origin due to their homosexuality. The case is still pending.¹¹¹

On the basis of information obtained from NGOs, gender identity has been the ground for

¹⁰⁷ Poland, President of the Office for Foreigners (*Urząd ds. Cudzoziemców*) (2014) Reply to freedom of information request no. BSZ – 0351-387/14/TB, 17 February 2014; Council for Refugees (*Rada ds. Uchodźców*) (2014) Reply to freedom of information request no. DSWRU-5/10/14, 18 February 2014; Ministry of Internal Affairs (*Ministerstwo Spraw Wewnętrznych*) (2014) Reply to freedom of information request no. DPM-WPM-0667-2/2014/RS, 7 March 2014.

¹⁰⁸ Information received from the representative of the Campaign Against Homophobia, 24 February 2014.

¹⁰⁹ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*), Biuletyn Monitoringu Dyskryminacji Osób LGBT w Polsce, Styczeń-Maj, 5/2009, January-May 2009, available at: www.bezuprzedzen.org/doc/Biuletyn_5-PL.pdf, accessed on 6 May 2014.

¹¹⁰ Information received from a representative of the Campaign Against Homophobia, 24 February 2014.

¹¹¹ Information received from a representative of the Campaign Against Homophobia, 24 February 2014.

granting the refugee status to two transgender persons in 2011.¹¹²

In 2012 the decision on granting the refugee status was taken in relation to a gay applicant from Uganda. The Ugandan came to Poland in August 2009 and applied for a refugee status. He claimed that in his country of origin he had been persecuted because of his sexual orientation. Under Ugandan criminal law, same-sex relationships are punishable with a prison term or a life sentence. After the President of the Office for Foreigners denied the man the refugee status, he appealed to the Refugee Council. The Council underlined that the existence of homophobic laws in Uganda, among other factors, constitutes a well-founded fear of being persecuted on account of sexual orientation or gender identity. The Council questioned, however, the credibility of the man and the medical certificate he submitted, and upheld the decision about the denial. The citizen of Uganda challenged the decision of the Council to expel him to his home country. The administrative court held that the Council did not have the power to challenge the medical certificate. According to the court, by disregarding the certificate, the Council failed to establish the facts of the case and obtain evidence necessary to clarify these facts. The court held that the administrative bodies do not have the power to challenge the credibility of a medical certificate confirming someone's sexual orientation. In addition the court underlined that the administrative bodies are expected to thoroughly examine all facts of a case before deciding it. The court revoked the decision of the Council who will handle the case once again.¹¹³

In Poland neither the judgments of the Court of Justice of the European Union CJEU in cases C-199/12, C-200/12, C-201/12, nor the enactment of the recast Qualification Directive 2011/95 affected the situation of LGBT persons regarding asylum.

The experience of Polish NGOs active in the field of LGBT rights shows that, while there exists a legal basis for granting refugee status to people who fear persecution because of their sexual orientation, institutions handling these cases sometimes lack understanding of situations of LGBT refugees. They do not have the necessary knowledge about the situation in the refugee's home country and do not exhaustively investigate the actual state of affairs.¹¹⁴

There is no information on using in Poland phallometric testing during the asylum procedure.

¹¹² Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) and Trans-fuzja Foundation, (2012), Monitoring of implementation of CoE Recommendations, available at: www.ilga-europe.org/home/guide_europe/council_of_europe/lgbt_rights/recommendation_com_lgbt/reports, accessed on 6 May 2014.

¹¹³ Poland, Regional Administrative Court in Warsaw, (*Wojewódzki Sąd Administracyjny w Warszawie*) case V SA/WA 1048/12, 29 August 2012.

¹¹⁴ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2012), *Prawa osób LGBT w Polsce*, Warszawa, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) available at: www.kph.org.pl/publikacje/prawa_osob_lgbt.pdf, accessed on 11 June 2014.

D. Family reunification

Article 4 Section 3 of Council Directive 2003/86/EC has been implemented by the Law of 22 April 2005 amending the Act on Foreigners (AoF) (*Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach*).¹¹⁵ Article 53 Section 2 of the AoF provided that a family member is:

- a person in a marriage relationship *recognised by Polish law*;
- a minor child of the alien or of the person in a marriage relationship recognised by Polish law, as well as their adopted child;
- a minor child of the alien, as well as her/his adopted child, who is dependent on the alien and where the alien has real custody power;
- a minor child of the person defined in the first point, as well as her/his adopted child, who is dependent on that person and where the alien has real custody power.

The entry and residence of unmarried partners who are third country nationals and remain in a duly attested, stable, long-term relationship or in a registered partnership was not mentioned in the provision. Moreover, AoF stressed that the marriage relationship must be *recognised* by Polish law. Such wording implied an even narrower interpretation of marriage than resulting from the law implementing the Free Movement Directive (see above). As a result of such a definition of a “family member” LGBT partners did not benefit from the provisions on family reunification.

The issue presented here cannot, however, be illustrated with relevant statistics or unofficial data because such data does not exist. There is also no relevant case law that would help in identifying any possible trends regarding the family reunification of LGBT partners.

In 2013 a new law on aliens was adopted in Poland.¹¹⁶ It entered into force on 1 May 2014. However, the provisions on family reunification and the definition of a family member remained unchanged. Consequently, the specific provisions on family reunification still do not apply to LGBT partners, since they cover only “family members” as defined by the AoF.

At the same time it is worth mentioning that the new law allows granting the right of residence to a person who “leads a family life” (*prowadzi życie rodzinne*) – as defined by the European Convention on Human Rights – with a Polish or EU citizen living in Poland (article 160 par. 3 of the new AoF).

It is not yet clear how the new provisions will be applied in practice. However it is important to highlight that according to the case law of the European Court of Human Rights (ECtHR) the concept of a “family life” applies to same-sex partnerships. In *Schalk and Kopf v Austria*¹¹⁷ the ECtHR recognized that same-sex couples enjoy the right to “respect for family life” protected by Article 8 of the Convention. Thanks to the reference to the Convention included in the new AoF, the new law should allow granting residence permit to LGBT partners.

¹¹⁵ Poland, Act on Foreigners (*Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach*), 13 June 2003.

¹¹⁶ Poland, Act on Foreigners (*Ustawa z dnia 12 grudnia 2013 o cudzoziemcach*), 12 December 2013.

¹¹⁷ European Court of Human Rights (ECtHR), *Schalk and Kopf v Austria*, no. 30141/04, 24 June 2010.

E. Freedom of assembly

In the early '00s (2001-2003) Equality Parades were organised in Poland by the International Gay and Lesbian Association for Culture (*Międzynarodowe Stowarzyszenie Gejów i Lesbijek na Rzecz Kultury*). However, at that time these gay pride marches did not attract much attention, either from politicians or participants, and were organised without any significant problems. There were also no problems with registering these assemblies. Since 2004 LGBT marches have been organized in different Polish cities (Poznań, Kraków, Warsaw).

In 2005 the Equality Parade in Warsaw was to take place on 11 July. The Equality Parade was banned by a decision of the President of Warsaw of 3 June 2005 based on the Road Traffic Law (*Ustawa – prawo o ruchu drogowym*).¹¹⁸ The ban resulted in different sets of legal proceedings. Firstly, the events in Warsaw were a cause for HRD to question the provisions of the Road Traffic Law. Secondly, the organisers of the Equality Parade submitted an application to the ECtHR.

Following the ban on the Equality Parade on the basis of the provisions of the Road Traffic Law, which imposed numerous obligations on organizers of an assembly,¹¹⁹ and bearing in mind that similar problems had also arisen for other “left-wing” organisers earlier in Warsaw, HRD decided to refer the case to the Constitutional Court for an abstract review. The Constitutional Court declared that the provisions of the Road Traffic Law were unconstitutional. One of the most important aspects of the judgment was the analysis of the very essence of the constitutional freedom of assembly in the context of power exercised by state authorities.¹²⁰

The organisers of the Equality Parade 2005 in Warsaw also submitted an application to the ECtHR claiming that the ban was a violation of Articles 11, 13 and 14 of the Convention. On 3 May 2007 the ECtHR issued a judgment in the case *Bączkowski and others v. Poland*.¹²¹ It was a long-awaited decision, especially in view of the bans of gay pride marches taking place in other capital cities in Europe, e.g. in Riga and Moscow.

The ECtHR did not state directly that sexual minorities, LGBT movements, or those fighting discrimination, had a right to protest or that such views might be shared at the assembly. Taking into account the special context of the Bączkowski case, the ECtHR considered this issue self-explanatory, without the need to place any special emphasis on it. Instead, the ECtHR started its consideration of the case by underlining basic principles connected with the freedom of assembly.

Referring to its earlier case law, the ECtHR underlined the value of the European Convention on Human Rights in promoting the ideals and values of a democratic society.¹²² It referred to the role played by political parties and associations for democracy and pluralism, which is built “on the genuine recognition of, and respect for, diversity and the dynamics of cultural

¹¹⁸ Poland, Road Traffic Law, (*Ustawa z dnia 20 czerwca 1997 r. Prawo o ruchu drogowym*), 20 June 1997.

¹¹⁹ Poland, Road Traffic Law, (*Ustawa z dnia 20 czerwca 1997 r. - Prawo o ruchu drogowym*), 20 June 1997.

¹²⁰ Poland, Constitutional Tribunal (*Trybunał Konstytucyjny*), case K 21/05, 18 January 2006.

¹²¹ European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

¹²² European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.”¹²³ According to the Court, “the harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.”¹²⁴ In the opinion of the ECtHR, “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”¹²⁵ Taking into account the above background, the ECtHR confirmed the positive obligation on the part of the state to secure the enjoyment of rights and freedoms for persons holding unpopular views or belonging to minorities.

The ECtHR indicated that in its previous case law it had pointed out that the state should be the ultimate guarantor of the principle of pluralism.¹²⁶ It reiterated that the freedom of assembly might not be reduced to a purely negative concept (mere duty of non-interference by the state), because it would not be compatible with the Convention and with the purpose of Article 11 of the Convention.

The judgment in *Bączkowski* also confirmed that a violation of human rights might result from a situation where individuals are compelled to disobey the law (as in the Equality Parade) in order to test its compatibility with constitutional or international guarantees of human rights. Such a situation creates a chilling effect on the freedom of assembly and may deter persons from participating in demonstration due to the threat of legal sanctions.

Secondly, the ECtHR established a new standard concerning the exercise of the freedom of speech by politicians who concurrently hold administrative office. The Court stated that politicians, “when exercising their freedom of expression may be required to show restraint, bearing in mind that their views can be regarded as instructions by civil servants, whose employment and careers depend on their approval.”¹²⁷ The Court referred to the opinions of the Mayor of Warsaw about gay pride marches, expressed well before the issuing of the contested decision.

Finally, the ECtHR established a standard according to which the procedural rules concerning the organisation of the Equality Parade should be constructed in such a way that they guarantee the possibility of exhausting all domestic remedies before the date of the assembly. Otherwise, freedom of assembly will be meaningless because the authorities may use procedural arguments in order to ban an assembly and there will be no possibility for a domestic court to review the decision before the date of such an assembly. The Court underlined that the date of the assembly has the essential meaning for the exercise of this freedom.

¹²³ European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

¹²⁴ European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

¹²⁵ European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

¹²⁶ European Court of Human Rights (ECtHR), *Informationsverein Lentia and Others v. Austria*, no. 37093/97, 24 November 1993.

¹²⁷ European Court of Human Rights (ECtHR), *Bączkowski and others v. Poland*, no. 1543/06, 3 May 2007.

Another important case of interfering with the freedom of assembly occurred in Poznań in 2005. In November LGBT groups wanted to organise an Equality March. The mayor of Poznań and the governor of Wielkopolska Voivodship banned the demonstration. Despite the ban, the demonstration took place. Since it was illegal, constituting an act of civil disobedience, it was brutally dispersed by the police.

Decisions by the authorities in Poznań were quashed as ill-founded first by the Regional Administrative Court in Poznań (*Wojewódzki Sąd Administracyjny w Poznaniu*)¹²⁸ and then (upon a cassation appeal by the governor) by the Supreme Administrative Court.¹²⁹ In particular, the Supreme Administrative Court had to review whether the decisions of the authorities in Poznań were in compliance with the provisions of law. The Supreme Administrative Court included in its obiter dicta statements underlining the special value of the assembly. The Court said that, when assessing the notification of an assembly to municipal authorities, the level of controversy of the views expressed by the participants of the assembly should not be taken into account, as long as the purpose of the assembly is not contrary to law. As regards the risk posed by counter-demonstrators, the Supreme Administrative Court, without any hesitation, referred to the standards established in the jurisprudence of the ECtHR, i.e. that merely the intent or expected possibility of a counter-demonstration cannot deprive the organisers of their freedom of assembly.¹³⁰ The Supreme Administrative Court also referred to the cost of organising a public assembly, as it was one of the issues raised in the public debate. According to the Court, facilitating the organisation of such assemblies and the positive duty to protect them is a cost of democracy and it must be covered by the state authorities.

The most immediate consequence of the judgments of the Constitutional Court and the Supreme Administrative Court was that, from their date of issue, there have been no particular problems for the LGBT community with organising assemblies. Over the recent years, also a demonstration by feminists, the so-called “Manifa”, has taken place every year on a date close to the International Women’s Day (8 March). One of the co-organisers of this event is the Association of Lesbians (*Porozumienie Lesbijek*).

Although there are no formal obstacles to registering assemblies, there have been certain problems with protecting their participants, especially against the risk of attacks from counter-demonstrators. Marches are sometimes disturbed by aggressive hooligan groups and the reactions of the police are not always satisfactory, e.g. in May 2011 the participants of Krakow’s Gay Pride experienced physical violence from counter-demonstrators and accused the Police of non-reaction.¹³¹ The participants of the Gay Pride in Krakow submitted their notice of a possible crime to Krakow’s Prosecutor. After examination, the Prosecutor decided to discontinue the proceedings claiming that there was no harm to public interest as well as no constituent elements of a criminal act according to Polish criminal law.

¹²⁸ Poland, Regional Administrative Court in Poznań (*Wojewódzki Sąd Administracyjny*), case IV SA/Po 983/05, 14 December 2005.

¹²⁹ Poland, Supreme Administrative Court (*Naczelny Sąd Administracyjny*), case I OSK 329/06, 25 May 2006.

¹³⁰ European Court of Human Rights (ECtHR), *Plattform Ärzte für das Leben v. Austria*, application No. 10126/82, 21 June 1988.

¹³¹ Poland, *Gazeta.pl* (2011) ‘Pobicie po Marszu Równości’, 22 May 2011.

Aggressive counter-demonstrators often carry homophobic and hateful signs. In 2012, a heated debate regarding bias-motivated crimes and violence was incited as a consequence of the registration by the Regional Court of Warsaw of certain symbols and slogans, including the Celtic Cross and Phalanx (symbols of fascist organizations such as White Power) and “No queering!” (“*Zakaz pedalowania!*”), as official, legal symbols of a radical organization called the National Rebirth of Poland (NRP) (*Narodowe Odrodzenie Polski*, NOP). The decision of the Regional Court was based on an expert opinion which determined that the above-mentioned symbols were not discriminatory or of a fascist or Nazi character.¹³² On 28 November 2011 HRD¹³³ and a public prosecutor lodged an appeal against the ruling arguing that the expert opinions were substantially wrong and did not comply with the Polish Constitution.¹³⁴ Eventually, in May 2012 the motion concerning registration was overruled by the Appellate Court in Warsaw.¹³⁵ After rehearing the case, on 16 May 2012 the Regional Court ruled that according to Polish law a political party could have only one registered symbol, which needs to be in line with the Polish Constitution. Accordingly, the Court stated that the “No queering!” sign was discriminatory, and the rest of the symbols as legally inadmissible were not examined.¹³⁶

Regarding the current situation, it may be important to highlight that in 2012 changes to the Act on Assemblies¹³⁷ were introduced. These changes allow prohibiting several assemblies to take place at the same time, if there is a risk of violence. The amendments were criticized by NGOs according to whom they disproportionately limit the freedom of assembly, as well as the HRD who filed a complaint to the Constitutional Court.¹³⁸ In addition, it is important to point out that the ECtHR judgment in the case *Bączkowski and others v. Poland* has not been properly implemented. The Act on Assemblies does not contain a procedure that guarantees obtaining a final decision on an assembly prior to the date for which it is planned. The current appeal procedure does not meet the standards set by the judgment of the European Court of Human Rights.

¹³² Poland, Kaminski R., Nowak P. (2012), *Ekspertyza na okoliczność ustalenia znaczenia znaków graficznych partii Narodowe Odrodzenie Polski*, available at: www.nop.org.pl/wp-content/uploads/2011/11/ekspertyza-sadowa-dot-znakow-NOP.pdf?6949c1, accessed on 6 May 2014.

¹³³ Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2012), *Official statement concerning lodging an appeal by the Human Rights Defender*, available at: www.rpo.gov.pl/pliki/13224951810.pdf, accessed on 6 May 2014.

¹³⁴ Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2012), *Official statement concerning lodging an appeal by the Human Rights Defender*, available at: www.rpo.gov.pl/pliki/13224951810.pdf, accessed on 6 May 2014.

¹³⁵ Poland, *Gazeta Wyborcza* (2012), *Sąd odmówił rejestracji "zakazu pedalowania" dla NOP*.

¹³⁶ Poland, *Gazeta Wyborcza* (2012), *Sąd odmówił rejestracji "zakazu pedalowania" dla NOP*.

¹³⁷ Poland, The Act on Assemblies (*Ustawa Prawo o Zgromadzeniach*), 5 July 1990.

¹³⁸ Poland, Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*) (2014) *Opinia w sprawie ustawy Prawo o Zgromadzeniach*, 17 April 2014, available at: www.hfhr.pl/wp-content/uploads/2014/04/HFPC_TK_amicus_17042014.pdf, accessed on 6 May 2014.

F. Criminal law

F.1 Protection against hate speech

In Poland there are no separate criminal rules that would protect members of sexual minorities against hate speech, although special protection is granted to members of other minorities. According to Article 256 paragraph 1 of the Criminal Code (*Kodeks Karny*)¹³⁹ “[w]hoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on *national, ethnic, racial or religious differences or for reason of the absence of any religious belief*, shall be subject to a fine, a penalty of restriction of liberty or a penalty of deprivation of liberty for up to two years.”¹⁴⁰ According to Article 257 paragraph 1 of the Criminal Code “[w]hoever publicly insults a group within the population or a particular person because of his/her *national, ethnic, racial or religious affiliation or because of the absence of any religious belief*, or for these reasons breaches the personal inviolability of another individual, shall be subject to the penalty of deprivation of liberty for up to three years.”

Sexual minorities are not, however, protected by these provisions, only by general provisions of the Criminal Code¹⁴¹ and the Civil Code¹⁴². In particular Article 212 of the Criminal Code is applied. According to Article 212 paragraph 1 “[w]hoever imputes to another person, a group of persons, institution, legal person, or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of trust necessary for a given position, occupation or type of activity, shall be subject to a fine or a penalty of restriction of liberty.” Article 212 paragraph 2 refers to committing the act described in paragraph 1 through mass media.

The rules which protect ethnic, national or religious minorities (that is Article 256 and 257 of the Criminal Code) constitute *sui generis* aggravated rules in comparison to Article 212 of the Criminal Code. There are considerable differences between the two groups of crimes. Firstly, Article 212 of the Criminal Code was intended to serve a different purpose than Articles 256 and 257. Above all, the aim of this provision is to protect reputation, not safety and public order. The compatibility of Article 212 of the Criminal Code with the Constitution, i.e. the provisions on freedom of speech, was challenged before the Constitutional Court, however the Court ruled that Article 212 does not violate the Constitution.¹⁴³ Moreover, the crimes mentioned in Article 256 and 257 of the Criminal Code are prosecuted *ex officio*, whereas defamation (Article 212 of the Criminal Code) is prosecuted only upon a private charge. It means that the bill of indictment (*prywatny akt oskarżenia*) must be written and then supported in court by the victim. This can discourage such persons from claiming their rights. In contrast, in the case of offences prosecuted on the basis of Article 256 and 257 of the Criminal Code, it is enough for the victim to inform the

¹³⁹ Poland, Criminal Code (*Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny*), 6 June 1997.

¹⁴⁰ Poland, Supreme Court (*Sąd Najwyższy*), Resolution (I KZP 5/02), OSNKW 2002/5-6/32, 28 March 2002.

¹⁴¹ Poland, Criminal Code (*Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny*), 6 June 1997.

¹⁴² Poland, Civil Code (*Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny*), 23 April 1964.

¹⁴³ Poland, Constitutional Tribunal (*Trybunał Konstytucyjny*), case K 10/06, 30 October 2006.

prosecutor about the offence and then the prosecutor takes the role of the prosecuting attorney.

Since there are no provisions that explicitly prohibit homophobic hate speech there exist no statistics concerning the size of the problem in Poland.

Over the years, there have been several attempts to amend the law. In September 2008 a group of LGBT NGOs introduced their project of amendments to the Criminal Code, which would expand the scope of protection against hate speech and hate crimes. In September 2009 certain amendments to the Criminal Code were approved by Sejm.¹⁴⁴ They included changes to Article 256 of the Criminal Code, but did not make any references to the criteria listed in the NGOs' project. The amendments concerned only the addition to Article 256 of paragraph 2 (penalization of e.g. producing, presenting, sending, buying and storage of written, pictorial or other material containing manifestations covered by Article 256) and paragraph 3, excluding legal responsibility, if the unlawful acts were committed within the framework of artistic, educational, collector or scientific activities.¹⁴⁵ In 2011 the Constitutional Tribunal ruled that the fragment referring to the penalization of materials containing manifestations covered by Article 256 was unconstitutional.¹⁴⁶

During the 7th Parliamentary term that began in November 2011 three draft laws aiming at the amendment of the Criminal Code with regard to hate speech and hate crimes have already been discussed. In March and in April 2012 two draft laws on hate crimes and hate speech motivated by sexual orientation or gender identity were submitted to the Parliament by two opposition parties – Palikot's Movement and Democratic Left Alliance.¹⁴⁷ Apart from Articles 256 and 257 referred to above, the draft laws also concern Article 119 of Criminal Code, according to which whoever uses violence or makes unlawful threat towards a group of persons or a particular individual because of their national, ethnic, racial, political, religious affiliation or because of their lack of religious belief shall be punished with imprisonment from 3 months to 5 years.

The draft submitted by Palikot's Movement when referring to Article 119 of the Criminal Code postulates extending the catalogue of discriminatory grounds. In the light of the draft act, unlawful threats and violence on the basis of gender, gender identity, age, disability and sexual orientation would also be punished. In accordance with the draft act, the catalogues indicated in Articles 256 and 257 of the Criminal Code (incitement to hatred and defamation of a group of people) shall also include the grounds mentioned above (gender, gender identity, age, disability and sexual orientation).

The draft act submitted by the Democratic Left Alliance postulates, among others, the extension of the catalogue of grounds stipulated in Articles 119, 256 and 257 of the Criminal

¹⁴⁴ Poland, The Act amending the Criminal Code and several other acts (*Ustawa z dnia 5 listopada 2009 r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego, ustawy - Kodeks karny wykonawczy, ustawy - Kodeks karny skarbowy oraz niektórych innych ustaw*), 5 November 2009.

¹⁴⁵ Poland, Senat (2009), Opinion on the amendments to the Criminal Code, available at: www.senat.gov.pl/k7/dok/opinia/2009/042/o/668.pdf, accessed on 6 May 2014.

¹⁴⁶ Poland, The Constitutional Tribunal (*Trybunał Konstytucyjny*), K 11/10, 19 July 2011, available at: http://otk.trybunal.gov.pl/orzeczenia/teksty/otkpdf/2011/K_11_10.pdf, accessed on 6 May 2014.

¹⁴⁷ Poland, The Act on the amendment of Criminal Code (*Projekt ustawy z dnia 7 marca 2012 o zmianie ustawy Kodeks karny*), 7 March 2012.

Poland, The Act on the amendment of Criminal Code (*Projekt ustawy z dnia 7 marca 2012 o zmianie ustawy Kodeks karny*), 20 April 2012.

Code (to include also gender, gender identity, disability, sexual orientation) and amending Articles 194-196 of the Criminal Code (crimes of religious discrimination, violation of the right to public religious worship and injury of religious feelings).

The third draft¹⁴⁸ was submitted by MPs' Club of the ruling party Civic Platform (*Platforma Obywatelska*). The draft postulates the extension of the catalogue of grounds contained in Article 256 of the Criminal Code to include "political affiliation, social origin, natural or acquired personal features or convictions" and elimination of Articles 119 and 257 of the Criminal Code. The grounds of "natural or acquired personal features" attracted the attention of the National Judiciary Council (*Krajowa Rada Sądownictwa*) and the Prosecutor General (*Prokurator Generalny*) who submitted their opinions on the draft. Both institutions found them ambiguous. Furthermore, the National Judiciary Council in its opinion postulated preparing a definition of these grounds. In April 2013, the government presented its own opinion on this draft.¹⁴⁹ The government shared the same observation that the concept of "natural or acquired personal features" is ambiguous and may raise serious interpretation doubts. The government was also not in favour of the elimination of Articles 119 and 257 of the Criminal Code.

In April 2013 the parliamentary subcommittee decided that the draft laws would be discussed together. The first meeting of the subcommittee devoted to the proposed changes to the Criminal Code was held on 11 March 2014.¹⁵⁰

In this context, it is worth mentioning that in 2014 after the adoption by the European Parliament of the report by Ulrike Lunacek on the EU Roadmap against homophobia and discrimination on the grounds of sexual orientation and gender identity, some conservative politicians from Poland argued that the EU law would limit freedom of speech and that Catholics would not be allowed to express their view. These accusations were rebuked by human rights experts.¹⁵¹

Because of the specificity of Polish criminal law, important cases concerning the protection of LGBT persons against hate speech are lodged by private individuals. One such case concerned the comparison of homosexuality to pedophilia, necrophilia and zoophilia during a public debate on 7 November 2004 by members of the local council, Przemysław Aleksandrowicz and Jacek Tomczak. Their statements were found offensive by the LGBT community and a private charge was lodged by a group of four lesbian women. On 4 September 2006 the parties entered into a settlement in the course of the trial before the District Court in Poznań. According to the settlement, the accused (who after the elections

¹⁴⁸ Poland, The Act on amendments on Criminal Code (*Projekt ustawy z dnia 7 marca 2012 o zmianie ustawy Kodeks karny*), 27 November 2012

¹⁴⁹ Poland, Council of Ministers (*Rada Ministrów*) (2013) Government's stance on MPs' draft act amending the Criminal Code (*Stanowisko Rządu do poselskiego projektu ustawy o zmianie ustawy – Kodeks karny*), 29 April 2013, available at: orka.sejm.gov.pl/Druki7ka.nsf/0/974FAC8B308266CAC1257B6C0025C035/%24File/1078%20-s.pdf, accessed on 6 May 2014.

¹⁵⁰ Poland, Association „The Diversity Workshop” (*Stowarzyszenie „Pracownia Różnorodności”*) (2013), ‘Ciąg dalszy sejmowych prac nad nowelizacją kodeksu karnego’, 11 March 2014, available at: www.spr.org.pl/2014/03/11/ci%C4%85g-dalszy-sejmowych-prac-nad-nowelizacj%C4%85-kodeksu-karnego/, accessed on 11 June 2014.

¹⁵¹ Poland, *Wyborcza.pl* (2014), ‘Prawica straszy, że przez Unię katolik nie będzie mógł skrytykować geja’, 18 February 2014, available at: wyborcza.pl/1,75478,15479278,Prawica_straszy__ze_przez_Unie_katolik_nie_bedzie.html, accessed on 6 May 2014.

in 2005 became the members of the Polish Parliament) expressed regret that homosexual persons might have been offended by their statements. They claimed they did not mean to compare homosexuality to pedophilia, necrophilia and zoophilia.¹⁵²

Another important case concerned the abuse of the personal data of LGBT people by one of the main anti-gay politicians. One of the leaders of the right-wing party, the League of Polish Families (*Liga Polskich Rodzin*), Wojciech Wierzejski, in 2004 organised a protest against equality marches. At that time, he was Vice Marshall of the Mazowieckie Voivodship. In response to Wierzejski's initiative a number of gays and lesbians sent him letters of protest. Wojciech Wierzejski prepared a list of these people and placed the names of 24 people on a website (together with their email addresses). These people claimed that it was a violation of their privacy and that Wojciech Wierzejski was breaching the law on the protection of personal data and submitted an official notification to the General Inspector for the Protection of Personal Data (*Generalny Inspektor Danych Osobowych*, GIODO). Following the intervention of GIODO, the prosecutor's office started criminal proceedings against Wojciech Wierzejski, claiming that he used personal data illegally. In the period 2005-2007 the criminal investigation was suspended because Wojciech Wierzejski was an MP and was protected by immunity.¹⁵³

In August 2009 a landmark judgement was issued by the Regional Court in Szczecin.¹⁵⁴ It proved that apart from criminal proceedings, a civil action might also be used as a tool of protection against homophobic hate speech. Ryszard Giersz, a young homosexual living in Wolin, a small town (5,000 inhabitants) in Western Poland, brought a lawsuit against his neighbour. The defendant, a woman who was in a long-lasting conflict with the plaintiff's family, was notoriously calling him publicly and in the presence of other people "a faggot" ("pedał") and was using other offensive words concerning his sexual orientation. The Court found that the behaviour of the defendant infringed upon the plaintiff's personal rights (*dobra osobiste*) protected by Article 24 § 1 of the Civil Code. According to the Court, using the word "faggot" aimed at offending the plaintiff and this expression could not be considered as a commonly accepted term. In the Court's opinion "humiliation of a person while criticizing his/her sexual distinctness threatens one of the most sensitive aspects of human life." Therefore the Court prohibited the defendant from infringing upon the plaintiff's personal rights, i.e. his liberty, dignity, honour, intimate life and good name, and particularly from using the word "faggot" or other abusive words as well as from commenting publicly on the plaintiff's intimate life and his sexual orientation. The defendant was to pay satisfaction in the amount of PLN 15,000 (around €3,700). The judgment became final, since in February 2010 the Appellate Court in Szczecin dismissed the appeal lodged by the defendant. The court confirmed that "using vulgar words to describe someone's sexuality always infringes personal rights." The court decided to decrease the satisfaction to PLN 5000.¹⁵⁵ According to the Campaign Against Homophobia this was the first case where a homosexual decided to defend his rights in court so openly.¹⁵⁶

¹⁵² Poland, Homiki.pl (2012), Profesor obraził homoseksualistów. Będzie proces, 21 April 2012.

¹⁵³ Poland, Queer.pl (2005), 'Kolejne kłopoty Wierzejskiego', 22 September 2005.

¹⁵⁴ Poland, Regional Court in Szczecin (*Sąd Okręgowy w Szczecinie*), 4 August 2009.

¹⁵⁵ Poland, Wyborcza.pl (2010), 'Słowo "pedał" obraża', available at: wyborcza.pl/1,76842,7529907,Slowo__pedal__obraza.html, accessed on 6 May 2014.

¹⁵⁶ Poland, Gazeta.pl (2009), 'Precedensowy wyrok: 15 tysięcy za "pedała"', available at: wiadomosci.gazeta.pl/wiadomosci/1,126765,6892821,Precedensowy_wyrok__15_tysiecy_zl_za__pedala_.html,

In November 2009 a lesbian and a homosexual, members of the association Open Forum (*Otwarte Forum*), brought a civil lawsuit against two journalists, the editor-in-chief and the publisher of *Rzeczpospolita*, one of the leading Polish newspapers, after *Rzeczpospolita* published an article concerning homosexual partnerships and a satirical picture. The picture presented a homosexual couple during a marriage ceremony. A man standing next to them was saying to a goat held on a string “It’s our turn as soon as these misters get married”. In the opinion of the plaintiffs, which reflected the feelings of many homosexuals, this publication compared homosexuals to zoophiles and, therefore, violated their dignity protected by Article 24 § 1 of the Civil Code. After three years of trial, the court dismissed the case.¹⁵⁷ The court decided that the picture and the article could not violate personal rights of the plaintiffs because there was no personal link between the plaintiffs and the published materials.

The *Rzeczpospolita* case exemplifies the main problem with fighting homophobic speech with available legal means, namely the approach of the courts according to whom there should exist a personal link between the homophobic statement and the person who feels offended. If the statement is of general nature and does not refer to a particular person the courts refuse to admit that somebody’s rights could be violated. The authors are not aware of the recent successful civil actions used as a tool against homophobic hate speech.¹⁵⁸ There are no official statistics that would prove otherwise.

F.2. Physical violence against LGBT people

The Criminal Code contains several provisions penalizing generic hate crimes – extermination, homicide, grievous bodily injury, using violence and unlawful threats on the grounds of nationality, ethnicity, race, religion or lack thereof, and political views. However, neither the Criminal Code nor any other provision of the Polish law penalizes bias-motivated crimes against LGBT persons. Since sexual orientation is not listed in any of the provisions of the Criminal Code, the Ministry of Justice does not collect statistics regarding physical violence on the ground of sexual orientation.¹⁵⁹ The only data available is that collected by LGBT organisations. In addition, Polish law does not list homo- or transphobic motivation to be an aggravating circumstance of a crime. Moreover, the Ministry of Justice does not divide the data according to the motivation of the perpetrator. Therefore there is no official data that could be analyzed. Thus the basic source of knowledge about the hate crimes committed with a homo- or transphobic motivation remains to be the reports of relevant NGOs.

In 2002 Lambda, one of Poland’s leading NGOs, prepared a report concerning discrimination of sexual minorities¹⁶⁰ in which it indicated that homosexual, bisexual and transsexual people

¹⁵⁷ Poland, *Moje Miasto* (2012), ‘Związki homoseksualne jak zoofilia? *Rzeczpospolita* nie musi przeproszać’, 27 January 2012, available at: www.mmwarszawa.pl/401070/2012/1/27/zwiazki-homoseksualne-jak-zoofilia-rzeczpospolita-nie-musi-przeproszac, accessed on 6 May 2014.

¹⁵⁸ This has been confirmed by representatives of the main NGOs active in the field of LGBT rights, 24 April 2014.

¹⁵⁹ Poland, Ministry of Justice (*Ministerstwo Sprawiedliwości*) (2014) Reply to freedom of information request no. DSD-II-061-33/14, 27 February 2014.

¹⁶⁰ Poland, Stowarzyszenie Lambda Warszawa, Kampania Przeciw Homofobii (2003) *Raport o dyskryminacji i*

do not trust the institutions that should guarantee their safety. Thirty-five per cent of those surveyed (that is 148 people) experienced verbal or physical violence or both. 12.2 per cent of those questioned (52 people) experienced physical violence and 31.5 per cent (134 people) psychological violence. Only a small number of the injured persons reported their experiences to the police. In the case of physical violence, 25 per cent of injured people reported this fact to the police, in the case of psychological violence it was only 13.5 per cent. Among the cases of psychological violence reported to the police, in 66.7 per cent of cases police did not intervene and in 5.6 per cent the reaction to the report was hostile.

In December 2004, the Regional Court in Łódź issued a judgment in which it found that two men were guilty of beating a transvestite to death. They did not explain the motives for their brutal conduct. While they were drinking alcohol in a public park, they noticed a person searching through litterbins. When they realised it was a man dressed in women's clothes, they pushed him on to the ground, undressed him and started kicking. The victim died as a result of injuries caused by the men. Their only explanation was that they acted under the influence of alcohol. 27-year-old A.F. was sentenced to six years of imprisonment and 23-year-old D.R. was sentenced to six years and two months of imprisonment. In the opinion of the Regional Court in Łódź, there was no doubt that the act of violence was motivated by stereotypical prejudice against transvestites.¹⁶¹

According to the report of the Campaign Against Homophobia for years 2005- 2006, 14.6 per cent of LGBT people surveyed had been subject to physical violence. Other reports by LGBT organisations¹⁶² also show examples of numerous aggressive misdemeanours against LGBT persons.

In 2008 and 2009 the Campaign Against Homophobia kept reporting numerous examples of aggressive behaviour towards LGBT people.¹⁶³ However, as in previous years, most of the incidents or offences against LGBT people were not followed by any legal action, in most cases they were not even officially notified to the Police. In 2008 the Campaign Against Homophobia was also informed about some incidents of physical violence against LGBT pupils at schools. An analysis of the situation in that regard clearly showed that Polish schools are not prepared to deal with the problem of homophobic aggression among pupils.¹⁶⁴

In September 2009 the Campaign Against Homophobia intervened in the case of verbal and physical assaults on a homosexual person perpetrated by City Guards (*Straż Miejska*) in Warsaw. The letter to the Chief Commissioner of the City Guard in Warsaw (*Komendant Warszawskiej Straży Miejskiej*) underlined that the Campaign Against Homophobia had previously been informed about examples of similar, unacceptable behaviour of the City

nietolerancji ze względu na orientację seksualną w Polsce, Warszawa, Stowarzyszenie Lambda Warszawa, Kampania Przeciw Homofobii.

¹⁶¹ Poland, Crossdressing.pl (2004) '6 lat za śmiertelne pobicie transwestyty', 21 December 20014, available at: crossdressing.pl/main.php?lv1_id=2&lv2_id=74&lv3_id=272, accessed on 6 May 2014.

¹⁶² Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2007) *Social situation of bisexual and homosexual people in Poland –2005 and 2006 report*, available at: www.kph.org.pl/publikacje/sytuacja_bi_homo_2007_EN.pdf, accessed on 6 May 2014.

¹⁶³ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2009) *Raport o homofobicznej mowie nienawiści w Polsce*, Warszawa, Campaign Against Homophobia (*Kampania Przeciw Homofobii*).

¹⁶⁴ Poland, Queer (2008) 'Polska szkoła homofobią stoi', available at: queer.pl/news/190743/polska-szkola-homofobia-stoi, accessed on 6 May 2014.

Guards. The Commissioner was called to examine all such cases in detail.¹⁶⁵ Another disturbing issue described by the Campaign Against Homophobia referred to the practice of identifying homosexual persons on dating and social web portals.¹⁶⁶ After arriving to the previously agreed meeting spots, homosexual persons were assaulted and beaten. One particular case concerning aggression against LGBT persons, which gained special attention in the Polish media, was the assault of Rafalala – a transvestite, poet and theatre performer who became well-known after Polish parliamentary elections in October 2007 when she was denied the right to vote. Rafalala was insulted, attacked with tear gas and almost beaten in the centre of Warsaw in October 2009.¹⁶⁷ She asked the City Guards for help, but they refused to take any action.

According to a more recent survey on discrimination on the grounds of sexual orientation and gender identity in Poland prepared by Polish LGBT NGOs¹⁶⁸ (*Campaign Against Homophobia, Lambda Warsaw and the Trans-Fuzja Foundation*), 44 per cent of LGBT people in Poland experienced verbal abuse while 12 per cent were subject to physical violence. According to the report, 90 per cent of acts of physical violence and 97 per cent of acts of psychological violence are not reported to the police.

In 2013 more homophobic attacks and events against LGBT organisations were reported. The Campaign Against Homophobia received many threats, including bomb threats.¹⁶⁹ There were also several violent incidents during the public screenings¹⁷⁰ of LGBT films or the Pride March in Warsaw. On 11 November 2013, the Polish Independence Day, an artistic installation of a rainbow, seen by many as a symbol of gay rights and tolerance, was set alight by rioters during a march of the far-right. The scale of homophobic violence urged the Government Plenipotentiary for Equal Treatment to issue a public statement condemning the attacks.¹⁷¹

LGBT public persons also become targets of violence. Robert Biedroń, the openly gay MP, was subjected to violence, both physical and verbal, on several occasions. In 2013 hooligans attacked him after the Gay Pride in Warsaw.¹⁷² In January 2014 two men beat him in front

¹⁶⁵ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2009) 'List do Straży Miejskiej o Przemocy', 19 September 2009, available at monitoring.kph.org.pl/index.php?option=com_content&view=article&id=93:list-do-stray-miejskiej-o-przemocy&catid=1:news, accessed on 6 May 2014.

¹⁶⁶ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*) (2009) Raport o homofobicznej mowie nienawiści (Report on homophobic hate speech in Poland), available at: www.kph.org.pl/publikacje/homofobiczna_mowa_nienawisci.pdf, accessed on 6 May 2014.

¹⁶⁷ Poland, Wysokie Obcasy (2009) 'Zaklinanie rzeczywistości', 9 November 2009, available at: www.wysokieobcasy.pl/wysokie-obcasy/1,66725,7224415,Zaklinanie_rzeczywistosci.html accessed on 6 May 2014.

¹⁶⁸ Poland, M. Makuchowska, M. Pawłęga, (2012), *Sytuacja społeczna osób LGBT. Raport za lata 2010-2011*, Warsaw: Kampania Przeciw Homofobii, available at: www.kph.org.pl/publikacje/Raport_badania_LGBT_do_netu.pdf, accessed on 6 May 2014.

¹⁶⁹ Poland, *Gazeta Wyborcza*, (2013), 'Groził Kampanii przeciw Homofobii. Podłożę wam bombę', available at: wyborcza.pl/1,75248,14869790,Grozil_Kampanii_przeciw_Homofobii_Podloze_wam_bombe.html, accessed on 6 May 2014.

¹⁷⁰ Poland, *Gazeta Wyborcza*, (2013), 'Bomba w Krytyce Politycznej. Jest dochodzenie Policji', available at: warszawa.gazeta.pl/warszawa/1,34862,14864266,_Bomba_w_Krytyce_Politycznej_Jest_dochodzenie_policji.html, accessed on 6 May 2014.

¹⁷¹ Poland, The Government Plenipotentiary for Equal Treatment (*Pelnomocnik Rządu ds. Równego Traktowania*) (2013) Statement on hate against LGBT, 30 October 2013, available at: rownetraktowanie.gov.pl/aktualnosci/oswiadczenie-w-sprawie-aktow-nienawisci-wobec-srodowiska-lgbt, accessed on 6 May 2014.

¹⁷² Poland, Campaign against Homophobia (*Kampania przeciw Homofobii*) (2013) 'Pobicie Roberta Biedronia',

of his apartment.¹⁷³ The investigation in this case is pending. There were also some aggressive incidents during public meetings with LGBT MPs, e.g. a meeting with Anna Grodzka at the University of Warsaw in which unknown perpetrators threw a smoke generator into the meeting room.¹⁷⁴

Another issue of a criminal nature which is related to homophobia concerns the website www.redwatch.info. It is a website which has been operating since January 2006 and which presents materials of a fascist and racist nature. In particular, the website lists a number of people who, in the opinion of the authors of the website, represent a threat to Polish society. Information on the website includes photos, addresses and even mobile phone numbers of a number of people, including leaders of the LGBT movement in Poland. The descriptions of people also contain information on political beliefs, social activities, and sometimes describe people using vulgar language. Furthermore, the website contains photos from gay pride marches and counter-demonstrations which have taken place in Poland. It seems that the people managing the website have connections with neo-fascist organisations from the United Kingdom, such as Blood&Honour.

As a result of the investigation, charges were brought against three people, Andrzej P., Bartosz B. and Mariusz T. Despite their arrest, the website still operates. The Polish government tried to intervene with the US authorities (where the servers are said to be located), however it was unsuccessful. In 2010 the three men accused of running the Redwatch website were sentenced to imprisonment (from 13 to 18 months). The court found them guilty of participating in a criminal group, which consisted of public promotion of totalitarian regime, incitement to violence against people because of their racial, ethnic, and political affiliation as well as public defaming of individuals and groups because of their nationality. Because they administered the said website, the men were also found guilty of inciting violence and unlawful threats, and unauthorized processing of personal data.¹⁷⁵

available at: www.kph.org.pl/pl/archiwum/809-pobicie-roberta-biedronia, accessed on 6 May 2014.

¹⁷³ Poland, Wp.pl (2014) 'Atak na Roberta Biedronia', 21 February 2014, available at: <http://wiadomosci.wp.pl/kat,1348,title,Atak-na-Roberta-Biedronia-zostalem-uderzony-na-ulicy.wid,16423660,wiadomosc.html?ticaid=11245f>, accessed on 6 May 2014.

¹⁷⁴ Poland, Faculty of Law and Administration University of Warsaw (*Wydział Prawa i Administracji Uniwersytetu Warszawskiego*) (2012) 'Oświadczenie dziekana wydziału prawa i administracji', Press release, 3 June 2012.

¹⁷⁵ Poland, Helsinki Foundation for Human Rights (*Helsinkińska Fundacja Praw Człowieka*) (2010) Relacja dr Anny Śledzińskiej-Simon dotycząca wyroku w sprawie Redwatch, 21 December 2010, available at: www.hfhrpol.waw.pl/interwencja/interwencje/relacja-dr-anny-sledzinskiej-simon-dotyczaca-wyroku-w-sprawie-redwatch.html, accessed on 6 May 2014.

G. Transgender issues

G.1. Legal situation

Article 32 Section 2 of the Polish Constitution prohibits discrimination in political, social or economic life. Discrimination of transgender people is dealt with as discrimination on the ground of sex. Besides Article 11³ of the Labour Code, which proscribes direct or indirect discrimination in relation to employment on the grounds of sex and sexual orientation, there are only a few explicit provisions banning discrimination on the grounds of sex or sexual orientation. The LGBT organisations in Poland are striving to amend the Criminal Code in order to make discrimination on the grounds of sex, as well sexual orientation, age or disability a punishable offence. For the time being, the Code specifies a few acts aimed against the members of national, ethnic, racial, political, religious or non-religious group as crimes (see Chapter F. above for detailed description).

In Poland the transition process is very long and costly (the medical procedures cost approx. 30.000-35.000 PLN – ca. 7.200 Euro).¹⁷⁶ There occur substantial differences in its course depending on the health care institution.¹⁷⁷ The procedure includes obtaining basic medical blood and urine tests, electroencephalogram (EEG), tomography of the skull, karyotype, psychiatric, psychological and sexology opinions, hormone treatment, a declaratory judgment stating that a person is of the opposite sex to that declared in the birth certificate, change of name and personal documents and sex reassignment surgery. Most of the costs of the reassignment therapy are not covered by the National Health Fund (*Narodowy Fundusz Zdrowia*), a body that manages health premiums. The sex reassignment therapy was explicitly excluded by the Law on Health Services Financed from Public Resources of 27 August 2004 (*Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*)¹⁷⁸ from being financed by public resources. Although this provision was amended, currently still only a very few specific medical services which are performed as elements of sex reassignment therapy are classified on the list of hospital services financed by public resources. Most elements of the sex reassignment therapy are not on the list. It means that a person who needs to undergo the therapy of sex reassignment is forced to bear the costs on their own.

Sex reassignment surgery (SRS) is in practice possible only after a declaratory judgment has been delivered. There have been situations where surgeons denied reassignment fearing that criminal charges would be brought against them¹⁷⁹ in spite of the consent of the transsexual person.¹⁸⁰ For those reasons, the SRS (involving removal of female or male genital organs,

¹⁷⁶ Poland, Trans-fuzja Foundation (*Fundacja Trans-Fuzja*) (2007) 'Ile kosztuje zmiana płci?', 22 November 2007, available at: http://transfuzja.org/pl/artykuly/kompendium_wiedzy_ts_mk/ile_kosztuje_zmiana_plci_ts_mk.htm, accessed on 6 May 2014.

¹⁷⁷ In some hospitals hormonal therapy is not required for a declaratory judgment.

¹⁷⁸ Poland, The Law on Health Services Financed from the Public Resources (*Ustawa z dnia 27 sierpnia 2004 o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*), 27 August 2004.

¹⁷⁹ Sex reassignment surgery may fall under the scope of Article 156 of the Penal Code that prohibits causing serious damage to health, as it results in infertility.

¹⁸⁰ Consent from the person concerned does not exclude the illegality of the act. In the legal doctrine there are voices arguing that sex reassignment surgery can be exculpated by the state by necessity, which constitutes circumstances

which results in depriving transsexual people of their reproductive capacity) is carried out on the basis of the declaratory judgment.

According to the established court practice a declaratory court judgment is available only when there have already been irrevocable changes towards the formation of the opposite sex or when a surgical intervention (mastectomy)¹⁸¹ has taken place. It cannot be based solely on the subjective feeling of the person concerned that s/he belongs to a particular sex.¹⁸² Such an approach is supported in the legal literature in particular with regard to married transsexuals for the reason that the Polish Constitution proclaims marriage only as a union of a man and a woman (Article 18 of the Constitution). Following this provision, a transsexual person who is married must divorce and if they are the sole guardian of minor children, they must wait until the children come of age. If there is another parent, the court will give them custody.

There is still no comprehensive act that would regulate the legal situation of trans-persons. The procedure for legal gender recognition is based on the jurisprudence of the Supreme Court.

In the judgment of 1978¹⁸³ the Supreme Court held that not only external physical features and organs define the sex of an individual, but also the emotional association with the gender opposite to that assigned at birth. The Court found that no one could be forced to be a man (or woman) if they internally denied it. The Court stated that, in exceptional circumstances, courts can rectify acts of civil status before sex reassignment surgery takes place if the features of the new sex are predominant and changes irreversible. The Supreme Court in a later judgment withdrew, however, from its earlier position and rejected the stance that transsexualism justified the rectification of birth certificates with regard to sex defined at birth.¹⁸⁴ The new approach made it impossible to rectify records of civil status. In order to modify data included in the records, Article 21 of the Law on civil status records (*Ustawa Prawo o aktach stanu cywilnego*)¹⁸⁵ foresees the institution of additional inscription (note). Only on this basis can a transsexual person apply for a change of their first name and, in most cases, the ending of the last name.

Subsequently, the Supreme Court recognised that determination of gender identity belonged to personal rights. The person concerned could, therefore, file an action for a declaratory judgment (in accordance with Article 189 of the Civil Procedure Code).¹⁸⁶ In this procedure the court determines the legal gender of the transsexual person.

According to the rule established by the Supreme Court, the parents of the concerned person, or in their absence a guardian (*kurator*) appointed by the court, should be the defendant

excluding the illegality of the criminal act.

¹⁸¹ Mastectomy is the surgical removal of the breasts leading to the main sex reassignment surgery such as *feminising genitoplasty* and *masculinising genitoplasty*.

¹⁸² Poland, Appellate Court in Katowice (*Sąd Apelacyjny w Katowicach*), case U I ACa 276/04, 30 April 2004.

¹⁸³ Poland, Supreme Court (*Sąd Najwyższy*), case CZP 100/77, 2 February 1978

¹⁸⁴ Poland, Supreme Court (*Sąd Najwyższy*), case III CZP 37/89, 22 June 1989. The Court stated that acts of civil status only have a declaratory character and describe the legal status of a person resulting from acts of law and transsexualism could not be described as a change by acts of law, since it is a psychological transformation.

¹⁸⁵ Poland, Law on civil status records (*Ustawa z dnia 29 września 1986 r. - Prawo o aktach stanu cywilnego*), 29 September 1986.

¹⁸⁶ Poland, Supreme Court (*Sąd Najwyższy*), case III CRN 28/91, 22 March 1991.

party.¹⁸⁷ Adult transsexual persons also have to file a suit against their parents. The Court justified the need for suing the parents by arguing that in cases that concern the civil status, the parties are usually persons between whom there is a family tie sanctioned by the law (e.g. in the case of a paternity lawsuit, parents and children are parties to the proceedings). In the course of the case, the parents' objections do not count as a veto power. The court declares the current – meaning different from the one stated in the birth certificate – legal gender of the person concerned on the basis of an opinion of a medical doctor, which is attached to the suit, and in some cases a testimony of a medical expert. Moreover, the parties in these proceedings can agree that the jurisdiction of the court will be that of the plaintiff's place of residence, not of the defendants.

In the most recent judgment concerning legal gender recognition, the Polish Supreme Court¹⁸⁸ held that, apart from his or her parents, the person who wishes their legal gender to be corrected should bring an action against his or her spouse and children. According to the court, these persons also have a legal interest in the court's decision and should be parties to the proceedings.

The proceedings before the Supreme Court concerned the overturning of an already final (*prawomocny*) judgment. In 2009, on the basis of article 189 of the Civil Procedure Code,¹⁸⁹ the regional court issued a declaratory judgment in the case of a transsexual woman. In the course of the proceedings, the plaintiff did not confess to being married. In the judgment, the court stated that the plaintiff, who had already undergone the sex reassignment surgery abroad, was a woman. As a result, after the judgment of the court, there existed in Poland a marriage of two women. After the civil registry office became aware of this fact, in July 2010 the public prosecutor filed for resumption of the proceedings arguing that they were invalid, because the plaintiff did not enumerate his wife and children among the defendants. It is noteworthy that none of the earlier judgments, neither of the Supreme Court nor district courts, said that the plaintiff should bring action against their spouse or children.

The district court resumed proceedings and dismissed the plaintiff's claim, arguing that the decision in accordance with his request would lead to the legalization of a marriage between persons of the same sex, which is contrary to Article 18 of the Constitution. The appellate court dismissed the appeal of the plaintiff, and the Supreme Court agreed with the decisions of the courts of lower instance.

Upon a request, the Ministry of Internal Affairs provided the authors with statistical information based on data about personal identification numbers of Polish residents (PESEL).¹⁹⁰ PESEL registry has been operating since 1979. According to the Ministry, on the basis of information generated by the PESEL registry, it could be established that as of 13 February 2014 626 persons changed the PESEL number and it was related to the change of gender. 438 people changed their PESEL from female to male, 188 from male to female. This data is not divided into years.

¹⁸⁷ Poland, Supreme Court (*Sąd Najwyższy*), case III CZP II8/95, 22 September 1991.

¹⁸⁸ Poland, Supreme Court (*Sąd Najwyższy*), I CSK 146/13, 6 December 2013.

¹⁸⁹ Poland, Civil Procedure Code (*Ustawa z dnia 17 listopada 1974 Kodeks Postępowania Cywilnego*), 17 November 1974.

¹⁹⁰ Poland, Ministry of Interior (*Ministerstwo Spraw Wewnętrznych*) (2014) Reply to freedom of information request no. DSO/WSC-0667/2/2014, 21 February 2014.

G.2. Recent initiatives

Polish transgender persons are receiving more public attention, mainly thanks to the efforts of the Trans-Fuzja Foundation, as well as the presence of the first trans-gender MP in the Polish Parliament.

Since 2010 the Human Rights Defender has intervened several times in cases concerning transgender persons. A need for specific legislative initiatives was highlighted in order to regulate the fundamental legal aspects of transgender person's lives. The Human Rights Defender submitted an intervention to the Minister of Labour and Social Policy (*Ministerstwo Pracy i Polityki Społecznej*) asking the Minister to regulate changing of names on work certificates of transgender persons¹⁹¹ and an intervention to the Minister of Justice highlighting the urgent necessity to undertake legislative initiatives in order to regulate holistically all legal aspects of sex changes.¹⁹²

In 2012 the Human Rights Defender once again addressed the Ministry of Justice, inquiring about the progress of the work on the law that would comprehensively regulate the legal situation of transgender persons.¹⁹³

There seems to be a growing consensus and increasing political will to introduce a comprehensive law on legal gender recognition.

On 9 May 2012 a draft Gender Accordance Act (*Projekt ustawy z dnia 9 maja 2012 o uzgodnieniu płci*) was submitted to the Parliament by the Palikot's Movement.¹⁹⁴ The law would establish a new and simple way for court proceedings in relation to gender recognition and replace the incoherent court practice. In November 2012, however, the draft was withdrawn by its proponents.

In January 2013 a draft Gender Accordance Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*) was submitted by the same political party.¹⁹⁵ Its main aim is to create a formal procedure of gender recognition. A recent report¹⁹⁶ of Trans-Fuzja Foundation (Fundacja Trans-Fuzja) and the Polish Society of Antidiscrimination Law, describing court practices with regard to gender reassignment, shows that violations of the right to privacy and family life as well as freedom from degrading treatment are commonplace during court

¹⁹¹ Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2011) Letter to the Minister of Labour and Social Policy, 26 April 2011, available at: www.sprawy-generalne.brpo.gov.pl/pdf/2011/04/673031/1561741.pdf, accessed on 6 May 2014.

¹⁹² Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2011) Letter to the Minister of Justice, 1 August 2011, available at: www.sprawy-generalne.brpo.gov.pl/pdf/2010/11/660929/1583682.pdf, accessed on 6 May 2014.

¹⁹³ Poland, Human Rights Defender (*Rzecznik Praw Obywatelskich*) (2012) Letter to the Minister of Justice, 21 March 2012, available at: www.rpo.gov.pl/sites/default/files/1633035.pdf, accessed on 6 May 2014.

¹⁹⁴ Poland, Draft Gender Accordance Act (*Projekt ustawy z dnia 9 maja 2012 o uzgodnieniu płci*), 9 May 2012,

¹⁹⁵ Poland, Draft Gender Accordance Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*), 3 January 2013.

¹⁹⁶ Poland, Polish Society of Antidiscrimination Law, Trans-Fuzja Foundation (2013), Legal situation of transgender people in Poland. Report and proposals of law changes" ("*Sytuacja prawna osób transpłciowych w Polsce. Raport z badań i propozycje zmian*"), ptpa.org.pl/public/files/Sytuacja_prawna_osob_transpłciowych_w_Polsce.pdf, accessed on 6 May 2014.

proceedings. Moreover, the lack of substantive provisions on gender reassignment results in different practices of Polish courts when it comes to medical requirements that must be fulfilled by transgender persons when applying for recognition of their gender.

The draft law changes the procedure of gender reassignment from litigious to non-litigious. It also defines the concept of gender identity as well as introduces three main conditions that are necessary to start the court procedure: i) Polish citizenship, ii) the minimum age of 18, or 16 with the permission of parents/guardians or the family court, iii) being unmarried. The motion to start the procedure of gender reassignment must be supported by two independent opinions of medical doctors (psychiatrists or psychologists/sexologists). The draft law also introduces a possibility for a court to issue its approval without medical opinions in situations where there is an evident and obvious need for gender reassignment. In addition, the draft law prohibits any surgical or hormonal interventions as a requirement to grant the approval of gender reassignment. Likewise, it prohibits any surgical or other medical interventions with regard to intersex people under 13.

The first reading of the draft law took place in December 2013. At the same time, a motion to dismiss the draft did not pass. The draft was referred to parliamentary commissions.

The Government is preparing its own proposal to regulate the issue of gender reassignment. First versions of the draft law were said to contain, among others, the requirement of a „real life test” and propositions of introducing a special commission of medical experts authorized to issue decisions on transsexuality.

The government’s proposition also contained a provision on special documents (temporary ID) for transsexual people undergoing the reassignment procedure (in the period between the positive decision of the medical commission and the court judgment). It contained the divorce requirement when launching the court procedure on gender reassignment. After strong criticism the requirement of the “real life” test was withdrawn at the end of 2013. No official version of the project has been published.¹⁹⁷ So far the government published the preliminary background document on the planned proposal that would amend different legal acts and establish a procedure for legal gender recognition, i.e the assumptions to the future draft law (*projekt założeń projektu ustawy*).¹⁹⁸ According to the assumptions the court procedure that leads to the declaratory judgment should be changed from litigious to non-litigious. Moreover, it would be possible to obtain a declaratory judgment without the necessity of undergoing irreversible medical interventions, and the medical therapy of persons undergoing transition would be refunded by the state.

¹⁹⁷ Poland, Association „The Diversity Workshop” (*Stowarzyszenie „Pracownia Różnorodności”*), (2013) *Rządowy Projekt ustawy dla osób transseksualnych*, available at: www.spr.org.pl/2013/11/28/spotkanie-w-min-sprawiedliwo%C5%9Bci-rz%C4%85dowy-projekt-ustawy-dla-os%C3%B3b-transseksualnych/, accessed on 6 May 2014.

¹⁹⁸ Poland, Council of Ministers (*Rada Ministrów*) (2014) *Projekt założeń projektu ustawy o zmianie ustawy Kodeks postępowania cywilnego, ustawy – Kodeks rodzinny i opiekuńczy, ustawy o zawodach lekarza i lekarza dentystry oraz niektórych innych ustaw*, 31 January 2014, available at: <http://legislacja.rcl.gov.pl/docs//1/207482/207483/207484/dokument104214.pdf>, accessed on 11 June 2014.

H. Miscellaneous

H.1. Educating about LGBT issues

At the beginning of 2006 the Polish version of Compass, a guide for teachers on methods of educating young people about human rights, published by the Council of Europe, was withdrawn from circulation by the Ministry of Education. On 8 June 2006 the Minister of Education dismissed the director of the National In-Service Teacher Training Centre (NTTC) (*Centralny Ośrodek Doskonalenia Nauczycieli*, CODN), Mirosław Sielatycki, for publishing the guide. The ground for dismissal was the content of the chapter on homosexuality supposedly contrary to the general programme of education, as well as the charge that the publication promoted homosexuality at schools.¹⁹⁹ During a visit of the Commissioner for Human Rights of the Council of Europe to Poland, the Secretary of State at the Ministry of Education, Mirosław Orzechowski, explained that, although the Compass guide contained many positive chapters, the chapter on homosexuality was not acceptable for the Polish government due to the lack of Polish values. According to the Minister, homosexuality was not a problem in the Polish society and should not be discussed at schools. The officially accepted manual entitled *Let's win youth (Wygrajmy Młodość)* defined homosexuality as an unnatural tendency and homosexual people as those who required special care and help to fight this shameful deviation. The authors associated homosexuality with a fear of responsibility, improper hierarchy of values, lack of an appropriate ideal of love, a hedonistic attitude, and prostitution. The Commissioner for Human Rights of the Council of Europe found this depiction wrong, insulting and contrary to the principle of equality, diversity and respect for the rights of every human being. He underscored that although Polish authorities have full discretion in determining the content of school subjects and books, the principles regarding human rights and non-discrimination are not optional. He also expressed his concern about the planned law prohibiting the promotion of homosexuality at schools.²⁰⁰ Nevertheless, Compass never reached school libraries.

In October 2009, the local division of the Campaign Against Homophobia in Gdańsk organized the first Polish promotion of a book for children entitled “And Tango Makes Three” (“*Z Tango jest nas troje*”), written by Peter Parnell and Justin Richardson to help parents teach children about same-sex parents families. The meeting took place in the Centre of Creative Play. Local politicians of the Law and Justice organized a “Campaign against demoralization” expressing their protest against the “promotion” of demoralization and deviation.²⁰¹ They were joined by the members of the All-Poland Youth (*Młodzież Wszechpolska*). In 2010 another children’s book concerning the issue of homosexual couples

¹⁹⁹ For considerations on the litigation initiated by Mirosław Sielatycki against the Minister of National Education, see Chapter A of the previous version of the report.

²⁰⁰ Council of Europe, The Commissioner for Human Rights, (2007), Memorandum to the Polish Government: Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, 20 June 2007, CommDH(2007) 13, available at: https://wcd.coe.int/ViewDoc.jsp?id=1155005&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P100_1248, accessed on 6 May 2014.

²⁰¹ Poland, Law and Justice (Prawo i Sprawiedliwość), (2009), *Pomorskie PiS rozpoczęło Kampanię przeciw demoralizacji*, available at www.pis.org.pl/article.php?id=15919, accessed on 6 May 2014.

was translated into Polish. The fairy tale written by Linda de Haan and Stern Nijland told the story of two Princes who fell in love and became the King and the King.²⁰²

In 2013 a project that analyzed school handbooks from the point of view of LGBT issues was concluded. It was conducted by the Polish Association “The Diversity Workshop” (*Stowarzyszenie “Pracownia Różnorodności”*). In the course of the project four experts – sexologist, sociologist, educator and a psychologist – analyzed the content of 51 textbooks for junior high and high schools. The result of their work is the report “School of silence” (*Szkola Milczenia*).²⁰³ According to the authors the available handbooks rarely mention any LGBT issues. Those handbooks that touch upon them do that in an outdated and judgmental way contrary to the current state of scientific knowledge.

After the nomination of a new Minister of Education in November 2013 a group of LGBT organisations sent a letter to the newly appointed Minister. The organizations asked the Minister for a meeting in order to discuss, in particular, the following issues: the need to include LGBT and anti-discrimination issues in curricula and in the education of teachers, the problem of homophobia at schools – the appropriate response and prevention, and the cooperation of schools with LGBT organizations. To the disappointment of the organizations, a representative of the Ministry replied that they at that point had no time for such a meeting.²⁰⁴

More recently a campaign against “gender ideology”, and the notion of “gender” itself, could be observed in Poland. According to the Catholic Church and conservative politicians, “gender” presents a threat to the society and is at odds with nature and natural law. A series of actions took place in response to “gender”, e.g. posters which read “Protect Your Child Against Gender” were hung in schools. The Church, as well as the right wing politicians, protested against classes for young children devoted to gender education; conservative politicians even formed a parliamentary group called “Stop Gender Ideology”. At some schools the parents also complained about gender education of their children. Some local governments adopted statements where they opposed the presence of gender ideologies and gender education at schools. The Church, as well as the conservative politicians, linked gender ideology with other issues they opposed, such as abortion or gay-marriage. The Church uttered its opinion in an official pastoral letter.²⁰⁵ The first version of the letter was replaced soon after the publication with a more toned-down version, which still was critical of the gender ideology. The letter said that “according to this [gender] ideology, a person can voluntarily decide for themselves whether they are a man or a woman, and they are also free to choose their own sexual orientation” and “this voluntary self-determination, which does not have to be a one-time thing, is supposed to lead to the fact that society has accepted the

²⁰² Poland, Wikinews.org (2010), Król i król: bajka dla dzieci ucząca tolerancji będzie wydana w Polsce, available at: http://pl.wikinews.org/wiki/Kr%C3%B3l_i_kr%C3%B3l:_bajka_dla_dzieci_ucz%C4%85ca_tolerancji_b%C4%99dzie_wydana_w_Polsce, accessed on 6 May 2014.

²⁰³ Poland, Association „The Diversity Workshop” (*Stowarzyszenie „Pracownia Różnorodności”*), (2013), *Szkola milczenia*, available at: www.spr.org.pl/2013/01/23/szko%C5%82a-milczenia-wie%C5%84czy-projekt-weryfikacji-podr%C4%99cznik%C3%B3w/, accessed on 6 May 2014.

²⁰⁴ Poland, Association for LGBT Persons (*Stowarzyszenie na Rzecz Osób LGBT*) (2014), *MEN zbyt zaangażowane żeby się spotkać*, available at: www.spr.org.pl/2014/02/20/men-zbyt-zaanga%C5%BCowane-%C5%BCeby-si%C4%99-spotka%C4%87/, accessed on 6 May 2014.

²⁰⁵ Poland, Konferencja Episkopatu Polski (2013), *List pasterski na niedzielę świętej rodziny*, episkopat.pl/dokumenty/5545.1.List_pasterski_na_Niedziele_Swietej_Rodziny_2013_roku.html, accessed on 6 May 2014.

right to establish new types of families, for example, built on homosexual relationships.” According to the letter, “the attempts at redefining the notion of marriage should raise extreme concerns.” And while “the Church in no way agrees with the humiliation of persons with homosexual tendencies”, “homosexual activity is profoundly disordered and [...] marriage, that is a commune of a man and a woman, cannot be socially equated with a homosexual relationship.”

H.2. The draft law on same-sex couples (registered partnerships)

On 27 July 2011, the first parliamentary reading of the draft law on registered partnership contracts (*Ustawa o umowie związku partnerskiego*)²⁰⁶ took place. The draft law was prepared by LGBT NGOs and activists and passed to the Democratic Left Alliance in order to present it as a legislative initiative.

The draft law would introduce a new type of a civil contract for heterosexual and homosexual couples to regulate some of the legal and economic aspects of their partnerships. The draft law was passed to the subcommittee in order to discuss the details. The work on the draft was discontinued due to the end of the parliamentary term.

In February and in May 2012 two draft laws on registered partnerships were submitted to the Parliament by two opposition parties – the Palikot’s Movement and the Democratic Left Alliance.²⁰⁷ The draft laws concerned both same-sex and heterosexual couples. They would enable them to formalise their relationships, and guaranteed fundamental rights, including shared property rights, inheritance rights and tax rights. On 24 June 2012 the Parliament decided by an overwhelming majority not to discuss the draft laws and postponed the legislative procedure.²⁰⁸

On 31 August 2012 the ruling party – the Civic Platform - submitted its own draft law on registered partnerships to the Parliament.²⁰⁹ The draft law submitted by the ruling party did not provide tax privileges or inheritance and social security rights for registered partners.

None of the draft laws regulated any issues related to childcare or adoption.

In January 2013 the Parliament, after an extremely hostile and homophobic discussion, rejected three proposals of laws on registered partnerships (including the one elaborated by

²⁰⁶ Poland, Draft law on registered partnership contract (*Projekt ustawy o umowie związku partnerskiego*), 19 May 2011, available at: [http://orka.sejm.gov.pl/Druki6ka.nsf/0/F1DA05E62ED0B62BC12578CC00268996/\\$file/4418.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/F1DA05E62ED0B62BC12578CC00268996/$file/4418.pdf), accessed on 6 May 2014.

²⁰⁷ Poland, Draft law on registered partnerships (*Projekt ustawy o związkach partnerskich*), 16 February 2012, available at orka.sejm.gov.pl/Druki7ka.nsf/0/97A9C9C40D26CB7CC1257A370043EC84/%24File/552.pdf, accessed on 6 May 2014. and Poland, Draft law on registered partnerships (*Projekt ustawy z dnia 22 maja 2012 o związkach partnerskich*), 22 May 2012, available at orka.sejm.gov.pl/Druki7ka.nsf/0/9436A1BBFEDA2278C1257A370043EC9D/%24File/554.pdf, accessed on 6 May 2014.

²⁰⁸ Poland, Parliament of the Republic of Poland, (*Sejm Rzeczypospolitej Polskiej*), 2012, Press release, 24 June 2012, available at: sejm.gov.pl/Sejm7.nsf/agent.xsp?symbol=listaglos&IdDnia=1229, accessed on 6 May 2014.

²⁰⁹ Poland, Draft law on registered partnership contract (*Projekt ustawy o umowie związku partnerskiego*), 29 August 2012, available at: orka.sejm.gov.pl/Druki7ka.nsf/0/29BC5BD1F2B22CECC1257AA0003715ED/%24File/825.pdf, accessed on 6 May 2014.

the ruling party Civic Platform which received public support from the Prime Minister).²¹⁰

During this debate, members of the Law and Justice expressed their homophobic opinions and a disagreement was revealed between two members of the government. The Prime Minister, Donald Tusk, supported the proposition of his party, while the Minister of Justice of that time, Jarosław Gowin, objected it arguing that registration of same-sex partnerships is contrary to the Constitution. It remains unclear whether the current Parliament will adopt any law on registered partnerships, since the ruling party is divided on this issue.

After the rejection of their proposals, the two opposition parties (Palikot's Movement and Democratic Left Alliance) submitted the two drafts of law on registered partnerships once again.

In May 2013 the weekly *Wprost* published information on a new draft law on a “partnership contract” prepared by the Civic Platform.²¹¹ The draft was not yet passed to the Sejm for discussion.

An important point in the debate on the future regulation of registered partnership is compliance with Article 18 of the Constitution according to which “[m]arriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.” According to one view, this wording excludes any alternative to marriage, since the constitutional protection covers only the relationship between persons of different sex.

On the other hand, the proponents of registered partnerships argue that the Constitution not only permits partnerships (since Article 18 in no way prohibits their introduction), but also requires – i.e. the constitutional protection of human dignity, equality before the law and non-discrimination – that the law regulates other forms of family life outside marriage. Proponents of this view claim that Article 18 does not create an obstacle to the regulation of this issue, and it should not be read as excluding the possibility of regulating registered partnerships.

While the issue of registered-partnerships remains a legal void in Poland, a crucial judgment of the European Court of Human Rights regarding the status of same-sex couples and the right to enter into a lease agreement after the death of one's homosexual partner was passed in 2010. In *Kozak v. Poland* ECtHR held that Poland had violated Articles 8 and 14 of the European Convention on Human Rights by denying a man living in a homosexual relationship the right to succeed a tenancy after the death of his partner.²¹² The ECtHR took into account the factors related to national legislation. It looked at the new provisions of the Civil Code that regulated stepping into a lease agreement. It highlighted that the provision of the Civil Code in question (Article 691)²¹³ did not include the word “marital”. The Court

²¹⁰Poland, *Tvparlament.pl* (2013), ‘Debata nad projektami o związkach partnerskich’, 25 January 2013.

²¹¹ Poland, *Wprost* (2013) ‘Projekt ustawy o związkach partnerskich’, 15 May 2013, available at: www.wprost.pl/ar/399880/Projekt-ustawy-PO-o-zwiazkach-partnerskich/, accessed on 6 May 2014.

²¹² European Court of Human Rights (ECtHR), *Kozak v. Poland*, no. 13102/02, 2 March 2010.

²¹³ According to Article 691 of the Civil Code “ In the event of a tenant's death, his or her spouse (if he or she is not a co-tenant), his or her and his or her spouse's children, other persons in respect of whom the tenant had maintenance obligations and a person who has lived in de facto cohabitation with the tenant shall succeed to the tenancy agreement.”

highlighted that States have a narrow margin of appreciation in maintaining provisions based on discrimination with regard to sexual orientation. Although States may protect the meaning of traditional marriage, domestic authorities should take into account the “developments in society”. In November 2012 the Polish Supreme Court clarified that same-sex couples in de facto cohabitation should not be discriminated against under Article 691 of the Civil Code.²¹⁴

H.3. Limited access to advertising agencies and other services

Homophobic attitudes in the Polish society were visible in the approach to advertising and outdoor advertising campaigns prepared by the leading LGBT non-governmental organisation in Poland, the Campaign Against Homophobia. At the end of 2007, the Campaign Against Homophobia prepared a campaign entitled “You are not alone.” The main idea of the campaign was to put up posters in different public places presenting homosexual “everymen” and “everywomen”, thus indicating the general problem of discrimination. Every poster included a slogan indicating a profession and the fact that somebody exercising this profession is a homosexual (e.g. “I am a dentist. I am a lesbian”). This slogan was followed by a name (e.g. Anna) and the place of residence. In the middle of the poster there was a picture of a given person exercising this profession, where the face was not recognisable. At the bottom of the poster, there was another slogan e.g. “We are more than 6,000 in Toruń” (different numbers in different cities).

Organisers were unable to run their campaign effectively. In Toruń, the public transport company informally let them know that it would not work with the campaign. Furthermore, one of the outdoor advertising firms also refused to place posters on their pillars and billboards.

It should also be noted that Robert Biedroń, at that time the leader of the Campaign Against Homophobia, was refused the right to promote his book “Rainbow Elementary” (“*Tęczowy elementarz*”) in Empik which is one of the largest chains of bookstores in Poland. He was not able to have meetings with readers as an author. In the official reply, the PR manager of the network claimed that “the strategy of communication of the firm includes supporting only such titles which do not violate somebody’s reputation or religious beliefs,” and that “such meetings may also result in objections of customers who are in the bookstore at that time, and the topic of discussion may shock or offend somebody’s feelings.”

In 2008 and 2009 further cases of limiting access to goods and services for LGBT organisations were reported. The Campaign Against Homophobia was unable to implement the action promoting their activities as an NGO because a private company in Wrocław refused to print their posters. Furthermore, the organisers of the Festival “Culture for Tolerance” in Kraków were informed by an employee of a private printing house that the exhibition pictures devoted to Argentinian lesbians would not be printed, as they violated his religious beliefs and his worldview. The owner of the printing house stated that he respected the refusal of his employee, although he personally would accept such an order. Finally, the owner refunded the costs of the order to the organisers. It is worth noting that the pictures did not contain any shocking or controversial symbols or content, they only presented graffiti

²¹⁴ Poland, Supreme Court (Sąd Najwyższy), Case III CZP 65/12, 28 November 2012.

found by the author on the walls in Argentinian cities with the slogans such as “Heterosexuality is not obligatory”.²¹⁵

Another example of denying access to advertisement could be found in Rzeszów where the public transport company refused to place the posters of Radio Eska Rock, as they showed two popular male TV and Radio presenters lying together in bed. The company stated that the content of the advertisement might promote homosexuality. The Director of the public transport company in Rzeszów stated that he was not prejudiced towards homosexuals, but a public company was not allowed to promote them, as it might harm public morals and the company’s reputation. Finally, the posters were placed on public buses in a censored version.²¹⁶

More recently, NGOs were informed about the discrimination of LGBT persons in their access to insurance and financial instruments, when e.g. a same-sex partner is not covered by a private insurance of their partner, which is typical in the case of different-sex couples.²¹⁷

The lack of the prohibition of discrimination on the ground of sexual orientation in the provision of goods and services (see above, the chapter on the new anti-discrimination law), together with the limited competences of the national equality bodies to act in cases between private parties (see above the chapter on HRD) create a risk that similar cases will be occurring in the future and will not be sufficiently addressed.

H.4. Collection of personal data by the police

The Law on the collection, processing and transmission of criminal information of 6 July 2001²¹⁸ grants the police the power to gather sensitive personal data about suspects, minors committing indictable criminal offences, people without a confirmed identity or people who try to conceal their identity, and fugitives. This can be done without their knowledge and consent. Article 20 Section 18 of the Law on the Police²¹⁹ provides that all data concerning racial or ethnic origin, political opinions, religious or philosophical convictions, religious, party or trade union membership, data about the state of health, addictions or sexual life of persons under suspicion of indictable criminal acts who are acquitted are subject to immediate destruction by the commission after the judgment becomes final. However, there is no parallel provision protecting sensitive data of witnesses or victims as parties in such proceedings.

Thus, the regulation regarding the processing of personal data by the police is inadequate, since it leaves these categories of persons unprotected, even if all of them individually have

²¹⁵ Poland, Feminoteka.pl (2009), ‘Lesbijki? Tego wam nie wydrukujemy’, available at: www.feminoteka.pl/news.php?readmore=4790, accessed on 6 May 2014.

²¹⁶ Poland, Gazeta.pl (2008), ‘Cenzura według MPK’, available at: wiadomosci.gazeta.pl/kraj/1,34309,5307554.html, accessed on 6 May 2014.

²¹⁷ Poland, Campaign Against Homophobia (*Kampania Przeciw Homofobii*), (date not indicated), *Dyskryminacja w dostępie do ubezpieczeń*, available at www.kph.org.pl/allnews/15-kph/448--dyskryminacja-w-dostpie-do-ubezpiecze, accessed on 6 May 2014.

²¹⁸ Poland, The Act on gathering, processing and transfer of criminal information (*Ustawa z dnia 6 lipca 2001 r. o gromadzeniu, przetwarzaniu i przekazywaniu informacji kryminalnych*), 6 July 2001.

²¹⁹ Poland, The Act on Police (*Ustawa z dnia 6 kwietnia 1990 r. o Policji*), 6 April 1990.

the right to have their personal data removed from police registers. The clear consequence of this shortcoming is that homosexual people are unwilling to report any criminal acts against them, fearing that their sensitive data will be collected by the investigative bodies or might be used by unauthorised third parties.

It is also worth noting that the Commission for the Prosecution of Crimes against the Polish Nation at the Institute for National Remembrance (*Instytut Pamięci Narodowej*, IPN) decided not to investigate the case concerning the activities undertaken by the Citizens' Militia (*Milicja Obywatelska*) against homosexuals in 1985-1987²²⁰. This case was brought by Szymon Niemiec and Jacek Adler on 25 September 2007. The Institute found that the so-called Action Hyacinth did not fulfil the criteria of a communist crime because the activities carried out were within the statutory duties of the Citizens' Militia (regarding crime prevention and the fight against crime).²²¹

H.5. Public statements by politicians

In 2008 and 2009 two significant cases of homophobic attitude, presented publicly by the members of the Polish biggest political parties, were reported. The first case concerned the Vice-Marshall of the Sejm (*Wicemarszałek Sejmu*) Stefan Niesiołowski, member of the ruling party Civic Platform. Vice-Marshall Niesiołowski stated that he supported the idea an obligatory separation of children from a homosexual parent if such a parent “brings home” another homosexual. This statement was followed by a strong reaction of LGBT organisations.²²²

Another member of the Polish Parliament, Deputy Artur Górski from Law and Justice stated during a parliamentary debate that “homosexuality should not be regarded as ordinary inclination to sin, because it exceeds all such inclinations in its vileness”. Again, the Campaign Against Homophobia protested against this homophobic attitude of the member of the Polish Parliament. The statement was also strongly criticised by Elżbieta Radziszewska, the then Plenipotentiary for Equal Treatment.²²³

In January 2010 Janusz Palikot, at that time a prominent politician of the Civic Platform, stated in a press interview that he was “searching for” the evidence of the homosexuality of Zbigniew Ziobro, the former Minister of Justice in the the Law and Justice Government, who was his political opponent. Palikot claimed that he did so in order to expose the hypocrisy of

²²⁰ These activities are known under the cryptonym of *Akcja Hiacynt* (Action Hyacinth). They were intended to collect sensitive data about the LGBT community, however, they could also be used for blackmail and the recruitment of new secret agents or informants.

²²¹ Poland, Queer (2008), Akcja “Hiacynt” była legalna, <http://queer.pl/news/190684/akcja-hiacynt-byla-legalna>, accessed on 6 May 2014.

²²² Poland, Campaign Against Homophobia (Kampania Przeciw Homofobii), (2008), KPH interweniuje w sprawie homofobicznych wypowiedzi wicemarszałka Niesiołowskiego, available at http://monitoring.kph.org.pl/index.php?option=com_content&view=article&id=34:kph-interweniuje-w-sprawie-homofobicznych-wypowiedzi-wicemarszaka-niesioowskiego&catid=1:news, accessed on 6 May 2014.

²²³ Poland, Gazeta.pl (2009), ‘Radziszewska będzie interweniować ws. Wypowiedzi Górskiego nt. homoseksualistów’, available at: wiadomosci.gazeta.pl/wiadomosci/1,114873,6241108,Radziszewska_będzie_interweniowac_ws__wypowiedzi_Gorskie_go.html, accessed on 6 May 2014.

the Law and Justice party, which he considered to be a homophobic organisation.²²⁴

In February 2010 the Polish media reported another example of a homophobic statement made by a member of the Civic Platform – one of the town councillors of Tomaszów Mazowiecki. In a dispute with a local media representative, Tadeusz Adamus stated that journalist Agnieszka Łuczak, who officially admitted that she was a lesbian, had no chances of becoming a town councillor. He added that it was necessary to “think with the head, not with the ovaries.”²²⁵ The statements of Mr. Adamus were criticised by other town councillors, representatives of town authorities and the Plenipotentiary Elżbieta Radziszewska. Before the case was further discussed during the meeting of the town council, Tadeusz Adamus resigned from his membership of the Civic Platform.²²⁶

During the current term, the presence of transsexual and openly gay MPs in the Parliament generated hostile reactions from right-wing politicians both during parliament debates as well as outside the Parliament.

The cases of hateful speech are often downplayed. Jan Dziedziczak, MP, at a meeting of the Parliamentary Committee on Culture and Media on 26 January 2012 turned to Anna Grodzka – a transgender MP – with the words “you’re right, sir”. Commenting on this incident, on 18 March 2012 priest Tadeusz Rydzyk said on air of radio Maryja “When one of the MP’s tongue slipped and said ”sir” to a man who, at the age of 56, said he was a woman and began to make himself into a woman, they want to bring him before the ethics committee! People, where are we? Let’s be normal.”

There were several cases of Polish MPs accused by LGBT NGOs of homophobic statements. Most complaints were addressed to the MPs Ethics Committee at the Polish Sejm and Senate.

In most cases, the Ethics Committee decided not to take action. Despite numerous complaints, in the course of the present parliamentary term, only in the cases of three MPs – Stanisław Pięta, Krystyna Pawłowicz and Bartosz Kownacki – the Committee, decided to reprimand the said representatives.

Pięta was punished for the statement about “gay fascism” uttered in the course of the parliamentary debate on the amendments to the Criminal Code in relation to hate crimes;²²⁷ Pawłowicz was reprimanded for numerous homophobic statements during the debate on registered partnerships and trans-phobic statements uttered outside the parliament,²²⁸ and

²²⁴ Poland, Polska Times (2010), ‘Palikot: Tusk wychowuje teraz Schetynę’, available at: www.polskatimes.pl/stronaglowna/206990.palikot-tusk-wychowuje-teraz-schetyne-a-nowak-dostal-w-zeby.id.t.html#material_2, accessed on 6 May 2014.

²²⁵ Poland, Tok FM (2010), ‘Radny PO dyskryminuje dziennikarke z powodu orientacji seksualnej’, available at: www.tokfm.pl/Tokfm/1,103454.7518494.Radny_PO_dyskryminuje_dziennikarke_z_powodu_orientacji.html, accessed on 6 May 2014.

²²⁶ Poland, Gazeta.pl (2010), ‘Radny Adamus nie jest już w PO’, 2 February 2010, available at: http://wiadomosci.gazeta.pl/wiadomosci/1,114873,7522235.Radny_Adamus_nie_jest_juz_w_PO__Za_trzeba_myslec.html, accessed on 11 June 2014

²²⁷ Poland, Parliamentary Ethics Committee (*Komisja Etyki Poselskiej*) (2012), Decision of 29 September 2012, 29 September 2012, available at: [orka.sejm.gov.pl/opinie7.nsf/nazwa/eps_u12/\\$file/eps_u12.pdf](http://orka.sejm.gov.pl/opinie7.nsf/nazwa/eps_u12/$file/eps_u12.pdf), accessed on 6 May 2014.

²²⁸ Poland, Parliamentary Ethics Committee (*Komisja Etyki Poselskiej*) (2013) Decision of 4 April 2013, 4 April 2013, available at: [orka.sejm.gov.pl/opinie7.nsf/nazwa/eps_u22/\\$file/eps_u22.pdf](http://orka.sejm.gov.pl/opinie7.nsf/nazwa/eps_u22/$file/eps_u22.pdf), accessed on 6 May 2014.

Bartosz Kownacki for vulgarly commenting on the burning down of an artistic installation of the rainbow in the centre of Warsaw.²²⁹ So far no further actions against the MPs were undertaken or other types of redress used.

²²⁹ Poland, Parliamentary Ethics Committee (*Komisja Etyki Poselskiej*) (2014) Decision of 11 December 2013, 11 December 2013, available at: [orka.sejm.gov.pl/opinie7.nsf/nazwa/eps_u27/\\$file/eps_u27.pdf](http://orka.sejm.gov.pl/opinie7.nsf/nazwa/eps_u27/$file/eps_u27.pdf), accessed on 6 May 2014.

I. Intersex

There is a scarcity of sources related to the situation of intersex people in Poland. There are also no openly intersex people in the public sphere.²³⁰

According to the Polish Constitution no one should be discriminated against in political, social or economic life for any reason whatsoever. Thus, the general prohibition of discrimination should also cover the ground of “intersex”. Furthermore, since the catalogue of grounds for discrimination in the Labour Code is open, the prohibition of discrimination should include the discrimination on the ground of “intersex”. There is, however, no mention of intersex discrimination in the national non-discrimination policies.

It is not allowed in Poland for children to remain without a gender marker or identification on their birth certificates. In the form filled out after the child’s birth, the sex of the child has to be given. There is also no formal procedure of ascribing a temporary gender.

Surgical interventions can and are performed on intersex people. The term “intersexuality” covers different medically recognized conditions, the treatment of which is covered by health insurance.²³¹ There are no procedures specific to the treatment of intersex children. The procedures in a given case are chosen from the international catalogue of diseases (ICD-9), e.g. operations of urethra, operations of testes, incisions and excisions of uterus.

According to medical experts, no specific guidelines for physicians dealing with intersex persons were established (which would specify how the physician should act upon the birth of an intersex baby).

Furthermore, there is no specific legal basis for interventions on intersex persons and the general rules applicable to all patients are relevant.²³²

The consent of the patient – and in the case of minor patients or persons incapable of expressing their wishes the consent of the legal representative or sometimes of the guardian-in-fact or guardianship court – is the main basis for a physician to act. In all cases, the patient, or his or her legal representatives, has the right to express his or her consent to accept defined health services or to refuse them after having been given appropriate information.

The consent has to be distinct and, in the case of interventions which entail a risk higher than average, shall be in writing. This is the case in surgeries of intersex persons. The Law on the Physicians' Profession²³³ stipulates that a physician may only perform an operation or apply a treatment or a diagnostic method, creating an increased risk for the patient, if he or she has obtained the patient's written consent.

²³⁰ In the course of preparing this chapter we have consulted two experts – a representative of the Trans-fuzja Foundation, and a medical expert from the Medical University in Łódź.

²³¹ Poland, Regulation of the Minister of Health on the guaranteed services in hospital treatment (*Rozporządzenie Ministra Zdrowia z dnia 22 listopada 2013 w sprawie świadczeń gwarantowanych z zakresu leczenia szpitalnego*), 22 November 2013.

²³² Poland, The Act on patients rights and Patient's Right Commissioner (*Ustawa z dnia 6 listopada 2008 o prawach pacjenta i Rzeczniku Praw Pacjenta*), 6 November 2008.

²³³ Poland, The Act on the Medical Profession (*Ustawa z dnia 5 grudnia 1996 o zawodzie lekarza*), 5 December 1996.

The fact that the consent has to be given in writing, when the risk is higher than average, is a formal requirement for evidential purposes. The burden of proof that an informed consent was given rests on the physician.

If the patient is a minor, substitute consent is required. His or her legal representative, guardian-in-fact or guardianship court may give this substitute consent. When the patient is 16 years old, a double consent is needed. When the patient who has reached the age of 16 refuses to accept medical acts, the consent of the guardianship court is required, regardless of the consent of their legal representative.

If a minor patient has no legal representative or a guardian-in-fact, the physician may start further medical interventions only after the guardianship court has given its consent, except in case of necessity.

If a legal representative of a minor patient does not permit the physician to perform an operation or to apply a treatment method or diagnostic tests which create an aggravated risk for the patient, but which are necessary to remove a risk that endangers the patient's life or exposes him to possible grave bodily injury or other dangerous health disturbance, then the physician may perform such interventions only with the consent of the guardianship court.

At the moment, it is the parents who decide whether to perform a medical intervention on an intersex child.²³⁴ According to the recently proposed draft “Gender Accordance Act”²³⁵ it would be forbidden “to execute without a consent any kind of irreversible medical interventions aimed at reassigning the external or internal sex characteristics on those persons who possess characteristics of both sexes or those whose sex cannot be explicitly recognized based on those characteristics unless the matter is absolutely necessary to save the person’s life or health.” Those persons could agree to undergo irreversible medical interventions once they reach the age of 13.

²³⁴ Poland, Pilonis H., Dzieci bez płci, Medonet.pl, available at: www.medonet.pl/zdrowie-na-co-dzien,artykul,1645975,5,dzieci-bez-plci,index.html, accessed on 6 May 2014.

²³⁵ Poland, Draft Gender Accordance Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*), 3 January 2013.

J. Good practices

One example of a good practice is the cooperation between Polish courts and NGOs in litigation of precedent cases. Polish courts accept public interest litigation, especially if an organisation presents an *amicus curiae* brief or legal opinion, and may take advantage of views expressed therein.²³⁶ It is of great help in advancing the rights of the LGBT community and may have good effects if the legislator or the executive bodies are not responding correctly to the needs and problems of a given minority. Such a possibility of NGO involvement does not exist, for example, in the proceedings before the Court of Justice of the European Union. However there is no data that would allow to evaluate precisely how often NGOs become involved in court proceedings or what is the effect of this practice.

Another example of a good practice is the increased presence of LGBT issues in the training for the police. It is more significant than in other areas within public administration. This is a result of the activity conducted by the police governing bodies, in particular the network of police Commissioners for the Protection of Human Rights. Education of Police forces on LGBT rights is especially important in the light of the fact that most acts of violence against LGBT people are not reported.

Since 2010, trainings on hate crimes for police officers from, among others, prevention departments, including community support officers, have been conducted also at the local level.²³⁷ According to the Ministry of Interior's website, until 30 April 2011, 64 coaches were trained at the central level and approx. 20 000 police officers at the regional level.²³⁸ According to the Commander in Chief's Plenipotentiary for Human Rights Protection, this number is currently higher and may reach up to 60 000 police officers.²³⁹ For the purpose of this training, a manual for trainers was also published under the title "Hate Crime. Supporting material for trainers".²⁴⁰ It contains a definition of hate crimes,²⁴¹ which besides statutory grounds refers also to sexual orientation. Representatives of non-governmental organisations were involved in the provision of training at the local level.

In 2013 the manual "The Human being comes first. Anti-discrimination actions in Police units. A practical guide"²⁴² was prepared by the Police Commander in Chief's Plenipotentiary

²³⁶ Poland, Polskie Stowarzyszenie Edukacji Prawnej (*Polish Association of Legal Education*) (2006) *Opinia prawna*, 4 June 2006, available at www.psep.pl/pliki/news/obr/uwagi_wstepne.pdf, accessed on 6 May 2014.

²³⁷ Poland, Ministry of Interior (*Ministerstwo Spraw Wewnętrznych*), (date not indicated), 'Program zwalczania przestępstw na tle nienawiści', available at: www.msw.gov.pl/pl/bezpieczenstwo/ochrona-praw-czlowieka/program-zwalczania-prz/program-zwalczania-prz/4348,Informacje-ogolne.html, accessed on 6 May 2014.

²³⁸ Poland, Ministry of Interior (*Ministerstwo Spraw Wewnętrznych*), (date not indicated), 'Program zwalczania przestępstw na tle nienawiści', available at: www.msw.gov.pl/pl/bezpieczenstwo/ochrona-praw-czlowieka/program-zwalczania-prz/program-zwalczania-prz/4348,Informacje-ogolne.html, accessed on 6 May 2014.

²³⁹ Poland, information obtained during a conversation with the Police Commander in Chief's Plenipotentiary for Human Rights Protection, 4 October 2013.

²⁴⁰ Poland, Ministry of Interior, the Police (*Ministerstwo Spraw Wewnętrznych, Policja*), *Przestępstwa z nienawiści. Materiał pomocniczy dla trenera*, Warsaw 2010. Available at: <http://isp.policja.pl/isp/prawa-czlowieka-w-poli/aktualnosci/2518,quotPrzestepstwa-z-nienawisciquot-material-pomocniczy-dla-trenera.html>, accessed on 6 May 2014.

²⁴¹ Poland, Ministry of Interior, the Police (*Ministerstwo Spraw Wewnętrznych, Policja*), *Przestępstwa z nienawiści. Materiał pomocniczy dla trenera*, Warsaw 2010. Available at: <http://isp.policja.pl/isp/prawa-czlowieka-w-poli/aktualnosci/2518,quotPrzestepstwa-z-nienawisciquot-material-pomocniczy-dla-trenera.html>, accessed on 6 May 2014.

²⁴² Poland, Informative Base of Police (*Informacyjny serwis policyjny*) (2013) *Po pierwsze człowiek*, available at:

for Human Rights Protection (*Pełnomocnik Komendanta Głównego ds. Ochrony Praw Człowieka*) in cooperation with the Human Rights Defender, the Government Plenipotentiary for Equal Treatment and 12 non-governmental organisations. One of the chapters is devoted to LGBT issues. The NGOs contributed significantly to the preparation of the handbook. The aim behind the project was to improve the Police ability to tackle hate crimes in a sensitive manner.

Recently, the problem of hate speech became more visible in the public debate. In September 2013 the Minister for Administration and Digitalisation together with the Council of Europe organized a conference on hate crimes and hate speech. LGBT issues were one of the leading themes. The conference was one of the activities of the Council of Europe's "No hate speech movement" campaign. In October 2013 a Polish coalition was formed, also as a part of the CoE's campaign. More than 30 institutions, organizations and groups from all over Poland declared participation in the coalition. In November 2013, after the Polish Independence day, during which the artistic installation of the rainbow in the centre of Warsaw was burned down, which was accompanied by numerous homophobic comments online, a Facebook page called "Big Cleaning of Facebook. Stop hate speech, fascism and aggression" (*Wielkie sprzątnięcie FB. Stop mowie nienawiści, faszyzmowi i agresji*) was created. The followers of the fanpage succeeded in deleting many fanpages that included hate speech. Activities outside the internet are also initiated by the civil society. For example, the Association "Projekt:Polska" is conducting a campaign called "Hejtstop" the aim of which is to map and paint over hateful writings on walls in the public sphere.

Annex 1 – Case law

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC

Case title	B. K. versus CZA-TA
Decision date	16 March 2006
Reference details (type and title of court/body; in original language [official translation, if available])	District Court in Plock (Sąd Rejonowy w Płocku)
Key facts of the case (max. 500 chars)	The plaintiff claimed compensation (30.000 PLZ) for harassment and intimidation on the basis of his sexual orientation at work. Due to this situation, he terminated his employment.
Main reasoning/argumentation (max. 500 chars)	In accordance with Directive 2000/78/EC the burden of proof is on the respondent, while the person who claimed to be wronged has to establish facts, from which the court may presume that direct or indirect discrimination took place
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Direct or indirect discrimination does not occur in a situation when the management and colleagues treat a person less favourably due to objective reasons - non-fulfillment or improper fulfillment of his duties.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	No discriminatory treatment has been found in this case since major proofs could be interpreted in favour of both parties to the proceedings. Due to procedural failures, the appeal has been dismissed.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC

Case title	Mirosław Sielatycki versus the Minister of Education
Decision date	5 June 2007 31 March 2008
Reference details (type and title of court/body; in original language; in English [official translation, if available])	District Court in Warsaw (<i>Sąd Rejonowy w Warszawie</i>) Regional Court in Warsaw (<i>Sąd Okręgowy w Warszawie</i>)
Key facts of the case (max. 500 chars)	The plaintiff claimed compensation (19.000 PLN) for discrimination in employment and unfair dismissal from office as the director of the National In-Service Teacher Training Centre. The dismissal followed his decision to publish a manual, which allegedly promoted homosexuality.
Main reasoning/argumentation (max. 500 chars)	The case was decided on the basis of the Labour Code provisions prohibiting discrimination in employment on the ground of political views (not sexual orientation). Sexual orientation was at stake in this case but only to the extent the plaintiff argued that it was relevant to his view on the role of schools. The court found that the Minister of Education, Roman Giertych, and Mr. Mirosław Sielatycki discriminated against him on the basis of his political views.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Discrimination on the basis of sexual orientation does not take place where neither of the parties is of different sexual orientation, but just of different opinion about the type of education regarding this matter.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The District Court found discrimination and unfair dismissal and awarded almost the exact sum required by the plaintiff – 19.000 PLN compensation (16.000 PLN for discriminatory treatment on the basis of political views and 3.000 for unfair dismissal). In result of the appeal brought by the NTTC, the Regional Court affirmed the judgment of the District Court as to its finding (discriminatory treatment and unfair dismissal), but rejected as to the amount of compensation awarded for discriminatory treatment (reducing it from 16.000 to 5 300 PLN). The amount of compensation awarded for unfair dismissal remained the same.

Case title	VI C 402/13 Case of A.T. against X Company
Decision date	Case pending
Reference details	District Court for Warszawa Śródmieście, VI Civil Department (<i>Sąd Rejonowy dla Warszawy Śródmieścia VI Wydział Cywilny</i>)

Key facts of the case (max. 500 chars)	The case concerns a gay man who worked as a bodyguard for one of the Polish security companies. The man was dismissed because of his participation in the Equality Parade in Kraków. The employer justified his decision to terminate the employment that he didn't want to "work with faggots".
Main reasoning/argumentation (max. 500 chars)	Case is pending
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	As in the case mentioned above, the important issue from the point of view of the European anti-discrimination law is whether employment was not a traditional employment contract (as laid down in the Labour Code) but a 'civil contract'. The law under the Act to implement certain provisions of the European Union on equal treatment of 3 December 2010. The case is about if a non-traditional employment contract falls within the scope of protection provided by Polish antidiscrimination laws.
Results (sanctions) and key implications of the case (max. 500 chars)	Case is pending

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

Case title	III SA/Gd 229/08
Decision date	6 August 2008
Reference details (type and title of court/body; in original language [official translation, if available])	Regional Administrative Court in Gdańsk (<i>Wojewódzki Sąd Administracyjny w Gdańsku</i>)
Key facts of the case (max. 500 chars)	A case was lodged by a female citizen of Poland who wished to register a partnership with a female citizen of Germany under provisions of German law which recognize same-sex partnership. The woman was refused to by the He Registry Office (<i>Kierownik Urzędu Stanu Cywilnego</i>) to receive a certificate stating that she is not married to anyone else that she did not have any legal interest to obtain such a certificate. She made an appeal to the Governor of the Voivodsh which was also dismissed. Finally she lodged complaint to the Regional Administrative Court.
Main reasoning/argumentation (max. 500 chars)	Law does not allow to examine if, with whom or where an applicant wishes to contract marriage or to test authenticity of her/his intentions. The only task of the body entitled to issue certificates is to examine if a person fulfills stipulated by Polish law which are necessary to be fulfilled in order to get married. A citizen is entitled to receive such substantiating her/his request and in any case her/his intentions cannot be prerequisite for the refusal.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	This is the first judgment clearly confirming that a homosexuals who wish to enter abroad in the same-sex partnerships cannot meet any obstacles while applying in the Civil Status Office in order to receive the certificate stating not married to anyone else.

Case title	IV SA/Wa 154/13 X against The Chief of Polish Border Guard
Decision date	15 March 2013
Reference details (type and title of court/body; in original language and English [official translation, if available])	Regional Administrative Court in Warsaw (<i>Wojewódzki Sąd Administracyjny w Warszawie</i>) http://orzeczenia.nsa.gov.pl/doc/6DB8ABC90E
Key facts of the case (max. 500 chars)	This is an example of a case concerning the entry to Poland of an LGBT partner of a Polish citizen. The case concerns the situation of a gay man, a citizen of the Dominican Republic, who was denied entry to Poland. The man entered Poland with his registered partner, a Polish citizen. Their partnership was registered in the UK. The Polish Border Guard refused the man's EU citizen's family member card issued in the UK arguing that the man did not have a visa to enter Poland. The Polish man claimed that the institution of registered partnership is not recognised in Poland, which entitles the Polish authorities to refuse entry from entering Poland.
Main reasoning/argumentation (max. 500 chars)	The Court rejected the reasoning of the Polish Border Guard arguing that even though the Polish legal system does not recognise the institution of registered partnership it is still possible to recognise the complainant's right of entry on the basis of Article 17 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The complainant was recognised as a part of the family of a Union citizen has a durable relationship, duly attested.
Key issues (concepts, interpreted in the case (max. 500 chars)	The Court interpreted the provisions of Article 3.2b of the Directive 2004/38/EC as giving the right of entry to a registered partner of an EU citizen not an EU citizen. The Court noted that Poland had not properly implemented the Directive and that provisions on family members of EU citizens' partners with whom EU citizens have a durable duly attested partnership should be applied directly.
Results (sanctions) and key implications of the case (max. 500 chars)	The decision of the Polish Border Guard was overruled. In addition, as a result of the court's ruling the Border Guard Chief (<i>Komendant Główny Straży Granicznej</i>) published guidelines, which were disseminated among all branches of the Border Guard. The guidelines emphasised the need to recognise the right of entry for all persons (irrespective of their sex) being in a partnership with Polish citizens provided that such persons are able to prove their partnership status by relevant documents.

Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC, case 1

Case title	Application for the refugee status of a Chechen national
Decision date	1 October 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Chief of the Office for Foreigners (<i>Szef Urzędu ds Cudzoziemców</i>)
Key facts of the case (max. 500 chars)	A Chechen woman was not accepted in her locality and family due to her problems with gender self-identification. She feared persecution on this ground and fled to Poland.
Main reasoning/argumentation (max. 500 chars)	The applicant fear of persecution and serious harm or even loss of her life in the country of origin was well-founded.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The applicant feared persecution on the basis of belonging to a particular social group (or rather non-belonging to any sex (female or male) group.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Chief of the Office for Foreigners granted the applicant the refugee status.

Case title	V SA/Wa 1048/12 M.N.L against The Council for Foreigners
Decision date	20 November 2012
Reference details (type and title of court/body; in original language; if available) [official translation, if available]	Regional Administrative Court in Warsaw (<i>Wojewódzki Sąd Administracyjny w Warszawie</i>) http://orzeczenia.nsa.gov.pl/doc/F5E5B9C93F
Key facts of the case (max. 500 chars)	A citizen of Uganda challenged the decision of the Polish Council for Refugees to expel him to his home country. The decision upheld the decision of the Head of the Office for Foreigners, who refused to grant the foreigner a refugee status or other type of protection. The Ugandan came to Poland in August 2009 and applied for a refugee status. He claimed that in his country of origin he had been persecuted because of his sexual orientation. Under the Ugandan Criminal Code, same-sex sexual relationships are punishable with a life sentence.
Main reasoning/argumentation (max. 500 chars)	In the course of the proceedings before administrative bodies the foreigner submitted a medical certificate on his sexual orientation. The Council questioned the credibility of that certificate. The Court held, however, that the Council did not have the power to challenge the medical certificate. By disregarding the certificate the Council failed to establish facts of the case and obtain evidence necessary for the decision.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The administrative bodies do not have the power to challenge the credibility of a medical certificate confirming someone's sexual orientation. The administrative bodies are expected to thoroughly examine all facts of a case before deciding it.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court revoked the decision denying refugee status to the homosexual.

Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC, case 1

No case law data on family reunification is available

Chapter E, Freedom of assembly

Case title	No. K 21/05 Road Traffic Act
Decision date	18 January 2006
Reference details (type and title of court/body; in original language [official translation, if available])	Constitutional Court (<i>Trybunał Konstytucyjny</i>) in abstract review of constitutionality of the Road Traffic Act
Key facts of the case (max. 500 chars)	In result of series of instances when the Equality Parades were banned, the Human Rights Defender referred the Road Traffic Act to the Constitutional Court.
Main reasoning/argumentation (max. 500 chars)	Freedom of assembly may not be limited because of the lack of symmetry between its purposes and the intentions of the organisers and participants attributed to it by media, commentators or public officials. “Moral convictions of the organisers are not a synonym for ‘public morality’ as a limitation of the freedom of assembly”. Assemblies hindering traffic should not be subjected to the same administrative burden like commercial events, which are not essential for democracy and as such not within the scope of protected political freedoms
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Freedom of assembly is the constitutional and fundamental right, thus it should not fall in the same regime of administrative concessions like commercial events. Only the system of prior notifications suits the fundamental nature of assemblies
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Road Traffic Act submitting assemblies to the same administrative procedures as other commercial events was found unconstitutional.

Case title	IV SA/Po 983/05 I OSK 329/06
------------	---------------------------------

Decision date	Judgment of the Regional Administrative Court (<i>Wojewódzki Sąd Administracyjny</i>) in Poznań of 14 December 2005 Judgment of the Supreme Administrative Court (<i>Naczelny Sąd Administracyjny</i>) of 25 May 2006
Reference details (type and title of court/body; in original language; in English [official translation, if available])	Mayor of Poznań (<i>Prezydent Miasta Poznania</i>) as the administrative organ who banned the assembly Wielkopolskie Voivodship governor as the appeal administrative organ who upheld the ban Regional Administrative Court (<i>Wojewódzki Sąd Administracyjny</i>) as the first instance administrative court which quashed the ruling of the Mayor Supreme Administrative Court (<i>Naczelny Sąd Administracyjny</i>) as the appeal administrative court which upheld the ruling of the Regional Administrative Court
Key facts of the case (max. 500 chars)	The Mayor of Poznań banned the Equality March 2005 arguing that because of risk of counter-demonstrators attacking the March (taking into account events from the previous year), there is a danger to public property, demonstrators. The decision was quashed in the Regional Administrative Court and the cassation appeal against this ruling was upheld by the Supreme Administrative Court.
Main reasoning/argumentation (max. 500 chars)	'It is the role of neither public administration nor administrative courts to analyse slogans, ideas and views shared at the assembly, being not contrary to law, especially by prism of own moral convictions of public officials or judges justifying the ban on the assembly, or by prism of convictions of the dominant part of the society. Such analysis would thwart the concept of peaceful assembly'.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The risk of clashes between the notified assembly and any expected counter-demonstrations should not justify a ban on the assembly which has a lawful purpose.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The ban has been declared ill-founded on May 25, 2006, whereas the assembly took place in November 2005 under the presumption of illegality and was brutally dispersed by the Police. There is lack of prompt procedures that would enable administrative decisions before the planned date of the notified assembly.

Chapter F, Hate speech

Case title	Lesbian Women versus Przemysław Aleksandrowicz and Jacek Tomczak
Decision date	4 September 2004
Reference details (type and title of court/body; in original language; in English [official translation, if available])	District Court in Poznań (<i>Sąd Rejonowy w Poznaniu</i>)

Key facts of the case (max. 500 chars)	The councillors of the Law and Justice Party expressed publicly that Equality Parades “may be about promoting such inclinations as paedophilia, necrophilia and zoophilia; promotion of the promiscuity, even independently from the orientation, is glaring violation of the social cohabitation rules; we do not know if in a moment paedophilia, necrophilia won't be just considered as one of the sexual orientations”. Such statements were considered to be offensive for homose group of lesbian women in a private indictment charged the councillors with defamation on the basis of Article 212 of t
Main reasoning/argumentation (max. 500 chars)	The case ended with a settlement.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It was the first case of this type in Poland. The case showed that it is possible to claim for violation of dignity of homosexuals in case of homophobic hate speech.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The case ended with a settlement between the parties, according to which the councillors had to apologize for this unfortunate comparison (at that time they were already elected as members of the Parliament).

Chapter F, Hate speech

Case title	Ryszard Giersz versus Anna Sz.
Decision date	4 August 2009
Reference details (type and title of court/body; in original language [official translation, if available])	Regional Court in Szczecin (<i>Sąd Okręgowy w Szczecinie</i>)
Key facts of the case (max. 500 chars)	Ryszard Giersz, young homosexual living in Wolin, small town (5000 inhabitants) in Western Poland, brought a civil lawsuit against his neighbour. The defendant, a woman who was in long-lasting conflict with plaintiff's family, was calling him publicly and in the presence of other people <i>pedal</i> [a faggot] and was using other offensive words concerning orientation. Her comments provoked also plaintiff's harassment by other inhabitants, specially by the group of youth.
Main reasoning/argumentation (max. 500 chars)	The Court found the infringement of the plaintiff's personal goods [<i>dobro osobiste</i>] protected by article 24 § 1 of the Civil Code. According to the Court, using the word “faggot” aimed to offend the plaintiff and this expression cannot be commonly accepted. In Court's opinion “ <i>humiliation of a person while criticizing his/her sexual distinctness threatens sensitive aspects of human life</i> ”.

Key issues (concepts, interpretations) clarified by the court (max. 500 chars)	It seems to be the first case where a homosexual decided to defend his rights so openly at the Court which reveals that apart from criminal proceedings, a civil action may be also used as a tool of protection against homophobic hate speech.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court forbade the defendant to infringe plaintiff's personal goods, i.e. his liberty, dignity, honour, intimate life and good name and particularly to use the word "faggot" and other abusive words as well as to comment publicly plaintiff and his sexual orientation. The defendant was to pay satisfaction in the amount of 15 000 PLN (around 3700 EUR).

Chapter F, Hate crimes

Case title	Case against Wojciech Wierzejski
Decision date	Criminal investigations suspended for the period of term served in the European Parliament (2005-2007)
Reference details (type and title of court/body; in original language [official translation, if available])	General Inspector for Personal Data Protection (<i>Generalny Inspektor Ochrony Danych Osobowych</i>) Criminal Investigators
Key facts of the case (max. 500 chars)	One of the leaders of the League of the Polish Families Party and at the material time the Vice-Marshall of the Mazowieckie Voivodship organised a protest against LGBT demonstrations, in result of which he received letters from activists disapproving of his action. The case concerned posting the names and email addresses of 24 signatories of the website abusing their personal data. They complained to GIODO who referred the case for criminal investigation.
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the court (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	There is no official information whether criminal investigations against Wojciech Wierzejski have been resumed.

Chapter F, Hate crimes

Case title	Case against A.F. and D.A.
Decision date	December 2004

Reference details (type and title of court/body; in original language [official translation, if available])	District Court in Łódź (<i>Sąd Rejonowy w Łodzi</i>)
Key facts of the case (max. 500 chars)	Two drunk young men beat a transvestite to death. They met the victim in a public park, realized it was a man dressed in women's clothes; pushed him to the ground, undressed and started kicking. The man died in result of severe injuries.
Main reasoning/argumentation (max. 500 chars)	In the opinion of the court there was no doubt that the act of violence was motivated by stereotypical prejudice against transvestites.
Key issues (concepts, interpretations) clarified by the court (max. 500 chars)	'In this case a man would have not died, if he had been different. He died only because the accused did not like him. They put the equal sign between a queer, a transvestite and a deviant. He was beaten only because he was different. The court did not do anything to the accused. He died in such a cruel way - kicked to death'.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Both aggressors were found guilty. 27-year-old A.F. was sentenced to six years' imprisonment and 23-year-old D.R. was sentenced to six years and two months of imprisonment.

Chapter G, Applicability of legislation on trans gender issues

Case title	I ACa 276/04
Decision date	30 April 2004
Reference details (type and title of court/body; in original language [official translation, if available])	Appellate Court in Katowice (<i>Sąd Apelacyjny w Katowicach</i>)
Key facts of the case (max. 500 chars)	The Regional Court (<i>Sąd Okręgowy</i>) dismissed the suit for a declaratory judgment establishing the sex of a transsexual person on the ground that in the Polish law there is no legal basis for such an action. This judgment has been overturned and dismissed by the Appellate Court
Main reasoning/argumentation (max. 500 chars)	Sex of a human being belongs to personal goods protected by law. Determination of sex can take the course through a declaratory judgment. Declaratory judgment regarding sex of a transsexual person cannot be solely based on the medical perspective of this person, or her sense of belonging to a particular sex. Self-identification and its importance in the multilevel system of sex identification can be evaluated from the medical perspective as primary for the legal evaluation of sex of a human being

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The court confirmed the possibility of judicial change of sex in case of transsexuals through a declaratory judgment.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court confirmed the earlier position of the jurisprudence that transsexualism can justify insertion of an additional note about the judicial change of sex in the birth certificate.

Chapter G, Name change and/or sex change of trans gender people, relevant case law

Case title	I CZP 100/77.
Decision date	02 February 1978
Reference details (type and title of court/body; in original language; [official translation, if available])	Supreme Court (<i>Sąd Najwyższy</i>)
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	Not only external physical features and organs define an individual's sex, but also emotional association with the gender opposite to that assigned at birth.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Self-determination of one's sex is a personal right.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	In exceptional situations courts can rectify acts of civil status before sex reassignment surgery takes place if the features of the new sex are predominant and changes are irreversible.

Chapter G, Name change and/or sex change of trans gender people, relevant case law

Case title	III CZP 37/89
Decision date	22 June 1989

Reference details (type and title of court/body; in original language [official translation, if available])	Supreme Court (<i>Sąd Najwyższy</i>)
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	Acts of civil status only have a declaratory character and describe the legal status of a person resulting from acts of law and transsexualism could not be described as a change by acts of law, since it is a psychological transformation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Transsexualism does not justify rectification of birth certificates in regard to sex as defined at birth.

Chapter G, Name change and/or sex change of trans gender people, relevant case law

Case title	III CRN 28/91
Decision date	22 March 1991
Reference details (type and title of court/body; in original language [official translation, if available])	Supreme Court (<i>Sąd Najwyższy</i>)
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Determination of gender identity belongs to personal rights.

Results (sanctions) and key consequences or implications of (max. 500 chars)	A transsexual person can file an action for a declaratory judgment (in accordance with Article 189 of the Civil Procedure Code) in order to have one's legal sex judicially recognized.
--	---

Other important cases

Case title	III CZP 65/12 Interpretation of article 691 of the Polish Civil Code
Decision date	28 November 2012
Reference details (type and title of court/body; in original language [official translation, if available])	Sąd Najwyższy (<i>Sąd Najwyższy</i>) http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf
Key facts of the case (max. 500 chars)	XY had been refused to enter a lease after his late gay partner. Under article 691(1) of the Civil Code, if a lessee of residential premises has died, the right to enter into the lease can be exercised, among others, by "a person who was in actual cohabitation with the deceased tenant at the time of his death, provided that such a person was habitually living on the leased premises together with the original lessee until the latter's death". Having been in the same-sex relationship with a tenant for nearly nine years, XY was not allowed to enter into a lease. He brought his claim to the District Court, but the court dismissed his claims. He appealed to the Circuit Court in Warsaw who asked the Supreme Court to clarify the law.
Main reasoning/argumentation (max. 500 chars)	The Supreme Court referred to the decision in the case of <i>Kozak v. Poland</i> (application no. 13102/02), in which the ECtHR had found that a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy violated the prohibition of discrimination on the basis of sexual orientation. The Supreme Court held that there are no reasons to draw different legal consequences from the cohabitation of gay and heterosexual couples, as emotional, physical and economic bonds in both cases are the same.
Key issues (concepts, legal questions and interpretations) clarified by the case (max. 500 chars)	A person of the same sex as a deceased lessee can be considered to have been in "actual cohabitation" with the lessee, provided there is an emotional, physical and economic bond between the two.

Results (sanctions) and key consequences or implications of the decision (max. 500 chars)	Article 691 of the Polish Civil Code should be interpreted in a way that allows gay partners to enter a lease after the death of a partner.
---	---

Case title	Ts 15/11
Decision date	1 March 2012
Reference details (type and title of court/body; in original language; in English [official translation, if available])	Constitutional Court (<i>Trybunał Konstytucyjny</i>) http://otk.trybunal.gov.pl/orzeczenia/teksty/OTKZU/2012/2012B_02.pdf (page 109)
Key facts of the case (max. 500 chars)	The applicant complained against the decision of the Constitutional Tribunal not to initiate proceedings challenging the provisions of the law that allow same sex couples to enjoy the same pecuniary benefits in the case of illness of their partner as married couples.
Main reasoning/argumentation (max. 500 chars)	The Constitutional Tribunal argued that the fact that same-sex couples do not enjoy the same pecuniary benefits in the case of illness of their partner as married couples is a result of the fact that the Polish law does not recognize same-sex partnerships. In order to challenge this, a wide-reaching intervention of the Parliament would be necessary. Consequently, the Tribunal held that it is beyond its cognate jurisdiction to rule on the complaint.
Key issues (concepts, legal principles, interpretations) clarified by the decision (max. 500 chars)	social security benefits enjoyed by same-sex couples;
Results (sanctions) and key consequences or implications of the decision (max. 500 chars)	The applicant filed a complaint to the European Court of Human Rights.

Case title	II FSK 2082/10
Decision date	20 March 2010
Reference details (type and title of court/body; in original language; in English [official translation, if available])	Supreme Administrative Court (<i>Naczelny Sąd Administracyjny</i>) http://orzeczenia.nsa.gov.pl/doc/0E6008D267

Key facts of the case (max. 500 chars)	Married couples in Poland are allowed to file a common income statement. The applicant wanted to file a statement together with his partner. The tax office requested that both partners file individual statements. The applicant complained against the decision of the administrative court.
Main reasoning/argumentation (max. 500 chars)	The fact that the partners are in a permanent relationship does not satisfy the requirements necessary to be able to file a common income statement. Only a married couple, which according to the Constitution and the Polish family law is a man and woman who formally enter into a marriage, can do this. As a result the Supreme Administrative Court dismissed the appeal.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The possibility of a common income statement of same-sex couples;
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court dismissed the cassation appeal The applicant filed a complaint to the European Court of Human Rights

Case title	IV SA/Wa 2457/13
Decision date	29 January 2014
Reference details (type and title of court/body; in original language; [official translation, if available])	Regional Administrative Court in Warsaw (<i>Wojewódzki Sąd Administracyjny w Warszawie</i>) http://orzeczenia.nsa.gov.pl/doc/5A22CF3A3D
Key facts of the case (max. 500 chars)	A Citizen of Chile, who is a gay partner of a Polish citizen with whom he entered into a registered partnership in the United Kingdom, wanted to purchase real estate on the Polish coast. According to the Polish law in the case of real estate in the border area, in order to purchase the property the foreigner has to justify that there exists a “tie with Poland”. The man argued that the relationship with a Pole constitutes a “tie with Poland”. The Ministry of Interior, as a body of the second instance that oversees the decisions concerning the permits, disagreed.
Main reasoning/argumentation (max. 500 chars)	The written justification of the ruling is not yet available. According to the oral reasons, however, because the Polish law does not allow same-sex couples to purchase real estate in the border area, the decision of the Ministry was correct.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The right to purchase real estate in the border area, the meaning of the term “tie with Poland”;

Results (sanctions) and key consequences or implications of (chars)	The court dismissed the complaint against the administrative decision that a registered partnership with a Polish citizen does not constitute a "registered partnership with Poland" necessary to purchase real estate in the border area.
---	--

Annex 2 – Statistics

There are substantial problems with collecting statistical data related to homophobia and the situation of LGBTI persons in Poland. The system of data collection and data analysis applied by various ministries and administration does not include, or distinguish, data on discrimination against, or related to, LGBT persons.

In the course of preparing the update of the report the author contacted the following institutions and agencies requesting disclosure of public information:

- Human Rights Defender (*Rzecznik Praw Obywatelskich*)
- Government Plenipotentiary for Equal Treatment (*Pełnomocnik Rządu ds. Równego Traktowania*)
- National Board of Broadcasting (*Krajowa Rada Radiofonii i Telewizji*)
- Ministry of Health (*Ministerstwo Zdrowia*)
- Ministry of Justice (*Ministerstwo Sprawiedliwości*)
- Ministry of Internal Affairs (*Ministerstwo Spraw Wewnętrznych*)
- Ministry of Administration and Digitization (*Ministerstwo Administracji i Cyfryzacji*)
- President of the Office for Foreigners (*Szef Urzędu ds. Cudzoziemców*)
- Council for Refugees (*Rada ds. Uchodźców*)
- Chief of the Border Guard (*Komendant Główny Straży Granicznej*)
- Chief Work Inspection (*Główna Inspekcja Pracy*)

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (education, housing, goods and services etc.)								
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education and services etc.)								
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (education, housing, goods and services etc.)								
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, housing, goods and services etc.)								

No official statistics available.

Chapter B, Freedom of movement of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007

Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)								
Number of LGBT partners who claimed their right to residence but were denied this right								

No official statistic available.

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.								
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation								

No official statistics available.

Chapter C, Asylum and subsidiary protection, protection of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC								
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner								

No official statistics available..

Chapter D, LGBT partners benefiting family reunification

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.								
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification								

No official statistics available.

Chapter E, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc								
Number of demonstrations against tolerance of LGBT people.								

No official statistics available.

Chapter F, Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)								
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)								
Range of sanctions issued for homophobic hate speech								
Number of non-criminal court cases initiated for homophobic statements								
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanction symbolic were imposed)								

No official statistics available.

Chapter F, Homophobic motivation of crimes as aggravating factor

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

No official statistics available.

Chapter G, Transgender issues Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender	9	17	7	13	14	23	32	37
Number of persons who changed their gender/sex in your country under the applicable legislation								

No official statistics available.

In the course of preparing the update, upon a freedom of information request, the author received information from the Ministry of Interior about the number of changes of the PESEL number (the national identification number) due to the change of gender. According to this information, on the basis of information generated by the PESEL registry, which has been operating since 1979, it could be established that as of 13 February 2014 626 persons changed the PESEL number and it was related to the change of gender. 438 people changed their PESEL from female to male, 188 from male to female. This data is, however, not divided into individual years.²⁴³

²⁴³ Poland, Ministry of Interior (*Ministerstwo Spraw Wewnętrznych*) (2014) Reply to freedom of information request no. DSO/WSC-0667/2/2014, 21 February 2014.

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	✓	✓	✓	✓	✓	✓	✓		According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or psychological point of view. Changes are underway, forced sterilisation might be removed.
PL				✓	✓	✓		✓	No legislation in place, requirements set by court practice. (The judgments are not available in the official online court databases, thus no hyperlinks could be provided.)
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 ²⁴⁴	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

244

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 ²⁴⁴	All areas of RED*		
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	
ES			✓		
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL		✓			Despite the adoption of new anti-discrimination legislation, discrimination on grounds of sexual orientation is not prohibited in all areas specified in Racial Equality Directive. ²⁴⁵

²⁴⁵ Poland, The Act on implementation of the European Union's provisions concerning equal treatment (*Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania.*), 3 December 2010, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20102541700>

As regards sexual orientation, Article 8.1 of the law stipulates as follows:

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ²⁴⁴	All areas of RED*		
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**

“It is prohibited to treat unequally persons on the grounds of sex, race, ethnic origin, nationality, religion, belief, creed, disability, age or sexual orientation with regard to:

- 1) access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience
- 2) conditions for access to and carrying out of self-employment or access to occupation or employment
- 3) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
- 4) access and conditions of using of labour market instruments regulated in the law from 20 April 2004 on promotion of employment and labour market institutions, that are offered by labour market institutions and labour market instruments and labour market services offered by other entities that act for employment, development of human resources and counteracting unemployment.”

Other areas of RED (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, are not covered. Moreover, the Ombudsperson who is the national equality body has limited competences to intervene in the case of a conflict between private parties.

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 Equal Treatment Commission
PL	✓			Discrimination on grounds of gender reassignment is considered ‘sex’ discrimination i.e. by labour courts. The judgments are not available in official court databases. This information was obtained from NGOs monitoring such court cases . In no legal act are gender reassignment or identity autonomous grounds.

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.
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The 2009 Public Prosecution Service’s Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.
PL			General provisions could extend to LGBT people.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
			The provisions of the Criminal Code do not include homo or transphobic motivation of hate crimes. In general, while sentencing the courts make a decision as to the punishment within the legally set boundaries. Pursuant to Article 53 § 2 of the Criminal Code motivation has to be taken into consideration by the courts in the determination of penalties. ²⁴⁶ It can also have significance while deciding on particular criminal measures (<i>środki karne</i>). For example, in the light of Article 40 of the Criminal Code, ²⁴⁷ the court can sentence somebody to deprivation of public rights in the case of imprisonment longer than 3 years for a crime committed as a result of motivation deserving particular condemnation.
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

²⁴⁶ Poland, Criminal Code [*Ustawa z dnia 6 czerwca 1997 kodeks karny*] 6 June 1997, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>, Article 53 § 2 In imposing the penalty, the court shall above all take into account the motivation and the manner of conduct of the perpetrator (...)

²⁴⁷ Poland, Criminal Code [*Ustawa z dnia 6 czerwca 1997 kodeks karny*] 6 June 1997, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>, Article 40 § 2 The court may decide on the deprivation of civil rights in the event of sentencing to the deprivation of liberty, for a period of not less than 3 years for an offence committed with motives deserving particular reprobation.(...)

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

Country Codes	Free movement ²⁴⁸		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 acquis, confirms the notion that a family member includes the de facto 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							
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.

²⁴⁸ 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 ²⁴⁸		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
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	✓	?	✓		✓		As regards the moment of entry into Polish territory, according to guidelines of the Border Guard Commander-in-Chief the right of entry for all persons (irrespective of their sex) being in a partnership with Polish citizens should be guaranteed, provided that such persons are able to prove their partnership status by relevant documents. These guidelines are, however, not set in law. Information about them was sent to the Helsinki Foundation for Human Rights. ²⁴⁹ As regards the stay on Polish territory it is limited to the spouses (Pol. małżonek). The Polish legislation does not treat registered partnerships as equivalent to marriage.
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.

²⁴⁹ Poland, Helsinki Foundation for Human Rights (Helsinkińska Fundacja Praw Człowieka), (2013), Letter from the Chief Border Guard, available at: http://www.hfhr.pl/wp-content/uploads/2013/06/SG-HFPC-18_06_2013.pdf